Chapter VIII

The Preservation of Balance as a Legal Obligation (1713 – 1789)

Problems of Hereditary Succession, States and Wars

Franz Paul von Lisola's advice to conduct wars solely for the purposes of regaining a stable peace was, as always, easier to give than to carry out. Yet, from the beginning of the eighteenth century, the implementation of the advice met with obstacles that were new and resulted from shifts in the concept of sovereignty. Since the peace agreements of Utrecht, Rastatt and Baden of 1713 and 1714, the concept of sovereignty could apply to persons as holders of power in states, to states as a whole and to non-state institutions such as long-distance trading companies. These agreements promoted the demand that the interests of the personal sovereigns as members of ruling dynasties should rank behind interests that were focused on the maintenance of the continuity of states as durable political communities as well as the preservation or restitution of peace. The parties to the peace agreements of Utrecht, Rastatt and Baden indeed agreed on the principle that the stability of the Kingdom of Spain should have priority over the personal goals of the dynasties of the Bourbons and the Habsburgs. Yet, the peace agreements did not cast this principle into the terms of a general legal norm, because the agreement regulated the hereditary succession in Spain only and was, by consequence, not automatically applicable to other cases. Hence, the more fundamental problem remained unsolved, how the conflict between collective state interests and personal interests of ruling dynasties in succession processes should be settled in general terms. Such cases emerged for the main reason that most ruling dynasties were closely affiliated through a dense network of kin relations and that, by consequence, clashes among competing claims for succession to the same ruling office were frequent. The union of ruling offices of two or more state in the hands of one and the same person had the potential not only to alter power relationships among states, thereby rearranging the perceived balance of power in Europe, but also to shift collective identities of the ruled. In such cases, war was imminent.[1] There many such cases. Calvinist historian and jurist Jean Rousset de Missy (1686 – 1762) published a handbook in fourteen sizeable volumes listing all cases, in which he believed conflicts over hereditary succession might occur.[2] In addition to clashes over hereditary succession, there were conflicts over the succession to kingship in states, where no single ruling dynasty was holding hereditary privileges. In these states, rulers could campaign for election, even if they could not base their candidacy on kin relations.

Compared to the large number of possible conflicts, the number of actual succession wars was small. Between 1667 and 1783, the War of Devolution (1667 – 1668), the Nine Years War (1689 – 1698), the war on the succession in Spain (1702 – 1714), succession wars in Poland (1733 – 1735/38), the Austrian Habsburg hereditary lands (1740 – 1748) and Bavaria (1778 – 1779) were not the majority of military conflicts, if posited against the Great Northern War between Russian and Sweden over control of the Baltic area (1700 – 1721), the First Silesian War (1740 – 1742), the Second Silesian War (1744 – 1745) and the Seven Years War (1756 – 1763) about control over Silesia between Prussia on the one side, France, the Empire and Russia on the other, the war between France and the UK in North America and South Asia (1756 – 1763), the wars between the Ottoman Turkish Empire and Russia (1735 – 1739, 1777 – 1778) and the War of American Independence between the UK and British settlers in North America (1776 – 1783). In view of this list, it is not arguable that the eighteenth century witnessed an unprecedented proneness for succession wars, let alone for military conflicts, which allegedly arose from such psychological

[1] Gaspard Réal de Curban, *La science du gouvernement*, vol. 6: Contenant le traité de politique par rapport au dehors et au dedans de l'état et aux moyens de concilier les interest respectifs des puissances qui partagent la domination de l'Europe (Paris, 1762).

[2] Jean Rousset de Missy, *Les interêts presents et les prétensions des puissances de l'Europe*, 14 vols (Paris, 1734-1736).

motives as the willingness of rules to expand the reach of their control.[3] On the contrary, the theory of the law of war and peace had, from the sixteenth century, excluded personal greed for power as a cause of a just war and had categorised power no longer as a personal gift but as an asset of political communities. Eighteenth-century theorists added the qualifications that plain utility in the assessment of state interests could not justify the declaration of a just war and that every violation of specific state rights was an infringement of the general law among states.[4] Regarding the prioritisation of securing the continuity of state institutions, eighteenth-century theorists, such as Joachim Georg Darjes, went so far as to request that the permission to march an army through the territory of another state before and during a war should, in every single case, be given only of the basis of an advance agreement between both sides. This agreement was to regulate details of the conditions under which the crossing had to occur.[5] Although this theoretical demand was usually not implemented, it still reveals the underlying idea that wars were or should be planned as sequences of events and deviations from war plans for purported demands of tactics should not be considered in service to the stability of states. Hence, the seventeenth-century practice of negotiating crossing permissions prior to the beginning of wars continued, even though the results of these negotiations were usually not fixed in treaties under the law among states.

More importantly, succession wars of the later seventeenth and the entire eighteenth century ended with the confirmation of the *status quo ante*, therefore confirming the situation that had existed at the beginning of the wars. The principle applied not merely to the succession wars about the Southern Netherlands, the Palatinate and Spain, but also about Poland, the Austrian hereditary lands, except Silesia and attached areas, as well as Bavaria, even though the starting position differed in the latter three cases from that of the previous ones. As no ruling dynasty could claim precedence in royal succession in Poland, the danger was higher there than in other monarchies that the electors might not vote unanimously for only one candidate. Although the legal norm of unanimity formed the basis for the recognition of the legitimacy of succession all over Europe, Polish electors split into rival camps, each of which backed one candidate in cases where they failed to arrive at an agreement. In these cases, unanimity remained accomplished only within each of the rival camps. After such split elections, all elected candidates could claim legitimacy for themselves. The absence of an institution of arbitration to decide authoritatively about the appropriateness of the election procedure increased the likelihood of war subsequent to such split elections. In Spain, such an election had occurred at the beginning of the eighteenth century and had precipitated a long and destructive succession war. However, the conflict had, in its own right, been due to the lack of offspring of King Charles II, so that the Spanish electors had to weight the competing succession rights of the Bourbons and the Habsburgs. In Poland, by contrast, the electors had to assess the merits and demerits of candidates in all cases of succession to the monarch's office, even though they did also have the alternative option of quickly agreeing on a descendant of the deceased monarch.

The personal union, which had been in existence between the Electorate of Saxony within the Holy Roman Empire and the Kingdom of Poland from 1697, was contested already, while Elector Frederick August II was reigning as King of Poland. In 1704, opposing Polish aristocrats elected nobleman Stanisław Bogusław Leszczyński (1677 – 1766, King of Poland 1704 – 1709,

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[3] Ekkehard Krippendorff, 'La guerre – c'est moi!', in: Krippendorff, *Staat und Krieg. Die historische Logik politischer Unvernunft* (Frankfurt, 1985), pp. 272-299.

[4] Alberico Gentili, *De iure belli libri tres*, book I, chap. 14 (Hanau, 1598), pp. 104-105 [further edn (Hanau, 1612); reprint (Oxford, 1933)]. Joachim Georg Darjes, *Discours über sein Natur- und Völkerrecht*, § 362 (Jena, 1762), p. 498. Adam Friedrich Glafey, *Vernunfft- und Völcker-Recht*, book IV, chap. 3, § 126 (Frankfurt and Nuremberg, 1723), pp. 615-616 [third edn (Nuremberg, Frankfurt and Leipzig, 1752)]. Christian August Beck, *Versuch einer Staatspraxis oder Canzleiübung aus der Politik, dem Staats- und Völkerrechte*, § 1630 (Vienna, 1754), p. 272. Christian Wolff, *Jus Gentium methodo scientifico pertractatvm*, § 645 (Halle, 1749), pp. 518-519 [reprint, edited by Marcel Thomann (Wolff, Gesammelte Werke, series B, vol. 25) (Hildesheim and New York, 1972)].

[5] Joachim Georg Darjes, *Observationes ivris naturalis, socialis et gentium ad ordinem systematis svi selectae*, § 955 (Jena, 1751), pp. 544-545.

1733 – 1736, Duke of Lorraine 1737 – 1766). Through the ensuing military campaign, he forced Frederick August to waive his title in the Peace of Altranstädt of 1706.[6] But in 1709, Frederick August returned to the Polish throne with Russian assistance and stayed till his death in 1733. In 1725, Leszczyński, who had meanwhile through the marriage of his daughter Maria Leszczyńska (1703 – 1768) become father-in-law of King Louis XV of France (1715 – 1774), renewed his claims. However, on this occasion, the majority of Polish electors stayed loyal to Frederick August II and even opted for the latter's son with the same name, whom they elected as Frederick August III (1733 – 1763) in 1733. The war of the succession in Poland came about, because Leszczyński found support from France, Frederick August from Russia and the Habsburgs in Vienna. Hence, the contest about succession in Poland turned into a European military conflict. The Peace of Vienna of 1738 confirmed August III as King of Poland and compensated Leszczyński with the Duchy of Lorraine and Bar.[7] The reigning Duke Francis Stephen (1729 – 1738) had grown up in Vienna before succeeding to his father in 1729 and had vacated the ducal chair in 1738 to succeed as Grand Duke of Tuscany (1738 – 1765) to the last member of the Florentine kin group of the Medici, who had died in this year. Moreover, in 1736, Francis Stephen had become married to the Habsburg heir, Princess Maria Theresa, daughter of Emperor Charles VI, Archduchess of Austria (1717 – 1780), Queen of Bohemia and Queen of Hungary (1740 – 1780). Through his marriage with Maria Theresa, Francis Stephen appeared to be the most likely successor to the imperial throne after Charles VI, because Charles had no male descendants and the imperial succession law excluded females from eligibility to the office of the head of the Holy Roman Empire. Eventually, the war of the succession in Poland came to a conclusion through a multiple transfer of rulers across several European territories. French diplomats took a core role in managing the transfer, which assigned rulers to continuing state institutions. Even though French diplomacy tried to obtain benefits for France, the prime goal behind the transfer was the maintenance of state stability even against vicissitudes imposed by dynastic affiliations. French diplomacy would not guarantee the continuity of the Duchy of Lorraine and Bar, which was integrated into the Kingdom of France upon Leszczyński's death in 1766. Nevertheless, Lorraine and Bar was the last state in Europe that ceased to exist in consequence of kin relations among rulers. Through Maria Leszczyńska, it fell to her husband Louis XV.[8]

Diplomats arranged the transfer of rulers under the expectation that members of European aristocratic kin groups, specifically ruling dynasties, could be eligible as heads of states anywhere in Europe, while not being in need of specific cultural and linguistic relations with their subjects. The very idea that some national collective identity was existing as a time-honoured union of the ruled and the ruler did not become manifest in political theory up until the 1760s. By contrast, the transformation of the ruled into an indigenate with a collective identity at the ruler's behest counted as the prime task of government, whence high-ranking administrators as well as political theorists conceived of collective identities as modifiable, and expected that governments could and should "authorise" (stiften) the unification of the ruled into "nations", to the end of enhancing the "internal strength of the state".[9] Within this perception, nations were groups of subjects under the control of

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[6] Treaty Poland – Sweden, Altranstädt, 14 / 24 September 1706, in: *CTS*, vol. 25, pp. 477-491.

[7] Treaty Frankreich – Roman Emperor and Roman Empire, Vienna, 18 November 1738, in: *CTS*, vol 35, pp. 185-292.

[8] Johann Jakob Moser, *Versuch des neuesten europäischen Völker-Rechts in Friedens- und Kriegs-Zeiten*, 10 parts (Frankfurt, 1777-1780), part I (1777), book I, chap. 1, § 10, pp. 25-26, lists the principality of Dombes in Burgundy as another case of a dissolved state. However, this principality had been created only in 1681 as a fief for the Duke of Maine, a son of Louis XIV; a descendant of the duke exchanged it against service benefits to King Louis XV in 1762. Consequently, Dombes was neither an established state like Lorraine nor did it exist in any form recognised under the law among states with a distinct indigenate.

[9] Ewald Friedrich von Hertzberg, 'Betrachtung über die innerliche Stärke der Staaten und ihre verhältnißmäßige Macht gegen einander. Welche in der öffentlichen Versammlung der Königlichen Akademie der Wissenschaften zu Berlin den 24. Jänner 1782, am Geburtstagsfeste des Königs abgelesen worden', in: Hertzberg, *Drei Abhandlungen*, edited by Christian Conrad Wilhelm Dohm (Berlin and Leipzig, 1782), separate pagination, pp. 1-16, at p. 10. Joseph von Sonnenfels, 'Vortheile der Verbreitung der Vaterlandsliebe in der Regierungsform', in:

rulers, with the implication that nation-building was the task of rulers. However, during the eighteenth century, only a few rulers actually took up this task, while, in the majority of states, different sets of laws existed not only for various population groups under the control of one and the same ruler but also for different "estates" and professional groups. Within the context of Europe as a whole, the UK represented the rare case of a state, in which comprehensive laws were valid for the entire indigenate, enacted by Parliament through majority vote and implemented through government.[10]

While ending the war of the succession in Poland, the transfer of Duke Francis Stephen of Lorraine to Tuscany launched the war of succession in the Austrian hereditary lands. Already in 1713, Emperor Charles VI enforced a new Habsburg succession rule, which, under the title of Pragmatic Sanction, excluded all members of the kin group from succession in Austria, Bohemia and Hungary, who were not his own descendants.[11] In the course of his long tenure in office, he succeeded in persuading most European sovereigns to approve of the new Habsburg house law, including Frederick William I, King in Prussia (1713 – 1740) and Elector Charles Albrecht of Bavaria (1726 – 1745, as Emperor Charles VII, 1742 – 1745), who initially displayed reluctance to accept the Pragmatic Sanction. Even though the Sanction could not regulate succession to the imperial throne, as the imperial Electors continued to hold their rights, Charles VI could expect their support for the succession of Francis Stephen from the wide acceptance of the Pragmatic Sanction. But when Charles VI died on 20 October 1740, Charles Albrecht of Bavaria unexpectedly demanded recognition as successor not only on the imperial throne but also in the Habsburg hereditary lands. The Bavarian-Spanish treaty of Nymphenburg of 1741 launched an alliance with the goal of enforcing Charles Albrecht's candidacy, with France, Naples, Saxony-Poland, Sweden, Spain, the Palatinate and the Archbishopric of Cologne, the latter tied to the Electorate of Bavaria through dynastic ties, acceding to the alliance. In 1742, Frederick II, King in Prussia (1740 – 1786), joined the alliance as well, even though his father Frederick William I had accepted the Pragmatic Sanction.[12] The alliance declared war on the Habsburgs, which received support from the UK and the States General of the Netherlands. Immediately after the death of Frederick William I on 31 May 1740, his son Frederick II used the opportunity of what appeared to him as the then current Habsburg military weakness, to invade the Habsburg provinces of Silesia and Glatz and formed an alliance with France against the Habsburgs in 1741. To Habsburg surprise, the Electors placed Charles Albrecht of Bavaria successively on the throne of the Kingdom of Bohemia in 1741 and on the imperial throne in 1742. But he died already in 1745.[13] His son and successor Maximilian III Joseph as Elector of Bavaria (1745 – 1777) renounced all claims to rule outside Bavaria, thereby paving the way to the termination of the war of Habsburg succession.

During this war, the Electorate of Bavaria and its allies remained without decisive victory. The concluding Peace of Aix-la-Chapelle of 18 October 1748 enforced the Pragmatic Sanction for the warring parties, while obliging Maria Theresa to cede the Habsburg-controlled states of Parma, Piacenza and Guastalla in the North of the Italian Peninsula to a collateral line of the Spanish Bourbons as well as to agree to the transfer of some Habsburg lands in Savoy to the King of

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Sonnenfels, *Über die Liebe des Vaterlandes* (Sonnenfels, Gesammelte Schriften, 7) (Vienna, 1785), pp. 88-133, at p. 120. Johann Joseph Winckler, *Arcanum regimen. Das ist: Ein Königlich Geheimniß Für einen regierenden Landes-Herrn. Darinnen ihm entdecket wird, damit er eine Vereinigung bey seinem Volcke unvermerckt stiftet* (Wittenberg, 1703). Carl Abraham Zedlitz, *Sur le patriotisme consideré comme objet d'éducation dans les états monarchiques* (Berlin, 1776).

[10] John Brewer, 'The Eighteenth-Century British State. Contexts and Issues', in: Lawrence Stone, ed., *An Imperial State at War. Britain from 1689 to 1815* (London and New York, 1994), pp. 52-71.

[11] Gustav Turba, *Die Grundlagen der Pragmatischen Sanktion*, 2 vols (Wiener Staatswissenschaftliche Studien, 10,2. 11,1) (Vienna, 1911-1912).

[11] Treaty Bavaria – Spain [Cologne/France/Naples/Palatinate/Poland-Sacony/Prussia/Sweden later acceded], Nymphenburg, 28 May 1741, in: *CTS*, vol. 36, pp. 193-201.

[13] Treaty France – Prussia, 4 June 1741, in: *CTS*, vol. 36, pp. 219-224. For studies see: Rainer Koch, ed., *Wahl und Krönung in Frankfurt am Main. Kaiser Karl VII. (1742 – 1745)*, 3 vols (Frankfurt, 1986).

Sardinia-Savoy.[14] The treaty allowed Frederick II to keep Silesia and Glatz. The British King as Maria Theresa's ally obtained the restitution of Madras in South Asia to the English East India Company in exchange for the cession of British occupied territories in North America to France. Hence, the impact of the war of succession in Austria reached far beyond Europe, entailing transfers of colonial rule between France and UK. The Peace of Aix-la-Chappelle was laid down in one of the few multilateral treaties of the eighteenth century, but remained conventional in other formal respects, such as the invocation of the Holy Trinity as the guarantor of the treaty stipulations.[15] Moreover, the war of succession in Austria confirmed Maria Theresa's essential rights to rule over the Habsburg hereditary lands, Bohemia and Hungary, despite the cession of some territories. Moreover, she gained acceptance of Francis Stephen, who was elected unanimously as Emperor Francis I in 1745. The Grand Duchy of Tuscany remained under Habsburg rule after Francis's death in 1765, while continuing as a distinct state of its own.

The last in the series of succession wars started in 1778, following the death of the Elector Maximilian III Joseph of Bavaria in 1777, and ended without a single battle through French and Russian intermediation with the Peace of Teschen concluded between the Empire and Prussia on 13 May 1779. The issue, which brought about the war, was the hereditary succession of Elector Palatinate Charles Theodor (1742 – 1799, as Elector of Bavaria, 1777 – 1799) according to internal Bavarian arrangements. Charles Theodor thus united two electorships in his hand and was willing to compensate for the accumulation by offering to cede the territories of Upper Palatinate and the Bavarian Innviertel to the Habsburgs. But Frederick II refused to accept the deal, as he foresaw some danger for the Principalities of Ansbach and Bayreuth, which were affiliated through dynastic relations with the Prussian rulers. The Teschen peace agreement confirmed Habsburg possession of the Innviertel and guaranteed Prussian influence over Ansbach and Bayreuth.[16] The agreement was significant for the Empire, because the Russian Tsarina acted as a guarantor next to the King of France, replacing the King of Sweden, who had taken this role since the peace treaties of Munster and Osnabrück of 1648.[17] Through the swapping of Sweden against Russia as a guaranteeing power, the Emperor accepted the latter as a full member of the European states system in legal terms.

The Great Northern War and the Seven Years War did not follow the practice of succession wars, but were military conflicts resulting from rivalries about the expansion of rule. The Great Northern War took place between Russia and Sweden about control over the Baltic area. On the Russian side, Czar Peter I (1682 – 1725) attempted to extend Russian rule westwards to the shores of the Baltic Sea, thereby intervening in areas traditionally under Swedish control. Charles XII, King of Sweden (1697 – 1718), suffered a humiliating defeat during the Battle of Poltava in 1709, fled the battlefield and sought exile with the Ottoman Turkish Sultan. When he tried to regain control over Sweden in 1718, he suddenly died. His successor was his sister Ulrike Leonora (1688 – 1741, in office 1718 – 1720), since 1715 married to the son of the Landgrave of Hessen-Kassel with the name Frederick (1676 – 1751). Frederick had served as a commander in the British army during the war of the succession in Spain, rose to the rank of a Swedish generalissimo in 1716 and became King of Sweden, after his wife had abdicated in his favour. In 1730, he also succeeded as Landgrave of Hessen-Kassel. In his capacity as King of Sweden, he concluded the Peace of Nystad with Peter I on conditions that were unfavourable for the Swedish side, as the treaty confirmed Russian control over the eastern part of the Baltic area.[18] Already in 1703, Peter I could found the city of St Petersburg, where the River Narva mouths into the Baltic Sea, establish his centre of government in the city and use it as the window of Russia to the West. Thus, the Great Northern War belonged to

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[14] Treaty [Definitive Peace] France – States General of the Netherlands – UK, Aachen, 18. Oktober 1748, in: *CTS*, vol. 38, pp. 301-398.

[15] Michael Hochedlinger, *Austria's Wars of Emergence. War, State and Society in the Habsburg Monarchy. 1683 – 1797* (London, 2003). Christian Wikton, *Multilateral Treaty Calendar. 1648 – 1995* (The Hague, 1998), pp. 3-19.

[16] Treaty Prussia – Roman Emperor and Roman Empire, Teschen, 13 May 1779, art. X, XI, in: *CTS*, Bd 47, pp. 155-196, at pp. 159-161.

[17] Ibid., art. XVI, p. 161.

[18] Treaty Russia – Sweden, Nystad, 30 August 1721, in: *CTS*, vol. 31, pp. 341-355.

the few eighteenth-century military conflicts before 1792 that transformed the European states system.

Eighteenth-century successors to Peters I, most notably Tsarina Catherine II (1762 – 1796), continued the policy of the expansion of Russian control, while targeting at areas in the South rather than in the West. Eventually, this policy raised tensions with the Ottoman Turkish Empire. Both sides fought two major wars from 1735 to 1739 and again from 1768 to 1774, through which the Russian side advanced to the northern shore of the Black Sea. After the defeat of Ottoman army at Çeşme on 7 July 1770, both parties accomplished a peace agreement at Küçük-Kainarji on 21 July 1774, which legalised Russian control of the conquered areas.[19] By contrast, after Turkish withdrawal during the second half of the seventeenth century, the Sultan's rule over the Balkans remained stable during the eighteenth century. Although the Sultan had to surrender parts of Hungary to the Emperor by the peace agreement of Passarowitz of 21 July 1718,[20] the Emperor, who had joined the Russian-Turkish war in 1736 on the Russian side, was unable to retain these territories and had to return them to the Sultan with the exception of the Temeshvar Banat in the Peace of Belgrade of 18 September 1739.[21] These military conflicts resulted in the formation of closer political ties between the areas under Ottoman Turkish rule and the European states system.

The three Habsburg-Prussian wars about control over Silesia were interwoven with the war of succession in the Habsburg hereditary lands. Frederick II kicked off the First Silesian War with a military invasion, which he had neither announced nor justified and, in doing so, conducted an undeclared offensive in breach of the norms of the law of war. After some battles had been lost for the Habsburg side, this conflict ended with the Peace of Berlin of 28 July 1742. Through the agreement, Maria Theresa accepted the loss of the provinces of Lower and Upper Silesia and the adjacent County of Glatz, with a strip of land around Troppau and Teschen remaining under Habsburg rule.[22] The war altered the European states system by withdrawing the economically affluent Silesian provinces from Habsburg influence and adding them to Prussian territory. In 1744, Frederick launched the Second Silesian War again with an undeclared invasion of Habsburg-controlled territory, this time Bohemia. Again, armies under Habsburg leadership suffered defeat, whence Maria Teresa agreed upon the peace arrangement made at Dresden on 25 December 1745. The treaty left Silesia and Glatz under Prussian rule, while obliging Frederick to support the candidacy of Francis Stephen for the imperial throne.[23] The last of the three Silesian campaigns, the Seven Years War, did not change the European states system to the same degree as the First Silesian War and the Great Northern War. Rather, the Seven Years War again ended with the confirmation of Prussian control of Silesia and Glatz. This war came in the aftermath of a massive Prussian arms increase, following the Peace of Aix-la-Chapelle of 1748, most dramatically in 1755 and the first half of the following year. While, against current state practice, the arms increase for the Prussian army remained undeclared, it did not go unnoticed on the Habsburg side, which took countermeasures.[24] Frederick started the war with an undeclared invasion of Saxony in 1756,

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[19] Treaty Ottoman Empire – Russia, Küçük-Kainarji, 10 / 21 July 1774, in: *CTS*, vol. 45, pp. 368-386.

[20] Treaty Ottoman Empire – Roman Emperor and Roman Empire, Passarowitz, 21 July 1718, in: *CTS*, vol. 30, pp. 397-407; partly printed in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol 2 (Berlin and New York, 1992), pp. 355-360.

[21] Treaty Ottoman Empire – Roman Emperor and Roman Empire, Belgrad, 1 September 1739, in: *CTS*, vol., pp. 361-368, 383-424.

[22] Treaty [Definitive Peace] Prussia – Roman Emperor and Roman Empire, Berlin, 28 July 1742, in: *CTS*, vol. 36, pp. 411-420.

[23] Treraty Prussia – Saxony-Poland, Dresden, 25 December 1745, in: *CTS*, vol. 37, pp. 419-427. Treaty Prussia – Roman Emperor and Roman Empire, Dresden, 25 December 1745, in: *CTS*, vol. 37, pp. 431-439.

