IV. The Rejection of the Natural Law Tradition and Its Effects on the Culture of Diplomacy

1. The Conflict about the Recognition of Natural Law Theories

a) Introduction

Ius naturae et gentium was a common formula in seventeenth- and eighteenth-century legal terminology.[1] It connoted the partial identity of natural law and the law among states. The identity was partial, because not all natural law was law among states and only the unset law among states was natural law. However, since the nineteenth century, an implicit question mark cast doubts upon the self-evident certainty behind the use of the conjunction "et" linking both legal fields. In contradistinction against the seventeenth and eighteenth centuries, the problem has had to be solved from the nineteenth century, how international law can be derived as the legal framework seen as overarching sovereign states. Since then, recourse to natural law as the "source" of international law has become inappropriate, as is immediately obvious to everyone taking in consideration the machinery of setting, implementing, enforcing and questioning international legal norms. Hardly a single day passes in which not one of the 194 sovereign UN member states does not enter into an agreement with another member state. Since the approval of the Statute for the International Court of Law on 13 / 16 December 1920, treaties have been formally accepted as a major category of legal "sources" for international adjudication.[2] Thousands of binding international agreement have come into existence, with some of them explicity being designed as legislative treaties, setting international legal norms, while others acquire this role through custom or by court verdicts. This is not a new situation. Already in 1908, jurist and peace activist Walther Schücking predicted that the increased juridification of relations among states by way of treaties would eventually result in "world domestic politics" (Weltinnenpolitik).[3] Since then, the number not only of treaties among states has

---

[1] To name only a few: Alberico Gentili, *Regales disputationes tres. Id est: De potestate regis absoluta. De vnione Regnorvm Britanniæ. De vi ciuium in regem semper iniusta* (London, 1605), p. 17. Joachim Georg Darjes, *Observationes ivris naturalis, socialis et gentium ad ordinem systematis svi selectae* (Jena, 1751). Darjes, *Discours über sein Natur- und Völkerrecht* (Jena, 1762). Johann Gottlieb Heineccius [Heinecke], *Elementa iuris naturae et gentium* (Halle, 1738) new edn (Venice, 1791); German version s. t.: *Grundlagen der Natur- und Völkerrechts*, edited by Christoph Bergfeld (Bibliothek des deutschen Staatsdenkens, 2) (Frankfurt, 1994)]. Samuel von Pufendorf, *De jure naturae et gentium* (Amsterdam, 1688) [reprint (Oxford and London, 1934); first published (London, 1672); newly edited by Frank Böhling (Pufendorf, Gesammelte Werke, vol. 4, parts 1. 2) (Berlin 1998)]. Johann Sigismund Stapff [praes.] and Ferdinand Sebastian von Sickingen Hohenburg [resp.], *Jus naturae et gentium*. LLD. thesis (University of Mainz, 1735). On the formula see: Ian Hunter, 'Global Justice and Regional Metaphysics. On the Critical History of the Law of Nature and Nations', in: Shaunnagh Dorsett and Ian Hunter, eds, *Law and Politics in British Colonial Thought. Transpositions of Empire* (London, 2010), pp. 11-29, at p. 13.

[2] V. G. Degan, *Sources of International Law* (Development of International Law, 27) (The Hague, Boston and London, 1997).

[3] Walther Max Adrian Schücking, 'Die Organisation der Welt', in: *Staatsrechtliche Abhandlungen. Festgabe für Paul Laband* (Tübingen, 1908), pp. 533-614, at pp. 594-595 [separately printed (Tübingen, 1908)].

exploded, but also of international institutions and organisations at global and regional levels, which, through their own norm-setting activities, have intensified the network of already existing treaty relations.

The decision to accept treaties as "sources" of international law seemed to have answered the question about the origin of international legal norms. Already in 1899, Heinrich Triepel postulated that international legal norms were the products of streamlined single state wills,[4] thereby formulating something of a juristic confession that has rarely been called into question since then. This is surprising in view of a discrepancy that renders Triepel's smooth explanantion everything but satisfactory. The main difficulty is that, if indeed all international legal norms were to flow from state wills, in the last resort on the basis of voluntarily self-obligations by states, then governments of states would not only have the freedom to decide not to enter into treaties (which was self-evident for Triepel as well), but also to break existing treaties, should the state will command such action. However, empirically, far more than 95% of all treaties among states have been honoured at all times, under all conditions, by all governments. Why has this been so? One theorist took the viewpoint of psychology and argued that one and the same state will cannot simultaneously want and and reject a treaty.[5] But this argument runs contrary to experience in that it postulates the continuity of the state will, thereby excluding changes of state wills. It also ignores empirical evidence that many treaties continue to be honoured even after state wills have changed, and that, in cases of breaches of treaties, when they do occur, governments of states come forward with comprehensive arguments in defence of their acts. But, the current treaty-making business, involving international lawyers, organisations, regional institutions, governments of sovereign states with their foreign-policy establishments, leaves little room and no time for such abstract theoretical matters.

Natural law is one of the issues of abstract theory, opaque enough to serve as a platform for criticism among exausted practitioners. If natural law is mentioned in surveys of international law at all, it usually gets debunked on the garbage heap piling up the debris of ideas of previous centuries. It counts as an odd Eurocentric construct of addlebrained intellectuals in the ivory towers of the so-called "old international law", removed from reality and seemingly beyond the confines of rational theory-making.[6] Such censuring has had its tradition. After having been taught at

---

[4] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), pp. 76, 80 [new edn (Tübingen, 1907); reprint (Aalen, 1958); French version (Paris, 1920)]. On evolution of the concept of the international legal community: Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (Münchener Universitätsschriften, Reihe der Juristischen Fakultät 159) (Munich, 2011), pp. 78-80.

[5] Georg Jellinek, *Die rechtliche Natur der Staatsverträge. Ein Beitrag zur juristischen Konstruktion des Völkerrechts* (Vienna, 1880), p. 57.

[6] The so-called "critical" historiography of international law even claims the postulate that natural law offered the "ideological" foundation for the emergence of "modern state-centered, imperialist international law". See: Hunter (note 1), p. 13. For further derogatory descriptions of natural law see, among many: Andreas von Arnauld,

universities to the middle of the nineteenth century, later nineteenth-century legal theorists regarded it as a somewhat obscene theoreme that only well experienced jurists might be able to handle with the apparently required care.[7] It has become appropriate to exclude natural law from international legal theory dominating since then, even though natural law did find a few supporters during the nineteenth and twentieth centuries.[8] Occasionally, legal norms have been approved stipulating abidance by rules displaying proximity to natural law.[9] A few more recent theorists have even pointed to the conceptual links between natural and international law, have elevated natural law to a

---

Völkerrecht (Karlsruhe, 2012), pp. 29-31. Knut Ipsen, *Völkerrecht*, third edn (Munich, 1990), pp. 11-13 [first published Munich, 1979]; fourth edn (Munich, 1999); fifth edn (Munich, 2004); sixth edn (Munich, 2014)]. Malcom N. Shaw, *International Law*, sixth edn (Cambridge, 2008), pp. 17, 25, 53-54, 112, 266 [first published (Cambridge, 1986); third edn (Cambridge, 1991); fourth edn (Cambridge, 1997); fifth edn (Cambridge, 2003; 2006)].

[7] Jellinek, *Natur* (note 5), p. 49. Leopold August Warnkönig, 'Die gegenwärtige Aufgabe der Rechtsphilosophie nach den Bedürfnissen des Lebens und der Wissenschaft', in: *Zeitschrift für die gesammte Staatswissenschaft* 7 (1851), pp. 219-281, 473-536, 662-665, at pp. 629-630. Friedrich Adolf Trendelenburg, *Naturrecht auf dem Grunde der Ethik* (Leipzig, 1860), esp. p. 582 [second edn (Leipzig, 1868)]. Clyde Eagleton, *International Government*, § 9 (New York, 1932), pp. 45-46 [second edn (New York, 1948); third edn (New York, 1957)]. For teaching of natural law in universities see: Gérard Landin, 'Europäisches Gleichgewicht contra Kosmopolitismus. Der Prinzenerzieher Svarez und seine Überlegungen zu Krieg und Frieden zwischen naturrechtlicher Theorie und vertragsrechtlicher Legitimation der preußischen Politik', in: Guido Braun, ed., *Assecuratio Pacis. Les conceptions françaises de la sûreté et de la garantie de la paix de 1618 à 1815* (Schriften der Vereinigung zur Erforschung der Neueren Geschichte e. V., 35) (Munster, 2011), pp. 321-342. 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.

[8] Diethelm Klippel 'Naturrecht als politische Theorie. Zur politischen Bedeutung des deutschen Naturrechts im 18. und 19. Jahrhundert', in: Hans Erich Bödeker, ed., *Aufklärung als Politisierung – Politisierung der Aufklärung* (Studien zum 18. Jahrhundert, 8) (Hamburg, 1987), pp. 267-293. Klippel, 'Naturrecht und Politik im Deutschland des 19. Jahrhunderts', in: Karl Graf Bellestrem, ed., *Naturrecht und Politik* (Philosophische Schriften, 8) (Berlin, 1993), pp. 27-48. Klippel, 'Naturrecht und Rechtsphilosophie in der ersten Hälfte des 19. Jahrhunderts', in: Klippel and Otto Dann, eds, *Das europäische Naturrecht im ausgehenden 18. Jahrhundert* (Studien zum 18. Jahrhundert, 16) (Hamburg, 1995), pp. 270-292. Klippel and Michael Zwanzger, 'Krieg und Frieden im Naturrecht des 18. und 19. Jahrhunderts', in: Peter Gottwald, ed., *Festschrift für Dieter Henrich zum 70. Geburtstag* (Bielefeld, 2000), pp. 371-384. Klippel and Zwanzger, 'Naturrecht als Friedensordnung', in: Heinrich Rüping, ed., *Die Hallesche Schule des Naturrechts* (Frankfurt, 2002), pp. 95-118. Klippel, ed., *Naturrecht und Staat* (Schriften des Historischen Kollegs, Kolloquien 57) (Munich, 2006).

[9] Francis Lieber, 'Lieber Code: = General Order Nr 100, 24. April 1863', in: Dietrich Schindler and Jiří Toman, eds, *The Laws of Armed Conflicts*, third edn (Alphen aan den Rijn, 1988), pp. 3-23 [first published (Leiden, 1973); second edn (Alphen aan den Rijn, 1981); fourth edn (Leiden, 2004); also in: http://www.icrc.org/ihist/FULL/100?OpenDocument]. Under nr 4, the code obliged US armed forces to observe principles of justice, honour and humanity. Sometimes, reference is made to the so-called Martens clause in the preambleto the Hague Convention on the Law of War on Land of 1899, which calls for respect for the commands of humaneness and the customs of 'civilised' nations as principles innate in the unwritten law of war. See: Friedrich Frommhold [Fyodor Fyodorovič] Martens, [Address, 11th Meeting, 2nd Committee, 2nd Subcommittee, 20 June 1899], in: *Conférence internationale de la paix. La Haye, 13 Mai – 29 Juillet 1899*, vol. 3 (The Hague,1907), pp. 120-121 [also in: Arthur Clement Guillaume Marie Eyffinger, *The 1899 Hague Peace Conference. "The Parliament of Man, the Federation of the World"* (The Hague, 2000), p. 379]. According to this clause, parties at war stood "sous la sauvegarde et sous l'empire des principes du droit des gens" (CTS [= Clive Parry, ed., *The Consolidated Treaty Series*, 231 vols (Dobbs Ferry, 1969-1981)], vol. 187, p. 431), which, as unset law, can be considered to flow from natural law. For this interpretation see: Hanspeter Neuhold, Waldemar Hummer and Christoph Schreuer, *Österreichisches Handbuch des Völkerrechts*, vol. 1 (Vienna, 1997), p. 110, Rz 561.

benchmark for the justice of positive law and have pointed to defects of theories that admit only positive sources of international law.[10]

It is the aim of the following notes to establish not only the possibility of but also the need for the restoration of the links between natural and international law by way of an examination of the history of legal theory.

b) Definitions

The German word *Völkerrecht* is a loan formation from Latin *ius gentium*, on record in German since the seventeenth century.[11] Together with its parallel in French, *droit des gens*, it represents two concepts different in range and partly overlapping, without having ever been identical. The original Latin phrase could comprise the law common to all groups together with the law applicable to guests and foreigners in the city of Rome. These meanings differed substantially from the meaning *Völkerrecht* and *droit des gens* have carried since the seventeenth century.[12] In Antiquity, these meanings were encapsulated in different fomulae, most frequently that of the *ius belli ac pacis*. Cicero, for one, derived the *ius belli ac pacis* explicitly from natural law as the given, unset set of legal rules that he described as the law of reason.[13] This theoretical position, which may have been taken already in pre-Republican times, merged with Christianity and, in the Christian context,

---

[10] Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', in: *Süddeutsche Juristen-Zeitung* 1 (1946), pp. 105-108 [reprinted in: Radbruch, *Gesamtausgabe*, edited by Winfried Hassemer, vol. 3 (Heidelberg, 1993), pp. 83-93; also in: Radbruch, *Rechtsphilosophie*, sixth edn, edited by Erik Wolf (Stuttgart, 1963), pp. 347-357; also in: Radbruch, *Rechtsphilosophie*. Studienausgabe, edited by Ralf Dreier and Stanley L. Paulson, second edn (Heidelberg, 2003), pp. 211-219; first edn of this edn (Heidelberg, 1998)]. Alfred Verdross and Heribert Franz Köck, 'Natural Law. The Tradition of Universal Reason', in: Ronald Saint John Macdonald and Douglas M. Johnston, eds, *The Structure and Process of International Law* (Development of International Law, 6) (The Hague, Boston and Lancaster, 1983), pp. 17-50, at p. 42. Edward McWhinney, 'The Need for a New General Theory of International Law', in: *Canadian Yearbook of International Law* 23 (1985), pp. 311-324. Jan Klabbers, *International Law* (Cambridge, 2013). Yōrām Dinštein, *War, Aggression and Self-Defence* (Cambridge, 1988), p. 172 [first edn (Cambridge, 1994); third edn (Cambridge, 2001); fourth edn (Cambridge, 2005); fifth edn (Cambridge, 2012)]. Andreas Fischer-Lescano and Gunther Teubner, '"Regime-Collisions". The Vain Search for Legal Unity in the Fragmentation of Global Law', in: *Michigan Journal of International Law* 25 (2004), pp. 999-1046, at p. 1010, demand the abandoning of "the assumption that global law exclusively derives its validity from processes of State law-making and from state sanctions, where these derive from State internal sources of from officially sanctioned international sources of law.", and request recognition for a "concept of law to encompass norms lying beyond the legal sources of Nation-State and international law and, at the same time, to reformulate our concept of the regime."

[11] Richard Zouche, *Allgemeines Völcker-Recht* (Frankfurt, 1666) [first published s. t.: *Juris et judicii fecialis sive juris inter gentes et quaestionum de eodem explicatio, qua quae ad pacem et bellum inter diversos principes aut populos spectant, ex praecipuis historico-jure peritis exhibentur* (Leiden, 1651); reprint, edited by Thomas Erskine Holland (Washington, 1911); French version, edited by Dominique Gaurier (Cahiers de l'Institut d'Anthropologie Juridique, 21) (Limoges, 2009)]. Zouche already used different words for the Roman republican *ius gentium*, the law in force for Non-Romans in Rome, and the *ius inter gentes* as the law valid in relations among states.

[12] For a survey see: Max Kaser, *Ius gentium* (Forschungen zum Römischen Recht, 40) (Cologne, Weimar and Vienna, 1993).

[13] Marcus Tullius Cicero, *De re publica*, book III, chap.29, nr 107-108 [various edns].

resulted in the equation of natural law with divine or Mosaic law. At around 1600, the formula *ius inter gentes*, until then a rival to *ius gentium*, took the new meaning of a framework of norms valid among states, including the specific law emerging from treaties between states.[14] The *ius belli ac pacis* that had, until then, always been understood as unset, continued to form part of natural law jointly with the *ius gentium*. The dualism of specific positive *ius inter gentes* and unset general *ius gentium* (and *ius belli ac pacis*) established the basis for the theory of the law among states and the law of war during the seventeenth century, as proposed mainly by Grotius and Pufendorf. The latter constructed the *ius gentium* as unset law above states, from which he derived the natural-law obligation of rulers to provide security for the ruled, an obligation that he identified with the obligation to preserve peace.[15] In sharp rejection of Hobbes's political theory and against seventeenth-century deniers of the law among states, Pufendorf also insisted that the state of nature was under the rule of law.[16]

In the course of the eighteenth century, the concepts behind the words *ius inter gentes* and *ius gentium* drifted further apart. Two schools of thought came into existence. On the one side, theorists such as Geneva jurist Jean-Jacques Burlamaqui[17] and Halle jurist Johann Gottlieb Heinecke took[18] the *ius inter gentes* to be natural law and subsumed the *ius inter gentes* under unset law. On the other side, theorists such as Göttingen statistician Gottfried Achenwall positioned the *ius inter gentes* as a legal field of its own, juxtaposing it to unset natural law, which appeared to them to hedge the "complete freedom" (völlige Freyheit)[19] of political communities. The most influential member of this group was Christian Wolff at Halle, who derived from the natural law his *civitas maxima* extending across the entire globe as the legal "source" for state sovereignty as well as for the *ius belli ac pacis*.[20]

In 1789, Jeremy Bentham first called attention to his neologism "International Law", which he

---

[14] Francisco, Suárez, SJ, *Ausgewählte Texte zum Völkerrecht*, book II, chap. 19, nr 8, edited byJosef Soder (Die Klassiker des Völkerrechts, 4) (Tübingen, 1965), p. 64.

[15] Pufendorf, *De iure* (note 1), book VII, chap. 9, nr 3, p. 766.

[16] Ibid., book II, chap. 2, nr 3, pp. 108-109. Thomas Hobbes, *Leviathan*, part I, chap. 13 [(London, 1651)], edited by Crawford Brough Macpherson (Harmondsworth, 1981); also edited by Richard Tuck (Cambridge, 1991), pp. 87-88. Baruch Spinoza, *Tractatus theologico-politicus* [1670], chap. XVI, edited by Carl Gebhardt, Spinoza, *Opera*, vol. 3 (Heidelberg, 1925), pp. 189-200 [reprint of the edn by Gebhardt (Heidelberg, 1972); newly edited by Günter Gawlick and Friedrich Niewöhner, Spinoza, *Opera*, vol. 1 (Darmstadt, 2008)].

[17] Jean Jacques Burlamaqui, *The Principles of Natural and Political Law*, book II, chap. 6, fourth edn (Boston, 1792), p. 120 [first published (Amsterdam, 1751); further edns (Geneva, 1762); (Paris, 1820-1821)].

[18] Heinecke, *Elementa* (note 1), p. 315.

[19] Leopold Friedrich Fredersdorf, *System des Rechts der Natur auf bürgerliche Gesellschaften, Gesetzgebung und das Völkerrecht angewandt*, §§ 323, 331-334 (Brunswick, 1790), pp. 535, 541-554. Gottfried Achenwall, *Juris naturalis pars posterior*, chap. III (Göttingen, 1763), pp. 215-222.

[20] Christian Wolff, *Jus Gentium methodo scientifico pertractatvm*, §§ 11-12, 16 (Halle, 1749), pp. 9-10, 12 [reprint, edited by Marcel Thomann (Wolff, Gesammelte Werke, Section B, vol. 25) (Hildesheim and New York, 1972)].

placed above states and defined it as the sole type of set or customary law capable of regulating the behaviour of governments of states. Bentham's new formula disseminated into other languages, first into Spanish and later, though sluggishly, into German as well.[21] As Bentham and most nineteenth- and twentieth-century theorists no longer considered natural law as a "source" of any law above states, the problem of the derivation of "international law" came up again. Nineteenth-century jurists became used to the concept of the "legal source" as the instance or the non-institutional force that appeared to produce the law. Nineteenth-century positivists, following general legal theory,[22] took the postulate as their starting point that legal norms had to be combined into "frameworks of legal order" (Rechtsordnungen) and that a "legal community" (Rechtsgemeinschaft) would have to exist as the body of actors generating the "framework". For "international law", they similarly postulated an "international legal community" in charge of establishing and promoting an international "framework of legal order".[23] Through that postulate, the question of the "sources" of "international law" (in Bentham's sense) shifted from to the question under which conditions this "legal community" could legislate the law. All theorists, making statements relevant to this question, considered the "international legal community" to be identical with the "commuity of states".[24] Because states as sovereigns could not be subject to the will of any other government or ruling institution and could not be constrained in the freedom of exercising their wills, the postulated "international legal community" could only be imagined as resulting from the state wills of its members. This "community of states", often termed "family of nations", thus was limited to states in Europe and the European overseas settlement colonies. However, that law, which this exclusionist "international legal community" was held to legislate, was expected to become valid throughout the globe. The law that was being conceived as international positive law was thus explicitly shaped as the house law of a European club of states.[25]

---

[21] Jeremy Bentham, *Principles of International Law* [1786 – 1789], in: *The Works of Jeremy Bentham*, edited by John Bowring, vol. 2 (London, 1838), pp. 535-560 [reprint (New York, 1962)]. On the dissemination of this term in German-speaking areas see: Annemarie Niemeyer, 'Theodor Niemeyer', in: *Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel* (Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel, 51) (Hamburg, 1965), pp. 158-173.

[22] Georg Friedrich Puchta, *Gewohnheitsrecht*, 2 vols (Erlangen, 1828-1837) [reprint (Darmstadt, 1965)]. Puchta, [Review of: Georg Beseler, *Volksrecht und Juristenrecht* (1843)], in: *Jahrbücher für wissenschaftliche Kritik* 1 (1844), col. 1-30.

[23] Triepel, *Völkerrecht* (note 4), pp. 80-81.

[24] Karl Magnus Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (Tartu, 1876), pp. 19, 39, 77. Jellinek, *Natur* (note 5), p. 48. Triepel, *Völkerrecht* (note 4), pp. 80-81.

[25] Lassa Francis Oppenheim, *International Law*, § 94, vol. 1 (London and New York, 1905), pp. 139-140 [second edn (London and New York, 1912); third edn, edited by Ronald F. Roxburgh (London and New York, 1920-1921); fourth edn, edited by Arnold Duncan McNair (London and New York, 1926); fifth edn, edited by Hersch Lauterpacht (London and New York, 1935); sixth edn, edited by Hersch Lauterpacht (London and New York, 1944); seventh edn, edited by Hersch Lauterpacht (London und New York, 1948; 1952-1953); eighth edn, edited by Hersch Lauterpacht (London and New York, 1955; 1957; 1963); ninth edn, edited by Robert Yewdall Jennings and Andrew Watts (Harlow, 1992; 1996; 2008)]. John Westlake, *International Law*, vol. 2 (Cambridge, 1907), p. 59 [second edn (Cambridge, 1913); Microfiche edn (Zug, 1982)].

In specific respects, various views about the modality of the genesis of the European club of states were concurring, such as the claim that the club had come into existence through the unification of state wills,[26] or the argument that some "community of intercourse" had become established among all states linked to one another through legal norms.[27] Likewise, some theorists held the belief that "international law" was state law designed to impact on the outside beyond state borders and had become unified into a "common will" of the states forming the "international legal community".[28] In all these projections, the fundamental question, however, remained unanswered, where the newly conceived "international law" could receive its binding force from. Positivists were unable to derive, in the highest instance, the "basic norm" *pacta sunt servanda*. For positivists, like jurists in general, took the view that all legal norms had to be derived from a higher legal norm, with the eventual consequence that highest legal norms could not be derived any more.

c)   The Relevance of the Question about the Sources of International Law

The positivist theory of the derivation of international law was based on the assumption that international law, in itself, did not form an ordered legal system and could not exist without a "frameworld of legal order".[29] Such "legal orders" appeared to be evident for civil and criminal law in accordance with state law, but were not to be taken for granted for international law. Hence, international law appeared to be diffuse, heterogeneous and difficult to grasp.[30] By consequence "legal orders" in the international arena could not be understood as derivable from some uniform causal logic; instead they seemed to have resulted contingently from events. Hence, positivist international legal theory historicised the concept of "legal sources" through recourse to narrativity and did so long before narrativism became fashionable.[31] In its historical dimension, international law has thus ranked as defective compared to state law.[32]

However, this position is based on assumptions that are far from obvious, given that it equates the

---

[26] Bergbohm, *Staatsverträge* (note 25), p. 77.