[24] Moser, *Versuch* (note 8), part 7 (1779), book 10, chap. 2, § 4, p. 27. For studies see: Reinhold Carl Bernhard Alexander Koser, 'Zum Ursprung des Siebenjährigen Krieges', in: *Historische Zeitschrift* 74 (1895), pp. 69-85. Koser, 'Neue Veröffentlichungen zur Vorgeschichte des Siebenjährigen Krieges', in: *Historische Zeitschrift* 77 (1896), pp. 1-40. Max Lehmann, *Friedrich der Große und der Ursprung des siebenjährigen Krieges* (Leipzig, 1894). Lehmann, '[Reply to comments by Koser and Naudé]' in: *Göttingische Gelehrte Anzeigen*, vol. 157 (1895), pp. 106-125, vol. 158 (1896), pp. 139-151, 811-834. Lehmann, 'Urkundliche Beiträge zur Geschichte des Jahres

forcing the Saxon army to place itself under Prussian command. Prussian propaganda, promulgated in retrospect after the beginning of the war, contended that the Prussian invasion of Saxony had anticipated a coordinated attack on Prussia by the armies of France, Russian and the Empire. The reasoning was based on the French-Habsburg alliance of 1756, which Tsarina Elizabeth of Russia (1741 – 1762) entered late in the same year. But contrary to Prussian insistence, there was no evidence of an acute threat of the security of the Prussian state in any sense relevant to the law among states. Hence, when the news about the unprovoked Prussian invasion of Saxony spread, Louis Guy Henri Marquis de Valori (1692 – 1774), the French ambassador in Prussia, wrote to the Major General Pierre Chrysostème d'Usson de Bonnac (1724 – 1782), in September and again in October 1756 that he was at a loss to imagine, how Fredrick could draw himself our of the dilemma of having launched a war of aggression without any prospect of finding alliance partners. The imperial administration ranked the Prussian occupation of Silesia a threat of the Empire and declared an imperial war against Prussia.[25] On the Habsburg side, Maria Theresa instructed the army to fight the war not merely for the reconquest of Silesia and Glatz, but also to reduce the Prussian state to a size that prevented the Prussian king from henceforth modifying the balance of power within the European states system. After the severe defeat of the Prussian army in the Battle of Kunersdorf on 1 August 1759, this goal appeared to be within reach. Even though Frederick received British subsidies to fill empty Prussian coffers, Prussia was without alliance partners outside the Empire due to the repeated undeclared invasions, which Frederick had ordered. On the other side, Maria Theresa could choose among alliance partners, thereby seemingly accomplishing a strategic advantage over Prussia. Nevertheless, the Seven Years War, the military conflict with the highest casualty rates after the war on the succession in Spain in the eighteenth century up to 1792, ended with the confirmation of Prussian control over Silesia and Glatz. The Treaty of Hubertusburg of 15 February 1763 not merely restored the *status quo ante* of 1756, but also explicitly restituted the peace that had existed till 1756.[26] Yet, Frederick allowed himself to become integrated into the network of diplomatic-political relations within the European system. Not only did he refrain from any further attempts to expand Prussian rule by the use of military force from 1763, but also became an advocate of the maintenance of the balance of power.[27]

1756', in: *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 16 (1895), pp. 480-491. Albert Naudé, 'Beiträge zur Entstehungsgeschichte des siebenjährigen Krieges', in: *Forschungen zur brandenburgischen und preußischen Geschichte*, vol. 8 (1895), pp. 523-618, vol. 9 (1896), pp. 101-328. Leopold von Ranke, 'Ueber den Ausbruch des siebenjährigen Krieges. Aus ungedruckten Memoiren mitgeteilt', in: Ranke, *Abhandlungen und Versuche. Neue Sammlung*, edited by Alfred Dove and Theodor Wiedemann (Ranke, Sämmtliche Werke, vol. 51/52) (Leipzig, 1888), pp. 329-356 [first published in: *Zeitschrift für Geschichtswissenschaft* 1 (1844), pp. 134-163].

[25] Louis Guy Henri Marquis de Valori to Pierre Chrysostème d'Usson de Bonnac, 4 September 1756 and 5 October 1756, quoted in: Peter Feddersen Stuhr, *Forschungen und Erläuterungen über Hauptpunkte der Geschichte des siebenjährigen Krieges. Nach archivalischen Quellen*, vol. 1 (Hamburg, 1842), pp. 71-72. Wenzel Anton von Kaunitz-Rietberg, '[Memorandum, dated 21 August 1755]', edited by Gustav Berthold Volz and Gerhard Küntzel, *Preußische und Österreichische Acten zur Vorgeschichte des Siebenjährigen Krieges* (Publikationen aus den Königlich Preußischen Staatsarchiven, 74) (Leipzig, 1899), pp. 145-160, at p. 145 [reprint (Osnabrück, 1965)]. *Staats-Betrachtungen über gegenwärtigen Preußischen Krieg in Teutschland in wie fern solcher das allgemeine Europäische, vornehmlich aber das besondere Teutsche Interesse betrift* (Vienna, 1761), pp. 10, 29-30, 53 [*mit Anmerkungen wieder aufgelegt* (Berlin, 1761); edited, without the *Anmerkungen*, by Johannes Kunisch, *Das Mirakel des Hauses Brandenburg* (Munich and Vienna, 1978), pp. 102-141; Refutation published as: *Das wahre Interesse des Teutschen Reiches bey dem gegenwärtigen Kriege zwischen den Häusern Preussen und Oesterreich, entgegengesetzt einer boshaftigen Oesterreichischen Schrift, welche unter dem Titul: Staats-Betrachtungen über den gegenwärtigen Preußischen Krieg in Teutschland ... zum Vorschein gekommen* (Berlin, 1761)].

[26] Treaty Prussia – Roman Emperor and Roman Empire, Hubertusburg, 15 February 1763, art. I, in: *CTS*, vol. 42, pp. 349-359, at p. 349.

[27] Frederick II, King in Prussia, '[Political Testament, 7 November 1768]', edited by Richard Dietrich, *Die politischen Testamente der Hohenzollern* (Munich,1981), pp. 256-397, at pp. 366-373. Johannes von Müller, 'Darstellung des Fürstenbundes', in: Müller, *Sämmtliche Werke*, vol. 9 (Stuttgart and Tübingen, 1811), pp. 11-310, at pp. 256-257.

Outside the European states system, however, the Seven Years War entailed severe changes in the patterns of relations among European states. The UK, gaining control over North America in the German war theatre according to William Pitt the Elder (1708 – 1778), deployed the navy and the leverage of the English East India Company to suppress French influence in South Asia and to terminate French colonial rule in North America. In South Asia, the English East India Company, jointly with allied local rulers, accomplished a sweeping victory at Palashi (Plassey) on 23 June 1757 over French troops and Nawab Siraj-ud-Daula of Bengal (1733 – 1757) supporting the French side. Also, French troops had to withdraw from Canada. The Peace of Paris of 10 February 1763 placed all French colonial positions on the South Asian mainland and in the north of North America under the control of the UK.[28] Even if a critical observer such as François Marie Arouet de Voltaire (1694 – 1778), in his description of the times of Louis XV, ridiculed the Seven Years War as "a negligible quibble between France and England over wild stretches of land in a distant part of the world" (une légère querelle entre la France et l'Angleterre pour quelques terrains sauvages vers l'Acadie),[29] the various military activities during the war in the European and overseas war theatres were interrelated and mutually impacted upon one another. Diplomatic efforts to maintain state stability was confined to the European states system, where it was generally successful with the exceptions of the Great Northern and the First Silesian War. These efforts found expression in political propaganda and in academic theory, both of which positioned the preservation of the balance of power as a legal obligation.[30] By contrast, there was no guarantee of the distribution of European overseas colonial positions, including the strongholds of the long-distance trading companies. In European perspective, the balance of power did not extend to areas and population groups outside Europe.

The distinction between the focus on the maintenance of the balance of power in the largest part of the European states system and the readiness to deploy military means to overseas areas in efforts to overturn the existing distribution of rule and control, became dramatically recognisable, once British colonists in North America revolted against trading privileges held by the English East India Company in 1764 and, after minor skirmishes, took up arms against the UK in 1776. The colonists defended their resort to war on the basis of the right to resistance, which they claimed against King George III (1760 – 1820), denounced the king as a tyrant, accused him of having violated their natural rights and demanded validity of general human rights, which they derived from the law of nature.[31] For their declaration of war, they chose the conventional form of the abrogation of all legal obligations (diffidatio), which had been in use since the twelfth century.[32] They categorised the war, which they expected to come, as a just struggle against the alleged tyranny of the king. Explicitly, they pronounced their intention of rejecting the king's rule and, as autonomous groups of residents, declared their "independence" with the goal of establishing new states for themselves. The declaration of independence of the British North American colonists was a novelty in the respect that it did not restrict itself to defending the purported need of putting an end to tyrannical rule, but stated the principled goal of revoking all recognition of British laws and their execution through the British government. With their declaration, the British North American

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[28] Treaty France – Spain – UK, Paris, 10 February 1763, in: *CTS*, vol. 42, pp. 281-320.

[29] François Marie Arouet de Voltaire, *Œuvres complètes*, part III, chap. 31, vol. 3: Œuvres historiques, edited by Adrien Jean Quentin Beuchot (Paris, 1828), col. 3073.

[30] Ludwig Martin Kahle, *La balance de l'Europe considerée comme la règle de la paix et de la guerre* (Berlin and Göttingen, 1744), pp. 155-157. Johann Jacob Moser, *Grundsätze des Völkerrechts* (Deutsches Rechtsdenken, 16) (Frankfurt, 1959), pp. 17-18. *Staatsbetrachtungen* (note 25), pp. 10, 29-30.

[31] John Adams, *Thoughts on Government* [Boston 1776], partly edited by Charles S. Hyneman and Donald S. Lutz, *American Political Writing during the Founding Era. 1760 – 1805*, vol. 1 (Indianapolis, 1983), pp. 401-409. John Jay, 'Address to the People of New York [16. Dezember 1787]', edited by John D. Lewis, *Anti-Federalists Versus Federalists* (Scranton, 1967), pp. 266-274.

[32] Erich Angermann, 'Ständische Rechtstradition in der amerikanischen Unabhängigkeitserklärung', in: *Historische Zeitschrift* 200 (1965), pp. 61-91. Karl Vocelka, 'Fehderechtliche "Absagen" als völkerrechtliche Kriegserklärungen in der Propaganda der frühen Neuzeit', in: *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 84 (1976), pp. 378-410.

colonists introduced the concept of the independence of states into the law among states.[33] Explicitly, they asked for divine assistance in their struggle and conveyed hope that divine benevolence would support their cause. In employing this formula, the colonists indirectly confirmed that the concept of the state independence was, at the time, not regulated according to the law among states and that this law did not provide for procedures of the establishment and recognition of independence. The British government did not respond by itself to the declaration of independence, because any reply might have been misrepresented as an acceptance of the justice of the demands of the colonists. However, the government involved loyal pamphleteers to disseminate the argument that the colonists did not form an autonomous group of residents and were, by consequence, subject to the same laws as all other subjects of the king, ands that their actions were rebellion.[34] However, this legalistic argument did not strengthen the position of the British government. In the end of the war, the British government gave in to the demand for what the rebellious settlers claimed as their "independence", even though British troops in North America had not been defeated. Through the Peace of Paris of 3 September 1783, the British government recognised the former North American colonies south of Canada as new states.[35]

Instead, the British government, through its admiralty, responded quickly and with determination to the rebellion of the North American colonists. Already on 30 July 1768, the admiralty dispatched Captain James Cook (1728 – 1779) on an expedition to the South Pacific. It instructed Cook to search for a large continent in the Southern hemisphere (Terra Australis), about which Alexandrine cosmographer Klaudios Ptolemaios had already speculated in the first century CE.[36] Cook was to search for the new continent south of the fortieth latitudinal degree, explore it as far as possible and chart such places as harbours and bays as well as riffs and shallow waters. He was also to take note of the mentality of the local population and list predators, birds, fish, mines and minerals for exploitation. Last but not least, Cook was to take possession of unoccupied land for the British crown, after having obtained consent from the "natives". The instruction left unspecified how Cook had to obtain the consent and what kinds of legal entitlements it might cover. In the case that Cook could not implement the instruction, he was to explore the group of islands, which Abel Tasman (1603 – 1659) had visited in 1642 for the Dutch East India Company in search of the southern continent and which now go under the name New Zealand.[37] Cook was indeed unable to implement the instruction and actually reached New Zealand but failed to become aware that these were the islands which Tasman had already been. Cook undertook two further expeditions, for the latter of which he received a modified instruction.[38] The Classical Latin name Terra Australis became attached to Australia, which the British government had occupied from the 1780s. Cook's expeditions placed the British government in a position where it could compensate the loss of the

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[33] As already noted by: Johann Christoph Wilhelm von Steck, 'Versuch von Erkennung der Unabhängigkeit einer Nation und eines Staats', in: Steck, *Versuche über verschiedene Materien politischer und rechtlicher Kentnisse* (Berlin, 1783), pp. 49-56.

[34] Thomas Hutchinson, *Strictures upon the Declaration of the Congress at Philadelphia* (London, 1776), pp. 9, 20. John Lind and Jeremy Bentham, *Answer to the Declaration of the American Congress* (London, 1776), p. 5 [second – fourth edns (London, 1776); sixth edn (Aberdeen, 1777)].

[35] Treaty USA – UK, Paris, 3 September 1783, art. I, in: *CTS*, vol. 48, pp. 489-498, at p. 491.

[36] Klaudios Ptolemaios, *Cosmographia*. Printed version (Strasbourg, 1513) [reprint (Amsterdam, 1966)].

[37] Memorandum by François Jacobszoon Visseker, before August 1642 on "Het ontdecken vant Zuytlandt" [in: Algemeen Riksarchief, VOC 1140, fol. 509], edited in: B. J. Slot, *Abel Tasman and the Discovery of New Zealand* (Amsterdam, 1992), p. 41. Abel Ianszoon Tasman, *Het journaal van Abel Tasman. 1642 – 1643*, edited by Vibecke D. Roeper (The Hague, 2006), s. d. 13 December 1642, pp. 62, 65. James Cook, '[Instruction for his First Expedition, 30 July 1768]', in: *Naval Miscellany* 3 = *Publications of the Naval Records Society* 63 (1928), pp. 343-350, at pp. 347-349. Gwyndwr Williams, '"To Make Discoveries of Countries Hitherto Unknown". The Admiralty and Pacific Exploration in the Eighteenth Century', in: Alan Frost and Jane Sampson, eds, *Pacific Empires. Essays in Honour of Glyndwr Williams* (Vancouver, 1999), pp. 13-31.

[38] James Cook, '[Instruction for his Third Expedition, 6 July 1776]', in: John Cawte Beaglehole, ed., *The Journals of James Cook*, vol. 1 (Works Issued by the Hakluyt Society, 34) (London, 1955), pp. CCXX-CCXXIV, at pp. CCXXII-CCXXIII.

North American colonies with the expansion of colonial rule to the South Pacific.

The Trans-Atlantic Slave Trade

In the course of the eighteenth century, European governments acting as colonial rulers in America enlarged the scope of their grip on territories and population groups. Spanish colonists took hold of California in the second half of the century, while British and French colonists penetrated westward from the northeastern coasts of the continent into the Ohio River area and the Appalachian Mountains against strong and often successful resistance from among Native Americans.[39] As the colonists were usually engaged in agriculture producing cash crops for European markets, the enlargement of the cultivated soil ushered in the increase of the demand for labour force, which Africans deported as slaves, had provided since the sixteenth century. By consequence, the Trans-Atlantic slave trade peaked during the eighteenth century. While a few slave traders admitted the moral reprehensibleness of their business,[40] the trade neither did take place outside the framework of the European law of treaties among states[41] nor was it beyond control of those governments in Denmark, France, the Netherlands, Portugal, Spain and the UK, which chartered long-distance trading companies and legalised slaveholding in continental America and the Caribbean as well as in strongholds on the West African coast[42] and the Dutch settlement at the Cape of Good Hope.[43] Therefore, it was through government surveillance that deported Africans were transformed into trading goods and became objects of exploitation. The law among states, the unconditional application of which ought to have prevented the denial of the moral status of human beings to deported Africans and their relentless subjection to the arbitrariness of European slave traders and American slaveholders, was not only blunt vis-à-vis gross abuses but even regulated competition among the slave traders. The latter effect was crucial, because the profit margins for the trading companies operating in the Atlantic Ocean were narrow and accomplishable anyway only with ships capable of taking large cargoes on board. This was so, because raw materials such as sugar and cotton, which African slaves produced in America and the Caribbean, were saleable in European markets only at low prices. Because the sales prices for these products were low, the costs for maintaining slaves covered only expenditures essential for keeping slaves alive. In turn, life expectancy was short for those slaves, who had survived the passage across the Atlantic, and, correspondingly the high mortality rate ushered in a high demand for new slaves.[44] Therefore, the

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[39] Armstrong Marion Starkey, *European and Native-American Warfare. 1675 – 1815* (London, 1998). Starkey, 'European-Native American Warfare in North America. 1513 – 1815', in: Jeremy Martin Black, ed., *War in the Early Modern World* (London, 1998), pp. 237-259. Starkey, *War in the Age of the Enlightenment. 1700 – 1789* (Westport, CT, and London, 2003).

[40] *The African Trade. The Great Pillar and Support of the British Plantation Trade in America* (London, 1745), p. 11-13. Willem Bosman, *A New and Accurate Description of the Coast of Guinea, Divided in to the Gold, the Slave and the Ivory Coast* (London, 1705)**,** pp. 363-366 [second edn (London, 1721); reprint of the first edn, edited by John D. Fage and R. E. Bradbury London, 1967]; Microfilm edn (The Eighteenth Century, reel 2893, nr 5, reel 3445, nr 8) (Woodbridge, CT, 1986); first published (Utrecht, 1704)]. William Snelgrave, *A New Account of Some Parts of Guinea and the Slave-Trade* (London, 1734), pp. 157-165 [new edn (London, 1754); reprint (London, 1971)].

[41] 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.

[42] Pieter van Dam, *Beschryvinge van de Oostindische Compagnie*, edited by Frederik Willem Stapel, book I, part 1 (The Hague: Nijhoff, 1927), pp. 653-670 (Rijks Geschiedkundige Publicatiën, 63), book II, part 3 (Rijks Geschiedkundige Publicatiën, 83) (The Hague: Nijhoff, 1939), pp. 530-541 Carl Bernhard Wadström, *An Essay on Colonization* (London, 1794) [reprint (London, 1968)].

[43] Karl von Wurmb, *Briefe des Herrn von Wurmb und des Herrn Karl Baron von Wolzogen auf ihren Reisen nach Afrika und Ostindien in den Jahren 1774 bis 1792* (Gotha and Schleitz, 1794).

[44] Missive of the Directors of the Dutch East India Company, dispatched to the Governour General of the Company in Batavia and dated 8 October 1685, reported the death of every second slave deported from Madagascar to Southeast Asia [in: Dam, *Beschryvinge* (note 42), book I, part 1, chapter 47, pp. 665-668, at p. 665. For studies

sales prices for slaves on markets in America and the Caribbean were low, so that the slave traders were struggling to engaged not merely in immoral but also in risky business. At the same time, demand for raw materials produced by deported Africans in America increased in Europe, again pushing up the demand for slaves. Presumably, the combination of these factors resulted in the high number of deportations during the eighteenth century. Probably, 50 per cent of the total number of persons deported from Africa between the fifteenth and the nineteenth centuries, left in the course of the eighteenth century.

Till the 1770s, there was little resistance in America and in Europe against the practices of the slave trading and slaveholding. A public abolitionist movement began in the UK in 1783, but the British government did not intervene against slavery even in areas over which it exercised control. Nevertheless, a few Africans, who had succeeded in freeing themselves from the bonds of slavery, issued printed accounts of their lives and openly criticised slave trade and slaveholding.[45] A fundamentalist Protestant sect, which Swedish naturalist Emanuel von Swedenborg (1688 – 1772) had founded, took up the criticism and, in 1787, built a settlement on the West African coast near the mountain range called Sierra Leone since the fifteenth century. The settlement was to be open for Africans freed from slavery and willing to return to Africa. The small settlement bore the programmatic name Freetown.[46] But this movement, small and ineffective anyway, had no impact on European colonies in America and the Caribbean. When the British colonists in North America rebelled against King George III, they left the abused African slaves unmentioned in their declaration of independence. While the colonists claimed for themselves general human rights, as derived from the law of nature, they would include neither Africans nor Native Americans into their claim.

The Regularisation of War

Eighteenth-century military conflicts to 1792 witnessed the process of the regularisation of war, for which contemporary diction preferred the metaphor of the "taming" of the Bellona, the war goddess of Roman Antiquity. With regard to "lower tactics", demands became articulate that serving soldiers should be subjected to strict control by commanding officers, generating "blind obedience", the unconditional execution of given commands, through the remorseless enforcement of discipline and manual drill regulated at great detail.[47] The model of the disciplined fighting force continued to be the army of the Roman Imperium of Antiquity.[48] Dozens of usually printed drill manuals were to contribute to the formation of obedient subjects from the ordinary farming population and the often

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see: Philip D. Curtin, *The Atlantic Slave Trade* (Madison, 1969). Herbert S. Klein, *The Middle Passage. Comparative Studies in the Slave Trade* (Princeton, 1978). Joseph C. Miller, *Way of Death. Merchant Capitalism and the Angolan Slave Trade. 1730 – 1830* (Madison, 1988). Georges Scelle, *La traite négrière aux Indes de Castille. Contrats et traits d'asiento* (Paris, 1906).

45 Quobna Ottobah Cugoano, *Thoughts and Sentiments on the Evil and Wicked Traffic of the Slavery and Commerce of the Human Species* (London, 1787) [edited by Mary-Antoinette Smith, *Essays on the Slavery and Commerce of the Human Species* (Peterborough, Ont., and London, 2010) http://galenet.galegroup.com/servlet/Ecco]. Olaudah Equiano, *The Interesting Narrative of the Life of Olaudah Equiano or Gustavus Vassa the African* (London, 178)9 [eight further edns, provided by the author, and one US unauthorised copy; edited by Paul Geoffrey Edwards, *Equiano's Travel. His Autobiography. The Interesting Narrative of the Life of Olaudah Equiano or Gustavus Vassa the African* (London, 1967); further edn of this edn (London, 1977)]. James Abbot Ukawsaw Gronniosaw, *A Narrative of the Most Remarkable Particulars in the Life of … an African Prince, as Related by Himself* (Bath, 1770).

46 Wadström, *Essay* (note 42).

47 Frederick II, King in Prussia, '[Political Testament, 27 August 1752]', edited by Richard Dietrich, *Die politischen Testamente der Hohenzollern* (Munich, 1981), pp. 132-255, at p. 229. Franz Georg Miller, *Reine Taktik der Infanterie, Cavallerie und Artillerie*, 2 vols (Stuttgart, 1787-1788).

48 Johann Heinrich Kirchhoff, *Abhandlungen von den besonderen Soldatenrechten, Vorzügen und Freyheiten* (Hamburg, 1762), pp. 27-29.

forcefully recruited servicemen, who were to acquire "the air of the soldier" according to a phrase frequently used in drill books for the Prussian army.[49] Equally numerous edicts, promulgated in the names of rulers, requested discipline, but also sought to restrict the application by commanding sergeants of physical punishment and stipulated the making and use of uniforms, the issue of passports for soldiers, who were on their way outside their garrisons and would have been accused of desertion without such documents, as well as the prohibition of marriages without consent by the army command. Military theory concurred applying the then fashionable mechanicist imagery and variously equating each soldier and the army as a whole with a machine.[50]

Contemporaries perceived of drill and the maintenance of discipline in the Prussian army under Frederick William I and Frederick II as the model for Europe as a whole, with Count Gabriel-Honoré de Riquetti Mirabeau's (1749 – 1791) description of the Prussian state circulating widely.[51] However, Prussian drill was never regulated with insurmountable intensity. For example, infantrymen serving the Landgrave of Hessen-Darmstadt had to observe more than 200 commands only on positions without arms in 1712, against 78 commands for the same positions in the Prussian manual of 1714.[52] Commands for movements of battalions were added. Landgrave Louis IX of Hessen-Darmstadt (1768 – 1790) kept a military contingent under arms in the exclave of Pirmasens, where servicemen had few military tasks but rather played the role of the ruler's toy and drilled regularly and intensively in public.[53] Contemporary critics already noticed that drill, not only of individual soldiers but also of entire contingents, was not straightforwardly applicable in the battlefield, because no drill manual could anticipate the full range of occurrences that might happen in actual combat.[54] Nevertheless, the eighteenth century put on record agreement about the principles of drill, regardless of differences over detail, such as the frequency of the repetition of certain stereotype commands in the course of each drill. Hence, the fair uniformity of drill practices in most European armies promoted the formation of a Europe-wide order of armed forces, which were ready to implement the principles of the regularised forms of combat commonly termed "linear tactics" even under the constraints of battle. According to the principles of "linear tactics", the front in battle ought to advance "in uniformity" "step by step", whereby its volley fire ought to be like the "incessant rolling of thunder".[55] In other words, armies were expected to preserve throughout the battle the order in which they had moved onto the battle field, thereby allowing the implementation of the carefully crafted battle plan. Again, contemporaries recognised that this effect crucially hinged

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[49] *Reglement für die Königlich Preußische Infanterie* (Berlin, 1743), § II/27 [new edns (Berlin, 1750; 1757; 1766; 1773); reprint of the original edn (Altpreußischer Kommiss, 31/32) (Osnabrück, 1976); English version (London, 1754); new edn (London, 1754); reprint of the English version (Greenwood, 1968)].

[50] For a contemporary survey see: Johann Jakob Moser, *Von der Landeshoheit in Militärsachen* (Neues teutsches Staatsrecht, 16) (Frankfurt and Leipzig, 1773), pp. 159-165. For the use of mechanicist imagery in military theory see: Friedrich Eckard, *Versuch über die Kunst junge Soldaten zu bilden* (Prague, 1782), pp. 19-20 [comparison of an army with a machine]. Carl Gottfried Wolff, *Versuch über die sittlichen Eigenschaften und Pflichten des Soldatenstandes* (Leipzig, 1776), p. 324 [comparison of a soldier with a machine].

[51] Jakob Mauvillon, *Geschichte und Darstellung des Brandenburgischen und Preußischen Soldatenwesens bis zu der Regierung Friedrich Wilhelm II.* (Leipzig, 1796). Gabriel-Honoré de Riquetti Mirabeau, *De la monarchie prussienne sous Frédéric le Grand*, vol. 4 (London [recte Paris], 1788), p. 189 [Microfilm edn (The Eighteenth Century, reel 6905, nr 2) (Woodbridge, CT, 1986)].

[52] Hesse-Darmstadt, Erneuertes Reglement. Wornach es bey Unser … in Unserm Fürstenthum und Landen reglirten Land-Militz künfftig hin gehalten warden sole. 30. Dezember 1712. Ms. Darmstadt: Hessisches Staatsarchiv, E 8 B, 137/9. *Reglement* (note 49)]

[53] 'Auszüge aus den Briefen eines Reisenden' [report on Prussian military drill at Pirmasens], in: *Journal von und für Deutschland* (1789), pp. 77-85.

[54] Jacques Antoine Hippolyte de Guibert, *Bemerkungen über die Kriegsverfassung der preußischen Armee*. New, improved and enlarged edn (Cologne, 1780), pp. 124, 128 [first published (Amsterdam, 1778); first German version (Cologne, 1778)].

[55] Carl von Duncker, 'Militärische und politische Aktenstücke zur Geschichte des ersten schlesischen Krieges 1741', in: *Mitteilungen des K. u. K. Kriegs-Archivs*, N. F., vol. 1 (1887), pp. 163-222, at p. 206, vol. 2 (1888), pp. 179-256, vol. 3 (1889), pp. 249-312, vol. 5 (1891), pp. 209-339, vol. 6 (1892), pp. 253-375.

on the willingness of all warring parties to agree to observe this order in battle.[56] This order was thus credited with a binding force, which was neither legislatable nor enforceable. Yet, rulers, who, like Frederick II, did not feel obliged to observe the order under all circumstances and broke it occasionally, quickly acquired the reputation of being unreliable, with the consequence that they had difficulty in finding alliance partners. Hence, non-observation of the principles enshrined in "linear tactics" could raise the risks of war. Moreover, the application of "linear tactics" enhanced the establishment of a Europe-wide officer corps, trained in accordance with similar rules, highly mobile and, consequently, successively employed in the services of different rulers. These commanding officers were further united through the reception of a voluminous and even expanding body of publicly available handbook literature on matters of military theory as well as numerous specialised tracts about details of strategy and tactics.[57] In turn, the mobility of commanding officers with their standard comprehensive knowledge made redundant the build-up of military secrets relating to the size of troops under arms, preferred forms of combat and the foundations of military strategy and tactics, because information about all these matters was available in printed books.[58] The demand to maintain order included even armies as a whole. Armies were to operate like machines, with every soldier being a small wheel in a grand clock under the surveillance of a ruler.[59]

The machine model metaphorically articulated the regularity of the "armies that remained standing" and supported the perception of war as a sequence of planned events, even though these armies received much contemporary criticism for testifying to the willingness of rulers to engage in war at any time.[60] Yet, Frederick II, who by no means avoided battle under all circumstances and suffered grave defeats, repeatedly described armies as war machines and formulated rules of "linear tactics". In his testaments, which were made available to the general public only late in the nineteenth century,[61] he took for granted that wars should not be undertaken lightly or due to ambitions of greedy rulers. Rather, he insisted, wars should be based on carefully drafted comprehensive campaign plans, even though he approved of flexible responses to enemy action and the use of feints. However, according to Frederick, a battle should only be fought, if the enemy agreed to have it, with the implication that field marshals on both sides should agree on planning the battle as the instrument to decide the war. He further recommended classifying newly arranged maneuvers and innovative weapons technologies as state secrets, also to establish camps at fortified

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[56] Guibert, *Bemerkungen* (note 54), p. 124.

[57] Ferdinand Friedrich von Nicolai, 'Betrachtungen über die vorzüglichsten Gegenstände einer zur Bildung angehender Officiers anzuordnenden Kriegsschule' [Ms. Stuttgart, Württembergische Landesibliothek, Cod. Milit. 2º 33 (1770)], edited by Daniel Hohrath, in: *Militärgeschichtliche Mitteilungen* 41 (1992), pp. 115-141. Nicolai, *Versuch eines Grundrisses zur Bildung des Officiers* (Ulm, 1775). For studies see: Daniel Hohrath, *Die Bildung des Offziers in der Aufklärung. Ferdinand Friedrich von Nicolai (1730 – 1814) und seine enzyklopädischen Sammlungen* (Stuttgart, 1990). Hohrath, 'Die Beherrschung des Krieges in der Ordnung des Wissens', in: Theo Stammen and Wolfgang E. J. Weber, eds, *Wissenssicherung, Wissensordnung und Wissensverarbeitung* (Colloquia Augustana, 18) (Munich, 2004), pp. 371-386.

[58] Gottfried Achenwall, *Vorbereitung zur Staatswissenschaft der heutigen europäischen Reiche und Staaten*, § 58 (Göttingen, 1748, pp. 35-36. Nicolaus [Niklas] Vogt, 'Das neue politische Gleichgewicht', in: Vogt, ed., *Europäische Staatsrelationen*, vol. 6 (Frankfurt, 1806), pp. 44-53.

[59] Georg Heinrich von Berenhorst, *Aus dem Nachlass*, edited by Eduard von Bülow (Jena, 1845), p. 15 [reprint (Bibliotheca rerum militarium, vol. 38, part 2) (Osnabrück, 1978)]. Friedrich von Eckard[t], *Versuch über die Kunst junge Soldaten zu bilden* (Prague, 1782), pp. 19-20. Wenzel Anton von Kaunitz-Rietberg, [Memoranda], edited by Adolf Beer, in: *Archiv für österreichische Geschichte* 48 (1872), pp. 19-162, at pp. 110-111. Carl Gottfried Wolff, *Versuch über die sittlichen Eigenschaften und Pflichten des Soldaten-Standes* (Leipzig, 1776), p. 324.

[60] Julius Bernhard von Rohr, *Einleitung zur Ceremoniel-Wissenschaft der Grossen Herren* (Berlin, 1733), p. 475 [reprint, edited by Monika Schlechte (Leipzig and Weinheim, 1990)].

[61] As late as in 1843, historian Ranke advised the Prussian government not to permit the publication of these texts: Leopold von Ranke, 'Gutachten über die politischen Testamente Friedrichs des Großen [provided at th request from King Frederick William IV, 1843]', edited by Alfred Dove, in: Ranke, *Sämmtliche Werke*, vol. 53/54 (Leipzig, 1890), pp. 667-670.

places, so as to prevent combat action outside the frame of war plans.[62] In texts, which he published during his lifetime, he praised Marshall Turenne for his skills of avoiding battles.[63] He gave priority to the continuity of the state above all other military and political goals and advised of battle avoidance, because battles might decide about the existence of states.[64] In the essay on the Battle of Poltava, which he wrote under the impression of his rout at Kunersdof in 1759, he oracled that Charles XII of Sweden had gravely neglected the rules of "linear tactics" and, due to that neglect, had lost the battle.[65] Frederick did not categorise these rules as legal norms, but still acknowledged them as theoretical guidelines for the practical conduct of war. By contrast, he was reluctant to observe the law in war. Despite pleas to the contrary prior to his accession to kingship,[66] he placed the law in war at the disposal of tactical calculations in the campaigns he started in 1740, 1744 and 1756.

Theorists of the law in war were usually academics teaching in universities during the eighteenth century. Like theorists in previous centuries, they continued to define war as a regular conflict with the use of martial weapons,[67] allowed only previously inflicted injustice as a cause of just wars,[68] differentiated between "public" and "private" wars, some more precisely between offensive and defensive, recuperative and punitive wars,[69] and demanded the strict distinction between combatants and non-combatants as the core norm informing the law in war.[70] Moreover, the number of theorists increased who argued that the right to war should be restricted to heads of sovereign states.[71] Even though these theorists joined their colleagues in accepting the right to war of long-distance trading companies, the use of that right became subject to limitations. Among others, Karl Friedrich Pauli (1719 – 1772), historian and jurist at Halle, argued the position that long-distance trading companies could only undertake defensive wars against states,[72] but were entitled to conduct offensive wars against private persons, pirates, smugglers and corsars,[73] and that all of these wars were "public" acts of violence, even though companies established under private law might have declared them on the basis of government privileges.[74] War did not rank as a

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[62] Frederick II, 'Testament', 1768 (note 27), pp. 311-326.

[63] Frederick II, King in Prussia, 'Art de la guerre', Chant 6, vv 15-18 [1751, with commentary by François Marie Arouet de Voltaire], edited by Theodore Besterman, in: Voltaire, *Les Œuvres complètes*, vol. 32B (Oxford, 2007), pp. 113-215, at p. 203 [first printed in: *Les Œuvres du philosophe de Sans Souci* (Berlin, 1752)].

[64] Frederick II, King in Prussia, 'Réflexions sur les talents militaires et sur le catactère de Charles XII, Roi de Suède [Nov. / Dec. 1759]', in: Johannes Kunisch, ed., *Aufklärung und Kriegserfahrung* (Frankfurt, 1996), pp. 547-587, at pp. 562, 566.

[65] Ibid., p. 562.

[66] Frederick II, King in Prussia, 'Anti-Machiavell. Réfutation', chap. 18, 19 [written 1739-1740], in: Frederick, *Œuvres*, vol. 8 (Berlin, 1848), pp. 59-299, at pp. 118-122, 123-127.

[67] Samuel von Cocceji [Koch], *Introdvctio ad Henrici de Cocceji Grotium illustratum. Continens dissertationes proemiales XII in quibus principia Grotiana circa ius naturale ... ad iustam methodem revocantur* (Halle, 1748), p. 136 [Microfiche edn (The Grotius Collection. International Law, GRI-61) (Leiden, 1995)].

[68] Michael Heinrich Gribnerus [Griebner], *Principiorum iurisprudentiae naturalis libri IV. Quibus iuris naturae et gentium publici et privati universalis summa capita exhibentur*, book III, chap. 8 (Wittenberg, 1715), p. 339.

[69] Cocceji, *Introdvctio* (note 67), pp. 139-155. Darjes, *Discours* (note 4), § 963, p. 1251. Johann Gottlieb Heineccius [Heinecke], *Elementa iuris naturae et gentium*, § 305 (Halle, 1738), p. 532 [new edn (Venice, 1791); German version as: *Grundlagen der Natur- und Völkerrechts*, edited by Christoph Bergfeld (Bibliothek des deutschen Staatsdenkens, 2) (Frankfurt, 1994)]. Karl Friedrich Pauli [praes.] and Johann Andreas Buchholtz [resp.], *De iure belli societatis mercatoriae maioris privilegiatae*, § 12. LLD Thesis (University of Halle, 1751), pp. 11-12. Johann Friedrich Weidler, *Institutiones juris naturae et gentium* (Wittenberg, 1731), pp. 417-418. Christian Wolff, *Grundsätze des Natur- und Völckerrechts*, §§ 1169, 1170 (Halle, 1754), pp. 854-855 [reprint, edited by Marcel Thomann (Wolff, Gesammelte Werke, series A, vol. 19) (Hildesheim and New York, 1980)].

[70] Carl Anton von Martini, *Lehrbegriff des Natur-, Staats- und Völkerrechts*, vol. 4: Welcher das Völkerrecht enthält (Vienna, 1784), p. 118.

[71] Heineccius, *Elementa* (note 69), p. 533. Martini, *Lehrbegriff* (note 70), pp. 114-127.

[72] Pauli, *De iure belli* (note 69), § 12, pp. 11-12.

[73] Ibid., §§ 19-21, 24, 26, pp. 15-19.

[74] Ibid., § 30, p. 21.

naturally given process but appeared to result from human will through voluntary decision.[75] Each warring party received the duty of stating the claim for the justice of their acts in declarations of war. The older proposition, which Vitoria had supported and according to which all warring parties could fight a war in subjective perception of its justice, no longer found only supporters,[76] but also critics. Critics rejected the proposition drawing on the view, already shared by St Thomas Aquinas, that justice could only exist objectively and thus could not be ascertained through subjective claims.[77] Moreover, Vitoria's proposition was challenged with the pragmatic argument that assessments of the justice of a war had to be derived from actual declarations and other legal texts revealing the "causes" of the war, whence justice could not be based on subjective claims.[78] In order to qualify as just, wars had to be conducted with minimal use of force, measured in terms of weapons and troops deployed, financial resources mobilised and time passing between the beginning and the end of the war.[79] In any case, only wars fought for the restitution of previously inflicted injustice had a chance of becoming acknowledged as just.[80] Thus, like during the seventeenth century, war was tantamount to the legal means of enforcing the law among states, which theorists continued to position in the state of nature with regard to their mutual relations and would not regard as subjectable to the power of a higher law-enforcing institution.[81] In this sense, war was a breach of peace but not a breach of unset law. Wars could not exist in times of peace,[82] but the divinely willed law of nature continued to valid in force during wars. In his inaugural address as Professor of History at the University of Jena, Friedrich Schiller (1759 – 1805) could, even in May 1789, proclaim with full confidence: "The European society of states appears to have been transformed into a big family. The members of the household can treat one another with hostility, but can no longer tear each other to pieces."[83]

The change of the number of war casualties confirmed that these theoretical observations were neither pure fancy nor cheap propaganda of partisan ideologues. The costly battles fought in the war on the succession in Spain at Ramillies (1706) and Malplaquet (1709) charged some 50.000 war dead and seriously wounded among approximately 312.000 combatants of all sides. By contrast, the Silesian wars featured the battles of Mollwitz (10 April 1741), Rossbach (5 November 1757) and Leuthen (5 December 1757) with 478, 548 and about 6400 dead or seriously wounded among 23.4000, 22.000 and 29.000 men deployed on the Prussian side, and 4551, about 3000 and 10.000 dead or seriously wounded among 19.000, 41.000 and 66.000 combatants on the Habsburg side. As

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[75] Darjes, *Discours* (note 4), § 362, p. 498.

[76] Emer[ich] de Vattel, *Le droit des gens. Ou Principes de la loi naturelle appliquées à la conduite et aux affairs des Nations et des Souverains*, book III, chap. III/3, nr 39-40 (London [recte Neuchâtel], 1758), p. 30 [second edn (Paris, 1773); third edn (Amsterdam, 1775); Nouvelle édition, edited by Silvestre Pinheiro-Ferreira, Jean Pierre Baron de Chambrier d'Oleires and Paul Louis Ernest Pradier-Fodéré (Philadelphia, 1863); reprint of the first edn, edited by Albert de Lapradelle (Washington, 1916); reprint of the reprint (Geneva, 1983)].

[77] Wolff, *Grundsätze* (note 69), §§ 85-86, pp. 53-54.

[78] Prussia, 'Abhandlung von dem Unterschiede der Of- und Defensivkriege, worin besonders die Frage beantwortet wird, wer bei einem entstehenden Kriege für den eigentlichen Aggressor oder angreifenden Theil zu achten? [1756]', § 2, edited by Otto Krauske, *Preussische Staatsschriften aus der Regierungszeit König Friedrichs II. (der Beginn des Siebenjährigen Krieges)* (Preussische Staatsschriften aus der Regierungszeit König Friedrichs II., vol. 3) (Berlin, 1892), pp. 440-454, at p. 440.

[79] Darjes, *Disours* (note 4), § 963, p. 1251. Martini, *Lehrbegriff* (note 70), p. 114. Wolff, *Jus* (note 4), § 969, pp. 771-772.

[80] Jean Jacques Burlamaqui, *The Principles of Natural and Political Law*, fourth edn (Boston, 1792), p. 337 [first published (Amsterdam, 1751); further edns (Geneva, 1762); (Paris, 1820-1821)]. Darjes, *Discours* (note 4), § 360, pp. 95-96. Francis Hutcheson, *A System of Moral Philosophy* [1755], reprint, edited by Bernhard Fabian, Hutcheson, *Collected Works*, vol. 6 (Hildesheim, 1969), p. 234. Georg Friedrich von Martens, *Über die Erneuerung der Verträge in den Friedensschlüssen der Europäischen Geschichte* (Göttingen, 1797), p. 9.

[81] Heinceccius, *Elementa* (note 69), p. 533.

[82] Wolff, *Jus* (note 4), § 960, p. 764.

[83] Friedrich Schiller, 'Was heisst und zu welchem Ende studiert man Universalgeschichte? Eine akademische Antrittsrede [May 1789]', in: Schiller, *Werke. Nationalausgabe*, vol. 17: Historische Schriften, part 1, edited by Karl-Heinz Hahn (Weimar, 1970), pp. 359-376, at p. 367 [first published in: *Der Teutsche Merkur* (November 1789), pp. 105-135].

the Habsburg army lost all these battles, their losses were more severe than those of the Prussian army. Nevertheless, the absolute numbers differed fundamentally from the carnage inflicted during the majors battles fought early in the century. The reason for the decline was simple: Well-trained soldiers were hard to replace and much too expensive to be used only as cannon fodder. Yet, the regularisation of war had its limitations, which critics pointed out tirelessly. Voltaire, for one, censured war as one of the three scourges of humankind, next to hunger and epidemics,[84] while other enlightenment theorists condemned the armies "that remained standing", seemingly always ready for combat, as the main cause of the lack of the stability of peace.[85] In any case, war remained embedded n the Augustinian paradigmatic sequence of peace, war and peace again, with peace continuing to be recognised as the normal condition of the world.[86]

Peace Programs and the Law of Peace Treaties

Throughout the eighteenth century, the continuity of the Augustinian paradigmatic sequence of peace, war and peace was recognisable from the several newly issued programs for perpetual peace. These programs followed established conventions in categorising perpetual peace as possible within the foreseeable future and as accomplishable through the avoidance of new wars.[87] Nevertheless, some authors modified these conventions in conceiving perpetual peace in confinement to Europe and equating it with the formation of a "Union of Europe" [88] or, as the Abbé de Saint-Pierre (1658 – 1743) put it, as a "system of the perpetual Society of Europe" coming into existence by way of the conclusion of a covenant.[89] In submitting this type of proposal, these authors not only requested human contractualising action as the appropriate means of setting perpetual peace within the confines of Europe, but also gave priority to the future European "Union" or "Society" over the

[84] François Marie Arouet de Voltaire, *Dictionnaire philosophique* [1764], s. v. Guerre, edited by Theodore Besterman, in: Voltaire, *The Complete Works*, vol. 36 (Oxford, 1994), p. 186. Johann Jacob Zincken, *Ruhe des jetztlebenden Europa* (Coburg, 1727), s. p.

[85] Immanuel Kant, 'Zum ewigen Frieden [(Königsberg, 1795)]', third preliminary art., in: Kant, *Werke in zwölf Bänden*, edited by Wilhelm Weischedel, vol. 11 (Frankfurt, 1968), pp. 193-251, at pp. 197-198. For a study see: Lois Green Schwoerer, *"No Standing Armies!" The Antiarmy Ideology in Seventeenth-Century England* (Baltimore and London, 1974) [first published as: *The Standing Army Controversy in England. 1697–1700*. Ph. D. Thesis (Bryn Mawr College, 1956)].

[86] François de Salignac de la Mothe Fénelon, *Directions pour la conscience d'un roi*, nr VII, XXIV (Paris, 1775) , pp. 10-11, 61-62 [further edn (The Hague, 1748); reprinted in: Fénelon, *Œuvres*, vol. 4 (Paris, 1881), pp. 340-366]. Ludwig Julius Friedrich Höpfner, *Naturrecht des einzelnen Menschen und der Völker*, second edn (Gießen, 1783), p. 114 [first published (Gießen, 1780)]. Schiller, 'Was' (note 83), p. 367. Voltaire, *Dictionnaire* (note 84).

[87] Ange Goudar, *La paix de l'Europe ne put s'établir qu' à la suite d'une longue trêve. Ou Projet de la pacification générale* (Amsterdam, 1757). Jakob Heinrich von Lilienfeld, *Neues Staats-Gebäude* (Leipzig, 1767). Johann Michael von Loën, *Entwurf einer Staats-Kunst* (Frankfurt, 1747), pp. 245-248 [further edn (Frankfurt and Leipzig, 1751)]. Franz von Palthen, 'Projekt, einen immerwährenden Frieden von Europa zu unterhalten', in: Palthen, *Versuche zu vergnügen. Erste Sammlung* (Rostock and Wismar, 1758), pp. 71-84. Jean-Jacques Rousseau, 'Extrait du Projet de paix perpétuelle de M. l'Abbé de Saint-Pierre', in: *The Political Writings of Jean Jacques Rousseau*, edited by Charles Edwyn Vaughan, vol. 1, reprint (Oxford, 1962), pp. 364-396 [first publication of the edn by Vaughan (Cambridge, 1915); first English edn in: *The Works of Jean-Jacques Rousseau*, vol. 10 (Edinburgh, 1774), pp. 182-191; also edited by Charles Edwyn Vaughan, *Rousseau, A Lasting Peace Through the Federation of Europe* (London, 1917), pp. 5-35; E. M. Nuttall, Rousseau, *A Project of Perpetual Peace* (London, 1927); also in: Stanley Hoffman and David P. Fidler, ed., *Rousseau on International Relations* (Oxford, 1991), pp. 53-100].

[88] 'Projet d'un nouveau système de l'Europe, preferable au système de l'équilibre entre la Maison der France et celle d'Autriche', in: Anton Faber, ed., *Europäische Staats-Cantzley* (1746), pp. 102-132, at p. 117.

[89] Charles Irénée Castel de Saint-Pierre, *Projet pour rendre la paix perpétuelle en Europe*, Seconde Proposition (Utrecht, 1713), S. 37 [reprint, edited by Simone Goyard-Fabre (Paris, 1981); first published as: Mémoires pour rendre la paix perpétuelle en Europe (Cologne, 1712); abridged version as: *Abrégé du projet de paix perpétuellement inventé pa le roi Henri le Grand approprié à l'état présent des affaires générales de l'Europe* (Rotterdam, 1729)].

maintenance of the balance of power. Jurist Johann Michael von Loën (1694 – 1776), Prussian administrator at Lingen on the Ems, seeking to restrict war to the defensive aim of providing security for the ruled, believed that a European "Union" or "Society" alone, rather than manipulations of the balance of power, could guarantee the "maintenance of general repose" within the European states system and, by consequence, preserve peace in perpetuity. Loën willingly added a practical suggestion, where such a congress might be convened, and nominated his native city of Franfurt as the most suitable place.[90] In any case, peace was continuing among non-combatant inhabitants of states even during war, as Rousseau insisted. This, he believed, was so, because only combatants in regular armies were enemies in war, while actual fighting in war was of no concern for non-combatants and had no effect on the non-military relations among belligerent states.[91]

The Augustinian paradigmatic sequence of peace, war and again peace also continued to shape the procedure of the making of peace agreements as well as their core stipulations, even though doubts about the implementability and, towards the end of the eighteenth century, even questions about the desirability of perpetual peace came up. Critics of the Augustinian paradigm argued that peace treaties as such could not bring about more than temporary relief, allowing no more than the repair of defective war machines, whereas genuine peace could only result from laying down weapons by divine order.[92] Moreover, the quest for the establishment of some European "Union" or "Society" would entail transformations of the balance of power and, in turn, provoke instability.[93] However, despite these criticisms, peace-makers retained their often-tried practice of relating newly concluded peace agreements to previous treaties, whereby the Treaties of Munster and Osnabrück featured most prominently even as the foundation of the law of peace agreements.[94] Likewise, preambles to peace agreements usually contained the formulaic declaration that the cessation of fighting should lead to the restoration of the *status quo ante bellum*, that is, the condition before the beginning of the war that was to be concluded,[95] with theorists adding the demand that, at the end of a war, belligerents should return to the ante-bellum state of peace.[96] It was not till the very end of the eighteenth century that this practice met with staunch objections. Most articulately, the Göttingen jurist Georg Friedrich von Martens pointed out in a technical treatise on the renewal of treaties, published in 1797, that the confirmation of the *status quo ante bellum* through a peace agreement would only leave "controversial what had previously been contested",[97] thereby complaining that the practice of the return to the status quo ante bellum would involve the risk of warring parties taking up weapons again over the same issue. But Martens stayed alone with his criticism. Instead, the practice of the back-reference to previous peace instruments was even amplified through a refinement of the "composite" procedure of treaty-making. From the

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[90] Johann Michael von Loën, 'XXIX. Brief: Von der Gerechtigkeit des Krieges', in: Loën, *Kleine Staats-Schriften, welche bei Gelegenheit der Wahl und Krönung Carl des Siebenden und andern Begebenheiten sind aufgesetzt worden* (Loën, Kleine Schriften, edited by J. C. Schneider) (Frankfurt and Leipzig, 1750), pp. 348-395, at p. 357 [Nachdruck. Frankfurt 1972]. Loën, *Entwurf* (note 87), edn of 1751, pp. 236-240.

[91] Jean-Jacques Rousseau, *Du contrat social*, book I, chap. 4 [print version], edited by Simone Goyard-Fabre (Paris, 2010), p. 124.

[92] Casimir Freschot, *Histoire du Congrès et de la Paix d'Utrecht, comme aussi celle de Rastatt et de Bade* (Supplement to: Freschot, ed., *Actes, Mémoires et autres pieces authentiques concernantes la Paix d'Utrecht*) (Utrecht, 1716), Préface [reprint (Whitefish, MT, 2009)].

[93] Johann Valentin Embser, *Die Abgötterei unseres philosophischen Jahrhunderts*. Erster Abgott: Ewiger Friede (Mannheim, 1779), p. 199 [second edn (Mannheim, 1797)]. Frederick II, King in Prussia, '[Political Testament, 27 August 1752]', edited by Richard Dietrich, *Die politischen Testamente der Hohenzollern* (Munich, 1981), pp. 132-255, at pp. 143-144. Gottlob August Tittel, *Erläuterungen der theoretischen und praktischen Philosophie. Abhandlungen über einzelne wichtige Materien* (Frankfurt, 1786), pp. 26, 347 [reprint (Brussels, 1973)].