[27] Jellinek, *Natur* (note 5), pp. 48-49.

[28] Triepel, *Völkerrecht* (note 4), pp. 76, 80.

[29] Wolfgang Preiser, 'Über die Ursprünge des modernen Völkerrechts', in: *Internationalrechtliche und staatsrechtliche Abhandlungen. Festschrift für Walter Schätzel zum 70. Geburtstag* (Düsseldorf, 1960), pp. 373-387 [reprinted in: Preiser, *Macht und Norm in der Völkerrechtsgeschichte*, edited by Klaus Lüderssen and Karl-Heinz Ziegler (Baden-Baden, 1978), pp. 9-26]. Preiser, *Die Völkerrechtsgeschichte. Ihre Aufgaben und ihre Methode* (Sitzungsberichte der Wissenschaftlichen Gesellschaft der Johann-Wolfgang-Goethe-Universität Frankfurt/Main, 1963, nr 2) (Wiesbaden, 1963).

[30] Preiser, *Völkerrechtsgeschichte* (note 29), pp. 5, 11.

[31] Arthur Coleman Danto, *Analytical Philosophy of History* (Cambridge, 1968).

[32] Michael Stolleis, 'Zur Ideengeschichte des Völkerrechts. 1870 – 1939', in: Lutz Raphael and Heinz-Elmar Tenorth, eds, *Ideen als gesellschaftliche Gestaltungskraft im Europa der Neuzeit. Beiträge für eine erneuerte Geistesgeschichte* (Munich, 2006), pp. 161-171, at p. 168.

contingency of the unsatisfactory current condition of research in the history of international law with the significance of the matter itself. But the very fact that research in the history of international law has not been thriving field of study, when compared to other legal fields, does not justify the verdict that international law should be given a low rank among the legal fields. By contrast, the importance of international law emerges already from the logic of peace agreements as war-ending treaties, for they feature stipulations under international law that must be implemented within states under the threat of the use of military force, even when they are incompatible with state law and run contrary to the interests of affected population groups. This aspect of peace agreements is usually given with those many agreements, which enact the transformation of a military imbalance between the winner and the loser of a war into a legal framework, thereby perpetualising the imbalance beyond the end of a war. War-ending treaties of this kind are *ex definitione* unequal, because most of their stipulations are non-reciprocal. Moreover, they come into existence under the condition, being a mandatory requirement for treaties between states under European public law of treaties, that partners to treaties have recognised each other as sovereigns, thereby can legitimately implement the treaties agreed upon and have voluntarily accepted the agreement. There is no legitimate reason for doubts in the fundamental justice of this procedure. However, the format of peace treaties as war-ending agreements was applied in other contexts, in which the justic of this procedure has been far from given.

In these contexts, positivist international law of European provenance has had its own impact beyond the confines of Europe, the Americas and the "family of nations". Numerous agreements were made out between European and the US governments on the one side, governments in Africa, West, South, Southeast, East Asia and the South Pacific on the other and drew on the European public law of treaties. As a rule, they were unequal, although the vast majority of them were no war-ending treaties, thereby resulting not from a military decision in the course of a war but from political dictates enforced under diplomatic pressure. European and the US governments usually insisted upon the application of the European public law of treaties without making explicit some of the principles that stood behind the stipulations, notably the "basic norm" *pacta sunt servanda* and the demand for the use of literacy as the venue of communicating the texts of the agreements. In retrospect, the presumption of the justice of these treaties,[33] in contradistinction against the war-ending treaties, has become subject to serious doubts to the extent that these agreement cannot be regarded as acceptable in principled terms. Nevertheless, these treaties were enforced as positive law in territories that had come under colonial rule to the disadvantage of the victims of colonialism, even though the European and the US governments often exempted themselves from their own treaty

---

[33] Radbruch, 'Unrecht' (note 10).

obligations.[34] Hence, it is incontestable that the superimposition of international law upon victims of colonial rule has had disadvantageous consequence for the general acceptance of international law in the world at large.[35]

However, positivism is as incapable of justifying the effects of international upon state law, as it lacks reasoning how it "can on its own justify the validity of laws" (aus eigener Kraft die Geltung von Gesetzen): "it believes to have already proved the validity of a law, when that law has possessed the power of coming into force. But power may perhaps serve as the foundation for a must, but never for the should." (er glaubt, die Geltung eines Gesetzes schon damit erwiesen zu haben, daß es die Macht besessen hat, sich durchzusetzen. Aber auf Macht läßt sich vielleicht ein Müssen, aber niemals ein Sollen oder ein Gelten begründen.)[36] The same applies for treaties among states, the validity of which cannot be established by force, but only through law above the laws. Since the middle of the nineteenth century, positivists have adhered to the assumption that such law above the laws can be derived from the unification of state wills, drawn together into the "international legal community". They regarded the genesis of this "international legal commuity" as the outcome of an extralegal historical process. Yet, this assumption does ot provide an answer to the question why which population groups have become members of the "international legal community" and which have not been coopted into it. Positivists usually take as a given the postulate that population groups united in the "international legal community" share some common cultural identity, seemingly tied to a nation or a group or apparently similar nations. In committing themselves to this assumption, positivist legal theorists has underwritten part of the political ideology of nationalism, which, among others, formed the backdrop for Georg Friedrich Puchta's claim that customary law must be traceable to a nation as a "legal community".[37] In the perception of international legal theorists, the "family of nations" also served as the generator of customary law.[38] It featured as a legal term in the Paris peace agreement of 1856, which has often been interpreted as an act of grace admitting the Ottoman Turkish Empire into the club of states and subjected the empire to the club's house law.[39]

---

[34] Harald Kleinschmidt, *Geschichte des Völkerrechts in Krieg und Frieden* (Tübingen, 2013), pp. 350-357.

[35] For studies see: Georges M. Abi-Saab, 'The Third World and the Future of the International Legal Order', in: *Revue égyptienne de droit international* 29 (1973), pp. 27-66. Bernard Victor Aloysius Röling, *International Law in an Expanded World* (Amsterdam, 1960), pp. 74, 88. S. Prakash Sinha, *New Nations and the Law of Nations* (Leiden, 1967). Okon Udokang, 'The Role of the New States in International Law', in: *Archiv für Völkerrecht* 15 (1972), pp. 145-166.

[36] Radbruch, 'Unrecht' (note 10), S. 215.

[37] Puchta, *Gewohnheitsrecht* (note 22).

[38] Oppenheim, *Law* (note 25), vol. 1, § 226, p. 281.

[39] Treaty France – Russia – Sardinia – Turkey – UK, Paris, 30 March 1856, in: *CTS*, vol. 114, pp. 410-420. On the treaty see: Kleinschmidt, *Geschichte* (note 35), pp. 299-300. The frequently stated contention that Turkey should have been accepted into "European international law" through the treaty [e. g.: Hedley Bull, *The Anarchical Society* (London, 1977), pp. 13-14; second edn, edited byStanley Hoffmann (Basingstoke and New York, 1995); third edn, edited by Andrew Hurrell (Basingstoke and New York, 2002)], cannot be confirmed from the text of the treaty and stands against corrollary material, confirming that, at the time, the Turkish government took the view

At the turn towards the twentieth century, Japan was coopted into the club, but not through a treaty as an act of grace, but by way of the evaluation of the military results of the Sino-Japanese War of 1895/95 as a kind of entrance ticket.[40] The "family of nations" claimed the "civilisation" of a state as the prime entitlement for membership, thereby classing "civilisation" as a legal term. Members of the "family of nations" retained for themselves the privilege of authoritatively deciding whether or not a state had accomplished "civilisation", the verdict not being adjudicable.[41] States ranked as "civilised", when their forms of government and "frameworks of legal order" appeared to be compatible with those current in Europe and North America.

The conception of international law as the house law of the club of the "family of nations" was thus closely related with the brisk rejection of natural law. According to positivist doctrine, the *societas* of the mutually interconnected states was not that of the freetraders, who sought to portray their demand for the "opening" of states for "intercourse" as legitimate. But the conception displayed similiarity to a political argument supported by the international peace movement, according to which states would not have the option of avoiding the rules of "world domestic policy", once they had entered into intercourse with one another. Jurist Georg Jellinek, the leading international legal theorist at the end of the nineteenth century, for one, thus anticipated the political argumentation of the international peace movement of the subsequent generation. Put differently: Once states had been "opened", they, according to Jellinek, had already come under the sway of international law. Jellinek apparently noted the proximity, in which his claims might be placed towards eighteenth-century natural law theory, specifically Christian Wolff's. This was so, because Jellinek's *societas* might appear to be identifable with Wolff's *civitas maxima*. Moreover, Jellinek used the word "nature" in an argument aimed at the derivation of the legal bondedness of state wills. Before it even arose, he already took an explicit stance against the misunderstanding that he was a natural law theorist, as misunderstanding, which he regarded as possible without falling in his responsibility. Seeking to distance himself from natural law theory, Jellinek argued that this thoery had been based on metaphysical, somewhat wooden mechanisms seemingly capable, as external agents, of constraining decision-making capabilites of governments of states. By contrast, he observed, the

---

that is was respecting international law.

[40] Alexander Freiherr von Siebold, *Der Eintritt Japans in das europäische Völkerrecht* (Berlin, 1900). Sakuei [Sakuyé] Takahashi, 'The Application of International Law during the China-Japanese War', in: *Law Quarterly Review* 14 (1898), pp. 405-415. Takahashi, ed., *Cases on International Law during the Chino-Japanese War. With a Preface by Thomas Erskine Holland and an Introduction by John Westlake* (Cambridge, 1899) [German version (Munich, 1900)]. Takahashi, 'Meiji jidai ni okeru kokusaihō kenkyū no hattatsu', in: *Hōgaku kyōkai zasshi*, vol. 30, nr 10 (1912), pp. 33-47, vol. 31, nr 3 (1913), pp. 47-54.

[41] For example seel: Georg Jellinek, 'China und das Völkerrecht', in: Jellinek, *Ausgewählte Schriften*, vol. 2 (Berlin, 1911), pp. 487-495 [reprint (Aalen, 1970); first published in: *Deutsche Juristen-Zeitung* (1900), pp. 401-404]. On this text see: Harald Kleinschmidt, *Diskriminierung durch Vertrag und Krieg* (Historische Zeitschrift, Beiheft 59) (Munich, 2013).

apparently given empirical "objective characteristics of international life" (objectiven Merkmale der internationalen Lebensverhältnisse) could not have "legal nature independently from state wills" (unabhängig vom Staatswillen überhaupt keine rechtliche Natur), but were, "as merely imagined, purely potential relations between state and state, empty barns, receiving flesh and blood, life and movement, only through the creative wills of the state" (als nur gedachte, als rein potentielle Beziehungen von Staat zu Staat leere Scheunen, die Fleisch und Blut, Leben und Bewegung erst durch den schöpferischen Willen des Staats erhalten).[42] Positivists thus reinterpretetd natural law theory in the context of nineteenth-century biologism. As they described the state in accordance with the model of the living body, the machine model, informing eighteenth-century natural law doctrine, was bound to offend them. Nevertheless, they continued to use the prime assumption, informing natural law theory, that some force, derived from reason and effectively regulating relations among states, alone could legally bind state wills, and adduced this assumption as the sole platform solliciting all legislative activities of state wills. And yet, against Jellinek's plea, the use of the word "nature" of "state lives" seemed have "come quite close" to the foundation of international law in natural law theory, in the perception of theorists at the turn towards the twentieth century. These theorists then took the critical position that Jellinek's rhetoric was "surely something no less questionable" (etwas sicherlich nicht minder bedenkliches) than the postulate that there was some power above states capable of enforcing the law above them.[43] In positivist perception, then, the shere obscenity of natural law theory seems to have resulted not just from the theory allowing the formation of legal norms without human activity, but even demanding the recognition of the need that the making of the highest legal norms should be placed outside the realm of human action. The latter statement includes the claim that natural legal norms should be accepted as valid for humankind as such and that they should not be subject to political and military decisions. Hence, positivism could narratively describe the general enforcement of international legal norms by way of the global expansion of the "family of nations", but it could not provide a causal explanation. By consequence, the "source" precisely of the highest legal norms remained unspecified in positivist legal theory.

This statement mainly applies to three legal norms, first the duty, explicitly regulated first in the Vienna Convention on the Law of Treaties of 1969, that treaties among states should be laid down in writing,[44] the "basic norm" *pacta sunt servanda*, which still has not been positively set, and the principle of the mutual recognition of the sovereign legal equality of states as UN member-states with subjecthood under international law, according to the UN Charter (Art. 2). The duty to lay

---

[42] Jellinek, *Natur* (note 5), p. 49.
[43] Triepel, *Völkerrecht* (note 4), p. 80-81.
[44] The Vienna Convention on the Law of Treaties, 23 May 1969, edited. in: Olivier Coxton and Pierre Klein, *The Vienna Conventions on the Law of Treaties*, 2 vols (Oxford, 2011).

down agreements in writing came up as customary law within the *ius Europeum publicum* as part of treaty formularies, of which some parts have formed a tradition going back to the Ancient Near East. The duty, initially applying to the Mediterranean world alone, was expanded to other parts of the world in the course of the seventeenth and eighteenth centuries, even though no binding consensus about the necessity of fulfilling that duty had then been reached,[45] and was further expanded to Africa and the South Pacific from the late eighteenth century.[46] In these cases, the use of writing in treaty-making was imposed as part of the European treaty-making practice was was not based on consensus. The European origin of the practice of writing down agreements between states is still recognisable from the use of European features of the treaty formulary on the side of the treaty partners of European and North American governments. This procedure of superimposing European aspects of the treaty formulary carried with it so much more significance as it coincided with the enforcement of the regularly implicit clausula that what had not been written down by the letter into a treaty, had not been agreed upon between the parties. In formal terms, the agreements followed the demand of the recognition of the legal equality of sovereign contracting parties, while the inequality of most treaty stipulations in material terms became explicit in the inclusion into the treaty texts of stipulations that mainly and unequally awarded rights to the European and North American parties, duties to their counterparts in Africa, West, South, Southeast and East Asia as well as the South Pacific. Hence, the obligation to lay down treaties in writing, bereaved partners to European and North American governments from the capability of unilaterally remedying treaty clauses, once these clauses had been found to be discriminating against states in Africa, West, South, Southeast and East Asia as well as the South Pacific. As a rule, governments of these states understood this procedure as acts of injustice forced upon them.[47]

---

[45] Treaty Ambon – Dutch East india Company (VOC), February 1605, in: Jan Ernst Heeres, ed., *Corpus diplomaticum Neerlando-Indicum*, part 1 (Bijdragen tot de Taal-, Land- en Volkenkunde van Nederlandsch-Indië, 87) (The Hague, 1931), pp. 31-33. Treaty Dutch East India Company (VOC) – Solor, 7 September 1618, in: ibid., pp. 138-142. Treaty Mapuche – Spain, 6 January 1641, in: José de Antonio Abreu Bertodano, ed., *Colección de tratados de paz, alianza, neutralidad, garantia, protección, tregua, mediación, reglamento de limites, comercio, navegación etc.*, vol. 3 (Madrid, 1740), p. 416 [not transmitted in the format of a diploma, first printed in: Alonso de Ovalle, *Histórica relación del reyno de Chile*, book VII, chap. IX (Rome, 1646), p. 309]. Treaty Iroquois – UK, Fort Stanwix, 22 October 1784, in: Barbara Graymont, *The Iroquois in the American Revolution* (Syracuse, 1972), pp. 297-298. Treaty Cherokee – USA, Hopewell, 28 November 1785, in: *CTS*, vol. 49, pp. 443-446. Treaty Choctaw – USA, Hopewell, 3 January 1786, in: *CTS*, vol. 49, pp. 451-456. Treaty Chicksaw – USA, Hopewell, 10 January 1786, in: *CTS*, vol. 49, pp. 457-459. Contrary to these easily accessible records, historian Christoph Marx could, as late as in 2008, rank the Iroquois among "stateless societies", among whom, purportedly, "rule and authority" were unknown. See: Christoph Marx, 'Barbarei und Zivilisation. Europa und die staatenlosen Gesellschaften', in: *Themenportal Europäische Geschichte* (2008), s. p. [http://www.europa.clio-online.de/site/lang-de/ ItemID_280/mid_11428/40208214/default.aspx].

[46] Treaty Ashanti – UK, Kumasi, 7 September 1817, in: *CTS*, vol. 68, pp. 5-7. Treaty North Bulloms (Sierra Leone) – UK, 2 August 1824, in: *CTS*, vol. 74, pp. 389-393. Treaty France – Tahiti, 4 September 1838, in: *CTS*, vol. 88, pp. 110.

[47] For details see: Kleinschmidt, *Diskriminierung* (note 41), pp. 151-168, on Ashanti. Kleinschmidt, *Legitimität, Frieden, Völkerrecht* (Beiträge zur Politischen Wissenschaft, 157) (Berlin, 2010), pp. 210-286, on Japan.

In connection with the obligation to lay down international legal agreements in writing, the simultaneous enforcement of the "basic norm" *pacta sunt servanda* added to the grievances that partners of the European and North American governments had. *Pacta sunt servanda*, which was often enforced on the European and North American side under the threat of the use of military force, even though it was nowhere explicitly stated, met with no objection or resistance on principal terms. However, its enforcement, in conjunction with the principle of layiong down agreements in writing, entailed the consequence that the treaty partners to the European and North American side saw themselves compelled to apply unequal stipulations that were manifestly disadvantageous to populations under their control, and to do so even under conditions that ran contrary domestic law in their states. In not a few cases, the lack of compatibility between positive treaty law and domestic customary law on the side of the treaty partners of the European and North American side, resulted in internal conflicts that could turn violent, thereby destabilise and even delegitimise state governments, eventually boosting legal insecurity and revolutionary change, as in Ashanti, China, Fiji, Japan, to name only a few. For states outside the the "family of nations", nternational law as the house law of that club of states not only had the sad impication of substantially delegitimising international law. Even more importantly, in the perception of European and North American governments, it appeared to legitimise the use of military force against resistance, with which governments of states in Africa, West, South, Southeast and East Asia as well as the South Pacific sough to act against existing unequal treaties, but were excluded from right of resistance against unjust legal norms under the pretense that they, in the perception of European and North American governments, were brandmarked as "uncivilised" or even "savage" and could not be party to norms enshrined in positive law of war.[48]

The third legal norm, that is, the principle of the legal equality of treaty partners, was the basic condition for the entire application of the European public law of treaties. This was so, because, from the early nineteenth century, this principle boosted recognition of the demand that only states as sovereigns could enter into agreements under international law.[49] Also unequal treaties, even in their extreme form of treaties of cession, operated under the condition that the signatory parties were

---

[48] Kleinschmidt, *Geschichte* (note 34), pp. 365-366.

[49] Theodor Anton Heinrich von Schmalz, *Das europäische Völkerrecht* (Berlin, 1817) [reprint (Frankfurt, 1970)]. Julius Schmelzing, *Systematischer Grundriß des praktischen europäischen Völker-Rechtes*, vol. 1 (Rudolstadt, 1818). Henry Wheaton, *Elements of International Law*, English edn, third edn, edited by Alexander Charles Boyd (London, 1889) [first published (London and Philadelphia, 1836); third edn (Philadelphia, 1846); new edn, edited by William Beach Lawrence (Boston, 1855); second edn of the edn by Lawrence (Boston and London, 1863); eighth edn, edited by Richard Henry Dana (Boston and London, 1866); new English edn, edited by Alexander Charles Boyd (London, 1878); second edn of the edn by Boyd (London, 1880); third edn of the edn by Boyd (London, 1889); fourth English edn, edited by James Beresford Atlay (London, 1904); fifth English edn, edited by Coleman Phillipsen (London, 1916); sixth English edn, edited by Arthur Berriedale Keith (London, 1929); reprint of the original edn (New York, 1972); reprint of the edn by Dana, edited by George Crafton Wilson (Oxford, 1936); reprint of this edn (New York, 1972); reprint of the edn by Dana (New York, 1991)].

recognising their legal equality as sovereigns, because this was the prime condition under which treaties could be regarded as implementable. As late as in 1832, the principle informed the US Supreme Court decision in a case, in which the state of Cherokee, then on the territory of the US federal state of Georgia, was recognised as a sovereign and credited with having received its sovereignty from natural conditions, that is, not by derivation through an act of grace by another government. The Court based its decision on the several treaties that the Cherkoee had concluded with the US government between 1785 and 1816.[50] The same logic applied to the many treaties under international law that came into existence between African and European governments in the course of the nineteenth century.[51] As most of these treaties were written out indefinitely, they remained valid as long as they were neither scapped nor replaced by new agreements. For example, the British governments concluded several treaties with the Kingdom of Bonny between 1837 and 1884, thereby recognising Bonny as a sovereign state, which is currently a local municipality in Nigeria.[52] A militant movement, which has demanded independence of Bonny from Nigeria since 2012, is pointing to the 1884 treaty, which has remained in force throughout the period of British colonial rule with the consequence that, in the view of the movement, Bonny has remained in existence as a state.[53]

Hence, colonial rule was irreconcilable with the principles of European public law of treaties among states. The very fact that European and North American governments, as a rule, did not suspend existing treaties with states that had come under their colonial domination, even though the interpreted them to their own advantage or simply ignored and broke them, strengthened mistrust in international law among the victims of colonial rule und enforced their readiness for military resistance. Positivist international legal theorists, by not only ignoring these negative consequences for the legitimacy of international law in the world at large, but even explicitly justifying the use of international law as the house lawe of the "family of nations" by recourse to the formulae of "civilisation", turned themselves into intellectual supporters of colonialism. In summary, the

---

[50] USA, Supreme Court; Samuel Arthur Webster vs State of Georgia, 31. U. S. (15 Peters) 15. 1832, Januar 1832 [http:// caselaw.lp.findlaw.com/scripts/getca].

[51] Edward Hertslet, *The Map of Africa by Treaty*, third edn (London, 1909) [first published (London, 1895); reprint of the third edn (London, 1967)].

[52] Treaty Bonny – UK, 25 January 1836, in: Gwilym Iwan Jones, *The Trading States of the Oil Rivers. A Study in Political Development in Eastern Nigeria* (London, Ibadan and Accra, 1963), pp. 221-222 [reprints (London, 1970); (Hamburg and London, 2001)]; also in: *CTS*, vol. 86, pp. 420-423. Treaty Bonny – UK, 21 November 1848, in: *CTS*, vol. 102, pp. 412-413. Treaty New Calabar/Bonny – UK, 2 / 3 October 1850, in: *CTS*, vol. 104, pp. 319-325 [also in: Jones (as above), pp. 222-225]. Treaty Bonny – UK, 23 January 1854, in: Jones (as above), pp. 225-227. Treaty Bonny – UK, 12 / 15 September 1855, in: *CTS*, vol. 113, p. 396. Treaty Bonny – UK, 20 January 1869, in: Jones (as above), pp. 232-233. Treaty Bonny/Opobo – UK, 2 / 3 January 1873, in: Jones (as above), pp. 237-239. Treaty Bonny – UK, 24 July 1884, in: *CTS*, vol. 163, pp. 163-164.