[94] Karl Gottlob Günther, *Europäisches Völkerrecht in Friedenszeiten*, vol. 1 (Altenburg, 1787), p. 242. Hoffmann, Christian Gottfried: *Entwurff einer Einleitung zu dem Erkäntniß des gegenwärtigen Zustands von Europa*, § 9 (Leipzig, 1720), p. 12.

[95] Treaty Prussia (note 26), Preamble, p. 349. Treaty Prussia (note 16), Preamble, p. 156.

[96] Vattel, *Droit* (note 76), book IV, chap. 2, nr 18, pp. 264-265.

[97] Martens, *Erneuerung* (note 80), p. 12.

1730s, treaty partners supplemented the existing practice of exchanging ratification charters by distinguishing between preliminary and definitive peace agreements.[98] As a rule, the definitive treaties confirmed the previously signed preliminary ones and, in this respect, were equivalent of ratification charters.[99] However, the exchange of ratification charters did not require another convention of the signatory parties, while the making of definitive peace agreements demanded that signatories gathered again to formally make out a new instrument, distinct from the preliminary agreement in formal respects, while often virtually identical in contents. The new practice of the confirmation of an agreement through a new solemn treaty revealed the intention of increasing the binding force of peace instruments. Yet, in practice, the refined procedure of the making of peace treaties did not significantly increase the periods of abidance by peace agreements, because war remained the sole effective means of enforcing treaties among states.[100]

Against Martens's skeptical argument, the majority of theorists even agreed upon the view that a peace treaty uncontestably stipulated the cessation of combat and, consequently, the irrevocable termination of the war. Hence, theorists juxtaposed war against peace as opposites. They insisted that, upon validifying a peace agreement, the contracting parties were obliging themselves to immediately implement the treaty stipulations,[101] had to forget the causes of the previous war and to promote the momentum for perpetual peace.[102] Therefore, causes of a war should by no means be mentioned in treaties ending the war.[103] A general "amnesty", in the literal sense of the collective forgetting of all acts of violence committed during the war, combined with the keeping of permanent silence about them,[104] should follow from the peace treaty, which should not assign injustice to any signatory party.[105] To fullfil this demand, the victorious side should exercise restraint in the sense of Lipsian ethics regarding conditions to be addressed to the vanquished for the making of a peace agreement, with unlawful demands being condemned as invalid. Hence, the law of nature framed the

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[98] Johann Heinrich Schoell, *Dissertatio inauguralis de praeliminaribus pacis*. LLD Thesis (University of Strasbourg, 1708).

[99] [Preliminary Peace] Prussia – Roman Emperor and Roman Empire, Breslau, 11 June 1742, in: *CTS*, vol. 36, pp. 277-282. [Definitive Peace] Prussia – Roman Emperor and Roman Empire, Berlin, 28 July 1742, in: *CTS*, vol. 36, pp. 411-420. [Preliminary Peace] France – States General of the Netherlands – UK, Aix-la-Chapelle, 30 April 1748, in: *CTS*, vol. 37, pp. 237-398. [Definitive Peace] France (note 14).

[100] Moser, *Versuch* (note 8), part 10 (1780), vol. 2, chap. 5, pp. 356-360. For studies on the history of treaty-making practice see: David J. Bederman, 'Grotius and His Followers on Treaty Construction', in: *Journal of the History of International Law* 3 (2001), pp. 18-37. Christophe N. Eick, *Indianerverträge im Nouvelle France* (Schriften zur Rechtsgeschichte, 64) (Berlin, 1994). Jörg Fisch, 'Völkerrechtliche Verträge zwischen Spaniern und Indianern', in: *Jahrbuch für Geschichte von Staat, Wirtschaft und Gesellschaft Lateinamerikas* 16 (1979), pp. 245-252. Paulus Andreas Hausmann, 'Friedenspräliminarien in der Völkerrechtsgeschichte', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 25 (1965), pp. 657-692. Georges Langrod, 'Les traités des Indiens d'Amérique du Nord entre 1621 et 1871', in: *Recueils de la Société Jean Bodin*, vol. 15: La paix (Brussels, 1961), pp. 415-448. Randall Lesaffer, *Europa. Een zoektocht naar vrede. 1453 – 1763 en 1945 – 1995*. Ph. D. Thesis, typescript (University of Louvain, 1999), pp. 233-264. Lesaffer, 'Peace Treaties and the Formation of International Law', in: Bardo Fassbender and Anne Peters, eds, *The Oxford Handbook of the History of International Law* (Oxford, 2012), pp. 71-93. James R. Miller, *Compact, Contract, Covenant. Aboriginal Treaty-Making in Canada* (Toronto, Buffalo and London, 2009), pp. 3-92. Francis Paul Prucha, *American Indian Treaties. The History of a Political Anomaly* (Berkeley and Los Angeles, 1994), pp. 41-65. Daniel Richter, 'To „Clear and King's and Indians' Title". Seventeenth-Century Origins of North American Land Cession Treaties', in: Saliha Belmessous, ed., *Empire by Treaties. Negotiating European Expansion. 1600 – 1900* (Oxford, 2015), pp. 45-77. Antonio Truyol y Serra, 'Geschichte der Staatsverträge und Völkerrecht', in: René Marcic and Hermann Mosler, eds, *Internationale Festschrift für Alfred Verdross* (Munich, 1971), pp. 509-522. Arthur Weststeijn, 'Love Alone is Not Enough. Treaties in Seventeenth-Century Dutch Colonial Expansion', in: Saliha Belmessous (as above), pp. 19-43.

[101] Leopold Friedrich Fredersdorf, *System des Rechts der Natur auf bürgerliche Gesellschaften, Gesetzgebung und das Völkerrecht angewandt*, §§ 334, 336 (Brunswick, 1790), pp. 543, 545. Vattel, *Droit* (note 76), book IV, chap. 1, nr 1, pp. 249-250; Wolff, *Jus* (note 4), § 97, pp. 80-81.

[102] Vattel, *Droit* (note 76), book IV, chap. 2, nr 19, pp. 265-266.

[103] Martini, Lehrbegriff (note 70), p. 135; Wolff, *Jus* (note 4), § 988, p. 789.

[104] Jörg Fisch, *Krieg und Frieden im Friedensvertrag* (Sprache und Geschichte, 3) (Stuttgart, 1978).

[105] Vattel, *Droit* (note 76), book IV, chap. 2, nr 20, p. 266. Wolff, *Jus* (note 4), §§ 989, 990, pp. 789-790.

law of peace agreements.[106] Explicitly contradicting Hobbesian political thought, theorists of the law of peace occasionally positioned peace as a naturally existing condition of the human world,[107] promoting the security of states.[108] These theorists took the principled position that the law of nature was derived from divinely willed reason and was in existence for the basic purpose of accomplishing happiness. Peace was the guarantor of stability and, in that capacity, the essential condition of happiness.[109] Consequently, nature was obliging human beings to preserve peace among states.[110] Halle University philosopher Christian Wolff specified that after the termination of a war, the pledge of "amnesty" excluded the resumption of the previous war, when the return to the *status quo ante* had been agreed upon. However, the beginning of a new war under a different cause was, according to Wolff, not a breach of the existing peace agreement.[111] However, the peace to be restored and perserved, applied to Europe exclusively.

In the course of the eighteenth century, the number of treaties among states increased dramatically, with their contents becoming more diverse and specific than at any time before. Usually multi-volume and large-size printed collections of treaties[112] became fashionable from humble sixteenth-century beginnings as sketches of the contents of select instruments.[113] The collections made available agreements between governments, thereby disseminating information on legal aspects of the relations among states among the general public, as Leibniz hoped, and categorised these legal instruments in conceptual and formal terms as truces, treaties of peace,

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[106] Fredersdorf, *System* (note 101), §§ 334, 338, 339, pp. 543, 545, 547.

[107] Darjes, *Discours* (note 4), p. 496. Adam Friedrich Glafey, *Vollständige Geschichte des Rechts der Vernunft, worin die in dieser Wissenschaft erschienenen Schriften nach ihrem Inhalt und wahren Wert beurteilt werden. Nebst einer Bibliotheca juris naturae et gentium*, book III, chap. 86 (Leipzig, 1739), p. 158 [reprint (Aalen, 1965)].

[108] Heinrich Köhler, *Ius sociale et gentium ad ius natural revocati specimina VII*, § 1630 (Jena, 1737), p. 272.

[109] Vattel, *Droit* (note 76), book IV, chap. 1, nr 2, pp. 250-251.

[110] Ibid., book IV, chap. 1, nr 1, p. 249. Wolff, *Jus* (note 4), § 961, p. 765.

[111] Wolff, *Jus* (note 4), §§ 1022, 1025, pp. 813-815.

[112] José de Antonio Abreu Bertodano, ed., *Colección de tratados de paz, alianza, neutralidad, garantia, protección, tregua, mediación, reglamento de limites, comercio, navegación etc.*, 15 vols (Madrid, 1740-1801). Johann Christoph Adelung, *Pragmatische Staatsgeschichte Europas von dem Ableben Kaiser Carls an bis auf die gegenwärtigen Zeiten. Aus sichern Quellen und authentischen Nachrichten mit unpartheiischer Feder vorgetragen und mit nötigen Beweisschriften bestätiget*, 9 vols and Supplement (Gotha, 1764-1769). Jacques Bernard, *Recueil des traités de paix, de trêve, de neutralité, de suspension d'armes, de confederation, d'alliance, de commerce, de garantie et d'autres actes publiques*, 4 vols (Amsterdam, 1700). Antonio de Capmany y de Montpalau, *Colección de los tratados de paz, alianza, comercio etc.*, 3 vols (Madrid, 1796-1801). George Chalmers, *A Collection of Treaties between Great Britain and Other Powers*, 2 Bde (London, 1790). Jean Dumont, Baron von Carels-Croon, *Corps universel diplomatique du droit des gens*, 8 vols (Amsterdam, 1726-1739). Charles Jenkinson, *A Collection of All the Treaties of Peace, Alliance and Commerce between Great Britain and Other Powers*, 3 vols (London, 1785). Gottfried Wilhelm Leibniz, ed., *Codex iuris diplomaticus* (Hanover, 1693) [further edn (Wolfenbüttel, 1747); reprint (Berlin, 1964)]. Leibniz, *Mantissa codicis juris gentium* (Wolfenbüttel, 1700). Leibniz, 'Praefatio codicis juris gentium', in: Leibniz, ed., *Codex iuris diplomaticus* (Hanover, 1693), s. p. [new edn of the Praefatio in: Leibniz, *Politische Schriften*, vol. 5 (Leibniz, Sämtliche Schriften und Briefe, series IV, vol. 5) (Berlin, 2004), pp. 50-79; English version in: Leibniz, *The Political Writings*, edited by Patrick Riley (Cambridge, 1989), pp. 165-176]. Frédéric Leonard, *Recueil des traités de paix, de trêve, de neutralité, de confederation, d'alliance et de commerce, faits par les Rois de France avec tous les Princes et Potentats de l'Europe et autres, depuis de trois siècle*, 6 vols (Paris, 1693). Georg Friedrich von Martens, *Recueil des principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce ... conclus par les puissances de l'Europe depuis 1761*, I. series, 7 vols (Göttingen, 1791-1801); Supplements (Göttingen, 1802-1808); Nouveau Recueil (1835-1944). Christoph Peller von und zu Scheppershof, *Theatrum pacis*, 2 vols (Nuremberg, 1663-1685). Jean Rousset de Missy, *Recueil historique d'actes, négociations, mémoires et traitez, depuis la paix d'Utrecht jusqu'au second congrès de Cambray*, 21 vols (Amsterdam and Leipzig, 1728-1755). Thomas Rymer, *Foedera, conventiones, literae et cuiuscunque generis acta publica inter reges Angliae et alios quosvis imperatores, reges, pontifices, principes vel communitates*, 17 vols (London, 1704-1717). Johann Jacob Schmauß, *Corpus iuris gentium academicum* (Leipzig, 1730). Friedrich August Wilhelm Wenck, *Codex ivris gentivm recentissimi*, 4 vols (Leipzig, 1781).

[113] Jean du Tillet Sieur de la Bussière, *Recueil des guerres et des traictés de paix* (Paris, 1588). Leibniz, 'Praefatio' (note 112), p. 55.

friendship and surrender, about subsidies, on neutrality, regulating barriers, confederations, alliances, guarantees, trade and renunciations of claims as well as pledges of the renunciation of the use of force.[114] The treaties between the States General of the Netherlands and the emerging USA of 8 October 1782 as well as between Prussia and the emerging USA of 10 September 1785 received special significance[115] as early agreements, which not only stipulated peace between the signatories but also reciprocal grants of the freedom of trade, communication and settlement between a European and an overseas state. According to the Prussian-US agreement, all Prussian subjects and all US citizens were to be capable of availing themselves of the stated privileges, which were, by consequence, withdrawn from the long-distance trading companies. Both parties reciprocally guaranteed Most-Favoured-Nation status and waived the concession of exterritoriality. Consequently, the Prussian side obliged its subjects to unconditionally abide by US law, with the US side imposing the same duty upon its citizens vis-à-vis Prussia. In accepting this obligation, both parties agreed on the unrestricted recognition of the principle of the territoriality of law. Likewise, both sides conceded the freedom of religious practice and of testation. During war, women, children and scholars "of every discipline" were not to be considered as combatants.[116] The subsequent Prussian-US treaty of 1799 explicitly stated that the peace agreed upon between both parties continued to be in effect.[117]

Already Grotius[118] had classed the law of treaties among states as the voluntary law among states (ius gentium voluntarium)[119] with the proviso that treaties among states could only put into effect obligations in accordance with the law of nature. Accordingly, eighteenth-century theorists surmised, treaties were valid, if they emerged from consent and did not stand in opposition against natural reason.[120] Once validated, treaties were to be implemented unconditionally, with the validity of legal instruments no longer being tied to formalities such as the swearing of oaths or the invocation of divine assistance.[121] Theorists insisted that the validity of treaties followed solely from the determination of the signatories to ensure the implementation of what had been agreed upon,[122] while the giving of guarantees for the abidance by agreed stipulations featured as the established treaty-making procedure.[123] Georg Friedrich von Martens specified, also on the basis of older legal theory, that only parties with recognised legitimate treaty-making competence could enter into valid agreements among states and that nothing could be agreed upon, which could not be implemented.[124] However, Martens derived the general obligation to honour existing treaties (*pacta sunt servanda*) in ways that differed from those preferred by his contemporary, the Jena philosopher Joachim Georg

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[114] Beck, *Versuch* (note 4), book V, chap. 82, p. 162.

[115] Henry Wheaton, *History of the Law of Nations in Europe and America* (New York, 1845), pp. 306-308 [reprint (New York, 1973); (Buffalo, 1982)].

[116] Treaty States General of the Netherlands – USA, 8 October 1782, in: *CTS*, vol. 48, pp. 171-175. Treaty Prussia – USA, The Hague, 10 September 1785, edited by Karl John Richard Arndt, D*er Freundschafts- und Handelsvertrag von 1785 zwischen Seiner Majestät dem König von Preußen und den Vereinigten Staaten von Amerika*, art. II, III, V, X, XI, XXIII (Munich, 1977), pp. 11-15, 18; also in: *CTS*, vol. 49, pp. 333-354; also edited by Raimund-Ekkehard Walter, *Der Preußisch-Amerikanische Freundschafts- und Handelsvertrag von 1785* (Schriftenreihe der Deutschen Gruppe der Association des Auditeurs de l'Académie de Droit International de La Haye, 7) (Cologne, 1989).

[117] Treaty Prussia – USA, 11 July 1799, in: *CTS*, vol. 55, pp. 15-29.

[118] Hugo Grotius, *De jure belli ac pacis libri tres*, book I, chap. 1, nr 14 [(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)].

[119] Darjes, *Observationes* (note 5), §§ 18, 20, pp. 46-47.

[120] Ibid., § 17, p. 46.

[121] Vattel, *Droit* (note76), book II, chap. 15, nr 225, pp. 438-439.

[122] Darjes, *Discours* (note 4), §§ 393, 400, pp. 552-556, 562. Fredersdorf, *System* (note 101), § 338, p. 545. Vattel, *Droit* (note 76), book II, chap. 12, nr 162, pp. 373-374.

[123] Pierre-Joseph Neyron, *Essai historique et politique sur les garanties et en général sur les méthodes diverses des anciens et des nations modernes d'assurer les traités publiques* (Jena, 1777), p. 84.

[124] Georg Friedrich von Martens, *Primae lineae iuris gentium Europaearum practice in usum auditorium adumbratae* (Göttingen, 1785), pp. 34-36.

Darjes. Whereas Darjes drew on Roman civil law,[125] referring to Connanus,[126] Martens was convinced that the basic norm *pacta sunt servanda* was enshrined in the very logic of the treaty-making procedure and derived this norm from the law of nature.[127] Already Helmstedt University publicist Johann Wolfgang Kipping (1695 – 1747), anticipating Martens's position, had declared invalid the provision that the validity of treaties among states depended on the continuity of the general political conditions at the time of the approval of the agreement (*clausula de rebus sic stantibus*) and had demanded that the clausula could only be considered as effective, if it had explicitly been stated in the text of a treaty, but not as an element of the general law of treaties among states.[128] As late as in 1791, the Habsburg imperial chancellery in Vienna obliged its ambassadors to other states to make sure that they contributed to the "preservation of public peace, the repose of states, the inviolability of possessions and the faithfulness to treaties".[129]

By contrast, the popular philosophical argument that rulers might be entitled to breach treaties due to some apparent "reason of state",[130] often contested anyway during the eighteenth century,[131] found no approval in contemporary theory of the law of treaties among states. Theorists shied away from supporting this argument, because it was irreconcilable with their effort to contribute to the stability of the European states system. Not only the breach of treaties, but also a variety of other political decisions of rulers could rank as factors jeopardising the stability of the system.[132] Most notoriously, the decision by Tsarina Catherine II of Russia, King Frederick II in Prussia and Archduchess Maria Theresa of Austria, in 1772, to partition large parts of the Kingdom Poland among themselves, raised massive criticism immediately. The decision was a major breach of rules in the "modern system of Europe" and called into question the great republic of values, an anonymous commentator opined, perhaps politician-philosopher Edmund Burke (1729 – 1797).[133] Three sovereigns, the commentator complained, had gathered to make this decision to the end of dissecting a sovereign state. Supporters of the partition presented the counterargument that the partition of Poland had established a new balance of power in Central Europe.[134] But this claim was overwhelmed by protests coming from France, the UK and the lesser imperial Estates.[135] Critics

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[125] Darjes, *Discours* (note), § 392, p. 550.

[126] Franciscus Connanus, *Commentariorum juris civilis libri decem*, book I, chap. 6, nr 12 (Naples, 1724), pp. 21-22 [first published (Basle, 1557)].

[127] Martens, *Lineae* (note 124), p. 34.

[128] Kipping, Johann Wolfgang: *Specimen errorvm commvnivm in Ivre. Sive Diatriba de Tacita Clavsvla Rebvs Sic Stantibvs* (Helmstedt, 1739).

[129] Wenzel Anton von Kaunitz-Rietberg, 'Mémoire du Chancelier de Cour et d'Etat pour les ambassadeurs et ministres de l'Empereur [17 July 1791]', in: Alfred Ritter von Vivenot, ed., *Quellen zur Geschichte der deutschen Kaiserpolitik Österreichs während der französischen Revolutionskriege. 1797 – 1801*, vol. 1 (Vienna, 1873), pp. 213-216, at p. 213 [also in: Walter Alison Phillips, *The Confederation of Europe. A Study of the European Alliances 1813 – 1832 as an Experiment in the International Organization of Peace* (London, 1914), p. 39; Frederick Charles Hicks, *The New World Order. International Organization, International Law, International Cooperation* (New York, 1920), p. 13].

[130] Frederick II, King in Prussia, *Histoire de mon temps* [1742/46], in: Frederick II, *Œuvres*, vol. 2 (Berlin, 1846), p. XXVI. Christian Garve, *Abhandlung über die Verbindung der Moral mit der Politik. Oder einige Bemerkungen über die Frage, in wiefern es möglich sei, die Moral des Privatlebens bei der Regierung zu beobachten* (Breslau, 1788), p. 78. For a comment see: Helga Lakaff, *Friedrich der Große und das Völkerrecht* (Berlin, 1935), p. 24.

[131] Frederick II, *Anti-Machiavell* (note 66), Réfutation, chap. 18, 19, pp. 118-122, 123-127.

[132] Vattel, *Droit* (note 76), book III, chap. III/3, nr 47, pp. 39-40.

[133] *Annual Register* (1772), '[On the Partition of Poland]', partly printed in: Michael G. Müller, *Die Teilungen Polens* (Munich,1984), p. 8.

[134] Frederick II, King in Prussia, '[Letter, dated 20 February 1771]', in: Frederick II, *Correspondence politique*, vol. 30 (Berlin, 1862), p. 487. Maria Theresa, Archduchess of Austria, '[Notes, 22 January 1772]', edited by Adolf Beer, *Die Erste Theilung Polens*, vol. 2 (Vienna, 1873), p. 341. Maria Theresa, '[Report, 13 February 1772]', edited by Adolf Beer (as above), vol. 2, p. 342. Russia, '[Notes on the Observations by the Russian Courtm Dispatched to Vienna, 5 July 1772]', edited by Adolf Beer (as above), vol. 3, p. 127. Johann Eustach von Görtz, *Mémoires et actes autentiques relatifs aux négociations qui ont précédées le partage de Pologne* (Weimar, 1810).

[135] David Bayne Horn, *British Public Opinion and the First Partition of Poland* (Edinburgh and London, 1945), pp. 14-16, 36.

insisted that the Kingdom of Poland was a state within the European system and the "slicing"[136] of territories from the Polish state endangered the continuity of the system as a whole.[137] Thus, the partition of Poland incited much opposition as a blatant breach of balance-of-power rules.[138] Even if Voltaire assumed that the partition was in line with the law and morality, he did not leave unmentioned the controversies that had occurred among the partitioners in the process of the execution of their decision.[139]

States, "Statistics" and the Balance of Power

Late eighteenth-century Latin texts no longer featured the word *gens* as a term for population groups but applied it to states.[140] While a few theorists used the terminology of "independence" in the second half of the eighteenth century, signalling readiness to analyse transformations of state structures,[141] the state then appeared as a "time-honoured" and "virtually general" human-made institution and was "treated" as a machine. The Göttingen historian August Ludwig von Schlözer (1735 – 1809), then a prominent theorist of the state, followed senior contemporary theorists in providing the following definition: "The state is (1) an *invention*: human beings made it for their well-being, just as they invented fire insurances and the like. The most insightful way of handling the theory of the state is to treat the state as an artful, most complex machine, designed for a specific purpose. But (2), this invention is *time-honoured*: we encounter it already at the very beginning of history. And (3) it is virtually *general*. ... All human groups known so far from ancient, medieval and modern times ... have lived in civil society. And by far most of them, though not all, have lived in states, societies or under governments."[142] Schlözer thus placed the state under the directive of utility for those subject to government control and applied his concept of the state to the world at large. The state as an "invention" was "very easy" to accomplish, as he judged from "its age and ubiquity", and imagined: "The only thing one needed was the recognition that human happiness is impossible without union, permanent union at that, namely without the state; then, one subjected oneself voluntarily."[143] Thus, Schlözer contextualised his concept of the state within the theory of the government covenant and, like his contemporary, imperial reformer, Elector and Archbishop of Mainz Carl Theodor von Dalberg (1744 – 1817), tied the accomplishment of happiness to the continuing stability of human-made state institutions.[144]

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[136] Frederick II, 'Letter' (note 134).

[137] John Lind, *Letters Concerning the Present State of Poland* (London, 1773), pp. 314-315. Gustavus III, King of Sweden, *The Danger of the Political Balance of Europe* (London, 1791), pp. 126-143 [first published (London, 1790); Microfilm reprint of the original edn (Woodbridge, CT, 1983) (The Eighteenth Century, reel 411, nr 4); Microfilm reprint of the new edn (Woodbridge, CT, 2000) (The Eighteenth Century, reel 10729, nr 2)].; 15 Nicolas Baudeau, *Lettres historiques dsur l'état actuel de la Pologne et sur l'origine de ses malheurs* (Amsterdam, 1772). Horace Walpole, '[Letter to Horace Mann, 11 November 1774]', in: Wilmarth Sheldon Lewis, Warren Hunting Smith, George L. Lam and Edwine M. Martz, eds, *Horace Walpole's Correspondence with Horace Mann*, vol. 8 (The Yale Edition of Horace Walpole's Correspondence, 24) (New Haven and London, 1967), pp. 54-55.

[138] Lind, *Letters* (note 137), pp. 303-304.

[139] François Marie Arouet de Voltaire, '[Letter to Frederick II, King in Prussia, 16 October 1772]', in: Voltaire, *Correspondence*, vol. 11 (Paris,1987), pp. 96-98., at p. 97.

[140] Joachim Georg Darjes, *Institutiones jurisprudentiae universalis*, new edn, § 960 (Frankfurt and Leipzig, 1754), p. 546 [first published in: *Philosophischer Büchersaal* 1 (1742), pp. 520-542, 646-656].

[141] Johann Jacob Moser, *Von der Landeshoheit derer teutschen Reichsstände überhaupt* (Neues Teutsches Staatsrecht, 14) (Frankfurt and Leipzig, 1773), p. 26 [reprint (Osnabrück, 1968)]. Johannes Christophorus Beckmann [Becmannus], *Meditationes politicae. XXIV dissertationibus academicis expositae* (Frankfurt /Viadra, 1762), p. 548.

[142] August Ludwig von Schlözer, *Allgemeines StatsRecht und StatsVerfassungslehre* (Göttingen, 1793), pp. 3-4. For a forerunner see: Beckmann, Meditationes (note 141), pp. 548-549, who described the state (respublica) as „eternal" (aeterna).