[53] Dokubo Asari, Interview with Nigeria Television Authority (NTA) News on October 10, 2012 [http://www.youtube.com/watch?v=rXN9Dpv_Aoc]. Asari, Interview with TVC News on May 5, 2013 [http://www.youtube.com/watch?v=s6TpvQOqq0M].

rejection of natural law theory by positivist international legal theorists has not only always been morally indefensible, but has sustained the lack of legitimacy of international law by eliminating recourse to law above laws.

d)   Defenders of Natural Law under the Dominant Influence of Positivism

That, however, does not mean that natural law completely disappeared from jurisprudence in the nineteenth and twentieth centuries. Specifically after World War II, under the immediate impact of German crimes against humanity under Nazi rule, legal theorist Gustav Radbruch, already in 1946, came to the conclusion that, under Nazi rule, justice was "consciously denied" (bewußt verleugnet) through the "setting of positive law" (bei der Setzung positiven Rechts), that "the laws had not just been 'improper law'" (das Gesetz nicht etwa nur 'unrichtiges Recht'), but that laws had laws "had not had any legal nature at all" (überhaupt der Rechtsnatur entbehrt).[54] Radbruch thus ranked justice, as established under natural law, above the legality of laws and did so in agreement with contemporary court practice. In the same year 1946, the Wiesbaden local court hat decreed that "the laws confiscating the property of Jews to the state" (die Gesetze, die das Eigentum der Juden dem Staat für verfallen erklärten) stood against the principles of natural law and had been null and void from the very beginning.[55] Likewise, Radbruch pleaded for law above the laws: "Where the injustice of positive law had reached a level at which legal security, usually guaranteed by positive law, remains insiginificant in view of manifest injustice: in such a case the unjust positive law has to be removed." (Wo die Ungerechtigkeit positiven Rechts ein solches Maß erreicht, daß die durch das positive Recht verbürgte Rechtssicherheit gegenüber dieser Ungerechtigkeit überhaupt nicht mehr ins Gewicht fällt: in einem solchen Fall hat das ungerechte positive Recht der Gerechtigkeit zu weichen.)[56] In English-speaking areas, natural law theories found acceptance in legal theories by Ronald Dworkin,[57] Lon Louvois Fuller[58] and John Finnis.[59]

There were also commitments to natural law in writings by international legal theorists at the turn towards the twentieth century and at the beginning of the 1930s. These theorists formed a group determined to derive international law not from human will alone but specifically wished to derive

---

[54]   Radbruch, 'Unrecht' (note 33), p. 216.

[55]   *Süddeutsche Juristen-Zeitung* 1 (1946), p. 36.

[56]   Gustav Radbruch, *Vorschule der Rechtsphilosophie. Nachschrift einer Vorlesung*, edited by Harald Schubert and Joachim Stoltzenburg (Willsbach, 1947), p. 31 [second edn (Göttingen, 1958); third edn (Göttingen, 1965)].

[57]   Ronald Dworkin, *Law's Empire* (London, 1986) [reprints (London, 1991); (Cambridge, MA, 1986; 1995)].

[58]   Lon Louvois Fuller, *The Morality of Law* (New Haven, 1964) [reprints (New Haven, 1969; 1975); second edn (New Haven, 1977; 1978); Hindi version (Delhi, 1969); fourth edn of this edn (Delhi, 2006)]. On Fuller see: Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law. An International Account* (Cambridge, 2010), pp. 33-55.

[59]   John Finnis, *Natural Law and Natural Rights* (Oxford, 1992) [reprints (Oxford, 1993; 1996; 2001; 2002; 2007); second edn (Oxford, 2011)].

the binding force of international law from the pre-existing community of human beings. Vis-à-vis the minority of the deniers of international law [60] they had to argue the legal character of international law as comprising more than just moral norms. Vis-à-vis the majority of positivist theorists they had to determine the primacy of international over state law. To that end, criminalist Karl Ludwig von Bar, in 1912, took a stand against the theory that governments of states were merely following international treaties by acts of self-obligation, and argued that the will of states might change and, with that possibility being given, the "basic norm" *pacta sunt servanda* could not be derived from state self-obligation alone and for all times. Bar thus contested the validity of the *clausula de rebus sic stantibus* and maintained that the binding force of positive international law could not be derived from state power but only from the superior "belief in the necessity of keeping word" (Glauben an die Notwendigkeit des Worthaltens). This belief, he insisted, was part of "all human relations" (gesamten menschlichen Verhältnisse),[61] which he explicitly termed "natural law."[62] He thereby affiliated himself with eighteenth-century natural law doctrine.

By contrast, Bar's collegue and younger contemporary Ernst von Beling asked the question under which conditions the binding force of international law could arise, in the context of a discussion of the concept of sovereignty, not at the level of the validity of treaties under international law. States, Beling believed, could receive their sovereignty not from within themselves but only from the "community of states placed above the states" (den Staaten übergeordnete Staatengemeinschaft). State sovereignty, Beling insisted, was not incompatible with the admission of the law-setting capability of the community of states, because, by analogy, private persons would not lose their autonomy by belonging to a state. Should there be a notion of sovereignty that might be "incompatible with the postulate of a superior community of states" (mit der Annahme einer übergeordneten Staatengemeinschaft unvereinbar wäre), that concept of sovereignty would have to go, not the conception of the community of states.[63] According to Beling, no state could claim sovereignty, unless it had previously been created and conveyed by the community of states. Beling's conception of the community of states comprised more than a law-setting legal community. Like Wolff's *civitas maxima*, it was the community within which alone states could be established. Criminalist Rudolf Stammler even arrived at the conviction that what he termed international law ("Völkerrecht") as the law of the community of states with "Western European civilisation" (westeuropäischer Zivilisation) should be distinguished from the "world law"

---

[60] Carl Victor Fricker, 'Das Problem des Völkerrechts', in: *Zeitschrift für die gesammte Staatswissenschaft* 28 (1872), pp. 1-89, 347-386, at p. 375.

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

[62] Ibid., p. 155.

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

(Weltrecht), which he regarded as valid without any limitation to certain states and population groups but as a legal framework that contained "the commitment of lawfulness" (das rechtliche Wollen) in the world at large.[64] Stammler described his "world law" in the terms of natural law doctrine in the same way as Wolff had cescribed his *civitas maxima*, and sharply turned against attempts to restrict the validity of "world law" to members of the "family of nations". The Vienna jurist, internaional peace activist and last Prime Minister of the Austro-Hungarian Dual Monarchy, Heinrich Lammasch, shared the opinion that the superior commuity of states was not detrimental to state sovereignty but was essential for the maintenance of ordered inter-state relations.[65] Moreover, some Catholic theologians, among them Viktor Cathrein SJ[66] and Joseph Mausbach,[67] followed the great tradition of the law of war and peace, as shaped by St Thomas Aquinas, which they tried to restore. And last but not least, philosopher Leonard Nelson was explicit in deriving international law from natural law.[68]

Elsewhere in Europe, the idea found acceptance that a superior general community should be regarded as existing above states. For one, the Leiden publicist Hugo Krabbe, in explicit agreement with Beling, argued that states could only be created under international law and that its binding force was the product of the general uniquitous legal consciousness.[69] Krabbe positioned this legal consciousness as the prime condition for all law.[70] In France as well, publicist Henri Bonfils[71] and constitutional lawyer Léon Duguit[72] maintained that the law above the state was founded in the legal consciousness that was spanning the world and had come into existence without acts of human will. These theorists then postulated that international law should have been derived from the general human willingness to recognise the rule of law.

From the 1920s, the number of chairs of jurisprudence denominated for international law increased and contributed to the professionalisation of this legal discipline, that was also reflected in

---

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

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

[66] Victor Cathrein, SJ, *Die Grundlagen des Völkerrechts* (Stimmen der Zeit. Ergänzungshefte, Reihe 1, Heft 1). (Freiburg, 1918).

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

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

[69] Hugo Krabbe, *De modern staatsidee* (The Hague, 1915), pp. 180, 183 [further edn (The Hague, 1918; German version (The Hague, 1919)].

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

[71] Henri Bonfils, *Manuel de droit international public (droit des gens)*, sixth edn (Paris, 1912) [first published (Paris, 1894); second edn (Paris, 1898); third edn (Paris, 1901; 1904); fourth edn (Paris, 1905); fifth edn (Paris, 1908); seventh edn (Paris, 1914); eighth edn (Paris, 1921-1926); German version (Berlin, 1904), p. 18].

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

deliberations about problems of determinating the sources of international law but also its methodologies and philosophical foundations. Alfready in 1911, the Vienna publicist and legal philosopher Hans Kelsen sharply atttacked the then dominating doctrine of the sources of international law. In his view, the existing doctrine positioned what it considered as independent "individual wills" (Einzelwillen) of states beyond the confines of the realm of the law, thereby placing it beyond any form of legal control. In this way, Kelsen maintained, the activities of governments of sovereign states was dominated by power not by the law.[73] In a study published shortly after the end of World War I on sovereignty and the theory of international law, Kelsen then returned to the old question of whether or not international law was a perfect "legal ordering system" (Rechtsordnung) capable of enforcing legal norms. And he arrived at the conclusion that this question had been put the wrong way. This, he argued, had been so, because the question, central to internaional law, was not about its effectiveness as an instrument of law enforcement, but about its rank vis-à-vis other legal fields. Properly put the question should be whether international law was to be placed above or below state law.[74] Kelsen assumed that a hierarchy among legal fields existed that he described as "orders" (Ordnungen), and he concluded that international law held the highest position in that hierarchy. Basic legal norms were to move from international law into other legal "orders" through "delegation" or "derivation".[75] Kelson would not recognise the state itself as a "generator" (Erzeuger) of but regarded the state as identical with a "legal ordering system".[76] This "legal ordering system", therefore, had to be delegated from a "source" (Quelle) above the state. The "delegation" was to refer not to all norms of state law, but should form merely the "basis for the claim of validity of an order" (den Grund für die Soll-Geltung einer Ordnung), in essence then the legal norm that alone could bring to the fore the legitimacy of the state.[77] Kelsen termed this legal norm the "basic norm" (Grund-Satz[78] or Grundnorm),[79] which he defined as the fact, in which every order is created "to which manifest human behaviour corresponds which is correlated with that order to a certain degree" (Tatbestand, in dem jene Ordnung erzeugt wird, der das tatsächliche Verhalten

---

[73] Hans Kelsen, *Hauptprobleme der Staatsrechtslehre. Entwickelt aus der Lehre vom Rechtssatze* (Tübingen, 1911) [second edn (Tübingen, 1923); reprints (Aalen, 1960; 1984)].

[74] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, 1920), p. 103 [reprints Tübingen, 1928]; (Aalen, 1960; 1981)]. Kelsen, *Reine Rechtslehre* (Leipzig and Vienna, 1934), pp. 129-130 [second edn (Vienna, 1960); reprints (Vienna, 1967; 2000); further reprint, edited by Stanley L. Paulson (Aalen, 1985); paperback edn, edited by Matthias Jestaedt (Tübingen, 2008)]. On Kelsen's theory see: Jochen Graf von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (Studien zur Geschichte des Völkerrechts, 2) (Baden-Baden, 2001), pp. 69-74, 95-106 [English version s. t.: *The Public International Law Theory of Hans Kelsen. Believing in Universal Law* (Cambridge, 2000), pp. 78-83, 108-118]. Paulus, *Gemeinschaft* (note 4), pp. 170-173.

[75] Kelsen, *Problem* (note 74), pp. 111-119. Kelsen, *Rechtslehre* (note 74), pp. 144-150.

[76] Kelsen, *Problem* (note 74), p. 131. Kelsen, *Rechtslehre* (note 74), pp. 132-133.

[77] Kelsen, *Problem* (note 74), p. 105. Kelsen, *Rechtslehre* (note 74), pp. 66-72.

[78] Kelsen, *Problem* (note 74), p. 105.

[79] Kelsen, *Rechtslehre* (note 74), p. 66.

der Menschen, auf die sich diese Ordnung bezieht, bis zu einem gewissen Grad entspricht).[80] According to Kelsen, it was only international law that could legitimise a power manifestly establishing itself and "delegated" in this way the order of legal force, that it had set, to the degree by which it becomes effective (so die von ihr gesetzte Zwangsordnung in dem Umfang, als sie effektiv wirksam wird).[81] This "basic norm" was not set, but predisposed.[82] In other words, Kelsen assumed that domestic law, in its capacity of regulating human behaviour "to a certain degree" (bis zu einem gewissen Grad), could not become effective solely through the "individual will" of a state. This, he argued was so, because without a "source" beyond a state, a state law would eventually have to flow from the power of the agent capable of validifying law in all its norms. Kelsen thus expected that the "basic norm" as the general legal norm establishing the legality of a " legal ordering system" was a legal "source" in its own right, not the state.[83] With this postulate, Kelsen operated with the context of theories that had been taken from the natural law tradition at the turn towards the twentieth century.[84] At the same time, Kelsen took a step beyond these theories in distinguishing between law and justice. He positioned the "basic norm" as the benchmark for the justice of what was to be accepted as the law.

At the same time, Kelsen distanced himself from the contemporary sociological theory of the law and rule that Max Weber was arguing. Weber derived the legitimate validity of a "legal ordering system", as perceived by actors in it, from tradition as "the validity of what had always existed" (Geltung des immer Gewesenen), belief as "the validity of the newly revealed or what was sanctioned by examples" (Geltung des neu Offenbarten oder des Vorbildlichen) as well as "what has been postulated as the absolutely valid" (als absolut gültig Erschlossenen). Weber would trace the legitimacy of the "legal ordering system" back to positive law only under the condition that actors, in turn, believed in the legality of that order.[85] Like Kelsen, Weber derived legality, that is the legal character of the "legal ordering system", from its legitimacy, that is the belief in its justice, and placed the belief in legitimacy outside the realm of the "legal ordering system". As a jurist, Kelsen did not follow Weber in this respect. Whereas Weber categorised his "basic norm" not as a legal norm, but as a feature of some religious belief or some tradition, Kelsen had to argue the theory that the "basic norm" itself was derived from the law. He had to take this stance, because otherwise he would not have been able to derive law from a legal "source", but, instead, would have had to agreed

---

[80] Ibid., p. 68.
[81] Ibid., p. 71.
[82] Ibid., p. 72.
[83] Kelsen, *Problem* (note 74), p. 106.
[84] Bar, 'Grundlage' (note 61), pp. 145-146. Beling, *Bedeutung* (note 63), pp. 12-13. Bonfils, *Manuel* (note 71), p. 18. Krabbe, *staatsidee* (note 69), pp. 180, 183.
[85] Max Weber, *Wirtschaft und Gesellschaft*, book I, chap. 7, fifth edn, paperback edn, edited by Johannes Winckelmann (Tübingen, 1980) , p. 19 [first book-trade publication (Tübingen, 1922)].

with the opposite theory, that he actually contested, that law could only be derived from power. Kelsen went to formal logic to support his assumption that the "basic norm" was a legal "source" in its own right. According to formal logic, in general, that is in every legal field, neither a state institution equipped with a an "individual will" nor a person could be a "legal source" but only a legal norm. This was so, because neither an "individual will" nor a "common will" could enforce the belief in the legitimacy of a "legal ordering system";[86] and the recognition of the legitimacy of set law as enforceable was not a matter of mere belief, but of obliging action. Therefore, positive law in an enforceable "legal ordering system" could obtain legitimacy neither on the basis of religious doctrine nor through state power, but had to be traced back to "the merely hypothetical, formal foundation through the basic norm" (die bloß hypothetische, formale Fundierung durch die Grundnorm), which, in turn, rested on natural law that was positioned above the state as unchangeable, unenforceable "perfect form".[87] From his assumption that positioned the "basic norm" in natural law above set law and thus conditioned as a legal norm,[88] Kelsen concluded that states as institutions of the legitimate use of force, recogniesed as such by its inhabitants, could only be derived from international law. He did so, because it was only through the hierarchically superior "order" of international law that the "legal ordering system" internal to the state, together with the institutions enforcing it, could coexist next to the internal "legal ordering systems" and the institutions enforcing them elsewhere in the world as independent and legally equal sovereigns.[89] Put differently, Kelsen, like natural law theorists at the turn towards the twentieth century, postulated that only a general ubiquitously valid legal norm could determine the sovereignty of the "legal ordering system" of a state.[90]

With his concept of the "source" and with his request that a hierarchy of "legal ordering system" peaking in natural law should be accepted as given, Kelsen opted against older theories, according to which international law should arise from some apparent self-obligation of states, the "entry" into the community of intercourse among states and the accompanying obligation to abide by the law, or the "agreement" about the alleged "common will".[91] Kelsen rejected the latter theory as a "dualism", seemingly juxtaposing the supra-statal "legal ordering system" against the internal "legal ordering system" of a state as separate fields of law. According to Kelsen, this procedure would open up the

---

[86] Kelsen, *Problem* (note 74), p. 106. Kelsen, *Der soziologische und der juristische Staatsbegriff* (Tübingen, 1928) [reprints (Aalen, 1962; 1981); first published (Tübingen, 1922)].

[87] Hans Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (Philosophische Vorträge, 31) (Berlin, 1928), pp. 9, 10, 12-14.

[88] Kelsen, *Problem* (note 74), pp. 252-253; Kelsen, *Rechtslehre* (note 74), pp. 153-154.

[89] Kelsen, *Rechtslehre* (note 74), pp. 140-141, 150-153.

[90] Kelsen, *Problem* (note 74), p. 149. On Kelsen's theory of sovereignty see: Martti Antero Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law. 1870 – 1960* (Cambridge, 2002), pp. 238-249 [fifth edn (Cambridge, 2008)].

[91] Kelsen, *Problem* (note 74), p. 139. Kelsen, *Rechtslehre* (note 74), pp. 129-130.

problem of how to establish the factors, through which such "dualism" might come into existence in the first place. He believed that reference to the alleged "agreement" about the "general will" was illogical, because that supposition would position the internal "legal ordering system" of the state above the international "legal ordering system". If that supposition were to be accepted, there would not be two distinct fields of law but a "monism" of the internal "legal ordering system" of the state generazing and then dominating the international arena. In applying the word "monism", Kelsen used a term that was current in English-speaking areas as part of the proaganda against Wilsonianism and the League of Nations.[92] However, Kelsen insisted, such purportedly "dualist", but manifestly "monist" supposition could not provide an causal explanation why the supra-statal "legal ordering system", as all internal state "legal ordering system" could be binding at all. This explanation could only be provided if the binding force was not derived from any other legal norm.[93] By contrast, Kelsen's own theory concluded with the derivation of the "basic norm" *pacta sunt servanda* from natural law. Consequently, the legal „nature" of the equality of sovereign states was not only not a platform for caling into question or even denying international law, but sovereignty as an essential feature of the concept of the state could not possibly exist without international law. Kelsen thereby argued against the established theoretical premise[94] that there could be non-sovereign states or states without subjecthood under international law.[95] Yet, at the same time, he stood against the theory, advocated by the international peace movement, that the increasing density specifically of multilateral agreements should impose limitations on state sovereignty by causing the reduction of the decision-making capabilities of governments of sovereign states. Instead, Kelsen maintained that positive international law, as emerging from treaties among states could do as little harm to the sovereignty of the contractualising states as a peace treaty alone could destroy a defeated state.[96] By the same standard, by which the implementation of a peace treaty required the collaboration of governing institutions on the defeated side, all agreements among states could only remain implementable as long as states retained their sovereignty. Hence, laying the principle of the legal equality of sovereign states was by no menas hostile to the bindingness of international law; instead, it was only through the application of and abidance by international law as a superior "legal ordering system" that recognition of the legal equality of sovereigns became possible, because neither sovereignty nor legal equality as such could be derived from self-obligations among contracting parties or any declarations by "individual wills".[97] Explicitly, Kelsen referred[98] to Christian Wolff's

---

[92] William Barry, 'Mr Wilson's Monism', in: *National Review* 73 (1919), pp. 337-345.

[93] Kelsen, *Problem* (note 74), pp. 121, 138. Kelsen, *Rechtslehre* (note 74), p. 129.

[94] Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Vienna, 1882), pp. 37 [reprint, edited by Walter Pauly (Bibliothek des Öffentlichen Rechts, 3) (Goldbach, 1996)].

[95] Kelsen, *Problem* (note 74), p. 53. Likewise: Eduard Reut-Nicolussi, *Zur Problematik der Heiligkeit der Verträge. Eine Studie über die Clausula de rebus sic stantibus im Völkerrecht* (Schriften des Instituts für Sozialforschung in den Alpenländern an der Universität Innsbruck, 7) (Innsbruck, 1931), p. 22.

[96] Kelsen, *Problem* (note 74), p. 267.

[97] Kelsen, *Problem* (note 74), p. 272. Likewise: Max Huber, 'Die Gleichheit der Staaten', in: Fritz Berolzheimer, ed.,

theory of the *civitas maxima* as well as to natural law theorist at the turn towards the twentieth century in his theoretical derivation of international law from "pre-existing" (vorausgesetzten) and unset natural law.[99] Kelsen thus argued a "monism" that placed international above state law.

In an article pubished in 1914, Kelsen's Viennese student Alfred Verdroß had placed international law under the primacy of state law, while, simultaneously, following the international peace movement and acknowledging the effect of treaties on the reduction of the decision-making capabilities of governments of sovereig states.[100] Subsequently, in his writings published after 1923, Verdroß took a strong stand against attempts to derive international law from self-obligations of contracting parties or some "common will" and pointed to natural law as the "source" of international law. Similarly to Kelsen, Verdroß went to late nineteenth- and early twentieth-century natural law theories and, adding acumen to Kelsen's theory, portrayed international law as the generator of the community of states.[101] Explicitly, he defined the "basic norm" *pacta sunt servanda* as "a scientific hypothesis beyond which no further questions were possible" (wissenschaftliche Hypothese, über die nicht weiter hinaus gefragt werden kann).[102] Verdroß argued against older theories of the "sources" of international law, which Kelsen had already criticised, pointing out that these theories had failed to produce cogent evidence for the distinctions between international and state law. Verdroß attacked the assumption that international law addressed to states only, while state was was addressed to persons, and posited that the distinctions between addressees of "legal ordering systems" was the same in international and in domestic state law, because domestic state law might also be addressed to nationals of other states. Should that be the case, state law would not fall apart into two distinct "legal ordering systems". Moreover, Verdroß, like Kelsen, rejected the claim that international law could become binding only through a law-establishing "common will", while domestic state law would result from the „individual will" of a state, and argued the counter theory that the "freedom of states" (staatliche Freiheit) to legislate was "nothing but the sphere of free decision-making given to states by international law" (nichts anderes als eine den Staaten vom Völkerrechte zugestandene Sphäre freien Ermessens).[103] Like Kelsen, Verdroß took *pacta sunt servanda* as "basic norm" and added the specification that even customary law became law in

---

Rechtswissenschaftliche Beiträge. Juristische Festgabe des Auslandes zu Josef Kohlers 60. Geburtstag (Stuttgart, 1909), pp. 88-118 [reprint (Aalen, 1981)].

[98] Kelsen, *Problem* (note 74), pp. 192, 241. Kelsen, *Rechtslehre* (note 74), pp. 71-72.

[99] Karl Theodor Pütter, *Beiträge zur Völkerrechts-Geschichte und Wissenschaft* (Leipzig, 1843), p. 241. Carl Kaltenborn von Stachau, *Kritik des Völkerrechts nach dem jetzigen Standpunkte der Wissenschaft* (Leipzig, 1847), pp. 242-244. Bar, 'Grundlage' (note 61), p. 155. Lammasch, *Völkerrecht* (note 65), pp. 80-83.

[100] Alfred Verdross, 'Zur Konstruktion des Völkerrechts', in: *Zeitschrift für Völkerrecht* 8 (1914), pp. 329-359, at pp. 333-334, 343-354.