[143] Ibid., p. 5.

[144] Carl Theodor Anton Maria von Dalberg, Elector of Mainz, *Von Erhaltung der Staatsverfassungen* (Erfurt, 1795),

The theory of the state as the "machine of the body politic"[145] was part of the university curricula, designed to prepare future government officials for their jobs. The field of study had the name "statistics" and comprised both theory of the state and practical information concerning states as they existed in the world, not just in confinement to the European states system.[146] The discipline of "statistics" represented the world as a stable assemblage of states. "Statistics", Schlözer believed, had the task of "giving a scientific form to the disparate matter, to integrate a heterogeneous but essential number of data into one point of view and create an order of these data, a closed system."[147] Schlözer expected the "system" he intended to establish, to be permanent and complete. He thus derived his methodology of "statistics" from the principles enshrined in contemporary philosophical "systematology",[148] describing his system of states in the same way as Carl von Linné had described his "System of Nature" (*Systema naturae*).[149] The word "statistics" came into existence only early in the eighteenth century,[150] and Schlözer himself confessed his ignorance about the etymology of the word 'state', even though the Latin root of the word is easily identifiable. Nevertheless, he noted that Latin words for the state known to him, such as *res publica*, *civitas*, *regnum* or *imperium* did not appropriately lend expression to the idea of the state as he had defined it, but only to certain empirically existing institutions.[151] From the middle of the eighteenth century, the state was, not only for Schlözer but for other statisticians as well, "the essence of everything actually existing in a civil society [or "republic"] and the lands pertaining to it", that is, the sum of the economic, military and political conditions of a political community.[152] According to the theory of "statistics", states arose from three types of contracts, the government contract on the establishment of a legitimate order, the social contract on the formation of a hierarchically structured indigenate, and the basic agreement about the constitutional form of government.[153] Statisticians imagined that changes might occur within states and referred to such changes as "main political

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pp. 6-7. Similarly already: Johann Jakob Moser, 'Grund-Sätze von der Policey überhaupt wie auch ihrer Natur und Schicksalen in Teutschland', §§ 1, 2, in: *Schwäbische Nachrichten von Oeconomie, Cameral-, Policey-, Handlungs-, Manufactur-, mechanischen und Bergwerkssachen* 9 (1756), pp. 824-845, at pp. 825, 828. Johann Friedrich von Pfeiffer, *Grundsätze der Universal-Kameral-Wissenschaft*, vol. 1 (Frankfurt, 1783), pp. 33, 38-39 [reprint (Aalen, 1970)].

145 Hoffmann, *Entwurff* (note 94), § 4, p. 7. Similarly: Pfeiffer, *Grundsätze* (note 144), p. 25.

146 For studies on eighteenth-century statistics see: Michael Behnen, 'Statistik, Politik und Staatengeschichte von Spittler bis Heeren', in: Hartmut Boockmann and Hermann Wellenreuther, eds, *Geschichtswissenschaft in Göttingen* (Göttingen, 1987), pp. 76-101. Ferdinand Felsing, *Die Statistik als Methode der politischen Ökonomie im 17. und 18. Jahrhundert* (Leipzig, 1930). Vincenz John, *Geschichte der Statistik* (Stuttgart, 1884). Kurt Lewin, *Die Entwicklung der Sozialwissenschaften in Göttingen im Zeitalter der Aufklärung. 1734 – 1812*. Ph.D. Thesis (Soc. Sci.), typescript (University of Göttingen, 1971). Mohammed Rassem and Justin Stagl, eds, *Statistik und Staatsbeschreibung in der Neuzeit* (Quellen und Abhandlungen zur Geschichte der Staatsbeschreibung und Statistik, 1) (Paderborn, 1980). Stagl, 'Vom Dialog zum Fragebogen. Miszellen zur Geschichte der Statistik', in: *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 31 (1979), pp. 611-638.

147 August Ludwig von Schlözer, *Theorie der Statistik* (Göttingen, 1804), pp. 1-2.

148 Johann Heinrich Lambert, 'Fragment einer Systematologie [before 1767]', in: Lambert, *Texte zur Systematologie und zur Theorie der wissenschaftlichen Erkenntnis*, edited by Geo Siegwart (Philosophische Bibliothek, 406) (Hamburg, 1988), pp. 125-144. Lambert, 'Theorie des Systems', in: Lambert, *Logische und Philosophische Abhandlungen*, vol. 1 (Berlin, 1782), pp. 510-517, at p. 510 [reprint, edited by Hans Werner Arndt (Lambert, Philosophische Schriften, vol. 6) (Hildesheim, 1969)]. Lambert, *Logische und Philosophische Abhandlungen*, vol. 2 (Berlin, 1787), pp. 388-389 [reprint, edited by Hans Werner Arndt (Lambert, Philosophische Schriften, vol. 7) (Hildesheim, 1969)].

149 Carl von Linné, *Systema naturae*, first edn (Leiden, 1735) [reprints of this edn (Stockholm, 1977); (Utrecht, 2003)].

150 Kaspar Thurmann, *Bibliotheca statistica. Sive de ratione status et cambiis* (Halle, 1701) [newly edited s. t.: *Bibliotheca statistica. Politik, Staatsrecht und Zeitgeschichte in einer frühneuzeitlichen Bibliographie raisonné*, by Wolfgang E. J. Weber (Schriften der Philosophischen Fakultäten der Universität Augsburg, Historisch-Sozialwissenschaftliche Reihe, 61) (Munich, 2000)].

151 Schlözer, *Theorie* (note 147), p. 3, footnote 6.

152 Achenwall, *Vorbereitung* (note 58), p. 5.

153 Gribnerus *Principiorum* (note 68), book II, chap. 1, pp. 175-184. Höpfner, *Naturrecht* (note 86), pp. 169-171.

revolutions" (politische Hauptrevolutionen). As late as in the 1770s, this phrase did not indicate radical transformations of the basic agreement on the constitutional form of government, but denoted major political decisions of governments.[154] The sequence of these domestic political decisions became subsumed into the "history of the state", which appeared to leave untouched the continuity both of the states and of the states system as a whole.[155]

Within the theory of "statistics", the state comprised a territory as the linearly demarcated section of the surface of the planet earth, "which one nation properly owns".[156] The unequivocal and consensual demarcation of borders appeared to be the pre-condition for the avoidance of conflicts about their location and to advance the stability of the state. All states were to be recognised as legal equals, endowed with the same rights and obligations.[157] Hence, the inhabitants of a political community had to be sedentary, so as to become capable of meeting the demands of statistical theory. According to the law of nature, the group of residents, having first occupied their territory, enjoyed the full and unalienable right of its possession. Only "unoccupied" islands in the "big ocean" were to admitted as *terrae nullius*, no one's lands, with conquests being generally outlawed.[158] By consequence, the Spanish conquest of America had been "unlawful", an early eighteenth-century theorist concluded.[159] Likewise, interventions into and apprehension by force of territories of a state were prohibited, except when the ruled were engaged in legitimate resistance against tyrannical rule and requested help from another state.[160] Transfers of state territory to the control of another rulers, for example through military occupation, were admitted as legal only under the condition that they had been approved in voluntarily agreed peace treaties.[161] However, not all theorists accepted these conclusions. For one, diplomat Emerich de Vattel (1714 – 1767), born in the then Prussian state of Neuchâtel and in Saxon service, would link the right of possession of state territory to the form of the economy of its residents. Vattel professed to the view that the recognition of possessive rights to state territory depended on whether or not the population complied with what Vattel took to be the divine command to cultivate the soil. Should the population living on a territory not abide by that command but rove around their lands, they had to abandon their rights to the advantage of farmers willing to follow the divine command. This was the argument, through which Vattel, like Vitoria in the sixteenth century, tried to justify not only the Spanish conquest of America,[162] but also the settlement of people migrating to America from other parts of Europe. Hence, Vattel's handbook of the law among states could even assist British colonists in North America, pursuing "independence" from the UK. Benjamin Franklin (1706 – 1790), US diplomatic representative in Paris, realised the argumentative value of Vattel's book early on and sent two copies of the work to North America in December 1775. One of them came into the possession of the Congress that declared the "independence" of the British colonies in the following year.[163]

The balance of power was the core concept informing not only "statistics" but also the theory of the law among states as well as pamphlet literature. The concept served as the guideline for political decision-making and provided the criteria for the determination of the justice of political action. Eighteenth-century critics of the balance of power, mainly in the Prussian camp at the time of the Silesian wars, tirelessly rejected the concept as a "chimera".[164] However, against such criticism,

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[154] Nicolai, 'Betrachtungen' (note 57), Ms., fol. 235[v].

[155] Adam Christian Gaspari, *Versuch über das politische Gleichgewicht der europäischen Staaten* (Hamburg, 1790), p. 21. Wolff, *Jus* (note 4), §§ 110-112, 116-119, pp. 92-93, 97-99.

[156] Achenwall, *Vorbereitung* (note 58), p. 12. Vattel, *Droit* (note 76), book II, chap. 7, nr 92, p. 323.

[157] Ibid., Prélim., § 18, p. 11.

[158] Glafey, *Vernunfftrecht* (note 4), book IV, chap. 3, nr 124, p. 615.

[159] Ibid., book IV, chap. 3, nr 126, pp. 615-616.

[160] Vattel, *Droit* (note 76), book II, chap. II/4, nr 54, p. 297, book II, chap. 4, nr 56, p. 298.

[161] Johan Meermann, *Von dem Rechte der Eroberung nach dem Staats- und Völkerrechte*, § 1 (Erfurt, 1774), p. 3.

[162] Vattel, *Droit* (note 76), book I, chap. 7, nr 81, pp. 78-79.

[163] Benjamin Franklin, 'Letter to Charles Dumas, 19 December 1775', in: Francis Wharton, ed., *The Revolutionary Diplomatic Correspondence of the United States*, vol. 2 (Washington, 1888), p. 64.

[164] Philip Dormer Stanhope, Earl of Chesterfield, 'Natural Reflections on the Present Conduct of His Prussian Majesty [1744]', in: Reinhold Koser, ed., *Preussische Staatsschriften aus der Regierungszeit König Friedrichs II.*

the concept, founded on the technical models of the scales and the machine, dominated not only the war of words in the political pamphlet literature,[165] but also the academic discours, in which it featured as a legal title.[166] In the course of the century, the machine model outscored the scales model[167] as the machine model appeared to be more suitable to elucidate the postulated regularities of strategies, focused on preserving the stability of the European states system.[168] Elaborating on Hobbes's theory of the state, diplomats together with other authors of advocacy and legal theorists constructed the "body politic of Europe" as a machine symbolising stability as a given or desirable condition of the states system seemingly apt to conserve all of its members.[169] The legal equality of sovereign states, so the argument continued from the seventeenth century, was derived from the law of nature and produced the economic, military and political balance among states, which were "gathering together into a society".[170] Therefore, theorists concluded, the preservation of the balance was a general duty, dictated by the law of nature.[171] As an outflow from the law of nature, that duty was not in need of enforcement mechanisms, but was self-implementing under the sole condition that rulers followed the principles of natural reason.[172]

(1740 – 1745) (Berlin, 1877), pp. 597-617. Nicolaus Hieronymus Gundling, *Ausführlicher Discours über den ietzigen Zustand der Europäischen Staaten* (Frankfurt and Leipzig, 1733), p. 47. Johann Heinrich Gottlieb Justi, *Die Chimäre des Gleichgewichts von Europa* (Altona, 1758). Paul-Pierre Le Mercier de la Rivière, *L'ordre naturel et essentiell des sociétés politiques*, vol. 1 (London and Paris, 1767), p. 322. *Die Morgenstunden des Königs von Pr[eußen] oder lehrreiche Vorschriften an seinen Thronfolger* (Boston, 1783). Christoph Ludwig Pfeiffer, *Das teutsche Gleichgewicht* (Frankfurt and Leipzig, 1788).

165 *Europe's Catechism* (London and Westminster, 1741), pp. 11-12 [Microfilm reprint (The Eighteenth Century, reel 441, nr 6) (Woodbridge, CT, 1983)]. *Staats-Betrachtungen* (note 25), S. 31 with footnote 29.

166 Georg Ludwig Erasmus von Huldenberg [praes.] and Johann Paul Kress [resp.], *Dissertatio juridica solemnis qua de aequilibrii alioque legali juris gentium arbitrio in gentium controversiis pacis tuendae causa interponendo permissu incluti juris consultorum*. LLD Thesis (University of Helmstedt, 1720). Kahle, *Balance* (note 30). Johann Jacob Lehmann, *Trutina vulgo Evropae norma belli pacisqve hactenus a svmmis imperantibus habita*. Ph. D. Thesis (University of Jena, 1716). Johann Georg Neureuter [praes.] and J. C. Benzel, Jr [resp.], *Specimen Juris Naturae de justis aequilibrii finibus*. LLD Thesis.(University of Mainz, 1746).

167 Frederick II, King in Prussia, 'Mémoires pour servir à l'histoire de la maison de Brandebourg [1746-1748]', in: Frederick II, *Œuvres de Frédéric le Grand*, edited by J. D. E. Preuss, vol. 1 (Berlin, 1846), pp. 1-175, at pp. 147-148. Frederick II, König in Preußen, 'Testament, 1768' (note 27), p. 389. Wenzel Anton von Kaunitz-Rietberg, '[Memorandum, dated 30 November 1766] ', edited by Adolf Beer, 'Die Zusammenkünfte Josefs II. und Friedrichs II. zu Neisse und Neustadt', in: *Archiv für österreichische Geschichte* 47 (1871), pp. 500–523, at pp. 503-504.

168 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). Lothar Schilling, *Kaunitz und das Renversement des alliances* (Historische Forschungen, 50) (Berlin, 1994). Barbara Stollberg-Rilinger, *Der Staat als Maschine* (Historische Forschungen, 30) (Berlin, 1986).

169 Gaspari, *Versuch* (note 155), p. 21. Johann Heinrich Gottlob Justi, 'Abhandlung von der Anordnung und dem Gleichgewichte der Hauptzweige der obersten Gewalt, worauf die Glückseligkeit und Freyheit des Staats hauptsächlich ankömmt', in: Justi, *Gesammlete politische und Finanz-Schriften über wichtige Gegenstände der Staatskunst, der Kriegswissenschaft und des Cameral- und Finanzwesens*, vol. 2 (Copenhagen and Leipzig, 1761), pp. 3-29, at pp. 16-17 [reprint (Aalen, 1970); first published in: Justi, *Neue Wahrheiten zum Vortheil der Naturkunde und des gesellschaftlichen Lebens der Menschen* (Leipzig, 1758), pp. 706-730]. Kahle, *Balance* (note 30), pp. 32, 126. Jean de La Sarraz du Franquesnay, *Le ministre public dans les cours étrangers. Ses fonctions et ses prérogatives* (Amsterdam, 1731), p. 111. Meermann, *Recht* (note 161), § 9, pp. 24-25. Antoine Pecquet, *L'Esprit des Maximes politiques pour server de suite du Président de Montesquieu*, vol. 1 (Paris, 1757), pp. 13-14. Rousseau, 'Extrait' (note 87), pp. 370-372. Johann Jacob Schmauß, *Historie der Balance von Europa* (Schmauß, Einleitung zu der Staas-Wissenschaft, part 1) (Leipzig, 1741), p. 55.

170 Günther, *Völkerrecht* (note 94), p. 198. Martini, *Lehrbegriff* (note 70), pp. 15-16. Johann Jacob Moser, *Betrachtungen über das Gleichgewicht von Europa und Deutschland* (Frankfurt and Leipzig, 1785), pp. 6-7. Johann Christoph Muhrbeck [praes.] and Karl Friedrich von Bering [resp.], *Dissertatio de bilance gentium*. Ph. D. Thesis (University of Greifswald, 1772), p. 8.

171 Darjes, *Institutiones* (note 140), § 960, p. 546. Huldenberg, *Dissertatio* (note 166). Kahle, *Balance* (note 30), pp. 32, 155-157. Lehmann, *Trutina* (note 166), § 3, pp. 4-5. Neureuter, *Specimen* (note 166), pp. 25-25, 56.

172 Kahle, *Balance* (note 30), pp. 155-156. Rousseau, 'Extrait' (note 87), pp. 370-371.

The significance of these learned propositions for the practical conduct of politics is documented in the debate over the problem, whether a war could be just, which was fought against a state with seemingly increasing power. The debate continued throughout the century, but gained intensity at the time of the Silesian wars. The starting point of the debate was the question, how rulers should respond, if at all, to discernible attempts at changing the existing balance, seemingly purposefully undertaken in a state. Put differently: if the ruler of a state in times of peace and without evident external military threats enlarged the number of combatants in armies "that remained standing", took steps of fiscal and trade policy to upgrade the economic achievement of the state population, promoted immigration in order to increase the state population, order the fortification of places and even occupied territory of another state, was it appropriate to identify these measures at means to upset the balance of power and, by consequence, to destabilise the states system? And would a preventive war be just for the purpose of preventing the completion of these measures to transfor the equilibrium into predominance? Persistent attention addressed to rival power holders anywhere in the system counted as the most effective means of preserving the balance of power as the "condition of a relationship among the European powers of such a kind that every free state may exist next to the other and none of them has to be fearful of being swallowed or unduly pressured by the other" (Zustand eines Verhältnisses der europäischen Mächte so zu einander, daß jeder freie Staat neben dem andern bestehen kann und keiner besorgen muß, von dem andern verschlungen oder ungebührlich bedrückt zu werden).[173] Contrary to these detailed considerations, Grotius had contented himself with the simple recommendation that rulers feeling threatened by a new fortress erected in peace time, should pose a counterthreat by building an opposing fortress.[174]

The majority of the participants in the debate opted for declaring just a preventive war conducted to thwart acts with the apparent capacity of transforming the balance of power. In doing so, they supported the view that rulers had the legal obligation to keep the European states system in balance. The majority of participants in the debate classed wars as a contribution to the preservation of peace in the long term and the maintenance of stability in the states system, even if these wars were fought against states, whose rulers had not committed acts of military aggression against another state, but seemed to be creating the capacity for future aggressive acts. In support of their stance, these theorists adduced the argument that securing the balance of power might require the deployment of military means and might be necessary in order to guarantee the equality of states in accordance with natural law.[175] Moreover, they insisted that the temporary interruption of peace was mandated, if wars could ease the restoration of peace in a more stable manner.[176] Third, they claimed that the obligation of keeping the balance of power was itself a legal norm, infringements of which were not to be tolerated.[177] Some adherents to this view conceded that power without recognisable determination to inflict damages could not be a threat and that the mere increase of the power of a state could not transform the balance as such.[178] Yet, if the ruler of a state had a record of promoting injustice, showing greed and ambition and seeking to dominate other states, a preventive war against the aggrandisement of such a state was just. This was the position Maria Theresa took in her demand for the release of information about Prussian armaments in 1756, claimed that the provision of such information was mandatory to allow her assessments of the goals of Prussian military policy and proceeded with war preparations, once she deemed the received

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[173] Moser, *Betrachtungen* (note 170), pp. 6-7. Moser, *Grundsätze* (note 30), p. 15. Vattel, *Droit* (note 76), book III, chap. 3, nr 44, pp. 34-37.

[174] Grotius, *Jus* (note 118), book II, chap. 22, § 5, nr 2.

[175] Gottfried Achenwall, *Juris naturalis pars posterior*, § 266 (Göttingen, 1763), p. 237. Nicolaus Hieronymus Gundling, *Erörterung der Frage ob wegen der anwachsenden Macht der Nachbarn man den Degen entblößen können*, new edn (Frankfurt and Leipzig, 1757) [first published (Halle, 1716)]. Gundling, *Commentatio de statu naturali Hobbesii in corpore iuris civilis* (Halle, 1735).

[176] Glafey, *Vernunfftrecht* (note 4), pp. 207-208. Johann Friedrich Kayser [praes.] and Eberhard Georg Wittich [resp.], *Dissertatio ivris gentivm et pvblici de tvendo aeqvilibrio Evropae*. LLD. Thesis (University of Gießen, 1723), §§ XIV, XIX, pp. 24-26, 32-34.

[177] Tittel, *Erläuterungen* (note 93), pp. 227.

[178] Gaspari, *Versuch* (note 155), p. 21.

information insufficient.[179] By contrast, a minority of participants in the debate denied categorically that the preservation of the balance of power could under any cirumstance be a just cause of a war. This, they argued, was so, because the balance of power was in itself the guarantor of the stability of states and, in this capacity a factor of peace. Therefore, the balance of power could only be kept by peaceful means and never be protected through war. Moreover, these theorists denied that there was a legal obligation to preserve the balance of power, which, by consequence, could be altered without infringements upon the law among states.[180]

The debate about the balance of power testified to the seriousness, with which theorists investigated possibilities of practically applying the law among states. The debate was not purely academic in kind, but delivered arguments to promote or prevent arms increases. Most importantly during the Seven Years War, it served the imperial chancellery in Vienna to defend its resistance against Prussian aggrandisement under Frederick II, whom the chancellery rightly[181] accused of having enlarged armed forces under his control at times of peace and without ascertainable cause. The Prussian side responded in 1756 asserting through war manifestos that Habsburg initiatives against Prussia were dangerously disturbing "repose" within the Empire, that meant, upsetting the balance of power. According to his propaganda, Frederick was compelled to start the war to protect the Empire against Habsburg predominance. The Prussian side thus gave out the war as a just means of defense both of Prussia and the Empire, Frederick not being an aggressor and the war an act of self-defense on the Prussian side.[182] Hence, both sides shared the common platform of the law among states for their arguments and contended that they were acting to the ends of preserving the balance of power and maintaining the stability of the Holy Roman Empire. The law among states was applicable to the relations between the Empire and its Estates, as if the latter were states like all others.

Diplomats and Jurists as Managers of the Balance of Power

Diplomats turned into managers of the balance of power during the eighteenth century. They received instruction to observe the law among states, without becoming obliged to subject themselves rigorously to the pure doctrine of legal theorists.[183] Descriptions of the activities of diplomats conveyed a sense of Max Weber's distinction between ethics of convictions and ethics of responsibility, diplomats becoming characterised as being guided by principles and ideas but mainly

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[179] Vattel, *Droit* (note 76), book III, chap. 3, nr 44, pp. 34-37. Maria Theresa, Archduchess of Austria, Queen of Bohemia and Hungary, '[Circular Rescript, 30 July 1756]', in: Johann Jakob Moser, *Versuch des neuesten europäischen Völker-Rechts in Friedens- und Kriegs-Zeiten*, part 7 (Frankfurt,1779), pp. 30-32, at p. 31. *Frederick II*, King in Prussia, '[Reply to the Circular Rescript by Maria Theresa of 3 July 1756, August 1756]', in: Moser, *Versuch* (as above), pp. 32-35.

[180] Höpfner, *Naturrecht* (note 86), pp. 208-209. Loën, 'Gerechtigkeit' (note 90), pp. 376-377. Wolff, *Jus* (note 4), §§ 646-649, pp. 520-523.

[181] Lehmann, *Friedrich* (note 24). Lehmann, 'Reply' (note 24). Lehmann, 'Beiträge' (note 24).

[182] The charges were summarily restated in: *Staats-Betrachtungen* (note 25). For the Prussian replies see: Prussia, 'Exposé des motifs qui ont obligé Sa Majesté le Roi de Prusse à prévenir les desseins de la Cour de Vienne [1756]', edited by Otto Krauske, *Preussische Staatsschriften aus der Regierungszeit König Friedrichs II. (der Beginn des Siebenjährigen Krieges)* (Preussische Staatsschriften aus der Regierungszeit König Friedrichs II., 3) (Berlin, 1892), pp. 172-181, at pp. 174, 180-181, 182-183. Prussia, 'Abhandlung von dem Unterschiede der Of- und Defensivkriege, worin besonders die Frage beantwortet wird, wer bei einem entstehenden Kriege für den eigentlichen Aggressor oder angreifenden Theil zu achten? [1756]', edited by Otto Krauske (as above), pp. 440-454, at pp. 440-441. Frederick II, King in Prussia, 'Darlegung der Gründe, die S[ein]e Majestät den König von Preußen gezwungen haben, den Anschlägen des Wiener Hofes zuvorzukommen [August 1756]', German version, in: Frederick, *Geschichte des Siebenjährigen Krieges*, part 1, edited by Gustav Berthold Volz (Frederick, Die Werke Friedrichs des Großen, vol. 3) (Berlin, 1913), pp. 179-184.

[183] Gundling, *Erörterung* (note 175), pp. 22-23. Johann August Schlettwein, *Staatskabinett*, vol. 1 (Leipzig, 1787), pp. 75-134.

driven by need to take responsibility for their actions.[184] The number of dispatched emissaries as well as the staff employed in foreign affairs bureaucracies once again rose dramatically. The Russian diplomatic service alone featured an exponential increase of staff from 120 in 1718 to 261 in 1762. New well-ordered agencies in charge of foreign policy came into existence in Spain and in the imperial chancellery in Vienna early in the eighteenth century. However, there were still only few institutions providing formal training for diplomats, one in Prussia existed between 1747 and 1756,[185] another one at Hanau was not attached to a particular state and did not continue beyond its first year of operation in 1749.[186] The imperial chancellery founded the so-called Oriental Academy in Vienna in 1754 to train diplomats for service in Istanbul and continues as the Diplomatic Academy.[187] Envoys continued to be selected mainly from among aristocrats, who appeared not to be in need of special professional training beyond their traditional kin-based education.