[101] Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf der Grundlage der Völkerrechtsverfassung* (Tübingen, 1923), pp. 8-10, 62-76.

[102] Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna, 1926), pp. 29, 31.

[103] Verdross, *Einheit* (note 101), pp. 34-38.

through this "basic norm".[104] For this as well as his other critical observations, Verdroß referred to natural law theories on the eve of World War I and supported the League of Nations as the instrumebt of establishing and maintaining peace.[105] Further theorists, among the Cambridge publicist Hersch Lauterpacht,[106] the Oxford publicists James Leslie Brierly[107] and Sir John Fischer Williams,[108] publicist Georges Scelle, finally teaching in Paris,[109] publicists Ji-yan Wang at Shanghai[110] and Kisaburō Yokota at Tokyo[111] adopted these theories. Brierly added the specific point, derived from natural law, that even privarte persons should admitted as subjects of international law.[112] Philosopher Max Scheler, though contesting, like Brierly, that war was "part of human nature" (im Wesen der Menschennatur) and ascribing to perpetual peace an unconditionally positive value, still, in opposition against Brierly, did not trust in the capability of the League of Nations to act as a guarantor of peace, thus, early on, committing himself to what he termed "instrumental militarism" (Instrumental-Militarismus), through which states obtained self-defense capability, peace thereby becoming possible, and becoming a forerunner of realism.[113]

Similar skepticism prevailed among scholars who continued to support the theory of the "common will" as the "source" of international law.[114] Specifically, Dionisio Anzilotti, at the end of the 1920s, argued the conventional theory that international law was "established through agreements concluded among states" (durch zwischen den Staaten abgeschlossene Vereinbarungen), even though, as in 1912, he referred to *pacta sunt servanda* as the "original norm" (Ur-Norm), above which no further legal norms could be found. This "original norm", he argued, produced the binding

---

[104] Ibid., p. 29.

[105] Dionisio Anzilotti, *Corso di diritto internazionale*, vol. 1 (Rome, 1912), pp. 26-27 [second edn (Rome, 1923); third edn (Rome, 1928); fourth edn (Anzilotti, Opere, vol. 1) (Padua, 1964)]. Beling, *Bedeutung* (note 63), p. 12.

[106] Hersch Lauterpacht, *Private Law Sources and Analogues of International Law* (New York, 1927), pp. 56, 58 [reprint (Hamden, 1970)].

[107] James Leslie Brierly, *The Law of Nations* (Oxford, 1928), pp. 37-38 [second edn (Oxford, 1936; 1950; 1955); sixth edn, edited by Humphrey Waldock (Oxford, 1963; 1980); seventh edn, edited by Andrew Clapham (Oxford, 2012); German version (Berlin, 1948)].

[108] John Fischer Williams, *Chapters on Current International Law and the League of Nations* (London, 1929), p. 23.

[109] Georges Scelle, *Précis de droit des gens*, vol. 1 (Paris, 1932), p. 41 [reprints (Paris, 1984; 2008)].

[110] Ji-Yan Wang, *Bu-ping deng tiao yue shih* (Shanghai, 1935), pp. 1-13. On Wang see: Stefan Kroll, *Normgenese durch Re-Interpretation. China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Studien zur Geschichte des Völkerrechts, 25) (Baden-Baden, 2012), p. 183.

[111] Kisaburō Yokota, 'Begriff und Gliederung der Verfassung der Völkerrechtsgemeinschaft', in: Alfred Verdross, ed., *Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre [Festschrift zum 50. Geburtstag von Hans Kelsen]* (Vienna, 1931), pp. 390-416. Yokota, *Kokusaihō*, vol. 1 (Tokyo, 1933), pp. 1-2 [second edn (Tokyo, 1938-1940)]. Yokota, *Junsui hōgaku ronshū*, 2 vols (Tokyo, 1976-1977).

[112] Brierly, *Law* (note 107), pp. 42-48, 109-118.

[113] Max Scheler, *Die Idee des Friedens und der Pazifismus* (Berlin, 1931), pp. 12, 33 [second edn (Berne and Munich, 1974)].

[114] Karl Strupp, *Grundzüge des positiven Völkerrechts* (Der Staatsbürger, vol. 2, issue 3) (Bonn, 1921) [third edn (Bonn, 1926); fourth edn (Bonn, 1928); fourth edn (Bonn, 1932)]. Dionisio Anzilotti, *Lehrbuch des Völkerrechts*, vol. 1 (Berlin, 1929) [revised German version of the third original edn (Rome, 1928)].

force of treaties among states. Yet only states could be addressses of international legal norms.[115] Therefore, collections of treaties under codifications of international law ought to be given a high significance for the "ordering of relations among states" (Ordnung der Beziehungen zwischen Staaten).[116] From the realm of enforceability of international law, Anzilotti, like late nineteenth- and early twentieth-century theorists, excluded all those population groups that, "due to their conditions of life and level of civilisation, are not involved in agreements about the creation of international legal norms" (die wegen ihrer Lebensbedingungen und der Stufe ihrer Zivilisation nicht zu Übereinkommen zur Schaffung von Völkerrechtsnormen beteiligt sind). He gave expression to this claim in the form of a statement of matters of fact and supported it with the argument that the population groups thus duscriminated against were "nomads or savage tribes" (um die Nomaden oder wilde Völkerschaften). Their alleged "lack of capability of understanding norms informing international law and thus wanting them" (Unfähigkeit, die Normen, die das Völkerrecht bilden, zu verstehen, und sie daher zu wollen) appeared, in Anzilotti's view to be the purported fac that these groups "had neither been part of agreements [on the formation of international legal norms] nor that they would acceed to these agreements at a later point of time" (daß sie an den Übereinkommen [zur Schaffung von Völkerrechtssätzen] nicht beteiligt sind, noch ihnen später beitreten).[117] Anzilotti ignored the well recorded fact that, in his own time, these apparently "savage tribes" were tied with members of the League of Nations through dozens of bilateral treaties.

Moreover, theorists, who, like Basle jurist Edward Wiegand refused to admit any norms beyond positive international law, imposed the suspicion upon Verdroß and his supporters that the were advicaing the abuse or even breach of international law. Wiegand argued that adherents of natural law doctrine claimed that "unilateral annihilation of treaties and arms increase in breach of treaties were covered by general legal norms if only these acts were supplied with sufficient ethical matter and if uncomfortable treaties were classed as void and offensive to some highly subjective and perhaps also changeable moral sentiment." (die einseitige Vertragslösung und vertragswidrige Aufrüstung seien durch allgemeine Rechtsgrundsätze gedeckt, wenn man ihnen nur einen tüchtigen ethischen Beigeschmack gibt und unbequeme Verträge als nichtig, weil dem höchst subjektiven und vielleicht auch wandelbaren sittlichen Empfinden des Auslegers nicht genehm hinstellt.)[118] Wiegand's argument was applicable to the perversion of natural law that was taking place at that

---

[115] Anzilotti, *Lehrbuch* (note 114), pp. 48-50, 89-91.

[116] Ibid., pp. 50-53. Denys Peter Myers, *Manual of Collections of Treaties and of Collections Relating to Treaties* (Harvard Bibliographies, Library Series 2) (Cambridge, MA, 1922). Mario Toscano, *The History of Treaties and International Politics*, vol. 1, second edn (Baltimore, 1966), pp. 47-87 [first published (Turin, 1958); second Italian edn (Turin, 1963)].

[117] Anzilotti, *Lehrbuch* (note 114), p. 94.

[118] Edward Wiegand, [review of: Alfred Verdross, 'Anfechtbare und nichtige Staatsverträge', in: *Zeitschrift für öffentliches Recht* 15 (1935), pp. 289-299], in: *Zeitschrift für Theorie des Rechts* 9 (1935), pp. 310-311.

time in the German empire under Nazi rule.[119] Yet it was easily refuted by Verdroß and his supporters. True, Verdroß had discussed "objectionable and void state treaties" in a journal article with an eye on the then current debate about the Trianon agreement and its possible voidness, and Wiegand explicitly referred to this article. And, indeed, Verdroß took the principled position that bilateral treaties might be void if they had not come into existence in accordance with due process.[120] In making this point, he alluded to the fact that Austria, like the other "defeated" states, had not been party to the Paris peace conference negotiating the peace agreements. However, Verdroß was far from admitting to anyone a general possibility of breaking existing agreements, because he derived the basic norm *pacta sunt servanda* from natural law, thereby positing it as a general obligation above all other legal norms.

e) The Overestimation of the League of Nations in Terms of Legal Theory and Its Consequences for the Present

In its own right, the League of Nations was not particularly helpful for theorists willing to place international law above domestic municipal law. This was so, because the League of Nations, although it counted as a "non-contractarian", "organic", "natural" and "objective" international organisation,[121] had come into existence through a bilateral agreement, which had not even fulfilled the conditions of being an agreement about the creation of international law. The Versailles Peace Agreement between the Allied Powers and the German Empire could not stand up to that expectation because the several state wills, tied together through the agreement, had not been streamlined into the same direction but had been opposed to each other. Furthermore, the League of Nations did not implement the prime theoretical condition for the establishment of a common will on law-making agreements, namely that the common will was unchangeable and could not be altered through a single state will. The League of Nations did not fulfill this condition, because member states, disagreeing with League of Nations obligations or facing sanctions, would simply quit the League, thereby rendering ineffective the Covenant.

The main reason for the lack of theoretical clarity about the relationship between international ald municipal law was the concept of the state to which theorists of various disciplines adhered. Verdroß, for one, made it clear that an "extralegal" (metarechtliche) institution, that is a state positioned above the law, was "a chimera" (ein Phantasiegebilde), thereby subjecting even the concept of the state to the procedure of establishing international legal norms.[122] But, like Anzilotti, Verdroß took the state

---

[119] For example, see: Hans-Helmut Dietze, *Naturrecht in der Gegenwart* (Bonn, 1936).

[120] Alfred Verdross, 'Anfechtbare und nichtige Staatsverträge', in: *Zeitschrift für öffentliches Recht* 15 (1935), pp. 289-299.

[121] Joseph Thomas Delos, *La société internationale et les principes du droit* (Paris, 1929), pp. 120, 122.

[122] Verdross, *Einheit* (note 101), p. 70.

to be the embodiment of the uity of the population groups settling on the state territory.[123] Both theorists thus accepted corporatist state theory, according to which the constitution should have the tasks of promotion "integration" among population groups settling on state territory, comprising the "state nation" (Staatsvolk) like a huge living body and of transforming that "nation" into a "unity".[124] The theoretical expectation that the state should be instrumental in the promotion of the "unity" of the "state nation", in its own right, followed from Jellinek's definition of the state as the triad of unities of territory, population and government.[125] Corporatist state integration theory thus ranked the national state above international institutions and organisation in the implementation of its messential tasks. The concept of the state of the theory of the state was thus useless for the conceptualisation of international law as a legal order above the state. At least Kelsen noted that contradiction and distinguished between a "juristic" concept of the state, compatible with his theory of international law as a legal source, and a "sociological" concept of the state as Jellinek had defined it.[126]

However, it was Jellinek's sociological, not Kelsen's juristic concept of the state that took roots in international legal theory and practice. It did so via the Montevideo Convention on the Rights and Duties of States, enforced on 26 December 1933 for American states.[127] If municipal legal norms were incompatible with those pertaining to international law, the dilemma arose that either the "unities" of the states or the "unity" of the community of states under international law had to be called into question. The Convention referred to this dilemma by adding a fourth "unity" to Jellinek's triad. The fourth definitional condition for the existence of states was the capability of entering into relations with other states,[128] whereby, again, the Convention transferred into law another on Jellinek's doctrines.[129] Hence, the Convention denied to all colonial "protectorates", which would not stand up to these conditions, the applicability of the concept of the state and, by consequence, the recognition of the validity of international law with regard to colonial "protectorates". Even though this restriction of the realm of the validity of interntaional law, technically, applied only to American states, it did sanction the exclusion of population groups under colonial rule in America. Moreover, the community of states, as subject to international law, did not merely suffer from the continuity of colonial rule in most parts of the world and also from the theory

---

[123] Anzilotti, *Lehrbuch* (note 114), pp. 92-93.

[124] Hugo Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften* (Berlin, 1889) [reprint (Aalen, 1964)]. Rudolf Smend, *Verfassung und Verfassungsrecht* (Munich and Leipzig, 1928).

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

[126] Kelsen, *Staatsbegriff* (note 86).

[127] Montevideo Convention on the Rights and Duties of States, Art 1, a-c [approved at the Seventh International Conference of American States, signed on 26 Dezember 1933; http://www.avalon.law.yale.edu/20th_century/inf].

[128] Ibid., Art. 1 d.

[129] Jellinek, *Natur* (note 5), p. 48.

of the state providing legitimacy to colonial rule, but also from the continuing, and even increasing, dissatisfaction in Europe with the regulations enforced at the Paris Peace Conference as well as with the vagaries of the international borders that were separating American states since their independence. The Monevideo Convention sought to meet these dissatisfactions with the mantra that all states were equal, had the same entitlements to the use of their rights and that no state could legally interfere into the domestic matters of another state.[130]

Yet Alfred Verdroß pretended as if positivist positions were compatible with natural law doctrine. Thus, he claimed that both directions of international legal theory were incompatible solely from a positivist point of view, as positivists were alone in principally rejecting natural law, whereas natural law theorists were recognising the effectiveness of positive law.[131] Already before World War I, Verdross had drawn the conclusion that natural law was taking its roots in the postulate of "human nature", but that it had been divided into primary and secondary legal norms. Only primary legal norms were valid for humanity as a whole, while secondary ones would apply to one "nation" only. [132] Since the seventeenth century, an "international legal community" (Völkerrechtsgemeinschaft) had been formed, beginning in Europe, and had "unfolded" (entfaltet) itself since then.[133] A "total reception of the principles" (totale Rezeption der Grundsätze) of this initially European international law had taken place only since the independence of the former European colonies in America.[134] Since then, some "universal international legal order" (universelle Völkerrechtsordnung) had come into existence on the basis of "the idea that the pluralism of states forms a comprehensive community" (auf Grund der Vorstellung, daß die Vielfalt der Staaten eine allumfassende Gemeinschaft bildet).[135] With his notion of the "international legal community", Verdroß referred to Christian Wolff's *civitas maxima*, even though the latter had explicitly rejected the idea that the *civitas maxima* was an institution.[136] Moreover, in fundamental opposition against Wolff, Verdroß would not admit his "universal international legal community" as a given by natural law, but ascribed to it contingent genesis as a result of the power politics if European governments seeking to expand their colonial rule. In giving out his institutionalised notion of the "international legal community" as a community of states and by restricting the validity of international law, including customary law, to members of the community, Verdroß, after World War II, allowed his theoretical commitment to shrink to lip service and even voiced opposition against the doctrine of

---

[130] Montevideo Convention (note 127), Art. 4, 8.

[131] Alfred Verdross, *Abendländische Rechtsphilosophie* (Vienna, 1958), pp. 246-247.

[132] Ibid., pp. 231-234. Thus already: Stammler, *Theorie* (note 64), pp. 282-283.

[133] Alfred Verdross, *Die Quellen des universellen Völkerrechts* (Freiburg, 1973), pp. 18-20.

[134] Alfred Verdross and Bruno Simma, *Universelles Völkerrecht*, third edn (Berlin, 1984), p. 22 [first published (Berlin, 1976)].

[135] Ibid., pp. 18-19.

[136] Ibid., p. 22. Wolff, *Ius gentium* (note 20), S. 9-10. For a comment see: Paulus, *Gemeinschaft* (note 4), pp. 174-179.

the Catholic Church, which had, in the papal peace encyclica of 11 April 1963, justified the use not only of state force but also political pressure in general, in no other context than the service to universal common wellbeing.[137]

Following ideologues of colonial rule around 1900, Verdroß also identified the "family of nations", newly baptised as "universal international legal community", with the global community of states seemingly comprising humanity as a whole. Like other international legal theorists,[138] Verdroß proceeded with that identification in view of the strong criticism that had become vocal specifically in Africa and Asia,[139] though not only there [140] during the 1960s. Critics were arguing that a "colonialist component" had become the main formative force of nineteenth- and twentieth-century international law and that states in Africa and Asia had by no means come into existence through the act of grace of admission into the "family of nations", but had been in existence from pre-colonial times;[141] that it was impossible to recognise as just the unequal treaties that had been concluded under colonial domination and during the phase of formal decolonisation;[142] that in Africa and Asia

---

[137] John XXIII., Pope, *Die Friedensenzyklika Papst Johannes' XXIII. Pacem in terris* [11. April 1963], nr 136, 138. German version, edited by Josef Kardinal Frings (Freiburg, 1963), pp. 127-129.

[138] Verdroß, *Quellen* (note 133), pp. 18-20. Verdroß, *Law* (note 10), p. 42. Richard A. Falk, 'The New States and International Legal Order', in: *Recueil des cours* 118 (1966, part II), pp. 7-103. Michael Schweitzer, *Das Völkergewohnheitsrecht und seine Geltung für neuentstandene Staaten* (Völkerrecht und Außenpolitik, 5) (Bad Homburg. 1969), p. 24.

[139] Georges M. Abi-Saab, 'The Newly Independent States and the Rule of International Law', in: *Howard Law Journal* 8 (1962), pp. 95-121. Abi-Saab, 'World' (note 35). Ram Prakesh Anand, 'Role of the "New" Asian-African Countries in the Present International Legal Order', in: *American Journal of International Law* 56 (1962), pp. 383-406. Anand, 'Attitude of the Asian-African Countries toward Certain Problems of International Law', in: *International and Comparative Law Quarterly* 15 (1966), pp. 55-75. Anand, ed., *Asian States and the Development of Universal International Law* (Delhi, 1972). Anand, *New States and International Law* (Delhi, 1972). Anand, *Confrontation or Cooperation? International Law and Developing Countries* (The Hague, 1987). Taslim Olawale Elias, *Africa and the Development of International Law* (Leiden, 1972) [second edn (Dordrecht, 1988)]. Felix Chuks Okoye, *International Law and the New African States* (Law in Africa, 33) (London, 1972). Milan Sahovic, 'Influence des états nouveaux sur la conception du droit international', in: *Annuaire français de droit international* 12 (1966), pp. 30-49. Sinha, *Nations* (note 35). Sinha, *Legal Polycenticity and International Law* (Durham, NC, 1996), pp. 69-131. Joop J. G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (The Hague, 1961). Udokang, 'Role' (note 35). For studies see: Lauren A. Benton, *Law and Colonial Cultures. Legal Regimes in World History. 1400 – 1900* (Cambridge, 2002), pp. 255, 259-260. Matthew Craven, *The Decolonization of International Law. State Succession and the Law of Treaties* (Oxford, 2007). Craven, 'Colonialism and Domination', in: Bardo Fassbender and Anne Peters, eds, *The Oxford Handbook of the History of International Law* (Oxford, 2012), pp. 862-879. Ranajit Guha, *Dominance without Hegemony* (Cambridge, MA, 1997), pp. 85, 86-87. Yilma Makonnen, 'State Succession in Africa. Selected Problems', in: *Recueil des cours* 200 (1986, part V), pp. 93-234, at p. 118. Yasuaki Ōnuma, 'International Law and Power in the Multipolar and Multi-Civilizational World of the Twenty-First Century', in: Richard A. Falk, Mark Juergensmeyer and Vesselin Popovsky, eds, *Legality and Legitimacy in Global Affairs* (Oxford and New York, 2012), pp. 149-197, at p. 160. Paulus, *Gemeinschaft* (note 4), pp. 186-188.

[140] Konrad Ginther, 'Die Einwirkung der Dekolonisierung auf die Grundlagen des Völkerrechts', in: *Schweizerisches Jahrbuch für internationales Recht* 38 (1982), pp. 9-27, pp. 12-16. Röling, *Law* (note 35). Antonio Truyol y Serra, 'L'expansion de la société internationale au XIXᵉ et XXᵉ siècles', in: *Recueil des cours* 116 (1965, part III), pp. 89-179, at pp. 160-165.

[141] Ginther, 'Einwirkung' (note 140), pp. 13-14. Syatauw, *States* (note 139), pp. 17-18.

[142] Röling, *Law* (note 35), pp. 74, 88.

critical attitudes towards international law had risen under the dominant influence of European governments during the globalisation of that law and that, by consequence, governments of states in Africa and Asia had to become involved in the postcolonial transformation of international law;[143] that the mere claim, emanating from Europe, that some "international legal ordering system" existed, was not an entitlement for the belief that that "legal ordering system" was recognised all over the world;[144] and that, last but not least, international legal theorists themselves had destroyed the basis for the global acceptance of international law by calling into question the natural law doctrine of the universal validity of international legal norms.[145] Hence, the experience of acts of injustice among victims of colonial rule resulted in the recourse on natural law theory as an instrument for the legitimation of resistance against positive international legal norms perceived as unjust.

Such recourse on natural law for the purpose of legitimising resistance against positive law is on record already from the second half of the nineteenth century in the Japanese government note dated 8 Febnruary 1868 on treaties between Japan and other states. The note states that the then newly incumbent government was going to honour all existing unequal treaties, but would also demand the revision of these agreements under "universal public law" (宇内の公法 udai no kōhō). As the Japanese government referred to a right that had not been positively agreed upon, it can only have operated upon the conception of natural law that is positioned above existing states. At this time, no reception of European natural law theories can have taken place in Japan. The government might have brought into circulation copies of Henry Wheaton's handbook on international law, of which a Chinese version had been published in 1864 under the title *Wànguó gōngfǎ* [万国公法 The Public Law of the Ten Thousand States]. Although Wheaton, in the first edition of his handbook, published in 1836, had specified natural law as one of the "sources" of international law, the Chinese version had been based on the first posthumous edition of the work, published in 1855, in which only tiny traces of natural law doctrine remained. Moreover, there is no reference in Wheaton's book to the classical natural law theory according to which a right to legitimate resistance against positive law could be derived from a legal framework placed above states.[146]

---

[143] Sinha, *Nations* (note 35), p. 26.

[144] Abi-Saab, 'States' (note 139), pp. 95, 99. Ders., 'World' (note 36), pp. 28-29.

[145] Udokang, 'Role' (note 35), p. 146.

[146] Japan, Gaikoku jimu sōtoku 外国事務総督, [Note by the Meiji Government, dated 8 February 1868on treaties in force between Japan and other states, written by Toshimichi Ōkubo and Munemitsu Mutsu], in: *Dai Nihon gaikō bunsho*, nr 97, vol. 1 (Tokyo, 1936), pp. 227-228, at p. 228. On this formula see: Kinji Akashi, 'Japanese "Acceptance" of the European Law of Nations. A Brief History of International Law in Japan. c. 1853 – 1900', in: Michael Stolleis and Masaharu Yanagihara, eds, *East Asian and European Perspectives on International Law* (Studien zur Geschichte des Völkerrechts, 7) (Baden-Baden, 2004), pp. 1-22, at pp. 3-7. Takeki Osatake, 'Bakumatsu ni okeru kokusaihō', in: *Hōgaku shirin*, vol. 16, nr 6 (1914), pp. 15-34. Osatake, *Kokusaihō yori mitaru bakumatsu gaikō monogatari* (Tokyo, 1926), p. 1.

Recourse to natural law, emerging self-evidently in Africa and Asia, demonstrates that, even during the twnetieth century, natural law theories were by no means due to specific cultural or religious origins. This finding can be confirmed from more distant legal relationships. Irrespective of disagreements about details of form and contents of treaties, there were no conflicts about the application of the principles informing the law of war and peace and the law among states, as long as these principles were taken to exist as givens among contracting parties. In the first place, these principles concerned the *ius ad bellum*, the recognition of the sovereign privilege of sending and received diplomatic envoys and the legal capability of sovereigns to enter into treatiy relations. The rooting of these principles as unset rights was at the bottom even of those treaties that European and the US governments concluded with states in Africa, America and Asia at the turn towards the nineteenth century.[147] Even Lord Lugard, who was among the most strident promoters of the expansion of European colonial rule, was aware of the existence of a tradition of a public law of treaties among states in Africa and that the basic nor pacta sunt servanda was part of that tradition.[148]

The empirical finding thus shows that relations among groups even across long distances were conducted under unset legal norms across the millennia. The validity of these norms was taken for granted. These norms could be infringed upon, such as in cases, where diplomatic envyos would get killed. However, infringements against the law such as these could not destroy the principled consciousness of the existence of the law. Even without acts of setting positive law, such faith in the existence of legal norms prevailed that twentieth-century legal philosophers have identified as the main precondition for abidance by the law.[149] Only when attempts were made to generate legal norms of culturally specific origin through military force or diplomatic pressure, skepticism arose about the justice of the norms those imposed. Since the 1880s, that skepticism converted into open or latent resistance in the context of the superimposition of European colonial rule. Put differently: It was only the positivism inherent in European international legal theory that provoked conflicts about the acceptance of a certain type of international legal norms. By contrast, empirical findings for periods up until the early nineteenth century display sufficient evidence that natural law had been conceivable in terms neutral not only to religion but also to culture. These findings, needless to say, do not stand against the usefulness of efforts to set international legal norms. But the ultimate factor of the acceptance of positive international legal norms cannot be enforced with utility arguments, but must result from the belief in the justice of the norms to be enforced. Precisely when the belief in the *a priori* justice of legal norms receives its confirmation as an outflow from unset natural law, the diversity of religiously and culturally specific set or customary legal norms remains secondary

---

[147] Among many, see the treaties listed in notes 45 and 46 above.

[148] Frederick John Dealtry Lugard, *The Rise of Our East African Empire*, vol. 2: Uganda (Edinburgh, 1893), pp. 33, 579 [reprints (London, 1968); (Hoboken, 2013)].

[149] Radbruch, 'Unrecht' (note 33). On this issue see the recent comment by: Hunter, 'Global' (note 1), pp. 20-21.

behind the broad empirical platform not only of manifestly recognised but also of actually implemented natural legal norms. In this respect, the word and the concept of natural law have resisted inapt efforts to reduce the concept to an *idée fixe* with the means of positivist international legal theory. The waving, by international legal theorists, of the potential of natural law to perform as a source of highest legal norms has delegitimised positivism but has not been harmful to natural law.

2. Culture(s) of Diplomacy

a) What is Culture of Diplomacy?

The definition of international relations as relations among groups, whose members mutually respect each other as outsiders, demands, for the specific field of diplomacy, answers to the questions, who gets perceived as a diplomat when as well as by whom and who was regarded as capable of assigning what kind of tasks and fields of acivity to diplomats when, where and why. Seeking to supply answers to these questions quickly leads to differentiating between two types of diplomacy as a general pattern of regular interactions among states, their rulers and governments, first in the non-technical sense of specific missions dispatched on certain occasions,[150] second, in the technical sense of standing missions.[151] The latter type has been investigated fairly well in its origins in Northern Italy during the 1420s.[152] In this region, the coexistence at the time of a pluralism of states in close proximity to one another, whose inhabitants took their states to be independent, entailed the transformation of repeatedly dispatched of *ad hoc* missions for specific purposes into permanently

---

[150] For example see: Frank Ezra Adcock and Derek John Mosley, *Diplomacy in Ancient Greece* (New York and London, 1975). Raymond Cohen and Raymond Westbrook, eds, *Amarna Diplomacy. The Beginnings of International Relations* (Baltimore and London, 2000). Raymond Cohen, 'Diplomacy in the Roman World', in: *Diplomacy and Statecraft*, vol. 12, nr 1 (2001), pp. 1-22. Andrew Wolpert, 'The Genealogy of Diplomacy in Classical Greece', in: *Diplomacy and Statecraft*, vol. 12, nr 1 (2001), pp. 71-88.

[151] As a rule, reference is made to standing missions, when diplomacy is under review. See: Lucien Bély, *L'Art de la paix en Europe. Naissance de la diplomatie moderne XVI – XVIIIe siècle* (Paris, 2007). Christian Jörg and Michael Jucker, eds, *Spezialisierung und Professionalisierung. Träger und Foren städtischer Außenpolitik während des späten Mittelalters und der frühen Neuzeit* (Trierer Beiträge zu den historischen Kulturwissenschaften, 1) (Wiesbaden, 2010). Claudia Märtl and Claudia Zey, eds, *Aus der Frühzeit der europäischen Diplomatie. Zum geistlichen und weltlichen Gesandtschaftswesen vom 12. bis zum 15. Jahrhundert* (Zurich, 2008). Adolf Schaube, 'Zur Entstehung der ständigen Gesandtschaften', in: *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 10 (1889), pp. 501-552. Hillard von Thiessen und Christan Windler, eds, *Akteure der Außenbeziehungen. Netzwerke und Interkulturalität im historischen Wandel* (Externa, 1) (Cologne, Weimar and Vienna, 2010).

[152] Manfred Holleger, 'Anlaßgesandtschaften – Ständige Gesandtschaften – Sondergesandtschaften. Das Gesandtschaftswesen im Zeitalter Maximilians I.', in: Sonja Dünnebeil and Christine Ottner, eds, *Aussenpolitisches Handeln im 15. Jahrhundert* (Vienna, 2007), pp. 213-226. Donald Edward Queller, *Early Venetian Legislation on Ambassadors* (Geneva, 1966). Queller, *The Office of Ambassador in the Middle Ages* (Princeton, 1967).

established diplomatic representations at the several courts in the area.

However, the proximity of neighbouring independent states in Northern Italy is only a necessary, not a sufficient condition for the emergence of standing diplomatic missions. This is so, because the same condition applies to other parts of the world, where, nevertheless, standing diplomacy had not appeared prior to the twentieth century. Thus, it was possible for states to coexist in a relatively small region without institutions of standing diplomacy necessarily having to become established. There seem to be factors of culture behind the formation and institutionalisation of standing diplomacy. The simple question what diplomacy is, thus cannot be answered without recourse to patterns of culture.[153] Whoever sets out to explain, why *ad hoc* diplomatic missions have become transformed into institutions of standing diplomacy, should differentiate between word, concept and subject matter, cannot succeed without the deconstruction of the specific components of European culture and must then provide clues to the critical inquiry, why specific aspects of European culture could have become globalised in a culture of diplomacy at large.

However, the even higher threshold of defining culture needs to be overcome, before this task can be tackled. Already in 1952, US anthropologists Alfred Louis Kroeber and Clyde Kay Maben Kluckhohn provided a list of more than 160 definitions of culture,[154] and that list has not shrunk since then. The diffculty at the bottom of the plethora of possible definitions of culture results from a basic decision, which everyone attempting a definition of culture must make. The decision is about the conceptual reach of the attempted definition: Is the definition to be inclusive in the sense that it

---

[153] For unsatisfactory attempts see: José Calvet de Magalhães, *The Pure Concept of Diplomacy* (Contributions in Political Science, 214) (Westport, CT, 1988), p. 9 [first published (Colleção ensaios e documentos. N. S., 22) (Lisbon, 1982)]. Iver B. Neumann, *"At Home with the Diplomats". Inside a European Foreign Ministry* (Ithaca, 2012). Nicholas Greenwood Onuf, *World of Our Making* (Columbia, SC, 1989), pp. 248-249. Richard Langhorne, 'Current Developments in Diplomacy. Who Are the Diplomats Now?', in: *Diplomacy and Statecraft*, vol. 8, nr 1 (1992), pp. 1-15. Moreover, attempts seeking to limit the impact of culture or cultures on diplomacy to choices of strategies and tactics as well as communicaton styles in negotiations among state emissaries, do not carry any further. This is so, because answers to the question whether or not these strategies, tactics and communication styles are peculiar to each culture, depend on perceptions of retrospective observers and are not necessarily drawn on contemporary perceptions of participants. For the discussion see: Raymond Cohen, *Negotiation across Cultures. International Communication in an Interdependent World* (Washington, 1997). Cohen, 'Meaning, Interpretation and International Negotiation', in: *Global Society* 14 (2000), pp. 317-335. Guy Olivier Faure and Jeffrey Z. Rubin, eds, *Culture and Negotiation* (Newbury Park, 1993). Glen Fisher, *International Negotiation. A Cross-Cultural Perspective* (Chicago, 1980). Fisher, *Mindsets* (Yarmouth, ME, 1988). Philip Hugh Gulliver, *Disputes and Negotiations. A Cross-Cultural Perspective* (New York, 1979). Christer Jönsson, *Communication in International Bargaining* (London, 1990). Jönsson, 'Diplomacy, Bargaining and Negotiation', in: Walter Carlsnæs, Thomas Risse and Beth A. Simmons, eds, *Handbook of International Relations. London* (Thousand Oaks and New Delhi, 2002), pp. 212-234.

[154] Alfred Louis Kroeber and Clyde Kluckhohn, *Culture. A Critical Review of Concepts and Definitions* (Papers of the Peabody Museum of American Archaeology and Ethnology, vol. 47, nr 1) (Cambridge, MA, 1952) [further edn (New York, 1963)].

seeks to provide a concept applicable to humankind at large, or is it to be restricted exclusively in its meaning to a certain, larger or smaller group? That is to say, the fundamental problem is to determine whether we should postulate the singularity of one culture for humankind at large or should take the pluralism of cultures for granted, is part of the process of the definition and thus dependent upon dispositions prior to the definition itself. Put differently, every definition of culture is circular in at least some of its components. Therefore, it is a matter of determining the point of view, whether we accept either the premise that only one culture of diplomacy exists or whether we assume that there is a pluralism of cultures of diplomacy.

Once we start investigating the causes of that difficulty, we encounter a surprising empirical finding. Whatever point of view we take, the principled matters of diplomacy manifest a remarkable parallelism of diplomatic procedures among widely different cultures and far-away states and display an equally remarkable scarcity of cross-cultural conflict about the legal bases of diplomatic relations. For one, Pope Innocent IV sought to rescue the claim for the universality of his rule, by transferring it from the Roman Empire to the Catholic Church. Simultaneously with St Thomas Aquinas, the Pope derived his claim for ecclesiastical overrule about humankind as a whole from the argument that all human beings were "Christ's sheep", believers as well in "infidels". He included not only Muslims into the reach of his claim, but also Mongols, to whom he dispatched his emissaries as missionaries.[155] He equipped his chief emissary with a letter of credence, in which he requested from the Mongol Khan to provide safety, specifically safe conduct (*salvus conductus*), to the diplomats sent from Rome.[156] In his reply, dated November 1246, Mongol Great Khan Güyük censured the Pope, saying that he knew well how to treat diplomats and attacked Christians for not having at their disposal a comparable level of knowledge about diplomatic procedure. He defended military actions by Mongol armies against "Magyars and Christians" maintaining that they had murdered a diplomatic envoy.[157] Hence, both, the Great Khan and the Pope, took it for granted that the protection of the safety of diplomatic envoys, that is, their lives and property, was part of a generally valid law which was in existence for all humankind even when and where it was not explicitly cast into written normative texts. Yet, at the same time, they lent expression to their knowledge that that law could be infringed upon. Diplomatic emissaries thus acted within a social space, in which law was not protected and enforced by the armed power of a territorial ruler. Therefore, all legal norms,

---

[155] Innocent IV, Pope, Commentaria apparatus in V libros decretalium, fol. 429ᵛ·-430ᵛ· Ms., partly printed in: Felicitas Schmieder, 'Das Werden des mittelalterlichen Europa aus dem Kulturkontakt. Voraussetzungen und Anfänge der europäischen Expansion', in: Renate Dürr, Gisela Engel and Johannes Süßmann, eds, *Expansionen in der Frühen Neuzeit* (Zeitschrift für Historische Forschung, Beiheft 34) (Berlin, 2005), pp. 27-41. Innocent IV, *Ex Innocentii IV registro. Epistolae saeculi XIII e regestis pontificum Romanorum selectae*, edited by Karl Rodenberg (Monumenta Germaniae historica, Epistolae, 1.2. 3) (Berlin, 1894), pp. 69-81.
[156] Innocent IV, *Registrum* (note 155), nr 102 (5 March 1245), pp. 72-73; nr 105 (13 March 1245), p. 75.
[157] Güyük, Great Khan of the Mongols, [Letter to Pope Innocent IV, November 1246], in: Christopher Dawson, ed., *Mission to Asia* (Medieval Academy Reprints for Teaching, 8) (Toronto, London and Buffalo, 1980), pp. 85-86.

perceived as being in force, were regarded as divine in origin and common to all humankind, as Bernard du Rosier, Archbishop of Toulouse, wrote in the fifteenth century.[158]

While there were no written contractual obligations in existence about the law of diplomatic intercourse among states prior to the Viena Convention of 1961,[159] a great tradition of the recognition of some formal norms on diplomatic intercourse prevailed in the "old world" of Africa, Asia and Europe from Antiquity:[160] The law included the demand that envoys had to be specifically empowered by legitimate rulers and had to give credence to their empowerment; the extremely restrictive handling of the recognition of the legal competence of sending and receiving diplomatic emissaries; the request for the protection of the person and the property of diplomatic envoys on the territory of the states to which they had been dispatched; and the implementation of the principle of *suaviter in modo fortiter in re*, that is, the use of cautious and unexcited diction to which envoys had to subject themselves. Much as is known, there were no debates about the specific origin of these norms and principles; the derivation of these norms and principles from natural law appears to have been taken for granted. Beyond the empirical pluralism of cultures, there was, at least as long as records have been available, a single culture of diplomacy. Yet, this finding applies only to the ad hoc missions for specific purposes, not to the principles informing standing diplomacy. The question about the causes of the rise of standing diplomacy can only be answered satisfactorily, once the history of the concept of the state and the international system has been clarified.

b) The Time Factor in Its Relevance on the Concept of the State

At leatst within the theory of international relations and international law, the concept of the state has been surprisingly constant since the nineteenth century. That, however, does not imply that this concept of the state has been accepted as valid throughout the world and at all times. The answer to the simple question of how many states have been in the world, crucially hinges on the concept of the state applied to the question. For about two hundred years, the most widely accepted concept of the state in the theory of international relations and international law[161] has emerged from Europe, more precisely from the German-speaking areas,[162] and has been globalised from the beginning of the twentieth century. The essential promoter of the globalisation of this concept of the state has

---

[158] Bernardus de Rosergio [Bernard du Rosier], 'Ambaxiator [1436]', chap. XXIII, edited by Vladimir Emmanuilovič Grabar, *De legatis et legationibus tractatus varii* (Tartu, 1905), pp. 1-28, at p. 23.

[159] Printed in: Niklas Wagner, Holger Raasch and Thomas Pröpstl, *Wiener Übereinkommen über diplomatische Beziehungen vom 18. April 1961. Kommentar für die Praxis* (Berlin, 2007), pp. 13-28.

[160] See: Kleinschmidt, *Geschichte* (note 34), pp. 243-248.

[161] For example see: Carl Theodor von Welcker, *Die Vervollkommung der organischen Entwicklung des deutschen Bundes zur bestmöglichen Förderung deutscher Nationaleinheit und deutscher staatsbürgerlicher Freiheit* (Karlsruhe, 1831).

[162] Thus already: Jellinek, *Staatslehre* (note 125), pp. 394-434.

been the above-mentioned 1933 Montevideo Convention on the Rights and Duties of States.[163] Up until the end of the eighteenth century, this narrowly defined concept of the state was not applicable anywhere in the world, as neither the unity of state territory within clearly demarcated linear borders nor the unity of government in ther sense of a fixed hierarchy of power-holders on a state territory nor the unity of population, defined as a nation drawn on constitutional principles, subject to generally applied legal norms and equipped with a single overarching collective identity were given.

In responce to this notion of the "territorial state", early twentieth-century historical research has become prone to the demand that the notion of sovereignty should not be applied to forms of rule prior to the end of the sixteenth century,[164] even though early variants of the word, together with the concept of sovereignty expressed through different words, was featured in earlier records;[165] and has coined the notion of the additional term of the "state based on interpersonal ties" (Personenverbandsstaat), to be used for periods before the sixteenth century.[166] The latter term was to represent a type of government institution, in which all compoents of rule were manifest, even though the demands of the nineteenth-century definition of the state were not met. States based in interpersonal ties were supposed to represent institutions of rule, the continuity of which was drawn on networks of personal ties between rulers and ruled tolerated varying population grops not settling on fixed territories demarcated in linear borders and under the sway of a pluralism of rulers.

The problem with this conceptualisation of the state is that already medieval state theory contained features of the state, which met at least the demand for the unity of government. The Anglian monk Bede, for one, conceived of royal rule as an institution positioned above a larger group of settlers on land.[167] According to this concept, the institutional compoent of rule was conceivable in contradisctinction against the person of the rulers, to whom the ruling office was entrusted. Hence, a state was more than just a network of transient personal ties between a ruler and the ruled. Likewise,

---

[163] Montevideo Convention (note 127).

[164] Otto Brunner, *Land und Herrschaft*, fourth edn (Vienna, 1959) [first published (Veröffentlichungen des Österreichischen Instituts für Geschichtsforschung, 1) (Vienna, 1939); fifth edn (Darmstadt, 1965)]. Contra: Georg von Below, *Der deutsche Staat des Mittelalters*, second edn (Leipzig, 1925) [first published (Leipzig, 1914)].

[165] Helmut Quaritsch, *Souveränität* (Schriften zur Verfassungsgeschichte, 38) (Berlin, 1986).

[166] Theodor Mayer, 'Die Entstehung des "modernen" Staates im Mittelalter und die freien Bauern', in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Germanistische Abteilung 57 (1937), pp. 210-288. Mayer, 'Die Ausbildung der Grundlagen des modernen deutschen Staates im hohen Mittelalter', in: *Historische Zeitschrift* 159 (1939), pp. 457-487 [reprinted in: Hellmut Kämpf, ed., *Herrschaft und Staat im Mittelalter* (Wege der Forschung, 2.) (Darmstadt, 1956), pp. 284-331; reprints of this edn (Darmstadt, 1960; 1963; 1964; 1970; 1972; 1974; 1984)].

[167] Bede, *Historia ecclesiastica gentis Anglorum*, book I, chap. 15, edited by Bertram Colgrave and Roger Aubrey Baskerville Mynors (Oxford, 1969), p. 50 [reprints (Oxford, 1991; 2003)]. On the concept of the teeritoriality of rule see: Stuart Elden, *The Birth of Territory* (Chicago and London, 2013), pp. 123-127. Harald Kleinschmidt, 'Der Fund von Staffordshire und die Krise der merzischen Königsherrschaft um 700. Ein Beitrag zur Kritik der Debatte um den Staatsbegriff des Frühmittelalters und zur Kooperation zwischen Geschichtswissenschaft und Archäologie', in: *Frühmittelalterliche Studien* 48 (2014), pp. 155-206.

Paul the Deacon, the eighth-century historiographer of the Lombards, could say that a king could usefully rule over a kingdom and was thus juxtaposing the kingdom as the object of rule in the hands of the king.[168] In the 870s, Archbishop Ado of Vienne could demand that solely a ruler reigning over a *res publica*, should be given the title of king (regem potius illum debere vocari qui rempublicam regeret).[169] Raban Maur quoted a formula first recorded by Isidore of Seville, according to whom the king (rex) had to have his title derived from legitimate rule, and Raban concluded that anyone was king, who ruled legitimately, irrespective if the titles used, and that no one could be styled *rex*, who was unwilling to subject himself to the rigid demands of legitimate rule. Raban identified justice and piety as the king's essential virtues (Rex eris si recte facias; si non facis non eris. Regiae virtutes praecipue justitia et pietas).[170] These theorists thus emphasised the need of the existence of legitimate rule, specifically of those kings who were bent to impose justice. Eight- and ninth-century theorists then defined rule as tied to an office in existence on a legal basis and entrusted with the competence of controlling the *res publica* as a whole.[171] At times, regnal styles could make explicit the unity of the territory and the population under the control of a rule.[172] In sum, the nineteenth-century theoretical doctrine of the three unities of the state is not applicable, just because it requests unities as definitional elements of state, but because it demands that all three unities should exist as the condition for a state to exist. The same observation applies for European Antiquity, for the Mediterranean area and most other parts of the world.

Consequently, it appears to make more sense to define the state as comprehensibly and as flexibly as possible rather than proposing a set of successive and mutually exclusive definitions, in order to cope with the varieties of different types of rule. Hence, states should be, as has been proposed earlier in this text, defined as political communities, which can avail themselves of secular legislative competence that cannot be derived from any superior ruling institution. States, whose original legislative competence is neither subject to any higher legislation nor is subject to any other external influence of another state that is considered as legally binding and has not been voluntarily

---

[168] Paul the Deacon, *Historia Langobardorum*, book III, chap. 35, edited by Georg Waitz (Monumenta Germaniae Historica Scriptores rerum Langobardicarum et Italicarum Saec[ulorum] VI – IX) (Hanover, 1878), p. 113.

[169] Ado, Archbishop of Vienne, 'Chronicon', edited in: Jacques-Paul Migne, *Patrologiae cursus completus*. Series Latina, vol. 123, col. 23-144, at col. 123.

[170] Raban Maur, Archbishop of Mainz, 'De universo libri viginti duo', book XVI, chap. 3, edited in: Jacques-Paul Migne, *Patrologiae cursus completus*. Series Latina, vol. 111, col. 9-614, at col. 446. Isidore of Seville, *Etymologiarvm sive originvm libri XX*, book IX, chap. 3, edited by Wallace Martin Lindsay (Oxford, 1911), s. p.

[171] For a study see: Walter Pohl, 'Staat und Herrschaft im frühen Mittelalter. Überlegungen zum Forschungsstand', in: Pohl, Stuart Airlie and Helmut Reimitz, eds, *Staat im frühen Mittelalter* (Denkschriften der Österreichischen Akademie der Wissenschaften. Philos.-Hist. Kl., 334 = Forschungen zur Geschichte des Mittelalters, 11) (Vienna, 2006), pp. 9-38.

[172] For a survey see: Harald Kleinschmidt, *Migration und Identität* (Schriften zur südwestdeutschen Landeskunde, 60) (Ostfildern, 2009), pp. 295-323.

accepted, should count as sovereigns.[173] This definition takes into account the normativity of state rule and regards states as institutions of some endurance, without excluding institutional and conceptual changes. In fulfilling these demands, the above definition recognised the perception of states as stable institutions, often recorded up to the end of the eighteenth century.[174]

Moreover, this definition of the state allows the inclusion of the interconnctedness between diplomacy and state institutions manifest across the millennia. The recorded scarcity of conflicts about the legal principles informing diplomatic intercourse can most easily be conceived within the perception of states as long-lasting institution of recognised legitimate rule. The conceptualisation of the state as a continuous, yet changeable institution of rule also permits the specification of some factors that contributed to the formation of standing diplomacy during the fifteenth century. By far the most significant of these factors was the process of the bureaucratisation of rule in cities as territorial states. This process is well recorded in urban legal and administrative sources, took its origin in Northern Italy late in the eleventh century and spread to cities in Southern Germany during the thirteenth century.[175] Although it did not originally affect diplomacy, it impacted on it in several waves from the fourteeenth century. Some cities formed leagues among themselves and used diplomatic envoys to keep the leagues in operation. These emissaries, usually members of urban patriciates, were repeatedly employed as diplomatic agents and professionalised themselves.[176]

c) The Culturality of European Diplomacy

A formal theory of diplomacy has been in existence from the thriteenth century, which established the platform for defining rights and duties of diplomats.[177] During the fifteenth and sixteenth centuries, the theory evolved into a veritable corpus of text.[178] The professionalisation of envoys

---

[173] Kleinschmidt, *Geschichte* (note 34), p. 8.