Yet, the eighteenth century also witnessed the publication in print of several handbooks of diplomatic service.[188] Likewise, textbooks on the law among states would regularly contain passages on the law of diplomatic envoys.[189] The terms used for emissaries remained untechnical, with Latin *legatus* being frequently in use,[190] side by side Latin *orator* and with French *ministres*

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[184] Max[imilian] Weber, 'Politik als Beruf', in: Weber, *Wissenschaft als Beruf*, edited by Wolfgang Justin Mommsen and Wolfgang Schluchter (Weber, Gesamtausgabe, series I, vol. 17) (Tübingen, 1992), pp. 150-252, at pp. 237-238 [first published (Geistige Arbeit als Beruf, 2) (Munich and Leipzig, 1919)]. Georg Friedrich von Martens, *Erzählungen merkwürdiger Fälle des neueren Europäischen Völkerrechts in einer practischen Sammlung von Staatsschriften aller Art in teutscher und französischer Sprache. Nebst einem Anhange von Gesetzen und Verordnungen, welche in einzelnen Europäischen Staaten über die Vorrechte auswärtiger Gesandten ergangen sind* (Göttingen, 1800).

[185] Jeremy Martin Black, *A History of Diplomacy* (London, 2010), p. 112.

[186] Johann Jacob Moser, *Entwurff einer Staats- und Cantzley-Academie* (Leipzig, 1749).

[187] Ernst Dieter Petritsch, 'Die Anfänge der Orientalischen Akademie', in: Oliver Rathholt, ed., *250 Jahre. Von der Orientalischen Akademie zur Diplomatischen Akademie in Wien* (Innsbruck, 2004), pp. 47-64.

[188] François de Callières, *De la manière de négocier avec les souverains* (Paris, 1716) [newly edited by Jean-Claude Waquet, *L'art de négocier en France sous Louis XIV* (Paris, 2005); English version as: *The Art of Negotiating with Sovereign Princes* (London, 1716); edited by A. F. Whyte, *The Art of Diplomacy* (London, 1919); reprint of the first English edition as: *On the Manner of Negotiating with Princes* (Notre Dame, 1963); also edited by Maurice A. Keens-Soper and Karl W. Schweitzer (Leicester, 1983)]. Gabriel Bonnot, Abbé de Mably, 'Des principes des négociations', in: Mably, *Le droit de l'Europe fondé sur les traités*, vol. 1, new edn (Amsterdam, 1761), pp. 1-234 [reprint (Aalen, 1977)]. Antoine Pecquet, *Discours sur l'art de négocier* (Paris, 1737) [new edn as: *De l'art de négocier avec les souverains* (The Hague, 1738); English version as: *Discourse on the Art of Negotiation* (New York, 2004)]. Abraham de Wicquefort, *L'Ambassadeur et ses fonctions* (Cologne, 1677) [first published as: *Mémoires touchant les ambassadeurs et les ministres publics* (Cologne, 1676); English version (London, 1716); reprint of the English version, edited by Maurice Keens-Soper (Leicester, 1997)].

[189] Martens, *Lineae* (note 124), book VII, pp. 136-184. Martini, *Lehrbegriff* (note 70), pp. 73-92.

[190] 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). Dominicus Arumaeus, *An legatus in principem ad quem missus est, conjurans puniri posit* (Jena, 1616). 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 (Wittenberg, 1623). Christoph Besold, 'De legatis eorumque jure', in: Besold, *Spicilegia politico-juridica* (Strasbourg, 1624), pp. 10-24. 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. 39]. Cornelis van Bynkershoek, *De foro legatorum tam in causa civili quam criminiali liber singularis* (Leiden, 1721) [also edited in: Bynkershoek, *Opera Minora* (Leiden, 1730); second edn of the *Opera Minora* (Leiden, 1744), pp. 427-571; reprint of this edn (Oxford, 1946)]. Cocceji, Introdvctio (note 67), book VII, chap. 8, pp. 505-510. Martens, *Lineae* (note 124), book VII, pp. 136-184.

and English 'ministers'.[191] *Ambassadeur* was a common term for envoys of various ranks,[192] even though the word could also denote the head of a standing mission.[193] In his memoirs, the French minister Etienne François Duc de Choiseul (1719 – 1785) applied the title *Ambassadeur* to the imperial envoy Wenzel Anton Kaunitz Rietberg (1711 – 1794), who was stationed in Paris from 1748 to 1756.[194] According to the theory, the power and the "honour" of envoys, regardless of the titles they might bear, were to be measured in accordance with the letters of accreditation (creditives) they had received from sending rulers. The letters were to detail the rank, status and specific tasks of the envoys. These statements were to form the basis for the ranking of envoys at their destinations. The statements articulated in the letters of accreditation had binding force, thereby elevating power and "honour" of rulers into the realm of the law.[195]

Choiseul also recorded the classical formula for the description of the tasks of emissaries. They had, according to Choiseul, to faithfully execute the wishes of the sending ruler and to provide information on all military and political projects and debates becoming known to them at their destinations.[196] Hence, the business of envoys remained in proximity of espionage, even though philosopher and politician Mably sought to convince diplomats that they were servants of the peace and should refrain from all unlawful acts.[197] Envoys were supposed to receive protection against attacks on their persons and property, as long as they did not by themselves violate the law.[198] This legal norm became so obvious during the second half of the eighteenth century that Adam Smith (1723 – 1790), in his lectures on the law of nature of 1763, could self-evidently and without further argument state that emissaries were inviolable and not subject to the jurisdiction of the receiving state.[199] For Smith, the recognition of the extraterritoriality of diplomats at their destinations was a given fact. Nevertheless, problems with the enforcement of that legal norm continued and were due to the lack of agreement about the range of the applicability of the law of diplomatic envoys. Thus, in 1744, a widely reported controversy came up between France and Hanover about the arrest of travelling Marshal Charles Louis August Fouquet de Belle-Isle (1684 – 1761) at Elbingerode in the Harz mountains. The Marshall had been arrested on Hanoverian territory, because the Electorate was then at war with France and would not tolerate French diplomats on its territory. By contrast, the French side took the incident to be a violation of principle of the inviolability of envoys and demanded the immediate release of the Marshal. Hanover backed in.[200]

Yet, the number of such cases declined during the eighteenth century, as the network of standing diplomatic missions was then close enough to give routine to the work of diplomats. This was even more easily possible, as their aristocratic background committed most diplomats to common habits and standards of personal behaviour.[201] Included in these standards were the demands to choose words carefully, avoid pointed and potentially offensive statements and to apply

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[191] Maximilian Brandstetter, 'Itinerarium oder Raisbeschreibung von Herberstein. 1608 – 1609', edited by Karl Nehring, *Adam Freiherr zu Herbersteins Gesandtschaft nach Konstantinopel. Ein Beitrag zum Frieden von Zsitvatorok (1606)* (Südosteuropäische Arbeiten, 78) (Munich, 1983), pp. 71-197, at p. 132. Callières, *Manière* (note 188), Chap. 18, p. 242. Wicquefort, *Ambassadeur* (note 188), English version, p. 2.

[192] Mably, *Principes* (note 188), p. 231.

[193] Rohr, *Einleitung* (note 60), p. 377.

[194] Etienne François Duc de Choiseul, *Mémoires du Duc de Choiseul*, edited by Philippe Bonnet (Paris, 1987), p. 155 [first edited by Fernand Calmettes (Paris, 1904)].

[195] Rohr, *Einleitung* (note 60), p. 384.

[196] Choiseuil, *Mémoires* (note 194), p. 121.

[197] Mably, *Principes* (note 188), pp. 231-232.

[198] Bynkershoek, *Foro* (note 190), pp. 451-456; *185* Martini, *Lehrbegriff* (note 70), S. 83. Wicquefort, *Ambassadeur* (note 188), English version, pp. 246, 275, 277.

[199] Adam Smith, *Lectures on Justice, Police, Revenue and Arms* (Oxford, 1896), p. 279 [reprint (New York, 1956)].

[200] Martens, *Erzählungen* (note 185), pp. 154-170. Emanuel Bowen and Herman Moll, *A Complete System of Geography Being a Description of All the Countries, Islands, Cities, Chief Towns, Harbours, Lakes and Rivers, Mountains, Mines etc. of the Known World*, vol. 1 (London, 1747), p. 733.

[201] Hillard von Thiessen and Christian Windler, eds, *Akteure der Außenbeziehungen. Netzwerke und Interkulturalität im historischen Wandel* (Externa, 1) (Cologne, Weimar and Vienna, 2010).

the principles of courteousness.[202] By convention, most states ranked as mutually elegible for alliances, even though, as in the case of the relations between France and the Habsburgs, there could prevail traditional perceptions of continuous enmity, in this case going back to Emperor Maximilian I. In consequence of such perceptions, policies of alliance formation both the French and the Habsburg sides, could appear to conduct calculable policies in the respect that both sides were unlikely to become allies.[203] Against these expectations, France and the Emperor, jointly with the UK and the Netherlands, with the latter not joining as a formal member, concluded the so-called "Quadruple Alliance" on 22 July 1718 to oppose the expansion of Spanish rule to Sardinia under the explicit reasoning that the alliance was to contribute to the "installation of a lasting balance of power in Europe" and to "public repose".[204] The same purpose was behind the gathering of French, Imperial and other envoys at Soissons, where they laboured to establish a general permanent peace. This general peace congress of participants which were not at war at the time, discussed changes of the terms that had been agreed upon during the peace negotiations at Utrecht, Rastatt and Baden between 1712 and 1714. Specifically, the British stronghold at Gibraltar was to be returned to Spain, the duchies of Parma, Piacenza and Gusatalla in the North of the Italian Peninsula were to come under Spanish control. Moreover, the imperial East India Company, founded in 1719, was to be dissolved. The congress did not accomplish any of these goals, even though the imperial East India Company found its end in 1731. Nevertheless, the congress put on record the willingness of high-ranking diplomats to gather at conventions not merely for the purpose of ending wars but also of avoiding war.[205]

Against this background, the change of alliances, which became known as the "Renvertissement des alliances" ("Diplomatic Revolution") of 1756 and ushered in the rapprochement between France and the Habsburgs, was far less sensational than it has appeared in the historiography of inter-state relations.[206] In 1756, while preparing for war against Prussia, Kaunitz-Rietberg succeeded in persuading the French government to abandon its often renewed alliance with Frederick II in Prussia and to switch to the imperial side. Already in 1743, Maria Theresa had established a „close friendship and a sincere, perpetual and inviolable alliance" with Sardinia as well as the UK (une Amitie étroite *et* sincere, perpétuelle et inviolable Alliance) and, in 1746, a further alliance, limitied to twenty-five years, followed with Tsarina Elizabeth of Russia, who, together with her chancellour Aleksej Petrovič Bestužev-Rjumin (1693 – 1766) was as vehemently opposed against the Prussian invasion of Silesia as Maria Theresa herself. Both sides regarded the invasion as a serious threat to the existng balance of power. During the early years of the Seven Years War, Frederick had to rely on British subsidies, as no one outside the Empire was willing to go into an alliance with the Prussian king. Hence, policies of alliance-making were governed by the law among states. Rulers could employ their decisions to establish or to reject alliances as a flexible instrument to respond against manifest breaches of the law or perceived attempts to alter the balance of power. In this sense, Maria Theresa referred to an alliance as a "perfect concert" in 1759.[207]

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[202] Alain Montandon, *Politesse, morale et construction sociale. Pour une histoire des traités de comportement (1670 – 1788)* (Paris, 2011).

[203] Franz Dominikus Häberlin, *Zufällige Gedanken und Erläuterungen über die Aachischen Friedenspraeliminarien* (s. l., 1748), p. 12. Schmauß, *Historie* (note 169), p. 632.

[204] Treaty France – States General of the Netherlands – Roman Emperor and Roman Empire – UK (Quadrupel Alliance), 22 July / 2 August 1718, Vorspruch, in: *CTS*, vol. 30, pp. 417-442, p. 418. Kahle, *Balance* (note 30), S. 87.

[205] For studies see: Andreas Gestrich, *Absolutismus und Öffentlichkeit* (Kritische Studien zur Geschichtswissenschaft, 103) (Göttingen, 1994). Ronnie Kern, *Der Friedenskongress von Soissons. 1728 – 1731* (Göttingen, 2009). Michael W. Serruys, 'Oostende en de Generale Ostindische Compagnie', in: *Tijdschrift voor Zeegeschiedenis* 24 (2005), pp. 23-59.

[206] Schilling, *Kaunitz* (note 168).

[207] Treaty [Definitve treaty] Queen of Bohemia and Hungary [Maria Theresa] – Sardinia – UK, Art. I, in: *CTS* 37, pp. 185-207, here at p. 190. Maria Theresa, Archduchess of Austria, '[Denkschrift an Feldmarschall Daun, 24. Juli 1759]', Ms., Vienna: Österreichisches Staatsarchiv, Abteilung Kriegsarchiv, Alte Feldakten 1759, Hpt.A. 7/308

In view of the intensity and frequency of diplomatic relations, controversies about ceremonial and ranks were no mere obsessions of formalists but helped with the practical application of the legal norm stipulating the equality of sovereigns,[208] while respecting the differences of rank among rulers. Put differently, the more often the concept of sovereignty became applied to states rather than to personal rulers, rank as manifest in ceremonial and the use of titles facilitated the preservation of a hierarchical order within the European states system under the overall compliance with the legal norm prescribing the equality of sovereigns. Within this complex ordering system, diplomats, in their capacity as representatives of sending sovereigns, faced the often difficult task of implementing mutually irreconcilable demands. On the basis of widely circulating manuals, advice provided by the "science of the ceremonial" (Ceremoniel-Wissenschaft) and a survey of norms applying to diplomacy,[209] theorists in cooperation with practicing diplomats repeatedly found ingenious compromises to resolve emerging controversies over rank peacefully. The imperial title constituted a major problem. Until the 1770s, the Emperor insisted upon his traditional claim that the imperial title conveyed precedence over all other sovereigns, whereas bearers of royal titles would not acknowledge the imperial claim.[210] Diplomats practically circumvented conflicts between these two positions by restricting personal meetings between the Emperor and other monarchs to rare occasions or staged conferences between the Emperor and a king on horseback in the open field, so that differences in rank would not be recognisable. [211] Meetings among diplomats could also raise problems with the observation of ceremonial. A serious problem could occur, if diplomats had to agree on ceremonial across cultures or religions. For one, Imperial and Ottoman diplomats arranged for the crossing by the Imperial emissary of the border from the Imperial to the Ottoman side after the peace of Passarowitz of 1718. The Imperial envoy was to be met at the border separating territories under Imperial and Ottoman rule. The two delegations agreed to set up a temporary checkpoint consisting of three columns. Both emissaries had to approach the central column on horseback from opposite sides and dismount simultaneously and at equal distance from each other. When the ceremony was implemented, the Imperial emissary, having a problem with dismounting, placed his foot on the ground slightly later than the Ottoman emissary. Yet, the mishap did not have

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1/2, edited by Johannes Kunisch, 'Das Ende des Siebenjährigen Krieges', in: *Zeitschrift für Historische Forschung* 2 (1975), pp. 216-222, at p. 218. For a study see: Matthias Schulz, *Normen und Praxis. Das Europäische Konzert der Grossmächte als Sicherheitsrat 1815-60* (Studien zur internationalen Geschichte, 21) (Munich, 2009), pp. 36-46.

[208] Peter Camper [praes.] and Abraham van Berchuys [resp.], *Dissertatio juris gentium inauguralis de legatis eorumque charctere repraesentatio*. LLD Thesis (University of Groningen, 1766).

[209] Georg Beyer, *Volkmannus emendatus. Das ist: Vollständige und verbesserte Notariats-Kunde* (Leipzig, 1721). 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). Johann Christian Lünig, *Theatrum ceremoniale historico-politicum*, 2 vols (Leipzig, 1719). Rohr, *Einleitung* (note 60). Burkhard Gotthelf Struve, *Grundmäßige Untersuchung Von dem Kayserlichen Titul und Würde. Worbey auch von der Czaarischen Titulatur und was maßen von Ihrer Czaarischen Majestät der Kayserl[iche] Titul geführet und prætendiret werde gehandelt* (Cologne, 1723). Christian Heinrich von Römer, *Versuch einer Einleitung in die rechtlichen, moralischen und politischen Grundsätze über die Gesandtschaften und die ihnen zukommenden Rechte* (Gotha, 1788). For a recent study see: André Krischer, 'Souveränität als sozialer Status. Zur Funktion des diplomatischen Zeremoniells in der Frühen Neuzeit', in: Ralph Kauz, Giorgio Rota and Jan Paul Niederkorn, eds, *Diplomatisches Zeremoniell in Europa und im mittleren Osten in der frühen Neuzeit* (Sitzungsberichte der Österreichischen Akademie der Wissenschaften, Philos.-Hist. Kl. 796 = Archiv für Österreichische Geschichte, 141 = Veröffentlichungen zur Iranistik, 52) (Vienna, 2009), pp. 1-32.

[210] Heinrich von Cocceji [praes.] and Franz Anton von Schallenheimb [resp.], *Dissertatio juris gentium de dominio seu imperio orbis*. LLD Thesis (University of Frankfurt/Oder, 1711).

[211] Adolf Beer, ed., 'Die Zusammenkünfte Josefs II. und Friedrichs II. zu Neisse und Neustadt', in: *Archiv für österreichische Geschichte* 47 (1871), pp. 383-527. Johann Jacob Moser, *Teutsches Auswärtiges Staatsrecht*, book I, chap. 1, nr 8 (Neues teutsches Staatsrecht, 20) (Frankfurt and Leipzig, 1772), pp. 14-15 [reprint (Osnabrück, 1967)].

any negative impact on Imperial-Turkish relations.[212]

But during the second half of the eighteenth century, the imperial chancellery, even within the European states system, encountered mounting difficulties upholding its bid that the imperial title should be reserved for the head of the Holy Roman Empire. In the relations between the Emperor and the Sultan, mutual recognition of the legal equality of their titles had been agreed upon alreada in the Treaty of Zitva Torok of 1606. But only during the second half of the eighteenth century did relations between the Holy Roman Empire and the Ottoman Turkish Empire become close enough to make possible reference to an "Imperial-Ottoman State Relationship".[213] Hence at this time, the European states system comprised two states for whose rulers the use of the title Emperor was mandatory. By contrast, the Russian Czar was not initially recognised as a ruler with the rank of an emperor, despite the derivation of the word czar from the personal name of Caesar. In Latin texts, "Autokrator" (Self-Ruler), the Greek title of the Czar, did occasionally appear as "Imperator"; however, if the imperial chancellery applied the word *imperator* to the Russian Czar, the Emperor intervened.[214] Moreover, when Peter I used the title "Emperor of All of Russia" (Kayser von ganz Russland) after the Peace of Nystad, the British government took over the usage,[215] while the imperial chancellery refused to do so and continued to refer to Russian rulers as "His Russian Majesty" (Ihro Russische Majetät) or as "Self-Ruler of the Russians" (Russorum Autocratrix). Emperor Charles VII employed the imperial title for the Russian Czar only in his Bavarian chancellery, while Emperor Francis I accepted that usage without restrictions for the imperial chancellery.[216] In the Treaty of Teschen of 1779, Emperor Joseph II conceded to Tsarina Catherine II, born as the daughter of the German Prince of Anhalt-Zerbst, the imperial title in legal terms, thereby finally waiving his claim to be the sole bearer of the imperial title within the European states system.[217]

Inside the Holy Roman Empire the legal norm demanding the recognition of the equality of sovereigns sparked controversy in the eighteenth century as well. The old problem of whether the Emperor or the governments of the imperial Estates were holders of sovereignty lingered on. In 1777, Göttingen jurist Johann Stephan Pütter (1725 – 1807), drawing on the the Treaties of Munster and Osnabrück, offered the compromise formula that sovereignty was divided between the Emperor and the Estates. Taking issue with Bodin's theory, Pütter argued that, according to the treaties, the Emperor as well as the Estates could enter into relations with sovereigns outside the Empire.[218] Pütter's unorthodox formula reflected, what Württemberg jurisconsult Johann Jacob Moser (1701 – 1785) denounced as the "greed for sovereignty ... of several Electoral and Princely courts" (Souveränitätsbegierde ... mancher Chur- und Fürsten-Höfe). Equating sovereignty with "supreme authority over territory" (Landeshoheit), Moser cast into terms both, the well-recorded quest by some rulers for upgrades of their titles and the uniquitous quest of Imperial Estates for recognition as autonomous rulers and governments. Moser defined *Landeshoheit* as "the right of imperial Estates, according to which they are competent to command, prohibit, give mandates to or to refrain from doing anything within their territories, as any other ruler can do according to divine law, the law of nature and the law among states, as long as their hands are not tied by imperial laws, imperial

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[212] Cornelius van den Driesch, *Historische Nachricht von der Röm[isch] Kayserl[ichen] Groß-Botschafft nach Constantinopel, welche auf allergnädigsten Befehl S[eine]r Röm[isch] Kayserlichen und Catholischen Majestät Carl des Sechsten nach glücklich vollendeten zweyjährigen Krieg, Der Hoch- und Wohlgeborene des H[eiligen] R[ömischen] Reiches Graf Damian Hugo von Virmondt rühmlichst verrichtet* (Nuremberg, 1723), pp. 50-51.

[213] *Europa auf der Wagschale. Oder das Staatsverhältniß des Kaisers mit der Ottonischen Pforte* (Leipzig, 1780).

[214] Johann Jakob Moser, *Teutsches Staatsrecht*, vol. 1 (Nuremberg, 1737), p. 23 [reprint (Osnabrück, 1968)]. Moser, *Staatsrecht* (note 211), book I, chap. 1, nr 6, p. 9.

[215] Martin Schulze Wessel, 'Systembegriff und Europapolitik der russischen Diplomatie im 18. Jahrhundert', in: *Historische Zeitschrift* 266 (1998), pp. 649-669, at p. 649.

[216] Treaty Ottoman Empire – Russia, Belgrad, 18 September 1739, in: *CTS*, vol. 35, pp. 425-457. Martens, *Lineae* (note 124), p. 21. Moser, *Staatsrecht* (note 212), book I, chap. 1, nr 6, pp. 9-10. Struve, *Untersuchung* (note 209).

[217] Treaty Prussia (note 16).

[218] Johann Stephan Pütter, *Beyträge zur näheren Erläuterung und richtigen Bestimmung einiger Lehren des teutschen Staats- und Fürstenrechts*, part 1 (Göttingen, 1777), pp. 30-32.

custom, contracts with their parliamentary representatives and subjects relating to ancient and well-recognised freedoms and rights" (denen Ständen des Reichs zukommende Recht, vermöge dessen sie befugt seyen, in ihren Landen und Gebieten alles dasjenige zu gebieten, verbieten, anzuordnen, zu thun und zu lassen, was einem jeden Regenten nach denen göttlichen, Natur- und Völkerrechten zukommt, insoferne ihnen nicht durch die Reichsgesetze, das Reichsherkommen, die Verträge mit ihren Landständen und Untertanen dieser alt- und wohl hergebrachten Freyheiten und Rechte die Hände gebunden sind).[219] By equating the rights of imperial Estates with the rights of sovereigns outside the Empire, Moser, identified *Landeshoheit* with sovereignty. His critical attitude towards the "greed for sovereignty" derived from his concern that Imperial Estates, demanding sovereign rights, might infringe upon the law of nature and government covenants stipulating rights of the ruled. Hence, Moser denied the proposition that the rights of the ruled could be touched legitimately.[220] Hence, for Moser, as for seventeenth-century theorists of imperial law, the application of the concept of sovereignty within the Holy Roman Empire was not compatible with the concept of independence. According to Moser all Imperial Estates remained members of the Empire, no matter how far their legislative autonomy might reach. Hence, within the Empire, there was no state, which was at the same time sovereign and independent.[221] By contrast, Moser neither frowned upon the capability of making alliances among Estates within the Empire or between Imperial Estates and sovereigns outside the Empire[222] nor the common use of words such as *status* or *Staat* for the imperial Estate.[223]

Government within a State under the Rule of Law

Inside as well as outside the Holy Roman Empire, the idea that government stood under the rule of law was current in Europe already in the fourteenth-century legal theory[224] and continued to be present during the sixteenth and seventeenth centuries.[225] In addition, sixteenth-century theories supported the use of the right of resistance against unlawful rule,[226] and the Dutch rebels availed themselves of these theories when formulating their ideologies of resistance against the Spanish government. Even violent opposition against urban elites as well as acts of disobedience of farmers[227] articulated the demand that government should be subject to the law.

Sixteenth-, seventeenth-, and eighteenth-century theorists took the enforcement of the law among states to be difficult, at least to be loaded with problems, whereas the idea that relations among state should be governed by the law was uncontested in accordance with the theory of the law of nature. Contrary to previous periods, the argument that the law of nature was valid in humankind at large, received support, during the eighteenth century, not merely through theoretical speculations but even upon empirical evidence. The evidence came mainly from employees of the Dutch East

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[219] Moser, *Landeshoheit* (note 141), p. 9.

[220] Ibid., pp. 4, 9, 253.

[221] Ibid., p. 267. Mirabeau, *Monarchie* (note 51), p. 61.

[222] Treaty Bishopric of Munster – States General of the Netherlands, Munster, 21 July 1706, in: Max Braubach, 'Politisch-militärische Verträge zwischen den Fürstbischöfen von Münster und den Generalstaaten der Vereinigten Niederlande im 18. Jahrhundert', in: *Westfälische Zeitschrift* 91 (1935), pp. 91-150, at pp. 177-180. Treaty Bishopric Munster – States General of the Netherlands, Munster, 4 July 1744, in: Braubach (as above), pp. 180-183.

[223] Joachim Erdmann Schmidt [praes.] and Johann Christian Majer [resp.], *Dissertatio inauguralis de statuum imperii romano germanici iure reformandi*. Ph. D. Thesis (Jena, 1771).

[224] Bartolus of Sassoferato, *In secvndvm Digesti noui partem commentaria* (Bartolus, Opera, vol. 6) (Venice, 1570-1571), fol. 217^{v}.

[225] Justus Lipsius, *Politicorum sive de doctrina civilis libri sex* (Leiden, 1589) [newly edited by Jan Waszink (Assen, 2004), p. 540; reprint of the edn of 1704, edited by Wolfgang Weber (Hildesheim, 1998)].