[174] See the survey in: Harald Kleinschmidt, *The Nemesis of Power* (London, 2000).

[175] See, among many: Gerhard Dilcher, *Bürgerrecht und Stadtverfassung im europäischen Mittelalter* (Cologne, Weimar and Vienna, 1996).

[176] Jörg, *Spezialisierung* (note 151).

[177] Guilelmus Durandus, 'Speculum', edited by Vladimir Emmanuilovič Grabar, *De legatis et legationibus tractatus varii* (Tartu, 1905), pp. 31-41.

[178] Rosergio, 'Ambaxiator' (note 158). Martinus Garatus of Lodi [Laudensis], 'Tractatus de legatis maxime principum', edited by Vladimir Emmanuilovič Grabar, *De legatis et legationibus tractatus varii* (Tartu, 1905), pp. 45-52 [first published in: Garatus, *Tractatus universi iuris*, vol. 13 (Venice, 1584), fol. 212-213]. Gonzalo García de Villadiego, 'Tractatus de legato [written in 1485]', in: ibid. [Spanish version, partly edited by L. García Arias, 'Doctrina diplomática expuesta por Gonzalo de Villadiego', in: *Cuadernos de historia diplomática* 3 (1956)]. Etienne Dolet, *De officio legati, quem vulgo ambassiatorem vocant* (Lyons, 1541) [edited by David Amherdt (Les classiques de la pensée politique, 23) (Geneva, 2010)]. Conrad Braun, *De legationibus libri quinque* (Mainz, 1548) [Microfiche edn (Bibliotheca Palatina, F2948) (Munich, 1991); French version, edited by Dominique Gaurier (Cahiers de l'Institut d'Anthropologie Juridique, 18) (Limoges, 2008)]. Octavianus Magius, *De legato libri duo* (Hanau, 1596) [first published (Venice, 1566)]. Pierre [Petrus Aerodius] Ayrault, 'De legationibus', in: Ayrault, *Rerum ab omni antiquitate judicatarum libri X*, book X, title XV (Geneva, 1677), pp. 621-630 [first published (Paris,

further amplified the literalisation of diplomatic activity, as ever more often, emissaries reported back home in the course of their ongoing missions. In response to incoming messages, the receiving central authorities had to register the reports, while preserving copies of outgoing messages for future reference. The Senate of Venice appears to have begun with consistent record-keeping in 1425.[179] Already by 1500, foreign office archives belonged to the standard institutional equipment of growing urban bureaucracies. The sending of diplomatic correspondence entailed the regularisation of postal services, which had to guarantee the safety of the dispatches against unlawful opening on their way. Towards the end of the fifteenth century, the Gonzaga Dukes of Mantua appear to have been the first to set up a regular messenger service for diplomatic correspondence to maintain secrecy. The emergence of cryptography, with early attempts having occurred in Venice already in 1145,[180] had the same purpose in many other Northern Italian cities from the end of the fourteenth century.[181] By the early sixteenth century, somehwat paradoxically, printed instructions on how to compose keys for cryptic scripts came into existence.[182] Urban councils put into effect special rules of conduct for their emissaries. In Venice, for example, the government prohibited the sale of gifts by returning diplomats on local public markets.[183] As envoys had to travel, as other groups of professionals were compelled to do, the academic discipline of apodemics began to be taught in universities and came to be laid down in textbooks.[184]

1573), pp. 701-709]. Félix de La Mothe le Vayer, *Legatus seu de legatione legatorumque priuilegiis, officio ac munere libellus ad titulos de legatione et legatis* (Paris, 1579) [further edn (Hanau, 1596)]. Alberico Gentili, *De legationibus libri tres*. Reprint of the edn of 1594, edited by Ernest Nys (London, 1924). Pierre Poncet, *Tractatvs de ivre mvnicipali* (Lyons, 1595) [Microfiche edn (Bibliotheca Palatina, F316/F318) (Munich, 1991)]. Krysztof Warszewicki [Christophorus Warsevicius], *De legationibus adeundis luculentissima oratio* (Lich, 1604) [first published (Cracow, 1595); further edns (Rostock, 1597); (Gdansk, 1646); also edited by Vladimir Emmanuilovič Grabar, *De legatis et legationibus tractatus varii* (Tartu, 1905), pp. 131-139]. Carolus Paschalius, *Legatus. Opus distinctum in capita septem et septuaginta* (Rouen, 1598) [second edn (Paris, 1612); third edn (Amsterdam, 1645)]. On these texts see: Alain Wijffels, 'Le statut juridique des ambassadeurs d'après la doctrine du XVIe siècle', in: *Publication du Centre Européen d'Etudes Bouguignonnes* 32 (1992), pp. 127-142.

[179] Queller, *Legislation* (note 152).

[180] Bartolomeo Cecchetti, 'Le scritture occulte nella diplomazia veneziana', in: *Atti del Real Istituto Veneto di scienze, lettere ed arti*, Series III, vol. 14 (1868/69), pp. 1185-1213. Luigi Pasini, 'Elenco delle decifrazioni dei dispacci degli ambasciatori veneti', in: Bartolomeo Cecchetti, *Archivio di Stato in Venezia. 1876-80* (Venice, 1881), pp. 202-204.

[181] Aloys Meister, *Die Anfänge der modernen diplomatischen Geheimschrift. Beiträge zur Geschichte der italienischen Kryptographie des XV. Jahrhunderts* (Paderborn, 1902), pp. 16-19.

[182] Johannes Tritheim [Trihemius, Abbot of Sponheim], *Polygraphiae libri sex* (Basle, 1518) [written in 1502]. Giovanni Battista Della Porta, *De furtivis litterarum notis, vulgo de zifferis libri III* (Naples, 1563). Blaise de Vigenère, *Traicté des chiffres. Ou Secrètes manières d'escrire* (Paris, 1586).

[183] Queller, *Legislation* (note 152).

[184] On the history of statistics see: Kaspar Thurmann, *Bibliotheca statistica. Sive de ratione status et cambiis* (Halle, 1704). 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. Peter J. Brenner, *Der Reisebericht in der deutschen Literatur* (Internationales Archiv für Sozialgeschichte der deutschen Literatur, Sonderheft 2) (Tübingen, 1990). Ferdinand Felsing, *Die Statistik als Methode der politischen Ökonomie im 17. und 18. Jahrhundert* (Leipzig, 1930). Vincenz John, *Geschichte der Statistik*, vol. 1 (Stuttgart, 1884) [reprint (Wiesbaden, 1968)]. Uli Kutter, 'Apodemiken und Reisehandbücher', in: *Das Achtzehnte Jahrhundert* 4 (1980), pp. 116-131. Kutter, *Reisen – Reisehandbücher – Wissenschaft. Materialien zur Reisekultur im 18. Jahrhundert* (Neuwied, 1996). Kurt Lewin, *Die Entwicklung der Sozialwissenschaften in Göttingen im Zeitalter der Aufklärung.*

Hence, there was logical consistency in the establishment of standing diplomatic representations, as all these bureaucratic demands required an organisational infrastructure that was laid out for indefinite use. The establishment of standing diplomatic representations, thus, was part of the general change of European culture specifically during the fifteenth century, while it did not in the first place result from the pressures of international relations.

This is so, first and foremost, because not all international relations are under the control of professional diplomatic emissaries, neither today nor in previous times. Quite on the contrary, the fields of activity of professional diplomats has been defined in rather restrictive tems for a long span of time. Restricting the realm of diplomatic activity has been controversial. Mainstream international law literature, together with general descriptions of diplomatic activity, have maintained the principle that emissaries have mainly been concerned with the maintenance of peace.[185] Yet, these claims stand in stark contrast with empirical records portaying diplomats as actors exercising political and economic pressure on governments under the label of the recently so called "coercive diplomacy".[186] For example, during the period of the expansion of European imperialist colonial rule

---

1734 – 1812. Ph. D. thesis, typescript (University of Göttingen, 1971). Martin Peters, *Altes Reich und Europa. Der Historiker, Statistiker und Publizist August Ludwig (v.) Schlözer (1735 – 1809)* (Forschungen zur Geschichte der Neuzeit, Marburger Beiträge, 6) (Munster, 2003), pp. 207-255 [second edn (Munster, 2005)]. Richard Saage, 'August Ludwig Schlözer als politischer Theoretiker', in: *Anfänge Göttinger Sozialwissenschaft* (Göttinger Universitätssschriften, Series A, vol. 4) (Göttingen, 1987), pp. 13-54. Merio Scattola, 'Schlözer und die Staatswissenschaften des 18. Jahrhunderts', in: Heinz Duchhardt and Martin Espenhorst, eds, *August Ludwig (von) Schlözer in Europa* (Veröffentlichungen des Instituts für europäische Geschichte Mainz, 86) (Göttingen, 2012), pp. 179-195. Arno Seifert, 'Staatenkunde', in: Mohammed Rassem and Justin Stagl, eds, *Statistik und Staatsbeschreibung in der Neuzeit* (Quellen und Abhandlungen zur Geschichte der Staatsbeschreibungen und Statistik, 1) (Paderborn, 1980), pp. 217-244. Justin Stagl, 'Vom Dialog zum Fragebogen. Miszellen zur Geschichte der Statistik', in: *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 31 (1979), pp. 611-638. Stagl, 'Der wohl unterwiesene Passagier', in: Boris Il'ič Krasnobaev, Gert Robel and Herbert Zeman, eds, *Reisen und Reisebeschreibungen im 18. und 19. Jahrhundert als Quellen der Kulturbeziehungsforschung* (Studien zur Geschichte der Kulturbeziehungen in Mittel- und Osteuropa, 6) (Berlin, 1980), pp. 353-384. Stagl, Klaus Orda and Christel Kämpfer, *Apodemiken* (Paderborn, 1983). Stagl, 'Das Reisen als Kunst und als Wissenschaft (16. – 18. Jahrhundert)', in: *Zeitschrift für Ethnologie* 108 (1983), pp. 15-34. Stagl, 'Die Methodisierung des Reisens im 16. Jahrhundert', in: Peter J. Brenner, ed., *Der Reisebericht* (Frankfurt, 1989), pp. 140-177. Stagl, 'Ars apodemica. Bildungsreise und Reisemetaphorik von 1560 bis 1600', in: Xenja von Ertzdorff [-Kupffer] and Dieter Neukirch, eds, *Reisen und Reiseliteratur im Mittelalter und und in der Frühen Neuzeit* (Chloë, 13) (Amsterdam and Atlanta, 1992), pp. 141-189. Stagl, *Geschichte der Neugier. Reisekunst 1550 – 1800* (Cologne, Weimar and Vienna, 2002). Gabriella Valera, *Acienza dello stato e metodo storiografico nella scuola storica di Gottinga* (La cultura delle idee, 3) (Naples, 1980). Valera, 'Statistik, Staatengeschichte. Geschichte im 18. Jahrhundert', in: Hans Erich Bödeker, ed., *Aufklärung und Geschichte. Studien zur deutschen Geschichtswissenscaft im 18. Jahrhundert* (Veröffentlichungen des Max-Planck-Instituts für Geschichte, 81) (Göttingen, 1986), pp. 119-143. Bernd Warlich, *August Ludwig von Schlözer*. Ph. D. thesis, typescript (University of Erlangen, 1972). Friedrich Wolfzettel, *Le discours du voyageur. Pour une histoire littéraire du récit de voyage en France, du Moyen Age au XVIIIe siècle* (Paris, 1996).
[185] Ronald Peter Barston, *Modern Diplomacy*, second edn (London, 1997), pp. 1-8 [first published (London and New York, 1988); third edn (Harlow, 2006)]. Calvet de Magalhães, *Concept* (note 153), p. 9. Oppenheim, *Law* (note 25), vol. 2. John Westlake, *International Law*, vol. 2 (Cambridge, 1907) [second edn (Cambridge, 1913); Microfiche edn (Zug, 1982)].
[186] Brian White, 'Diplomacy', in: John Baylis and Steve Smith, eds, *The Globalization of World Politics*, third edn

at around 1900, diplomats were by no means just messengers of peace, as military officials could act as diplomats and resort to coercion.[187] Even though many active diplomats[188] as well as historians of diplomacy[189] have willingly committed themselves to the view that envoys end their professional activity with the beginning of a war and return only, once the war has ended, this view is not tenable in general terms. Admittedly, there were cases, such as the launching of World War I, witnessing the recall of diplomatic envoys at the time of the beginning of hostilities, with the consequence that international relations among warring state parties were broken off. Yet this procedure did not represent a general, obliging practice across the periods. By contrast, there were many cases in which diplomats of warring parties would meet at neutral places to sound the potential for rapprochement and the cessation of hostilities.[190] The conduct of war and efforts for the restoration of peace were, as a rule, not considered as mutually exclusive. It was military, political and international legal theories that placed war and peace into opposition as absolute conditions of affairs, not the practical activities of diplomatic envoys. Vice versa, pacification missions, specifically during the high phase of European colonial expansion, could take place under the control of diplomats, unless alleged pacification missions were wholly serving as ideologies for military expansion.[191]

Consequently, efforts to restrict the areas of diplomatic activity have not been crowned with success, even though, prior to the twentieth century, economic and cultural matters usually did not fall into the province of diplomatic envoys. But the criteria determining diplomatic activity in formal legal respects have been quite manifest. As long as reports on this activity have been on record, envoys have ranked legally as mouthpieces of rulers and governments sending them out. That meant that emissaries have not been entitled to act on their own behalf but were on their way as empowered legates. Commonly, the commissions for ad hoc dispatches have been laid down in special instructions written in the names of sending rulers and governments. Instructions could also be given to members of standing mission for negotiations on specific matters. The empowerment (procura) could be expressed in general terms or for specific matters. As a rule, emissaries carried with them

(New York and Oxford, 2005), pp. 387-403 [first published (Oxford, 1997); second edn (Oxford, 2001)].

[187] Prototypical: Frederick John Dealtry Lugard, *The Dual Mandate in Tropical Africa* (Edinburgh, 1922) [second edn (Edinburgh and London, 1923); third edn (Edinburgh and London, 1926); fourth edn (Edinburgh and London, 1929); reprint (London, 1965)].

[188] Calvet de Magalhaes, *Concept* (wie Anm. 153). Neumann, *Home* (note 153).

[189] Matthew Smith Anderson, *The Rise of Modern Diplomacy. 1450 – 1919* (London and New York, 1993).

[190] Christoph Kampmann, 'Peace Impossible? The Holy Roman Empire and the European State System in the Seventeenth Century', in: Olaf Asbach and Peter Schröder, eds, *War, the State and International Law in Seventeenth-Century Europe* (Farnham, SY, 2010), pp. 197-210. Kampmann, 'Ius Gentium and Peace Order. The Treaty of London (1518) and Continuity in the International Law of the Modern Times', in: Thilo Marauhn and Heinhard Steiger, eds, *Universality and Continuity in International Law* (The Hague, 2011), pp. 393-406.

[191] Recognnisable from British policy at the time of the conquest of the Kingdom of Ashanti from1895 to 1901. See: Kleinschmidt, *Diskriminierung* (note 41), pp. 151-168.

proofs certifying their procura, whereby these proofs could take the form of the capacity to perform certain established rituals or could exist in the form of a written diploma. The commissions could concern a wide range of issues, which, nevertheless, had to make manifest their relations with the person of the sending ruler or the policy of the government of the sending state. For one, King Henry VII of England dispatched an ad hoc mission to Naples wooing for a bride in 1505. King Henry could not make up his mind whether to approach the unmarried daughter of the King of Naples, Charlotte de Beaux, or her widowed mother, Isabella de Beaux. To allow him to make a decision, he instructed his emissaries to discretely investigate the condition of health and the character. But the mission returned without a clear recommendation, and left Henry unmarried.[192] Informations of this and many other kinds were, as a rule, not available on the public news market, but had to be collected through informal channels. This practice regularly brought diplomats close to spies. Receiving rulers and governments were, therefore, in the comfortable position of being able to expel unwanted diplomats with the accusation of espionage.

Conversely, the flood of material that diplomats produced, specifically in standing missions, brought about the need to develop special bureaucracies for the scrutiny of the incoming reports, with these bureaucracies coming during the sixteenth century and expanding rapidly thereafter. Hence, standing missions, resulting from bureaucratic constraints, in turn contributed to the expansion of buraeucracies. Already by the second half of the eighteenth century, the foreign offices of major European states, such as France and Russia, comprised more two hundred officials, while most travelling diplomats, as members of the aristocracy, went on their missions at their own expense and without reimbursement of their costs by the sending ruler. Hence, they had to conduct their missions in such a way as to ensure that their costs would be met. They mainly sought to accomplish that goal through the practice of gift-giving. It was economically necessary for envoys to select the presents they were to submit to receiving rulers and their colleagues at their destinations by, first, carefully assessing the value these presents might be given by their recipients, and, second, investing less in the purchase of the presents at home than the value the counter-gifts might have that they received at their destinations. This practice of carefully assessing the value of gifts and counter-gifts required detailed knowledge of local markets at the destinations, which was commonly available in networks among standing missions. Yet, these informations were circulating only in closed diplomatic circles to which only aristocratic diplomats could have access.

The aristocratic descent of most diplomatic envoys upt to the nineteenth century also had the consequence that most diplomats received their education within their kin groups and were thus not

---

[192] For details see: Harald Kleinschmidt, *Charles V. The World Emperor* (Stroud, 2004), p. 21.

in need of formal schooling in diplomatic academies. This appears to have been the major reason, why schools for diplomats hardly succeeded prior to the end of the eighteenth century. Such schools opened at the Vatican in 1701, in France in 1712, in Prussia in 1747, at the city of Hanau in 1749 and in Vienna in 1754, but, with the exception of the Viennese academy, closed after a few years in operation. The Viennese schools was an exceptional case indeed, as it was established as the "Oriental Academy" (Orientalische Akademie) for the specific purpose of training emissaries to be sent to the High Porte in Istanbul and has continued to the present day. The professorship for Arabic language was set up at Oxford University for a similar purpose in 1699.

Literacy, as constitutive for standing missions, together with the modalities of the slow speed of travelling, entailed the further consequence between the fifteenth and the eighteenth centuries that diplomatic negotiations were time-consuming. Even though envoys did not have to return specifically to receive a reply to every message they would send, they did have to report and wait for instructions on specific steps to be taken during negotiations. Despite the use of high-speed post horses, which were able to master even wide distances across Europe within a few days, a week at most, negotiations could demand long periods of standstill. A change of procedure, manifest during the eighteenth century, accounted for the recognition of the disadvantages resulting from the clumsy negotiation processes, specifically during multilateral peace negotiations. Seeking to optimise these negotiations, jurists and diplomats then introduced the new format of the preliminary peace agreement, in which the basic issues of the definitive peace were already set out and could even go into force for a limited span of time. In some cases, stipulations laid down in these preliminary agreements might be of importance, some they might become ineffective if left unenforced for a considerable period. In many cases, these preliminary agreements were subsequently transformed into definitive treaties.[193] From the middle of the eighteenth century, the even shorter procedure of ratification of treaties through involved rulers and governments came into place and could be stipulated in treaties within fixed periods of time. The ratification procedure made redundant new gatherings among diplomatic representatives for the purpose of approving definitive treaties.[194]

---

[193] Or examples see: Treaty [Preliminary Peace Agreement] Prussia – Roman Emperor and Roman Empire, Breslau, 11 June 1742, in: *CTS*, vol. 36, pp. 277-282. Treaty [Definitive Peace Agreement] Prussia – Roman Emperor and Roman Empire, Berlin, 28 July 1742, in: *CTS*, vol. 36, pp. 411-420 [on the termination of the First Silesian War]. Treaty [Preminary Peace Agreement] France – States General of the Netherlands – UK, Aix-la-Chapelle, 30 April 1748, in: *CTS*, vol. 37, pp. 237-398. Treaty [Definitive Peace Agreement] France – States General of the Netherlands – UK, Aix-la-Chapelle, 18 October 1748, in: *CTS*, vol. 38, pp. 301-398. For the legal distinction between preliminary and definitive agreements see: Johann Heinrich Schoell, *Dissertatio inauguralis de praeliminaribus pacis*. LLD thesis (University of Strasbourg, 1708).

[194] This so-called "composite procedure" had already been practised during the later Middle Ages, but received recognition as a regular procedure, agreed upon in treaties, only during the eighteenth century. See: Walter Heinemeyer, 'Studien zur Diplomatik mittelalterlicher Verträge vornehmlich des 13. Jahrhunderts', in: *Archiv für Urkundenforschung* 14 (1936), pp. 321-413. For the history of communication see: Wolfgang Behringer, *Im Zeichen des Merkur. Reichspost und Kommunikationsrevolution in der Frühen Neuzeit* (Veröffentlichungen des

A further aspect of the practice of standing missions up until the end of the eighteenth century consisted in the strict ritualisation of diplomatic intercourse. It resulted from the perception of emissaries as mouthpieces of sending rulers and governments, within the context of the application of the machine model of the international system and the concept of the state as a stable institution of rule. According to this model, the maintenance of the divinely willed world order took priority over all other political goals. The international system ranked as unchangeable, which meant that every state as a part of the system had a definite rank within it. Ascertaining the rank of a state within the international system was equivalent of measuring the prestige, power and reputation of a ruler or government compared to all other rulers and governments. In addition to their task of gathering information, diplomatic envoys had the further obligation of claiming the appropriate degrees of prestige, power and reputation of their commissioning ruler or government at their destination. The ruling ceremonial commonly used at courts was the standard for measuring prestige, power and reputation.[195] Hence, courtly ceremonial was not only the object of extensive theoretical analyses but also of frequent controversy.[196] The performance of rituals as part of diplomatic business was by no means irrational mumbojumbo,[197] but a necessary condition for the conduct of international relations in what was then perceived as a stable world order.

However, from the beginning of the nineteenth century, successive changes took place with regard to certain aspects of European diplomatic culture, which have been discussed elsewhere.[198] By 1900, some diplomats perceived these changes as a fundamental transformation of diplomatic practice and described that transformation as the transition from "old" to "new" diplomacy.[199] They adduced the

Max-Planck-Instututs für Geschichte, 189) (Göttingen, 2003).
[195] See: Johann Christian Lünig, *Theatrum ceremoniale historico-politicum*, 2 vols (Leipzig, 1719). Julius Bernhard von Rohr, *Einleitung zur Ceremoniel-Wissenschaft der Grossen Herren* (Berlin, 1733) [reprint, edited by Monika Schlechte (Leipzig and Weinheim, 1990)]. Gottfried Stieve, *Europäisches Hof-Ceremoniel* (Leipzig, 1714) [second edn (Leipzig, 1723)]. Jörg Jochen Berns and Thomas Rahn, eds, *Zeremoniell als höfische Ästhetik* (Frühe Neuzeit, 25) (Tübingen, 1995). Barbara Stollberg-Rilinger, 'Die Wissenschaft der feinen Unterschiede. Das Präzedenzrecht und die europäischen Monarchien vom 16. bis zum 18. Jahrhundert', in: *Majestas* 10 (2002), pp. 125-150.
[196] See: Johann Jakob Moser, *Grundsätze des jetzt üblichen Europäischen Völcker-Rechts in Friedens-Zeiten* (Frankfurt, 1763).
[197] Thus: Onuf, *World* (note 153), pp. 248-249.
[198] For details see: Kleinschmidt, *Geschichte* (note 34), pp. 274-304.
[199] Jules Cambon, [Letter to de Margerie, 24 March 1905], in: Keith Hamilton and Richard Langhorne, *The Practice of Diplomacy* (London and New York, 1995), p. 137. Cambon, *Le diplomate* (Paris, 1927), p. 119. James Brown Scott, 'The Development of Modern Diplomacy', in: Edmund Aloysius Walsh, SJ, ed., *The History and Nature of International Relations* (New York, 1922), pp. 93-129. Dominik Geppert, 'The Public Challenge to Diplomacy. German and Britis Ways of Dealing with the Press. 1890 – 1914', in: Markus Mößlang and Torsten Riotte, eds, *The Diplomats' World. The Cultural History of Diplomacy. 1815 – 1914* (Oxford, 2008), pp. 133-165. Christer Jönsson, 'States Only? The Evolution of Diplomacy', in: Gunther Hellmann, Andreas K. Fahrmeir and Miloš Vec, eds, *The Transformation of Foreign Policy. Drawing and Managing Boundaries from Antiquity to the Present* (Oxford, 2016), pp. 242-262. Susanne Schattenberg, 'The Diplomat as "an Actor on a Great Stage before All People"? A Cultural History of Diplomacy and the Portsmouth Peace Negotiations of 1905', in: Mösslang (as above), pp. 167-194. Verena Steller, 'The Power of Protocol. On the Mechanisms of Symbolic Action in Diplomacy in

increase in the speed of travel, the conversion of diplomatic into civil servants, the criminalisation of private exchange of gifts, the technologisation of the transmission of information, the democratisation of forms of rule, the demand for the openness of diplomatic negotiations, the political downgrading of diplomatic ceremonial to the level of policy shows and the subjection of flexible personal networks among diplomats to binding legal inter-state relations as manifestations of "new" diplomacy. Moreover, in retrospect, the fields of diplomatic activity expanded in the course of the nineteenth century, with foreign economic policy and subsequently foreign cultural policy being added to the tasks of diplomats. In line with the expansion of the arena of diplomatic activity, the number of staff maintained in embassies grew exponentially. Embassies in foreign states were often classed as extraterritorial areas under the jurisdiction of the sending states, and the capability of unilaterally receiving the privilege of extraterritoriality without granting the same privilege counted as an indicator of great-power status. Embassies were treated as agencies capable of performing sovereign acts, targeted at controlling nationals residing in or visiting foreign states, including the practice of jurisdiction. For example, the nationality law of the German Empire, in force until 1913, requested registration in a diplomatic agency from all German nationals emigrating to a foreign country, if they wanted to retain their nationality.[200]

Diplomats thus had the essential task of expanding the international system, as it had come to be perceived in the course of the nineteenth century,[201] to the boundaries of the globe. In order to be able to do so, they employed the European public law of treaties among states as their major instrument, because that law appeared to regulate the treaty relations not only among European states, but also between states in Europe and elsewhere in the world.[202]

The consciousness of living in a borderless world, in which space seemed to disappear and political decisions of one government were credited with having impacts on decisions of other governments with regard to any spot on the surface of the planet earth, thereby having potential of generating incalculable interdependencies across the globe,[203] shaped the formation of concepts and strategies

Franco-German Relations. 1871 – 1914', in: Mößlang (as above), pp. 195-228.

[200] For details see: Harald Kleinschmidt, *Menschen in Bewegung* (Göttingen, 2002), pp. 261-279.

[201] For details see: Kleinschmidt, *Nemesis* (note 174), pp. 147-170.

[202] For details see: Kleinschmidt, *Geschichte* (note 34), pp. 304-316.

[203] Otto Hintze, 'Imperialismus und Weltpolitik', in: *Internationale Wochenschrift für Wissenschaft, Kunst und Technik* 1 (1907), pp. 593-605, 631-636 [reprinted in: Hintze, *Staat und Verfassung*, edited by Fritz Hartung (Hintze, Gesammelte Abhandlungen, vol. 1) (Leipzig, 1941), pp. 447-459, at p. 459; second edn of the Abhandlungen, edited by Gerhard Oestreich (Göttingen, 1962)]. Hintze, 'Imperialismus und Weltpolitik', in: *Die deutsche Freiheit* (1917), pp. 114-169, at p. 117. The perception of space disappearing has been recorded in: Karl Lamprecht, 'Moderne Expansion, moderner Staat und Weltpolitik', in: Lamprecht, *Deutsche Geschichte der jüngsten Vergangenheit und Gegenwart*, vol. 2 (Berlin, 1913), pp. 495-540, at p. 517 [first published in: Lamprecht, *Deutsche Geschichte*, Ergänzungsband 1 (Freiburg, 1902)].

in the foreign[204] and war ministries.[205] At around 1900, the notion of "world politics" no longer implied a foreign policy designed to maintain the stability of the world at large,[206] but applied to great-power politics aimed at enforcing change with global effects.[207] Imperialists took for granted that there was, within the international system of their own time, a pluralism of great powers all of which were bound to recognise and respect and among which some fragile balance of power was in existences beyond minor and even major disturbances that might occur here and there. one another's independence and legal equality. Imperialists in politics and in academe thus maintained that the European state system should have expanded since the fifteenth century and had brought about a world society of states under the sway of a few big powers. According to this conception, the international system existed without institutions of its own, simply by virtue of the interdependencies created through great-power politics.[208] Governments seen as capable of conducting these great-power politics appeared to act according to the maxim that all their decisions were mutually relevant, irrespective of the part of the world to which a single decision might apply.[209] Even in the view of contemporary liberal theorists, governments engaged in the conduct of "world politics" seemed to form a "cultural family" (Kulturfamilie),[210] to act in some "world theatre" (Welttheater)[211] and to direct the fates of allegedly "lower races" everywhere in the world and under the feigned goal of maintaining peace.[212]

This expectation that the actions of a few European governments might have global effects, was obviously so dominant at around 1900 that even Socialist critics came under its influence. Already in 1907,[213] Socialist theorists understood that European colonialist governments were acting in a kind of cartel in the formulation and implementation of their foreign policies. Within this perception, there was an informal cooperation among European colonial governments with the goal of

---

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

[205] See: Jehuda Lothar Wallach, *The Dogma of the Battle of Annihilation. The Theories of Clausewitz and Schlieffen and Their Impact on the German Conduct of Two World Wars* (Contributions in Military Studies, 45) (Westport, CT, 1986) [first published (Frankfurt, 1967)].

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

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

[208] Hintze, 'Imperialismus' (note 203, 1917), p. 118.

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

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

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

[212] John Atkinson Hobson, *Imperialism* (London, 1902), pp. 204-205, 208.

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

expanding their control over the largest possible part of the globe and to do so at the lowest political and military costs. In order to accomplish that goal, so the argument ran, governments engaged in efforts to expand their colonial rule were recognised the mutual interdependence of their political decisions under the cartellist strategy to carve out areas over which they might expand their rule without having to face competition from rival governments. Some theorists labelled that strategy as "ultraimperialism" (Ultraimperialismus)[214] and drew the conclusion that expansion of colonial rule through the restriction of competition among colonialist governments might generate the potential of stabilising relations among otherwise highly antagonistic capitalist states.[215] In view of Socialist theorists shortly before the beginning of World War I, then, the Imperialist International, already in practice, appeared to be a far more effective organisation than the Socialist International, then in the making, and might be able to protract the upcoming of the Socialist revolution.

As is well-known, Lenin subjected the theory of "ultraimperialism" to a scathing critique, although he had initially welcomed it.[216] During World War I, he exposed the conflict as the engine for the Socialist revolution.[217] Lenin based his critique on the claim, in retrospect found to have been unwarranted, that the theory of "ultraimperialism" had been formulated shorlty after the beginning of the war in September 1914, when, in Lenin's view, it should have been clear already that the war was not a contribution to the maintenance of the stability of the Imperialist international system. Instead, the theory of "ultraimperialism" had in fact been established in writing before the beginning of the war. Nevertheless, Lenin's attack was widely accepted among Socialist theorists throughout the 1920s.[218]

The increasing intensification of inter-state relations within the international system, together with the growing number of specialists in charge of managing military and political aspects of these relations, appeared to raise the level of difficulties in accomplshing the set goal of foreign policy control. This was so, because "world politics" as the instrument of control of apparently contingent futures was possible solely on the basis of solid factual knowledge of what seemed to be the case,

---

[214] Karl Kautsky, 'Der erste Mai und der Kampf gegen den Militarismus', in: *Die neue Zeit*, vol. 30, part II (1912), pp. 97-109.

[215] Karl Kautsky, 'Der Imperialismus [Zur Vertrustung der Großmacht]', in: *Die neue Zeit*, vol. 32, part II (1914), pp. 908-922 [English version in: *International Socialist Review*, vol. 15, nr 5 (1914), pp. 282-286; manuscript version s. t.: Der internationale Kongress und der Imperialismus. Ms. Amsterdam: Internationaal Instituut voor Sociale Geschiedenis. Kautsky Papers, A 56. summer 1914]. Kautsky, 'Der imperialistische Krieg (part 2)', in: *Die neue Zeit*, vol. 35, part II (1917), pp. 475-487.

[216] Vladimir Il'ič Lenin, 'Vorwort' [in: Nikolai Bucharin, *Weltwirtschaft und Imperialismus*, written in December 1915], in: Lenin, *Werke*, vol. 22 (Berlin, 1972), pp. 101-106.

[217] Vladimir Il'ič Lenin, *Imperialism. The Highest Stage of Capitalism* [written in 1916, first published (1917)], edited by Norman Lewis and James Malone (London and Ann Arbor, MI, 1996) [German version in: Lenin, *Werke*, vol. 22 (Berlin, 1972), pp. 189-309].

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

while obtaining that knowledge was perceived as increasingly difficult. Which government was stepping up its armaments, might be considered as recognisable; yet the causes of arms increases remained secret and impenetrable even for special envoys, who were dispatched on fact-finding missions.[219] Moreover, it was evident that governments of major European states, specifically the United Kingdom, France and the German Empire, were competing for taking the largest share of control over the world; yet the question remained unanswerable what kind of effects were to arise, if one government established itself as the colonial ruler over a certain spot somewhere, despite the coordinating impacts of the Final Act of the Berlin Africa Conference of 1885. Therefore, Ernest Mason Satow, among the most experienced of diplomats of the late nineteenth and early twentieth centuries, deplored the purchase of secret information through bribes, which he took to be rather more than less widely spread.[220] "World politics" thus corrupted its most influential agents.

The peak of "new" diplomacy, emanating from Europe, was between c. 1880 and c. 1940. Even though there were aspects of international relations during this period, which stood aloof from control by professional diplomats, yet non-state actors, such as the long-distance trading companies, if they continued to exist at all, were no longer admittted as legal actors in the international arena. By contrast, sovereign states, and the diplomats acting as their official representatives, received a monopoly of the legal conduct of international relations. Hence, the influence of professional diplomats on the conduct of international relations were at no times higher than during this period. When, for example, Albert Einstein received information on having been awarded the Nobel prize for physics, while on his way to Japan, the occurrence quickly turned into a diplomatic controversy. The issue was that Einstein, although a German by birth, held Swiss nationality at the time. Hence, the German embassy in Tokyo became worried how the scholar, who had no sense of state foreign political rivalries, could be employed in service to German nationalistic foreign cultural policy. From the point of view of German state policy, the issue was important, because diplomatic relations between the German Empire and Japan had been restored only in 1920 after having been broken off at the time of the beginning of World War I. Hence, the German embassy in Japan assumed that it had to take steps to make manifest, what it regarded as a matter of fact, namely that a German national had become a Nobel laureate, and not a Swiss national. However, the problem disappeared more quickly than the German embassy had anticipated, because the Swiss federal government made

---

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

[220] Ernest Mason Satow, *A Guide to Diplomatic Practice*, vol. 2 (London, 1921), p. 144 [reprint of the original edn (Satow, Collected Works, vol. 9) (Tokyo, 1998); further reprint (Oxford, 2009); sixth edn, edited by Ivor Richards, *Satow's Diplomatic Practice* (London, 1979)]. On Satow see: Thomas G. Otte, 'Satow', in: Otte, Geoff R. Berridge and Maurice Keens-Soper, eds, *Diplomatic Theory from Machiavelli to Kissinger* (Basingstoke, 2001), pp. 125-150. Otte, '"A Manual of Diplomacy". The Genesis of Satow's *Guide to Diplomatic Practice*', in: *Diplomacy and Statecraft*, vol. 13, nr 2 (2002), pp. 229-242.

no claim of being in charge of Einstein in Japan. Hence, there was a high sensitivity for foreign cultural policy issues in the German Empire during the 1920s, with the German Foreign Office creating a special department for cultural policy,[221] and the German Academic Exchange Service, established under the auspices of the Foreign Office in 1925, has continued to be a witness to that sensitivity to the present day.

However, from the end of World War II, "new" diplomacy has been on steady retreat. Progressively fewer aspects of international relations have been entrusted to official foreign policy makers or other staff doing business in embassies, ever since larger private multinational corporations have begun to develop and implement their own political strategies and once the further so-called "non-state actors", such as civil society groups and non-government organisations, have appeared in the international arena together with international organisations and even private persons. Moreover, for about fourty or so years, international relations have been shaped by secondary institutions of governance within sovereign states, specifically those with federal constitutions. Thus, governments of federal states within sovereign states have acquired competence to conduct their own international cultural and economic relations with non-sovereign entities in states elsewhere in the world. Baden-Württemberg, for one, maintains formal relations with Lombardy and Catalunya under the roof of the European Union and also with Kanagawa Prefecture in Japan.[222] And the region of Wallonia in Belgium has its own diplomatic representation in Japan, even though it uses the same building as the Belgian embassy.

Whereas some hallmarks of "new" diplomacy have thus continued to remain in effect and have expanded under the label of globalisation, other parts have witnessed a return to "old" diplomacy. True, the department of cultural policy has continued to be in existence within the German Foreign Office. But the impact of that department on the conduct of international relations has waned in view of the manifold activities of private persons performing as cultural actors. As a rule, departments of cultural and economic policy are now less in charge of cultural and economic matters than of the preparation of treaties governing cultural and economic relations. Hence, even in these respects, the return to "old" diplomacy is manifest. Within the European culture of diplomacy, culture does not feature prominently as an aspect of diplomatic activity.

d) Comparison between European and East Asian Cultures of Diplomacy

---

[221] Kurt Düwell, ed., *Deutsche auswärtige Kulturpolitik seit 1871* (Beiträge zur Geschichte der Kulturpolitik, 1) (Cologne and Vienna, 1981).

[222] For details see: Harald Kleinschmidt, *Württemberg und Japan. Landesgeschichtliche Aspekte der deutsch-japanischen Beziehungen* (Stuttgart, 1991).

To sum up, the following features of the European culture of diplomacy in its "new" phase can be contextualised with the model of the state conceptualised as a living body:

- constituing the bureaucratic agency in charge of the conduct of international relations as a government office of its own, claiming to be exclusively in charge of foreign policy;

- basing international relations of written bilateral agreements between sovereign states, which, since the middle of the eighteenth century, have been made out as multilateral treaties with increasing frequency;

- perceiving the international system in accordance with the model of the living body;

- progressively downgrading the significance of diplomatic ceremonial to a mere publicity show;

- abandoning claims for univeral rule and replacing them by the principle of the recognition of the legal equality of sovereign states as the most important structural feature of the international system;

- monopolising actorhood, constituted through international law, upon governments of sovereign states, among others by restricting admission to the United Nations to sovereign states.

The British mission, on which King George III dispatched George Macartney to China in 1793 and 1794, phas proved to be a test case for the implementability of the European and North American principle of the recognition of the equality of sovereign states in other parts of the world. The mission's declared purpose was to establish a legal basis for trade relations between China and the UK. The British side took China to be a "closed country", the "opening" of which to trade involving British merchants it demanded together with the admission of a British resident diplomatic agent on Chinese territory. Macartney thus was to accomplish the "opening" of China for trade with the UK. To that end, he carried with him a royal letter featuring the request. Macartney was to deliver the letter to the Qīng ruler Qian Long, trusting that the Chinese side would soon give in to the demand.

Yet, Macartney faced serious problems once he entered into a controversy about the performance of rituals the Chinese side considered not only appropriate but even essential even for the admission of Macartney to an imperial audience. It demanded the implementattion of what has come to be termed "Kowtow" (= prostration) in English as part of the ceremonial that the imperial government commonly requested from incoming diplomatic representatives. The ceremonial had the task of

positioning the Qīng ruler at the highest level of a hierarchy of rulers spanning the entire world.[223] That hierarchy was to become visible in the prostration ritual, which the Chinese side demanded unilaterally from Macartney. Macartney, who understood the logic of the ceremonial, refused the performance, arguing that, in his capacity as the diplomatic emissary of the British king, he was the representative of the highest ruler in the world and, in this respect, equal to the Qīng ruler.[224] Thus he made the point that he would perform the prostration only under the condition that the Qīng ruler would implement the same ritual in front of a picture of King George III. As this was a totally incomprehensible demand and complete anathema to the Chinese side, the preliminary negotiations did not advance, until eventually a compromise was reached and Macartney was admitted to an audience.[225] On this occasion, he slightly bent one knee and lower the upper part of his body towards the ground.[226] Macartney then was permitted to submit his demand for the "opening" of China, but received a blatant rejection in the form of a reply in Qian Long's name, addressed to George III. In his reply, Qian Long told the British king that China was not in need of trade with the UK, as everything the population under Qian Long's control needed was available on Chinese soil. Instead of submitting demands, the British king should introduce ethics and etiquette in the territory under his rule. As long as that had not happened, the gap between Chinese law and ceremonial on the one side, British habits on the other were too grave to allow the establishment of formal diplomatic relations between China and the UK. King George was finally given the duty to support the Chinese government in its bid for the preservation of peace in the world at large.[227]

In view of contemporary production statistics, according to which China was the home of more than 30% of the world production of manufactured goods at the turn towards the nineteenth century, the UK only to 4%,,[228] Qian Long's statements were not too far-fetched. Macartney concluded that

---

[223] John Lancelot Cranmer-Byng, 'Lord Macartney's Embassy to Peking in 1793. From Official Chinese Documents', in: *Journal of Oriental Studies*, vol. 4, issues 1-2 (1957/58), pp. 117-187, at pp. 145, 156-158. Eva Susanne Kraft, *Zum Dschungarenkrieg im 18. Jahrhundert. Berichte des Generals Funingga [1715 – 1724]. Aus einer mandschurischen Handschrift* [Tsing-ni-tsiang-kün-tsou-i, Mandschurische Eingaben an den kaiserlichen Hof; Privatbesitz Erich Haenisch] *übersetzt und an Hand der chinesischen Akten erläutert* (Das Mongolische Weltreich, 4) (Leipzig, 1953).

[224] Helen Robbins, *Our First Ambassador to China* (London, 1908), p. 284.

[225] Aeneas Andersen, *A Narrative of the British Embassy to China in the Years 1792, 1793 and 1794* (London, 1795), pp. 145-165 [Microfiche edn (The Eighteenth Century, Reel 3870, Nr 03); abridged version, second edn (Dublin, 1796); third edn (London, 1796); (London, 1797); German version (Erlangen, 1795); (Hamburg, 1796)]. George Leonard Staunton, *An Historical Account of the Embassy to the Emperor of China* (London, 1797), pp. 129-137, 143-144 [Microfiche edn (Hildesheim, 1994-1998); German version (Berlin, 1799-1800); extract (Leipzig, 1798); this extract also appeared in: *Historisch-genealogischer Kalender* (1798); French version (Paris, 1804)].

[226] Johann Christian Hüttner, *Nachricht von der Brittischen Gesandtschaftsreise durch China* (Berlin, 1797), pp. 219-220 [newly edited (Berlin, 1879); another new edn, edited by Sabine Dabringhaus (Fremde Kulturen in alten Berichten, 1) (Sigmaringen, 1996); Microfiche edn (German Books on China from the Late 15th Century to 1920, part 1, vols 260/261) (Munich, 2004)].

[227] Alain Peyrefitte, *L'empire immobile. Ou Le choc des mondes* (Paris, 1989), pp. 289-291. Frederick Whyte, *China and Foreign Powers. An Historical Review of Their Relations* (London, 1927), p. 39.

[228] Paul Bairoch, 'International Industrialization Levels from 1750 to 1980', in: *Journal of European Economic*

China was a part of the world, which operated on principles far different from those in the UK,[229] returned with empty hands and the British side temporarily accepted the rejection. A further British attempt to "open" China failed in 1816. Likewise, a Dutch mission, reaching China with the same agenda in 1794 and 1795, did not accomplish anything.[230] Temporarily, then, the Qīng government had succeeded in maintaining its self-claimed position at the top of a hierarchy of rulers in the world, refusing the recognition of the legal equality of sovereign states, while continuing to act as the regulator of trade. In Europe, however, the perception of China as the alien state *per se* strengthened, converting the Qīng Empire into the opposing pole to European culture as such. Even during the early years of the nineteenth century, European observers had, with respect to Japan, taken for granted that that a government could legitimately "restrict intercourse to the domestic arena", in order to "avoid encounters with foreigners and thereby the collisions conditioned by these encounters".[231] However, in the aftermath of the failure of British attempts to "open" China, demands to enforce the principles of the freedom of trade gained steam and justified even the deployment of military force.

The British-Chinese relationship changed abruptly in consequence of the first Opium War (1839 – 1842). The war had followed from the purposeful destruction of opium that British merchants had imported to China from South Asia. The Kanton port authorities, acting upon an order by government commissioner Lin Ze-Xu, had decided to act against the devastating consequences of the consumtion of opium by obstructing its import. The British side, responding to the destruction of the opium, again demanded the unlimited "opening" of the country and declared war. However, the British government conducted the war with minimal resources, specifically as the British navy had to be deployed in far-away waters, more distant from the British mainland than during any previous military campaign. But the British-Chinese treaty of Nanjing, dated 29 August 1842,[232] concluded the war as a success on the British side, even though the Chinese armed forces had not been defeated at all. Instead, the Chinese side, following ancient Chinese military doctrine, had ended the war, once it had concluded that a definitive and complete victory over its enemy was impossible. Hence, the Nanjing treaty was a peace treaty in the conventional sense of an agreement ending a war. In the preamble, the signatory parties recognise each other mutually as sovereigns, commit themselves, in Article I, to concluding a lasting peace following the cessation of hostilities and promise to

---

History 11 (1982), pp. 269-310, at p. 296.

[229] Hüttner, *Nachricht* (note 226), pp. 219-220.

[230] André Everard van Braam Houckgeest, *Voyage de l'ambassade de la Compagnie des Indes orientales hollandaise vers l'empereur de Chine en 1794 et 1795*, edited by Médéric Louis Elie Moreau de Saint-Méry (Philadelphia, 1797, and Paris, 1798) [English version (London, 1798); German version (Leipzig, 1798-1799)].

[231] Heinrich Gottlieb Tzschirner, *Ueber den Krieg* (Leipzig, 1815), p. 70.

[232] Treaty China – UK, Nanjing, 29 August 1842, in: *CTS*, vol. 93, pp. 466-474.

henceforth conduct their relations on friendly terms.[233] The ensuing dispositive part of the treaty comprises stipulations, which detail these relations as unequal, that is, without recourse to reciprocity. In featuring this format, the Nanjing treaty followed the standard European formulary of war-ending agreements.