[226] Kurt Wolzendorff, *Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht des Volkes gegen rechtswidrige Ausübung der Staatsgewalt* (Untersuchungen zur deutschen Staats- und Rechtsgeschichte, [A. F.] 126) (Berlin, 1916) [reprint (Aalen, 1961)].

[227] Andreas Würgler, *Unruhen und Öffentlichkeit* (Frühneuzeit-Forschungen, 1) (Tübingen,1995).

India Company (VOC), who were most productive in reporting on legal and political matters in areas where they were engaged in their trading businesses.[228] More or less comprehensive travel reports, for example on Japan, found their ways into carefully assembled library collections and were meticulousness listed in bibliographies,[229] and served as sources for statistics.[230] One of the most comprehensive travel reports, tantamount to a statistical survey, is extant in the work of the Lemgo physician Engelbert Kaempfer (1651 – 1716) on Japan, where he stayed from 1690 to 1692.[231] In

[228] Veit Hammer, *Der Blick von Außen und das europäische Wissen über Japan um 1700. Die Beispiele Andreas Cleyer (1638 – 1697/98) und Georg Meister (1653 – 1713)*. Ph. D. Thesis, typescript (University of Halle, 2012).

[229] Johann Beckmann, *Litteratur der älteren Reisenbeschreibungen*, 2 vols (Göttingen, 1808-1810).

[230] For seventeenth-century travel reports on Japan see: François Caron, *Beschrijvinghe van het machtigh Coninckrijck Japan* (Amsterdam, 1645) [further edn (Amsterdam, 1661); German version as: Caron and Jodocus Schouten, *Wahrhaftige Beschreibung zweyer mächtigen Königreiche, Jappan und Siam* (Nuremberg, 1663); further German version (Nuremberg, 1669; 1672); excerpt newly edited in Peter Kapitza, *Japan in Europa*, vol. 1 (Munich, 1990), p. 560; partly edited by Detlef Haberland, *Beschreibung des mächtigen Königreichs Japan* (Fremde Kulturen in alten Berichten, 10) (Stuttgart, 2000); English version: Caron, *A True Description of the Mighty Kingdoms of Japan & Siam* (London, 1663); reprint, edited by Charles Ralph Boxer (London, 1935); another reprint (Bangkok, 1986)]. Pierre François-Xavier Charlevoix, *Histoire et description générale du Japon*, vol. 1 (Paris, 1736). Christoph Frik, *Ost-Indianische Raysen- und Krieges-Dienste* (Ulm, 1692); rare print [Stadtbibliothek Ulm, 6397, 2] [newley edited (Berlin, 1926); excerpts in: Hertha von Schulz, 'Bibliographische Forschungen zur japanischen Kulturgeschichte im Japaninstitut zu Berlin', in: *Japanisch-deutsche Zeitschrift* N. F. 1 (1929), pp. 50-54. English version as: Christ Fryke, Elias Hesse and Christoph Schweitzer, *A Relation of Two Several Voyages Made into the East-Indies* (London, 1700); new edn of this edn (London, 1929); reprint of the new edn (New Delhi, 1997); Dutch versions: Christophorus Frikius, Elias Hesse and Christophorus Schweitzer, *Drie seer aanmerkelijke reysen na en door veelerley gewesten in Oost-Indien* (Utrecht, 1694); (Amsterdam, 1705)]. Georg Meister, *Der Orientalisch-Indianische Kunst- und Lust-Gärtner*, new edn, edited by Friedemann Berger and Wilfried Bonsack (Weimar, 1972) [first published (Dresden, 1692)]. Johann Jacob Merklein, *Reise nach Java, Vorder- und Hinterindien, China und Japan. 1644 – 1653*, edited by S. P. L'Honoré Naber, *Reisebeschreibungen von deutschen Beamten und Kriegsleuten im Dienst der niederländischen West- und Ostindischen Kompagnien*, vol. 3 (The Hague, 1930) [first published (Nuremberg, 1663); further edn (Nuremberg, 1672)]. Arnoldus Montanus, *Gedenkwaerdige Gesandtschappen der Oost-Indische Maetschappy in't Vereenigde Nederland aen de Kaisaren van Japan* (Amsterdam, 1669). Caspar Schamberger, *Der Ost-Indischen und angrenzenden Königreich vornehmste Seltenheiten betreffende kurze Erläuterung*, edited by Wolfgang Michel (The Faculty of Languages and Cultures Library,1) (Fukuoka, 2010). Caspar Schmalkalden, *Die wundersamen Reisen des Caspar Schmalkalden nach West- und Ostindien. 1642 – 1652*, edited by Wolfgang Joost (Weinheim, 1983). Zacharias Wagener, *An Account of Two Voyages, the First of Fedor Iskowitz Backhoff, the Muscovite Envoy into China; the Second of Mr Zachary Wagener, a Native of Dresden in Misnia, thro' a Great Part of the World, as also into China, in: A Collection of Voyages and Travels*, vol. 2 (London, 1742). Olof Erikson Willman, *Een kort beskriffningh på een reesa till Ostindien och för beskreffne Japan then an Swänsk mann och skeps capiteen* (Wijsingborgh, 1667).

[231] On Kaempfer see: Beatrice M. Bodart-Bailey, 'Kaempfer Restor'd', in: *Monumenta Nipponica* 43 (1988), pp. 1-33. Bodart-Bailey and Derek Massarella, eds, *The Furthest Goal. Engelbert Kaempfer's Encounter with Tokugawa Japan* (Folkestone, 1995). Gerhard Bonn, *Engelbert Kaempfer (1651 – 1716). Der Reisende und sein Einfluß auf die europäische Bewußtseinsbildung über Asien* (Europäische Hochschulschriften, series III, vol. 968.) (Frankfurt and Bern, 2003) Yu-Ying Brown, 'Japanese Books and Manuscripts. Sloane's Japanese Library and the Making of the History of Japan', in: Arthur MacGregor, ed., *Sir Hans Sloane* (London, 1994), pp. 278-90. Detlef Haberland, *Engelbert Kaempfer 1651 – 1716. A Biography* **(**London, 1996) [first published (Bielefeld, 1990)]. Haberland, ed., *Engelbert Kaempfer (1651 – 1716). Ein Gelehrtenleben zwischen Tradition und Innovation* (Wolfenbütterler Forschungen, 104) (Wiesbaden, 2004). Hans Hüls, 'Zur Geschichte des Druckes von Kaempfers Geschichte und Beschreibung von Japan und zur sozialökonomischen Struktur von Kaempfers Lesepublikum im 18. Jahrhundert', in: *Engelbert Kaempfers Geschichte und Beschreibung von Japan. Beiträge und Kommentar* (Berlin, Heidelberg and New York, 1980), pp. 65-94. Tadashi Imai, 'Engelbert Kaempfer und seine Quellen', 'Sprachliche und landeskundliche Anmerkungen zu Engelbert Kaempfers Geschichte und Beschreibung von Japan', in: Hans Hüls and Hans Hoppe, eds, *Engelbert Kaempfer zum 330. Geburtstag* (Lippische Studien, 9) (Lemgo, 1982), pp. 63-81, 83-121. Sabine Klocke-Daffa, Jürgen Scheffer and Gisela Wilbertz, eds, *Engelbert Kaempfer (1651 – 1716) und die kulturelle Begegnung zwischen Europa und Asien* (Lippische Studien, 18) (Lemgo, 2003). Josef Kreiner, *Kenperu no mita Nihon* (Tokyo, 1996). Wolfgang Michel, 'His Story of Japan. Engelbert Kaempfer's Manuscript in a New Translation', in: *Monumenta Nipponica* 55 (2000), pp. 109-20. Barend

his report, Kaempfer dealt at length with the forms of government.[232] Kaempfer's report gave empirical testimony to the factuality of the rule of law within a state outside the European states system. Hence, the relations between Europe and Japan also were based on the law and not in need of the exercise of power. In describing the position of the rulers as subject to the law, Kaempfer categorised Japan as a law-governed state, in which the demand for the recognition of the rjule of law, as enshrined in European political theory, had actually been implemented. In Japan, then, the rule of law appeared as a real-world fact, while European theorists positioned it as the goal of reforms they requested.[233]

Kaempfer established this empirical record of the implementability of the rule of law through his interpretation of the then already well-known complicated dualism of ruling institutions in Japan. In European perception, government appeared to be distributed upon two rulers, and European travellers found it hard to correlate their respective rights and duties. Even authors of early seventeenth-century travel reports had laboured upon the dualism of rulership in Japan. Bernhard Varen (1620 – 1650/1), the first author of a statistical handbook on Japan,[234] approached the problem through the lense of power politics. Like earlier seventeenth-century statisticians, he interpreted the coexistence of the Tennō, the ruler in Kyōto, and the Shōgun, the ruler in Edo, as the result of a long-standing rivalry, which had led to shifts in power. According to this interpretation, the Shōgun had usurped an essential part of his power from the Tennō and forced the latter to cede ruling competences. Varen dated this shift to wars of the late fifteenth and early sixteenth centuries, having entailed the loss of power of the Tennō.[235] Kaempfer realised the inappropriateness of the power-politics approach, reduced it to the level of past propaganda and juxtaposed this interpretation against the model if regulated dualism of ruling offices similar to the relationship of the Emperor as the holder of secular powerand the Pope as the holder spiritual power in Europe. For the Tennō, Kaempfer used the terms "Spiritual Hereditary Emperor" (Geistliche Erbkaisere), "born popes"

J. Terwiel, 'Kaempfer and Thai History. The Documents behind the Printed Texts', in: *Journal of the Royal Asiatic Society* 1 (1989), pp. 64-80.

[232] Engelbert Kaempfer, *Heutiges Japan*, edited by Wolfgang Michel and Barend J. Terwiel (Kaempfer, Werke, vol. 1) (Munich, 2001). Kaempfer, *Amoenitatum exoticarum politico-physico-medicarum fasciculi V*, Fasc. I (Lemgo, 1712) [reprint (Tehran, 1976); partly edited by Walther Hinz, *Engelbert Kaempfer am Hofe des persischen Großkönigs. 1684 – 1685. Das erste Buch der Amoenitates exoticae* (Quellen und Forschungen zur Geschichte der Geographie und Völkerkunde, 7) (Leipzig, 1940); reprint of this edn (Tübingen, 1977); digital edn of parts of the original text. (Editiones electronicae Guelferbytanae, 5) (Bonn, 2010)]. Kaempfer, *The History of Japan*, edited by Johann Caspar Scheuchzer, vol. 1 (London, 1727) [new edn (Glasgow, 1906); reprint of this edn (New York, 1971); Richmond, SY 1993]. Kaempfer, *Geschichte und Beschreibung von Japan*, edited by Christian Wilhelm Dohm, 2 vols (Lemgo, 1779) [reprint, edited by Hanno Beck (Quellen und Forschungen zur Geschichte der Geographie und der Reisen, 2) (Stuttgart, 1964)].

[233] Jean-Louis Castilhon, *Considérations sur les causes physiques et morales de la diversité du genie, des moeurs et du government des nations* (Bouillon, 1769), pp. 244-248.

[234] On Varen see: John Norman Leonard Baker, 'The Geography of Bernhard Varenius', in: *Transactions and Papers of the Institute of British Geographers* 21 (1955), pp. 51-60. Horst Walter Blanke, 'Marco Polo, Bernhard Varenius und Engelbert Kaempfer. Vom Hörensagen über die gelehrte Recherche zum Autopsiebericht. Drei Stationen der europäischen Japankunde', in: Wolfgang Griep, ed., *Bernhard Varenius (1622 – 1650). Der Beginn der modernen Geographie. Begleitband zur gleichnamigen Ausstellung der Eutiner Landesbibliothek* (Veröffentlichungen der Eutiner Landesbibliothek, 5) (Eutin, 2001), pp. 36-49 [second edn (Eutin, 2001); third edn (Eutin, 2009)]. Siegmund Günther, *Varenius* (Leipzig, 1905) [reprint (Amsterdam, 1970)]. Martin Schwind, 'Die wissenschaftliche Stellung der "Descriptio regni Japoniae"'; Blanke, 'Die Aneignung und Strukturierung von Wissen in der Polyhistorie. Ein Fallbeispiel: Bernhard Varenius'; Reinhard Düchting, 'Die *Descriptio Regni Japoniae* in der literarischen Tradition der europäischen „descriptiones"'; Folker E. Reichert, 'Reise- und entdeckungsgeschichtliche Grundlagen der *Descriptio regni Japoniae*', all in: Margret Schuchard, ed., *Bernhard Varenius (1622 – 1650)* (Brill's Studies in Intellectual History, 159) (Leiden, 2004), pp. XVII-XXXIX, 119-144, 145-162, 163-189. Schwind, 'Die älteste Japanbeschreibung in europäischer Sprache. Descriptio Regni Japoniae von Bernhard Varen 1649', in: *Chirigaku Hyōron* 46 (1973), pp. 81-91.

[235] Bernhard Varen, *Descriptio regni Japoniae*, chap. 4 (Amsterdam, 1649). German version, edited by Horst Hammitzsch and Martin Schwind (Darmstadt, 1974), p. 56. Similarly: Pierre d' Avity, *Les estats, empires et principautez du monde* (Paris, 1615), pp. 888-895: 'Discours du Japon', at p. 889.

(gebohrene Päpste) or "personified pontifical idol" (presente pontificiale Abgott), [236] the latter of which Kaempfer's translator Johann Caspar Scheuchzer (1702 – 1729) rendered into the formula "Japanese Pope".[237] According to this model, the Shōgun was the legitimate holder of secular power and no longer a usurper, while the Tennō was the spiritual head of the state and acted as the supreme legitimator the secular rule. Kaempfer was not the first to apply the title of emperor to the Shōgun,[238] yet he interpreted the dualism of rulers as the result of the legal differentiation between institutions of secular and spiritual rule. As Kaempfer took for granted that only a secular ruler could perform the duties of the head of a state, only the Shōgun could be the bearer of sovereignty. Therefore, the imperial title was applicable solely to the Shōgun. Applying the imperial title to the Shōgun, Kaempfer categorised Japan as a state, which was equal in rank not merely with the Holy Roman Empire but also with China.[239] Kaempfer thus was apparently the first European observer to consider states outside the European system not merely as legal equals with European states but also as ranking at the same level as the Holy Roman Empire. According to the same criteria, the imperial title needed to be applied to the head of the Chinese state. Hence, Kaempfer described Japan as an autonomous state in its relations with China, thereby taking issue with previous European reports, which had featured Japan as a Chinese dependency. Later in the eighteenth century, Kaempfer's use of the imperial title for rulers in Asia obtained legal quality, as the practice of making treaties between Europeans and rulers in South and Southeast Asia adopted the usage. For one, the VOC concluded a treaty with the ruler of Kandy (Sir Lanka) on 14 February 1766. This was an agreement ending a war and establishing "never changeable amity" (une amitié à jamais inaltérable) and styling the Kandy ruler "L'Empereur de Candy".[240]

For his interpretation of the dualism of rulers in Japan, Kaempfer drew on the traditional European model juxtaposing Church and Empire as holders of spiritual and secular power, while categorising the relationship between both powers in Japan as free from conflict and regulated by the law. With regard to the Holy Roman Empire, the papal and the imperial chancelleries were rivalling over predominance within the Empire and Latin Christendom at large. The Pope, in his capacity as ruler of the Papal States, together with some archbishops, bishops, abbots and abbesses as imperial Estates even were holders of secular power like the Emperor and other Estates. By contrast, the "Emperor" and the "pontifical idol" in Japan were integrated into the overarching normative system of municipal law controlling the relations between both rulers. Kaempfer thus presented Japan as an empirical case featuring the regulatedness, in terms of law, of relations between two holders of supreme power, albeit only in one single state. Still, in Japan as a state, the subjection of rulers to the law was on record, whereas, for the Holy Roman Empire as well as in Latin Christendom as a whole, theorists categorised the same subjection as hard to achieve.

Kaempfer's interpretation dominated the European image of Japan to the end of the eighteenth century. Although criticism became occasionally vocal concerning Kaempfer's assertion that the rule of law was absolute in Japan,[241] even his critics accepted his premise that the relationship between the Tennō and the Shōgun was describable in terms of the dualism between Pope and Emperor. Johann Gottlieb Georgi (1729 – 1802), who travelled in Siberia in 1772 and visited a Japanese settlement at Irkutsk and gathered information about Japan, even produced apparently independent proof of the appropriateness of Kaempfer's interpretation.[242] Indeed, Georgi

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[236] Kaempfer, *Japan* (note 232), pp. 124, 125, 174.

[237] Kaempfer, *History* (note 232), vol. 1, p. 206.

[238] Caron, *Beschrijvinghe* (note 230), edn by Kapitza, p. 538. Varen, *Descriptio* (note 235), chap. 7, p. 69. Willman, *Beskriffningh* (note 230), pp. 140-142.

[239] Kaempfer, *Geschichte* (note 232), p. 420.

[240] Treaty Kandy – VOC Dutch East India Company, Colombo, 14 February 1766, art. I, II, in: *CTS*, vol. 43, pp. 263-269, at p. 264. On the war between Kandy and the VOC see: Alicia Schrikker, 'Een ongelijke strijd? De oorlog tussen de Verenigde Oost-Indische Compagnie en de koning van Kandy. 1760-1766', in: Gerrit Knaap and Gerke Teitler, eds, *De Verenigde Oost-Indische Compagnie tussen oorlog en diplomatie* (Verhandelingen van het Koninklijke Instituut vor Taal-, Land- en Volkenkunde, 197) (Leiden, 2002), pp. 379-406.

[241] Kaempfer, *Amoenitatum* (note 232), pp. 417-419.

[242] Johann Gottlieb Georgi, *Bemerkungen einer Reise im Rußischen Reich im Jahre 1772*, vol. 2 (St. Petersburg, 1775), pp. 3-7 [excerpt newly edited in: Peter Kapitza, *Japan in Europa*, vol. 2 (Munich, 1990), pp. 628-632].

described the relationship between the Tennō and the Shōgun as the dualism between a spiritual and a secular ruler. However, contemporaries remained unaware of the fact that Georgi relied on Kaempfer's interpretation for his description, which, by consequence, was actually not independent evidence. Moreover, European reports featured not only Japan but also China as a case testifying to the subjection of government to the rule of law.[243]

The Theory of the Law among States in University Curricula

The eighteenth-century witnessed jurists and philosophers denying the existence of the law among states.[244] Like their seventeenth-century predecessors, they argued that political communities were in the state of nature and, as states, could not enter into any binding obligations. Any law, accepted as valid in all or most political communities, according to this doctrine, was not part of the law of nature, but positive municipal law, the customary practices observed in the intercourse among states pertaining to morality but not to the law.[245] However, writings by authors taking this position, were dwarfed by the mass of publications dealing with the law among states in larger numbers than ever before. The main factor of the increase of the number of printed texts about the law among states was the public accessibility of treaties among states, assembled in numerous printed collections.[246] The availability of treaties through these printed collections promoted academic research in positive sources of the law among states on the basis of the exact wording of treaties. The study and research into these materials fell into the province of jurisprudence and was mainly undertaken in the law schools of universities in the German-speaking areas. Treaties among states now were explicitly defined as "charters of free peoples, states and princes, through which binding obligations are being brought into existence, confirmed or lifted." (Urkunden freyer Völker, Staaten und Fürsten, wodurch eine Verbindlichkeit unter ihnen hervorgebracht, bestätiget oder aufgehoben wird.)[247] This type of definition encouraged the dissemination of legal instruments in publicly accessible printed collections, so as to facilitate investigations about the degree to which existing agreements were being honoured. Put differently: the publication of treaties enhanced their binding force in so far, as, on principle, every interested person could read all public legal commitments of all states everywhere and at any time Hence, the idea informing the printed treaty collections that the texts of legally binding commitments of states should be made available to the general public and thereby enhance their binding force, promoted the consciousness, already on record in the sevententh century, that the law among states was not solely an outflow of the law of nature but could also be set through human action.

The procedures of setting the law among states, specifically the law of treaties among states, formed objects of academic teaching and research in universities, were summarised in handbooks, analysed in specalised academic publications and listed in bibliographies.[248] Handbooks

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[243] Jean-Baptiste Du Halde, *Description géographique, historique, chronologique, politique et physique de l'Empire de la Chine et de la Tartarie chinoise*, vol. 4 (The Hague, 1736). Sonnenfels, 'Vortheile' (note 8), p. 121.

[244] Samuel von Cocceji [Koch], *Tractatus juris gentium* (Frankfurt/Oder, 1702). Nicolaus Hieronymus Gundling, *Discours über das Natur- und Völckerrecht* (Frankfurt and Leipzig, 1734), pp. 36, 315. Heineccius, *Elementa* (note 69), p. 30. Johann Nikolaus Hert [praes.] and Ludwig von Freudenberg [resp.], *Dissertatio de origine et progressu specialium Romano-Germanici Imperii rerumpublicarum*. LLD. Thesis (University of Gießen, 1701).

[245] Darjes, *Observationes* (note 5), § 1, p. 39. Jean-Jacques Rousseau, 'L'État de la guerre. Ou que l'état de guerre naît de l'état social [1755]', in: Rousseau, *The Political Writings of Jean Jacques Rousseau*, edited by Charles Edwyn Vaughan, vol. 1 Reprint (Oxford, 1962), pp. 293-307 [firs publication of Vaughan's edn (Cambridge, 1915); also in: Stanley Hoffmann and David P. Fidler, eds, *Rousseau on International Relations* (Oxford, 1991), p. 44: "As for what is commonly called the law of nations, because its laws lack any sanction, they are unquestionably mere illusions, even feebler than the law of nature. The latter at least speaks in the heart of individual men; whereas the decisions of international law, having no other guarantee than their usefulness to the person who submits to them, are only respected in so far as interest accords with them. "

[246] Mario Toscano, *The History of Treaties and International Politics*, vol. 1, second edn (Baltimore, 1966), pp. 51-73 [first published (Turin, 1958)].

[247] Beck, *Versuch* (note 4), book V, chap. 1, p. 162. Darjes, *Discours* (note 4), § 415, p. 82.

[248] Martens, *Erneuerung* (note 80). Moser, *Staatsrecht* (note 212). Dietrich Heinrich Ludwig von Ompteda,

on the law among states provided survey chapters about the law of treaties among states.[249] At the same time, philosophers included the law among states into their survey of the law of nature. Most prominently, Christian Wolff at Halle influenced the study of the law among states through his own writings as well as those by his students Joachim Georg Darjes at Jena and Daniel Nettelbladt at Halle (1719 – 1791). Likewise, academic authors began to scrutinise the history of legal theory, whereby they not only focused on the ancient Greek and Roman periods, but also took into account Confucian theories of the law of war and peace as part of the general law of nature.[250] Confucian texts had been printed in Euroepan languages from the seventeenth century, among others in the history of China by Jesuit Martino Martini (1614 – 1661)[251] as well as in special editions.[252] Surveys of the history of legal theory even included some of the larger sixteenth- and seventeenth-century compendia on the *ius gentium* and the law of war and peace, such as those by Gentili, Grotius and Pufendorf,[253] with the notable exception of Vitoria, whose work had fallen into oblivion.

Two new schools appeared with regard to the determination of the relationship between the law of nature and the law among states. On the one side, a minority of theorists equated the law among states with the law of nature. Members of this school were Geneva jurist Jean Jacques Burlamaqui (1694 – 1748)[254] and Johann Gottlieb Heinecke (Heineccius, 1681 – 1741) at Halle. Heineccius defined the laws among states as "the law of nature, applied to the social life of human beings" (das Naturrecht, angewandt auf das gesellschaftliche Leben des Menschen)[255] and derived from this definition the argument that the law among states could not be set through human action. According to Heineccius, the law of nature followed from reason only and, by consequence, could not flow from human legislative action. On the other side, the majority of theorists assumed that the law of nature comprised the "complete freedom" (völlige Freyheit) of political communities together with the unset norms of the law among states, limiting that freedom.[256] Yet, they positioned the law among states as a legal field of its own, emerging from treaties among states.[257] Various technical terms concurred for this latter legal field. The Göttingen historian, jurist and statistician Gottfried Achenwall (1719 – 1772) called it the "general hypothetical law among states" (ius gentium universale hypotheticum), including into this term the law of treaties among states.[258] Darjes used the phrase "positive law among states" (ius gentium positivum), which he interutilised with Achenwall's term.[259] Christian Wolff distinguished between voluntary law, treaty law and customary law (jus gentium voluntarium, pactitium, consuetudinarium) as elements of positive law, which he would not admit as having been dictated by nature.[260] He thus derived both, the law among states and the law of nature, from reason and concluded that the law among states must be

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Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts, 2 vols (Regensburg, 1785) [vol. 3, supplemented by Karl Christoph Albert Heinrich von Kamptz (Regensburg, 1817); reprint (Aalen, 1963-1965)].

[249] Achenwall, *Jus* (note 175), pp. 215-222. Beck, *Versuch* (note 4), pp. 162-176. Martens, *Lineae* (note 124), pp. 34-42.

[250] Glafey, *Geschichte* (note 107), § 93, pp. 72-77. Weidler, *Institutiones* (note 69), p. 31.

[251] Martino Martini, SJ, *Sinicae historiae decas* (Munich, 1658), pp. 120-133 [further edn (Amsterdam, 1659); newly edited in: Martini, *Opera omnia*, vol. 4, 2 parts, edited by Federico Masini (Trento, 2010)].

[252] Philippe Couplet, Prospero Intorcetta, Christian Herdtrich and François Rougement, *Confucius Sinarum philosophus sive scientia Sinensia latine exposita* (Paris, 1687).

[253] Weidler, *Institutiones* (note 69), pp. 39-41, 47-48.

[254] Burlamaqui, *Principles* (note 80), book II, chap. 6, p. 120.

[255] Heineccius, *Elementa* (note 69), German version, p. 315.

[256] Fredersdorf, *System* (note 101), §§ 323, 331-334, pp. 535, 541-554. Johann Friedrich Schneider, [praes.] and Christian Samuel Heuckenrott [resp.], *Jus gentium naturale*. LLD. Thesis (University of Leipzig, 1729). Christoph Friedrich Schott, *Dissertatio juris naturalis de iustis bellum gerendi et inferendi limitibus*. LLD. Thesis (University of Tübingen, 1758). Johann Sigismund Stapff [praes.] and Ferdinand Sebastian von Sickingen Hohenburg [resp.], *Jus naturae et gentium*. LLD. Thesis (University of Mainz, 1735).

[257] Carl Eberhard von Waechter, *Dissertatio juridica de modis tollendi pacta inter gentes*. LLD. Thesis (Stuttgart: Hohe Carlsschule, 1779).

[258] Achenwall, *Jus* (note 175), chap. III, pp. 215-222.

[259] Darjes, *Institutiones* (note 140), book VIII, chap. 3, pp. 554-560.

[260] Wolff, *Jus* (note 4), §§ 22, 23, 24, pp. 16-18.

common to all humankind regardless of religious beliefs. The Viennese theorist of the law of nature, Carl Anton Martini (1726 – 1800), followed Darjes and identified Hugo Grotius as the first theorist to have treated "a positive law among states" (ein positives Völkerrecht) as the sum of legal norms laid down in treaties and transmitted through custom.[261] Thus, the view is untenable that Grotius's work should not have had any significant impact on relations among states during the eighteenth century.[262]

Wolff's position reflected the then widening practice of making treaties among partners across the bounds of religion. Not only numerous agreements came into existence between rulers in Latin Christendom, including the Roman Emperor, on the one side and, on the other, Muslim rulers of states in Northern Africa[263] as well as the Ottoman Turkish Sultan, with neither side calling into question the legal entitlement of the other to enter into treaty obligations or doubting the validity of these obligations, once they had been agreed upon. Likewise, the Estado da India, the agency of Portuguese colonial rule in South and Southeast Asia, concluded several treaties with the Mahrattas in the course of the eighteenth century,[264] the English East India Company made out agreements with the die Mahrattas, Dholpur, Baroda and Nagpur,[265] the VOC with Kandy, Tidore and Johor,[266] whereby the latter instrument even contained a "protection" clause (beschermen),[267] and the French Africa Company followed with a treaty with the Emir of Tunis.[268] Portuguese rulers entered into agreements with African governments from the late sixteenth century, which the Portuguese colonial adminstration of Angola appears to carefully copied into an official registry of treaties, and two treaties came into existence linking together the King of France and the Shah of Iran early in the eighteenth century.[269] There were also agreements between Native American states on the one side and, on the other, the Kingdom of Spain, the Kingdom of France and the UK,[270] even after a

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[261] Martini, *Lehrbegriff* (note 70), pp. 10-11.

[262] Wilhelm Georg Carl Grewe, *Epochen der Völkerrechtsgeschichte*, second edn (Baden-Baden, 1988), p. 257 [first, unpublished print (Leipzig, 1945); first book trade edn (Baden-Baden, 1984); English version (Berlin, 2000)]. Joseph Gabriel Starke, 'Grotius and International Law in the Eighteenth Century', in: Charles Henry Alexandrowicz, ed., *Studies in the History of the Law of Nations* (Grotius Society Papers, 3) (The Hague, 1972), pp. 162-176, at p. 173.

[263] Treaty Algiers – Denmark, 10 April 1746, in: *CTS*, vol. 38, pp. 27-35.

[264] Edict in the name of the Viceroy of Portugal for India on an agreement with the Mahrattas, Goa, 16. Januar 1764, in: *CTS*, vol. 42, pp. 475-476. A further Edict, Goa, 25 December 1764, in: *CTS*, vol. 42, pp. 121-127. Treaty Mahrattas – Portugal, 14 October 1768, in: *CTS*, vol. 44, pp. 217-227.

[265] Treaty English East India Company – Mahrattas, 24 November 1778, in: *CTS*, vol. 47, pp. 93-97. Treaty English East India Company – Mahrattas, 1779, in: *CTS*, vol. 47, pp. 101-102. Treaty Dholpur – English East India Company, 2 December 1779, in: *CTS*, vol. 47, pp. 255-257. Treaty Baroda – English East India Company, 26 January 1780, in: *CTS*, vol. 47, pp. 261-267. Treaty English East India Company – Nagpur, 1781, in: *CTS*, vol. 47, pp. 405-406.

[266] Treaty Kandy (note 240). Treaty Tidore – VOC Dutch East India Company, Ternate, 17 December 1783, in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 392-405. Treaty Johor – VOC Dutch East India Company, Riow, 10 November 1784, in: *CTS*, vol. 49, pp. 177-187 (Dutch version), pp. 187-196 (French version).

[267] Treaty Johor (note 266), art. V, p. 180. For earlier treaties stipulating either „protection" or other forms of „subjetio" see: 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. Peace treaty Hottoways/Naneymond/Pamunkey/Waonske – Great Britain, 29 May 1677, in: *CTS*, vol. 14, pp. 257-263.

[268] Treaty French Africa Company – Tunis, 24 June 1781, in: *CTS*, vol. 47, pp. 491-493.

[269] Antonio Brásio, ed., *Monumenta missionária Africana*. Africa Occidental, series I, vol. 4 (Lisbon, 1965), p. 343. Beatrix Heintze, 'Der portugiesisch-afrikanische Vasallenvertrag in Angola im 17. Jahrhundert', in: *Paideuma* 25 (1979), pp. 195-223, at pp. 201, 207. Treaty France – Iran [Edict in the name of Shah Kulikan], September 1708, in: *CTS*, vol. 26, pp. 199-217. Treaty France – Iran, Versailles, 13 August 1715, in: *CTS*, vol. 29, pp. 305-309.

[270] Treaty Choctaw – Spain, Movila, 14 July 1784, in: *CTS*, vol. 49, pp. 109-112. Treaty France – Iroquois, 8 September 1700, in: Paris: Archives Nationales, C 11A, vol. 18, fol. 84^{r}-88^{v}; facsimile in: Christophe N. Eick, *Indianerverträge im Nouvelle France* (Schriften zur Rechtsgeschichte, 64) (Berlin, 1994), pp. 207-216. Treaty France – Chichi Catalo/Huronen/Iroquios/Kiskakons/Outoutagan/Sauks/Sinago Odwa, Montreal, 4 August 1701, in: Gilles Havard, *The Great Peace of Montreal. French-Native Diplomacy in the Seventeenth Century* (Montreal,

proclamation in the name of King George III had unilaterally established a kind of crown suzerainty (protectorate) over Native Americans west of the Apallachian Mountains in 1763.[271] From the point of view of the European signatory parties, the legal basis for these agreements was the law of treaties among states, according to which contracting parties reciprocally recognised one another as sovereigns. There was no record indicating any reluctance of any of these signatory parties on the European side to enter into binding commitments with sovereign states in Africa, America and Asia. Nor did records suggest that the African, American and Asian partners to these agreements had difficulties of understanding and accepting the principles of the treaty-making procedure. Thus, the practice of concluding legally binding agreements across the boundaries of states systems and the bounds of religion continued to rest on the common acceptance of a kind of law of nature as the unset source of the bindingness of treaty obligations among states, with no difference being recognisable in eighteenth- from seventeenth-century practice.

At the same time, it became possible to categorise imperial law as the "particular European law among states ... of the German nation" (besondere europäische Völkerrecht ... der teutschen Nation). Imperial law was now understood to cover "the essence of positive agreements, which contain (1) the rights and duties of the Empire and the other European states among themselves; (2) the rights and duties among European states themselves; and (3) the rights and duties of the Empire and foreign states among themselves" (den Inbegriff der Gesetze welche 1) die Rechte und Verbindlichkeiten des teutschen Reiches und der übrigen europäischen Staaten unter sich; 2) die Rechte und Verbindlichkeiten der europäischen Staaten unter sich; 3) die Rechte und Verbindlichkeiten der Staaten des teutschen Reichs und auswärtigen Staaten unter sich).[272] Within this framework of legally binding agreements among states within and beyond the European system, the Empire appeared as the "core of the European Republic and the European balance of power".[273] Thus understood, the European law among states was identical with the law of the "European system",[274] and the sovereigns assembled therein. It became equally possible to employ the theory of the government contract as the means not only for the derivation of the bindingness of particular treaty obligations among signatory parties but also for the setting of general legal norms of the law among states. To accomplish this task, theorists resorted to analogy. They claimed that the multitude of treaties made among rulers and governments transformed original "moral persons" (personae morales) from the state of nature into the community of contractually associated and bound states[275] in the same way, as the government contract founded a state within a political community.[276] Within this contractual society of states, war became the means of regulated public conflict, with the implication that private wars, as just wars, could take place only among individuals in the state of nature. From the middle of the eighteenth century, theorists adopted the view that the state of nature

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2001), pp. 100-188 (facsimile of the French original), pp. 210-215 (English version). Treaty Maryland/Virigina – Six Nations [Native Americans], Lancaster, PA, 26 June 1744, in: *A Treaty Held at the Town of Lancaster in Pennsylvania by the Honourable the Lieutenant-Governor of the Province, and the Honourable the Commissioners for the Provinces of Virginia and Maryland, with the Indians of the Six Nations, in June 1744* (Philadelphia, 1744); also edited by James H. Merrell, *The Lancaster Treaty* (Boston, 2008). Treaty Seneca – UK, Johnsonhall, 3 April 1764, in: *CTS*, vol. 42, pp. 499-502. Treaty Huronen – UK, Niagara, 18 July 1764, in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 389-391.

[271] UK, *A Proclamation* [in the name of King George III, single sheet, 7 October 1763] (London, 1763); edited by Clarence S. Brigham, *British Royal Proclamations Relating to America. 1603 – 1783* (Transactions and Collections of the American Antiquarian Society, 12) (Worcester, MA, 1911), p. 215 [also in: Arthur Berriedale Keith, ed., Selected *Speeches and Documents on British Colonial Policy. 1763 – 1917*, vol. 1 (The World's Classics, 215) (London, 1918), pp. 3-11; reprints of this edn (Oxford, 1948; 1961); partly printed in: http.//indigenousfoundations.art.ubc.ca/home/g].

[272] Daniel Nettelbladt, *Erörterungen einiger einzelner Lehren des teutschen Staatsrechts* (Halle, 1773), pp. 39-40.

[273] Gaspari, *Versuch* (note 155), p. 18. Loën, *Entwurf* (note 87), pp. 228-232. Rousseau, 'Extrait' (note 87), p. 372.

[274] Henry Saint-John, Viscount Bolingbroke, *Works*, edited by David Mallet, vol. 2 (London, 1754), p. 417 [reprint, edited by Bernhard Fabian (Anglistica et Americana, 13) (Hildesheim, 1968)]. Vattel, *Droit* (note 76), book III, chap. 3, nr 47, pp. 39-40.

[275] Julius Bernhard von Rohr, *Einleitung zur Staatsklugheit* (Leipzig, 1718), pp. 66-94.

[276] Martens, *Erzählungen* (note 185).

was a condition of humankind that, in Europe, had existed in the remote past.[277]

The European law among states thus positioned the "European system" as a legal order in balance as well as peace and subject to the universal law of nature.[278] In this capacity, the law among states was not just to feature as a theoretical construct but also to shape diplomatic practice offering, among others, arguments to be used in manifestos to defend the justice of a war.[279] The ties between the law among states and the law of nature were usually taken for granted. Christian Wolff belonged to the few eighteenth-century theorists, who raised the question of how the law of nature could become the foundation for positive and unset norms of the law among states everywhere in the world. Wolff, who was familiar with texts pertaining to the Confucian tradition and did not conceal his appreciation of Confucius's ideas,[280] classed the law among states as "necessary law" (jus gentium necessarium) and declared its foundation inalterable.[281] It became necessary, he thought, because nature had established an order, which comprised all states on the globe and therefore deserved the name "civitas maxima".[282] Like any other type of social order, the *civitas maxima* had to have laws and procedures of legislation. The order, Wolff surmised, had come into existence "as if by covenant" (quasi pacto) and served the promotion of common well-being, the repose and security of all states.[283] In the *civitas maxima*, all states were by nature equal among themselves.[284] With his theory of the *civitas maxima*, Wolff created a contractualist tool for the rational derivation of a world law among states, unchangeable in a comprehensive order of all states. Like other eighteenth-century theorists,[285] Wolff elevated the theory of the government covenant from the level of the theory of the state into that of relations among states across the boundaries of the European system. Yet, in doing so, he separated the law among states from law of nature, which, in his theory, remained aloof from human interference, and merely derived the postulated "necessity" of the *civitas maxima* from the law of nature. Accordingly, Wolff's *civitas maxima* was neither a world state in itself nor the fiction of a consensus about legal norms everywhere on the globe,[286] rather it was a kind of unchangeable machine, which, while resulting from human action,

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[277] Johannes Ihre [praes.] and Paulus Nöring [resp.], *Dissertatio politica de bello privato* (Uppsala, 1751). Andreas Wexonius, *De bello hominis privato* (Basle, 1742). Johann Christoph Adelung, *Versuch einer Geschichte der Cultur des menschlichen Geschlechtes* (Leipzig, 1782). Isaak Iselin, *Ueber die Geschichte der Menschheit*, vol. 1 (Frankfurt and Leipzig, 1764), pp. 81-162, 163-243. Henry Lord Kames, *Historical Law Tracts* (London, 1758) [second edn (Edinburgh, 1761); fourth edn (Edinburgh, 1792); new edn of the fourth edn (Edinburgh, 1817)]. Christoph Meiners, 'Historische Bemerkungen über die sogenannten Wilden oder über Jäger- und Fischer-Völker', in: *Göttingisches historisches Magazin* 6 (1790), pp. 273-311. Johann Gottlieb Steeb, *Versuch einer allgemeinen Beschreibung von dem Zustand der ungesitteten und gesitteten Völker nach ihrer moralischen und physicalischen Beschaffenheit* (Karlsruhe, 1766), pp. 13-53.

[278] On eighteenth-century doctrines of the law of nature see: Wolfgang Kersting, 'Der Kontraktualismus im deutschen Naturrecht', in: Otto Dann and Diethelm Klippel, eds, *Das europäische Naturrecht im ausgehenden 18. Jahrhundert* (Studien zum 18. Jahrhundert, 16) (Hamburg, 1995), pp. 90-110. Diethelm Klippel and Michael Zwanziger, 'Naturrecht als Friedensordnung', in: Heinrich Rüping, ed., *Die Hallesche Schule des Naturrechts* (Frankfurt, 2002), pp. 95-118. Ernest Brian Francis Midgeley, *The Natural Law Tradition and the Theory of International Relations* (London, 1975), pp. 67-174. Frank Steffen Schmidt, *Praktisches Naturrecht zwischen Thomasius und Wolff. Der Völkerrechtler Adam Friedrich Glafey (1692 – 1753)* (Studien zur Geschichte des Völkerrechts, 12) (Baden-Baden, 2007). Jan Schröder and Ines Pielemeier, 'Naturrecht als Lehrfach an den deutschen Universitäten des 18. und 19. Jahrhunderts', in: Otto Dann and Diethelm Klippel, eds, *Das europäische Naturrecht im ausgehenden 18. Jahrhundert* (Studien zum 18. Jahrhundert, 16) (Hamburg, 1995), pp. 255-269. Richard Tuck, *Natural Rights Theories* (Cambridge, 1979) [reprints (Cambridge, 1981; 1987; 1995; 1998; 2002)].

[279] Gottfried Achenwall, *Staatsklugheit*, third edn (Göttingen, 1774), pp. 15-17 [first published (Göttingen, 1763)]. Glafey, *Vernunfftrecht* (note 4), § 5, p. 4. *Staats-Betrachtungen* (note 25), pp. 24, 25, 29, 31, 36.

[280] Donald Frederick Lach, 'The Sinophilism of Christian Wolff (1679 – 1754)', in: *Journal of the History of Ideas* 14 (1953), pp. 561-574.

[281] Wolff, *Jus* (note 4), § 5, pp. 3-4.

[282] Ibid., §§ 8-10, pp. 6-9.

[283] Ibid., §§ 11-12, pp. 9-10.

[284] Ibid., § 16, p. 12.

[285] Hermann Friedrich Kahrel, *Ius publicum universale* (Gießen, 1765). Rohr, *Einleitung* (note 275).

[286] Francis Cheneval, 'Der präsumptive vernünftige Konsens der Menschen und Völker. Christian Wolffs Theorie der Civitas Maxima', in: *Archiv für Rechts- und Sozialphilosophie* 85 (1999), pp. 563-580. Cheneval,

transferred the law of nature into the law among states and subjected states to the rule of law. Within this theory, states were stable institutions and changes of the set-up of states within the European system were difficult to conceive, even though recognition slowly came on the way that, with the States General of the Netherlands, a new state had come into existence within the European system.[287]

Wolff met with little appreciation for his construct in his own time, even though Emerich de Vattel took it up and cast it into the formula of the "universal society of humankind" (La Société universelle du Genre-humain), which Rousseau took up and modified.[288] And yet, Wolff's answer to the question, how the law among states could have found general validity, reflected contemporary pragmatic attitudes. When Duke Anton Wilhelm of Brunswick-Wolfenbüttel (1714 – 1731) bought a slave named Amo (c. 1700 – after 1753) of Axim in what is Ghana today, who had been deported by the Dutch West India Company, freed him, had him baptised as Anton Wilhelm and sent him to the University of Halle for study, Amo decided to write a dissertation to obtain the degree of the Doctor of Philosophy and placed his work under the title "The Law of the Blacks in Europe" (De jure Maurorum in Europa). The text of the work, which he defended in 1729, is not extant. But the printed report about the defence conveys information that Amo demanded equality for Africans under the universal law of nature. Thus, early in the eighteenth century, Amo already derived from the law of nature for Africans the same legal norms, which revolting British colonists in North America claimed for themselves at the end of the century and termed them human rights. On the basis of these rights, to which apparently Amo did not yet apply this term, he insisted that, in the interest of the enforcement of the rule of the law among states, the trans-Atlantic slave trade and slave holding in America should be prohibited.[289] Amo taught philosophy according to Wolff's method at Halle, until he returned to Axim in 1753.[290]

Summary

In the course of the eighteenth century, the demand for the recognition of the rule of law found its most prominent articulation in the theory of the law among states. The demand concurred with the expectation of an imminent perpetual peace. Critical contemporaries ridiculed both, the quest for the recognition of the rule of law and the promise of perpetual peace. For one, Voltaire invented a scene, in which he positioned himself in front of a statue pondering the question whether, what he saw, was a lifeless piece of art or the incarnate Abbé de Saint-Pierre. Voltaire arrived at the conclusion that he was seeing a lifeless statue, because, he reasoned, the Abbé, being alive, would certainly have said

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'Auseinandersetzungen um die Civitas Maxima in der Nachfolge Christian Wolffs', in: *Studia Leibnitiana* 32 (2001), pp. 125-144.

[287] Joachim Erdmann Schmidt [praes.] and Cratus Wilhelm von Schell [resp.], *Exercitatio politico historica de civitatis origine, civitatvmqve systematis exemplo reipvbl[icae] Batavorvm illvstratis*. Ph. D. Thesis (Univerity of Jena, 1745). Moser, *Versuch* (note 8), part I (1778), book I, chap. 1, § 5, p. 6, noted that „Crimean Tartaria" had been established as a "newly independent state" through the Ottoman-Russian treaty of 1774.

[288] Vattel, *Droit* (note 76), Préliminaires, § 11, p. 7. Jean-Jacques Rousseau, *Du contrat social. Ou Principes du droit politique* [Manuscrit de Genève, 1760/61; printed version (Amsterdam, 1762)], chap. 2, edited by Simone Goyard-Fabre (Paris, 2010), pp. 22-32.

[289] Anton Wilhelm Amo, *De iure Maurorum in Europa* [Ph. D. Thesis (University of Halle, 1729), printed version no longer extant; report on the defence by Johann Peter von Ludewig, in: *Wöchentliche Hallische Frage- und Anzeigungs-Nachrichten* (28 November 1729)].

[290] Among others see: Burchard Brentjes, *Antonius Guilelmus Amo Afer in Ghana. Student, Doktor der Philosophie, Magister Legens an den Universitäten Halle, Wittenberg, Jena. 1727 – 1747*, 2 vols (Halle, 1968). Brentjes, 'Anton Wilhelm Amo in Halle', in: *Mitteilungen des Instituts für Orientforschung* 15 (1969), pp. 57-76. Brentjes, *Anton Wilhelm Amo. Der schwarze Philosoph in Halle* (Leipzig, 1976). Brentjes, ed., *Der Beitrag der Völker Afrikas zur Weltkultur. Materialien einer wissenschaftlichen Arbeitstagung zu Ehren des Philosophen Anton Wilhelm Amo (1727 – 1747 in Halle, Wittenberg und Jena)* (Wissenschaftliche Beiträge der Martin-Luther-Universität Halle-Wittenberg, Series I. 1997, Nr 32.) (Halle, 1977). Brentjes, 'Anton Wilhelm Amo zwischen Frühaufklärung und Pietismus', in: *Fremde Erfahrungen. Asiaten und Afrikaner in Deutschland*, edited by Gerhard Höpp (Zentrum Moderner Orient-Studien 4.) (Berlin, 1996), pp. 29-33.

something nonsensical.[291] Beyond such jokes, the subjection of states to the rule of law and the continuing attraction of the Augustinian paradigmatic sequence of peace, war and again peace were neither fancy dreams nor dusty academic theory. They did not, it is true, prevent occurrences of war with ensuing destructions of lives and property. But they helped with the taming of the "Bellona", imposing limitations upon the deployment of military means and reducing the number of war casualties. The majority of theorists divided the law among states into a general, "necessary" part spanning the globe and the particular set of norms as the European public law (ius publicum europeum), specifically the law of treaties among states. The trading companies continued to act as sovereigns outside the European states system and applied the European law of treaties among states in other continents. The legal basis, on which treaties among states could be considered valid across continents and religions was not in need of explicit agreement, as it appaered to be laid down in the universal law of nature.[292] At least with regard to the acceptance of this legal basis, something equivalent of Wolff's theoretically conceived *civitas maxima* was empirically in existence. The *civitas maxima* seemed to render redundant efforts to impose the law among states through diplomatic pressure or even through the use of military force. The same observation applied to the right to war and the procedures for ending wars. The Augustinian paradigmatic sequence of peace, war and again peace continued to operate as a guideline for setting up peace agreements and justifications of the resort to war. The conviction was uncontested that peace had to be restored at the end of a war among the parties to the conflict. Peace could not be created anew at the end of a war through some human act, but appeared to be part of the natural condition of the human world. The concept of amnesty, which formed part of many peace agreements, even comprised, in the view of some theorists, treaties, which had been concluded in the course of the war; these agreements were to be declared null and void through the peace settlement.[293] Positive European public law diversified within the Europeans system of states and impacted upon many economic and political aspects of the relations among states. Towards the end of the eighteenth century, however, critical questions came up with regard to the complicated relationship beween positive Euroepan public law and unset general law among states. Georg Friedrich von Martens, who, more than any one else, was committed to the publication of the texts of treaties among states,[294] admitted in 1787 that European public law was no longer restricted in its application to the European states system. He pointed to the fact the "outside Europe, a free state has formed itself, which has totally adopted the tradition and customary law of the European peoples" (ausserhalb Europas sich in Amerika ein Freystaat gebildet hat, der ganz das Herkommen und das Gewohnheitsrecht der Europäischen Völker angenommen hat).[295] Martens himself thus was aware of the fact that the independence of the USA had transferred European public law to areas outside the European states system. Hence, the continental borders of the European states system were becoming threadbare.

Theorists of the law among states were fascinated by the model of machine throughout the eighteenth century. Their mechanicist image of the world allowed only modifications of some procedures within the system, but no alterations of its structure. Legal theorists as well as practicing diplomats and military professionals bought their vision of stability, even static duration, at the price of denying the possibility, let alone the requirement of transformations of the world of states, and they continued to do so, even after the recognition of the USA had manifestly transformed that world already.[296] When, during the second half of the eighteenth century, the historicity of the world became an issue of theory-making, sparking criticism of the statistical method,[297] resulting in comprehensive histories of humankind,[298] even adopted into histories of war[299] and condensing into

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[291] François Marie Arouet de Voltaire, 'Rescrit de l'Empereur de la Chine [1761]', in: Voltaire, *Œuvres*, vol. 40, edited by Adrien Jean Quentin Beuchot (Paris, 1830), pp. 307-311.

[292] Höpfner, *Naturrecht* (note 86), p. 18.

[293] Georg Friedrich von Martens, *Einleitung in das positive Völkerrecht, auf Verträge und Herkommen gegründet* (Göttingen, 1796), p. 337.

[294] Martens, *Recueil* (note 112).

[295] Martens, *Erneuerung* (note 80), p. 1.

[296] Kaunitz-Rietberg, 'Mémoire' (note 129).

[297] John Millar, *Observations Concerning the Distinctions of Ranks in Society* (London, 1771), pp. XII-XIII.

[298] Adelung, *Versuch* (note 277). Iselin, *Geschichte* (note 277). Kames, *Law Tracts* (note 277). Millar, *Observations*

the image of the world as a laboratory of fundamental change,[300] the European states system, which its intellectual constructors had seemingly designed so carefully, collapsed, as if it had been a shaky house of cards.

(note 297). Steeb, *Versuch* (note 277).

[299] Achenwall, *Vorbereitung* (note 58), p. 35.

[300] Johann Gottfried Herder, *Ideen zur Philosophie der Geschichte der Menschheit* [1784-1791], edited by Bernhard Suphan, in: Herder, *Sämmtliche Werke*, book I, chap. 3, book II, chap. 1, vol. 13 (Berlin, 1887), pp. 21, 47.