The best-known of the specific privileges, the British side drew from the Nanjing treaty, refer to the admission of the freedom of trade at certain port cities and the indefinite transfer of rule over the island of Hong Kong to Queen Victoria.[234] However, the treaty contained further regulations, which subjected the Chinese state to lasting British control beyond the obligation to pay the war indemnity of the total of 21 million dollars. These stipulations contained the British privileges of residence for subjects at Gŭangzhōu, Xiàmén, Fúzhōu, Níngbō and Shánghǎi,[235] the release of arrested Chinese subjects, who had been accused of maintaining unlawful business relations with British subjects,[236] and the limitation of Chinese government customs authority on Chinese territory.[237] The Nanjing treaty was made out and signed in a Chinese and an English version. But as no one in the British Foreign Office was then capable of writing Chinese, the office used Calotype photography in 1843 to produce a copy of the handwritten Chinese version. This was probably the first occasion, upon which this reproduction technology was used for a government document in Europe.[238] The agreement was later supplemented by the treaty of Hu-mun Chase between China and the UK of 8 October 1843, which granted the freedom of residence to British subjects under the supervision of British consular residents.[239] The island of Hong Kong, facing Gŭangdōng Province, quickly emerged into a centre of piracy in the Western Pacific and was used as a transition port for the import of opium into China. Already early in the nineteenth century, Gŭangdōng Province had been one of the centres of Chinese piracy. In 1860, the Chinese government transferred to the British government control over the settlement of Kowloon (Gaŭ Lúng), located on the mainland opposite Hong Kong. All these stipulations comprised duties that were binding only for the Chinese.

In European peace agreements, the fusion of the legal equality of sovereign treaty parties, usually explicit in the preambles, were to be combined with unequal dispositive stipulations in the main part

---

[233] Ibid., Art. I, p. 466.

[234] Ibid., art. III, p. 467.

[235] Ibid., art. II, p. 467.

[236] Ibid., art. IX, p. 468.

[237] Ibid., art. X, p. 468.

[238] For details see: Larry Schaaf, 'Henry Collen and the Treaty of Nanking', in: *History of Photography*, vol. 6 (1982), pp. 353-366, vol. 7 (1983), pp. 163-165. R. Derek Wood, Photocopying the Treaty of Nanking in January 1843 [http://www.midley.co.uk/Nanking/Nanking.htm]. Wood, 'Photocopying in January 1843. The Treaty of Nanking', in: *Darkness and Light. The Proceedings of the Oslo Symposium, 25 – 28 August 1994* (Oslo 1995), pp. 145-150. Wood, 'The Treaty of Nanking', in *Journal of Imperial and Commonwealth History* 24 (1996), pp. 181-196.

[239] Treaty China – UK, Hu-mun Chase, 8 October 1843, art. VII, in: *CTS*, vol. 95, pp. 325-327, at p. 325.

of the agreements. The combination of, *prima facie*, irreconcilable parts, was, however, a cogent consequence of the structure of war-ending agreements, as a war was commonly understood in Europe to come to its end, when one side demanded a truce and thereby admitted its military defeat. The ensuing treaty then cast a temporary military situation into permanent legal diction, according to which the temporarily defeated side came to be classed as the loser in definite terms. In the case of the Nanjing treay, the Chinese side had indeed sought for a truce. In European perspective, the defeated side could only be forced to accept and implement treaty obligations, which would impose grave disadvantages, as long as the defeated side remained a sovereign state. Hence, wars in the European tradition usually did not end with complete state destruction, which, in the case of its war against China, the British government could not even have dreamt of. Hence, the destruction of the Chinese state and its total subjection to British control had not been British war aims. In working out the Nanjing treaty, the British government operated within the tradition of European peace treaty making, applying the European public law of treaties among states to East Asia. Still, it imposed a new demand in requesting that China should become "open" to global free trade. This request was not limited to the bilateral British-Chinese relations but had an impact on the complexity of Chinese international relations at large, as other governments in Europe and North America would soon issue the same demands to the Qīng government. The British and all following European and North American governments used military pressure to impose their rules of free trade upon the Qīng government. The globalisation of free trade rules did not follow from some self-enforcing internal principles but from military pressure converted into unequal treaty relations.

In Chinese perspective, the procedure of making the Nanjing treaty looked quite different. There was no tradition of laying down in writing treaties among states and rulers, even though written agreements under international law had been made out between China and Russia in 1689[240] and 1727[241] respectively. Yet the formulary and the entire texts of these agreements had followed the Russian model in the first case, while the second treaty had been written by Jesuits working at the Chinese ruling court. Despite the recognition of the legal equality of the signatory parties in both of these agreements, recognition of state sovereignty had not necessarily been intertwined with the

---

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

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

admission of legal equality from the Chinese side. This was so, because the traditional claim for the universality of rule continued in China beyond these treaties, permitting solely agreements of limited duration with other states under prevailing superiority of the rank of the Qīng. Even in the Chinese version of the Nanjing treaty, the Chinese side followed established practice in refusing to apply the name of the state to itself, in opposition to the English version, which featured the state name „China" (中國, Middle Kingdom) and used the dynastic name Qīng instead. The text also featured rank distinctions, explicit in Art. XI, which obliged the British side to use a certain terminology in its correspondence with the Qīng, this terminology establishing unequal relations within the Chinese perspective ("commnication" of "Her Britannia Mejesty's Chief High Office in China" "with the Chinese High Officers" = 照会= zhào huì; "statement" by "the subordinate British Officers" towards "Chinese High Officers in the provinces"=申渡 = shēn dù = let know something to a higher ranking person; "declaration" by "Chinese High Officers in the provinces" and by "subordinates of both countries on a footing of perfect equality"= 刊行= kān xíng = print and publish; "representation" by "merchants and others holding official situations and therefore not ncluded in the above"= 声明= shēng míng = represent, proclaim).[242] Even though the text of the Nanjing treaty proclaimed the surrender ot Hong Kong Island to the rule of Queen Victoria as perpetual, this stipulation was irreconcilable with Chinese public law and political tradition, as such transfers could only be a temporary toleration of British government officials on territory under the overrule of the Qīng.

Already in 1839, Lin Ze-Xu, the official who had then authorised the destruction of opium at Kanton, had commissioned the translation of a standard text on European international law. Peter Parker, a US missionary working in China at the time, decided to start making of a Chinese version of the popular eighteenth-century handbook by Emeric de Vattel, a diplomat from Neuchâtel in Saxon service.[243] Parker believed that this text was most suited to the Chinese request for a global policy aimed at preserving the "good order" among states in the world and deriving that policy from norms contained in the European tradition of international law as well. Scholar Wei Yuan integrated the translated parts of Vattel's text into his compilation of information about states beyond the ocean,

---

[242] Treaty of Nanjing note 232), art XI, pp. 468-469.

[243] Peter Parker, '10th Report of the Medical Missionary Society', nr 6505, in: *The Chinese Repository* 8 (1840), p. 635; transmitted in: Yuan Wei, *Hai guo tu zhi* (1847) [newly edited (Chang Sha, 1998); partly edited in: Stefan Kroll, *Normgenese durch Re-Interpretation. China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Studien zur Geschichte des Völkerrechts, 25) (Baden-Baden, 2012)]. Based on: 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* (London [recte Neuchâtel], 1758), book I, chap. 8, nr 90, pp. 63-72, book II, chap. 8, nr 100, 101, pp. 84-85 (on trade), book III, chap. 1, nr 1-4, pp. 328-330 (on war), pp. 1-2 [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, edited by Albert de Lapradelle (Washington, 1916); reprint of the reprint (Geneva, 1983)].

published in 1847. The project had been initialised under the expectation, well founded within Chinese perspective, that the traditional law of war and peace was drawn on the same principles of natural law on the Chinese as well as on the European side. But the Chinese version of Vattel's text featured only a short sample of passages and then broke off. With this project, the last attempt failed to find a common platform for combining European and East Asia perceptions of the law of war and peace, and the Nanjing treaty of 1842 rendered that search totally futile. It was not the lack of reciprocity that made it hard for the Chinese side to accept the Nanjing treaty but the combination of its dispositive stipulations with a formulary that demanded the mutual recognition of the legal equality of the signatory parties. The agreement turned completely unbearable for the Chinese side, because the British side pushed through free trade principles with specific regard to trading goods, which the Qīng government knew to be dangerous for the population under its control. The treaty obliged the Qīng to restrict its own surveillance and ordering capacity vis-à-vis the population, thereby using its sovereign competence to restrict its own sovereignty. This aspect of the Nanjing treaty made it unacceptable for the learned public in China.

Yet, the Qīng government not only allowed its own domestic policy competences to become restricted through the Nanjing treaty, but it also renounced two principles of foreign policy of long standing. In the first place, the Qīng government granted the same legal rank to the British government that it claimed for itself. This concession alone had severe consequences for the conduct of relations between the Qīng and other governments in East and Southeast Asia. Traditionally, the Chinese government had been perceived elsewhere in East and Southeast Asia as holding a kind of protective shield above other governments at times of crisis. But through the Nanjing treaty, the Qīng waived that position. It lost its competence and capacity as a protective power and exposed governments of other states to threats of the deployment of military force and diplomatic pressure issued from states in other parts of the world. Specifically in Japan, this aspect of the consequences of the Nanjing treaty raised serious concerns. King William II of the Netherlands increased these worries in 1844 with his warning that the British government was bent to coerce the Japanese government into accepting the "opening" of the state to expanding international maritime intercourse. The government in Edo reacted to King William's warning with the initial response that it was bound by ancient laws and would therefore not accept any change of policy with regard to international trade. It also told the Dutch king that it would not reply any further to similar advice.[244] But the Dutch government remained unimpressed and continued its policy of sending further

---

[244] William II., King of the Netherlands, [Letter to Ieyoshi Tokugawa, Shōgun of Japan. 1844], in: *The Meiji Japan through Contemporary Sources*, vol. 2 (Tokyo, 1970), pp. 1-8 [also edited by Daniel Crosby Greene, 'Correspondence between William II of Holland and the Shogun of Japan, A. D. 1844', in: *Transactions of the Asiatic Society of Japan*. First Series, vol. 34 (1907), pp. 106-122; also in: John Zimmermann Bowers, *Western Medical Pioneers in Feudal Japan* (Baltimore and London, 1970), pp. 203-207].

warnings, to which they added information about aggressive US goverment plans to use military force to the end of "opening" Japan. In doing so, the Dutch government pursued a policy *pro domo*, seeking to maintain its own privileged position as the holder of a monopoly of trade with Europe under the protection by the Edo government.[245]

Second, the Chinese government implicitly recognised the general European principles of sovereignty, simply by entering into treaty relations with the UK. The crucial point was enshrined in Jean Bodins argument that the admission of the pluralism of sovereign states and rulers would necessarily imply the admission of legal equality among all sovereigns. Hence, the most significant of the stipulations of the Nanjing treaty was the recognition of sovereign equality on the Chinese side. Even if, optimistically considered, the Chinese government could imagine a military victory over the UK at a later point of time, allowing it to reverse the disadvantageous stipulations it had accepted, it had, in 1842, waived, once at for all, its claim for the highest position in the hierarchy of governments in the world. It had done so by simply taking over the European formulary of peace agreements. Therefore, from the enforcement of the Nanjing treaty, the Qīng government was not only legally equal with the British government in its capacity of being in control of a sovereign state, but also in the same respect with some of its neighbours, notably Annam and Japan. The imposition of European international law and the European principles of free trade, then, destroyed a system of inter-state relations in East and Southeast Asia, that had then been in operation for about 1500 years, even though the Qīng government retained its claim for the highest position of governments in the world at large to the end of the 1840s and insisted that the Nanjing treaty had prevented the "coming into existence of further difficulties in the future" [yóng tú hòu huàn].[246] Yet, the Japanese government was quick to realise the negative implications of the treaty. In an official memorandum, it warned against repeating the Qīng policy of admitting European and US diplomatic representatives and demanded that foreign pressures towards the "opening" of states should be resisted.[247] The Japanese government thus recognised early on that it was not only European governments seeking to intervene into the domestic affairs of states in East Asia but also the US government. The US government dispatched its envoy Caleb Cushing to China with the instruction to request the "opening" of the country for US traders in a decisive manner. Cushing was to make it clear that the US was an independent state, legally equal to all other states.[248] Hence, the US

---

[245] Miyako Vos [-Kobayashi], ed., *Bakumatsu Dejima mikōkai monjo. Donkeru Kuruchiusu oboegaki* (Tokyo, 1992), p. 52 (entry for 27 September 1852), p. 56 (entry for 9 October 1852).

[246] Yen-Ping Hao and Erh-Min Wang, 'Changing Chinese Views of Western Relations. 1840-95', in: Denis Twitchett and John King Fairbank, eds, *The Cambridge History of China*, vol. 11: Late Ch'ing. 1800 – 1911, Part 2 (Cambridge, 1980), pp. 142-201, at p. 154.

[247] Japan, Kaibō gakari, 'Ōmetsuke, metsuke jōshinsho [Feb. 1857]', edited by Seizaburō Satō and Tsunekichi Yoshida, *Bakumatsu seiji ronshū* (Tokyo, 1976), p. 45.

[248] Daniel Webster, '[Instruction for Caleb Cushing for his Mission to China, 8 May 1843], in: Webster, *The Writings and Speeches*, vol. 12 (Boston and New York, 1903), pp. 141-146, at p. 143.

government would find it impossible to be on a friendly footing with the "Emperor of China", if the subjects of any government anywhere in the world had more privileges or more benefitial trading consitions than US citizens.[249] On 3 July 1844, Cushing concluded the treaty of Wang Hiya between China and the USA, which gave the same privileges to US merchants that British merchants were already enjoying.[250]

The culture of East Asian diplomacy has thus featured a number of commonalities with its European counterpart, specifically with those of "old" diplomacy. For one, there were never problems with the recognition of the principle that envoys would act on their own behalf but always as rulers' and government representative agents. Moreover, the need to present credentials of procura never encountered difficulty. The empowered repesentative envoy was to enjoy protection at the destination, at least on principle, even if infringements upon the legal norm did occur. The origin of the basic rules of diplomatic conduct on unset natural law principles was thus put on record

Yet, on the other side, the culture of East Asian diplomacy betrayed a number of specificities, setting it apart mainly from "new" European diplomacy. Up to the turn towards the nineteenth century, the East Asian international system comprised China together with the eastern part of Central Asia, Northern Asia with the exception of Siberia, Mongolia, Japan, Korea, Annam (Vietnam), the mountainous regions of Southeast Asia (Zomia) as well as, at least temporarily, the Tibetan highlands. Within this system, the Qīng government claimed the highest rank and tolerated no legal equal. The Qīng ruler war referred to with the European title of "Emperor", accounting for that hierarchically superior position.[251] Thus, the system was hierarchically structured and served as the frame for the implementation of the Qīng claim for the universality of its rule. The Qīng government used ceremonial, including the demand for the performance of rituals of prostration, to manifest its claim for universality of rule. Put differently, the Chinese "Emperor" demanded the recognition of sovereignty in the sense of the classical theory of universal rule, which was built upon the application of the principle of the inequality of governments. According to that theory, only the Qīng government in Beijing was entitled to claim full sovereignty. Up to the end of the eighteenth century, European government representatives and other diplomatic envoys, such as emissaries dispatchted by the long-distance trading companies, had little difficulty with the encactment of the prostration

---

[249] USA, Senate, [Instruction by the Secretary in charge of foreign relations, Daniel Webster, 3 May 1853], 28th Congress, Second Session, Discussion, nr 138.

[250] Treaty China – USA, Wang Hiya, 3 July 1844, in: *CTS*, vol. 97, pp. 106-123, art. II, III, at p. 107.

[251] For details see: John King Fairbank and S. Y. Teng, 'On the Ch'ing Tributary System', in: *Harvard Journal of Asiatic Studies* 6 (1941), pp. 135-246. Fairbank, *China's Response to the West. A Documentary Survey. 1839 – 1923* (Cambridge, MA, 1954). Susanne Weigelin-Schwiedrzik, 'Zentrum und Peripherie in China und Ostasien', in: Weigelin-Schwiedrzik and Sepp Linhart, eds, *Ostasien. 1600 – 1900* (Edition Weltregionen, 10) (Vienna, 2004), pp. 88-92.

ritual. They simply implemented Qīng government instructions. It was only on the occasion of the Macartney mission that dissent arose about British official envoys refsuing to perform the prostration ritual, even though the Qīng ruler would not do so as well. In Beijing, then, the agency in charge of managing relations with other states within ther international system and with other parts of the world was the office for the rituals (Lǐ Bù).[252] When need arose, this agency prescribed rituals it considered to be required. Within the Qīng government, there was no specific agency with exclusive competence for the mangement of freign affairs up until the middle of the nineteenth century.

After the failed attempt to compose a Chinese version of Vattel's handbook on international law, missionary William Alexander Parsons Martin and several further translators set down to prepare a Chinese version of the widely read handbook of international law by Henry Wheaton.[253] They published the work in 1864. At that time, the task awas no longer to find a common platform for the East Asian and European tradition of international law. Instead, the intention was to transfer European concepts and conceptions to China. The translators faced a tough task. Martin himself lamented the wide gaps between the Chinese and the European terminologies that made it difficult to find appropriate equations in Chinese characters for European technical terms. On many occasions, the available Chinese characters appeared to be unsuitable to provide satisfactory equivalents.[254] Indeed, in later Chinese versions of further North American and European international law treatises,[255] some of Martin's phrases were replaced by versions that had in the meantime come into use in Japanese.[256] Martin himself rephrased parts of his terminology in his version of the introduction to the study of international law by Theodore Dwight Woolsey.[257]

The introduction of European international legal concepts and conceptions into Chinese and Japanese followed the pressure issued by European and US diplomats insisting upon abidance by standards of international law, common and customary in Europe and North America at the time,

---

[252] In 1909, jurist and sinologist Herbert Müller published his transnlation of a report on the Lǐ-fǎn-yuàn, the office in charge of administering foreigners in Beijing. Müller provided a description of the history of the office of the Lǐ Bù, the office of the ceremonies, apparently established towards the end of the eighteenth century and placed in charge of regulating the procedures for interactions with emissaries from all foreign states. See: Herbert Müller, 'Über die Natur des Völkerrechts und seine Quellen in China. Einleitende Bemerkungen zu einer Bearbeitung des Li-fan-yan-tse-li', in: *Zeitschrift für Völkerrecht* 3 (1909), pp. 192-205, at pp. 201-202.

[253] Wheaton, *Elements* (note 49).

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

[255] Svarverud, *Law* (note 254), pp. 267-302.

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

[257] Theodore Dwight Woolsey, *Introduction to the Study of International Law*, third edn (New York, 1871) [first published (Boston, 1860)]. On the reception of Woolsey's text see: Kroll, *Normgenese* (note 254), p. 99.

even though most of these standards were not explicitly laid down in agreements under international law. These implicit standards mainly concerned the customary European public law of treaties between states, upon which European and North American diplomats insisted even when they ran contrary to established legal norms and procedures in East Asia. Quickly, the reception of European and North American standards of international law entailed the reorganisation of government agencies. Thus, the Qīng government replaced the Lǐ Bùby the Office in Charge of Matters of All States (Zǒnglǐ Géguó Shìwù Yámén) in 1861, which operated under the name Foreign Ministry (Waì-Jiào Bù) from 1901. In Japan, the Foreign Ministry (Gaimushō) came into existence as an agency of its own in 1869, which immediately committed itself to the process of the revision of the unequal treaties, which became possible in accordance with these treaties from 1872.

From the core significance of rituals for the conduct of international relations followed the practice of laying down agreements between states not in the form of written texts but in oral agreements enforced through the performance of rituals. Prior to the nineteenth century, Chinese governments entered only into the two agreements with Russia on the basis of written texts. These treaties followed European formularies. On the Chinese side, the procedures of making out inter-state agreements were flexible and allowed adaptations to the habits of its various treaty partners, as long as the Chinese claims towards the universality of rule and the inequality of the legal status of the partners to the Chinese government were to be implemented and executed through appropriate rituals.

The organisers of the Macartney mission started with the false premise that China would have to be "opened" to British and international trade. This premise did not flow from Chinese law but from the demands of free trade theorists, who rejected all government legal competence to regulate trade.[258] By contrast, the goverments in China, Japan and Korea did not principally prohibit international trade, although they insisted upon their own competence to issue trading privileges, as the long-distance trading companies had receievd them centuries ago. Hence, problems with managing international relations came up, once the perception of the international system had changed, the principles of the organisation of trade had been transformed and the a new culture of diplomacy had taken root in Europe. When the Qīng government took a strong stance against the negative consequences of the importation and consumption of opium in 1839, open military conflict was the result between the Qīng and the British government, which was then promoting the opium trade. The conflict turned into the first Opium War and ended preliminarily with the Nanjing treaty of 1842.

---

[258] See: Desmond Christopher St Martin Platt, *Finance, Trade and Politics in British Foreign Policy* (Oxford, 1968). Bernard Semmel, *The Rise of Free Trade Imperialism* (Cambridge, 1970).

In summary, East Asian culture of diplomacy, up until the turn towards the nineteenth century, was compatible with "old" European diplomacy. The enforcement of the Nanjing treaty and the resultued imposion of the East Asian international system ended that compatibility. The Qīng government was compelled to take over the principles of "new" European diplomacy. The same process of the imposition of "new" European diplomacy repeated itself during the second half of the twentieth century, when postcolonial states in Africa, South and Southeast Asia as well as the South Pacific obtained their independence. The European culture of "new" diplomacy globalised jointly with the superimposition of the European public law of treaties between states and free trade regimes.

e) From the Pluralism of Cultures of Diplomacy to the Globality of the European Culture of "New" Diplomacy

The globalisation of the European culture of "new" diplomacy took place within a newly conceived international system as a single, flexible and expanding framework for the conduct of international relations across the globe. The process of this expansion ended the previous concurrence of a pluralism of mutually compatible cultures of diplomacy. The consequences of this transformation have been on record to the present day in many respects and have impacted deeply upon felds of culture. One of the consequences was a virtually complete Europeanisation of concepts relevant too international relations. In legal respects, only Jellinek's juristic concept of the state is valid, together with the concepts of sovereignty and legal equality attached to the state. Political discourses on international relations abound with European terminology, focused on concepts of politics and society, including the complex notion of civil society. Also, diplomatic procedures follow European practices. The normative force of this process of the globalisation of concepts and terminologies is hard to overestimate. Concepts form the gist of political goal-settings that can be imposed upon governments of sovereign states, usually through international organisations.

Nevertheless, the non-normative consequences of the globalisation of the European culture of "new" diplomacy appear to be even more grave. They concern mainly the arena of verbal and non-verbal communication. With regard to both types of commnication, Japanese diplomat and sometime Foreign Minister Shidehara Kijūrō, already in 1919, noted the problems resulting from the elevation of the English language to the global *lingua franca* of diplomatic envoys from the middle of the nineteenth century. Shidehara, who was well versed in English, complained about Japanese delegates not only becoming victims of racist prejudice during the Paris Peace Conference, but also facing disadvantages due to their lack of mastery of English. It appeared to him that Japanese delegates not only articulated themselves imperfectly at international conferences, thereby triggering

ridicule and sarkasm, but, more importantly, were unfamiliar with European negotiation styles. He thus believed that it was dangerous for Japan to participate in international conferences, which might place the Japanese state in jeopardy and at the mercy of power brokers at thse gatherings.[259]

Shidehara's comment related to verbal as well as to non-verbal communicaton. In his time, the European technical terminology had already become the common property of diplomatic jargon. However, these technical terms had been rendered into different words used in various Asian languages and these versions were not always competely compatible with the meanings and connotations of the original English words. Therefore, a vast potential for misunderstands existed, when non-native English speakers used a technical term without the required precision of meaning. In addition, non-verbal signals, which European and North American conference participants would exchange among one another, might be unintelligible to participants from Asia and even Latin America. These communicative deficits have by no means been overcome but have even strengthened distortions in the semantic triangles in use in diplomatic communication. These distortions have resulted from the imposition of diplomatic procedures as referent matter and formalised perceptions, which acquired legal status, once they received sanctions through treaties under international law. These procedures and legally enforced concepts were often represented imperfectly by words and practices of non-verbal communication that were culturally specific.[260]

In summary, then, the question of the singularity of a culture of diplomacy meets a differentiating answer. A single, integrated culture of diplomacy drawn on institutions and a legal basis is young and has been globalised from European origins. It relates to the structure of diplomatic intercourse with all its prodecures, the organisation of foreign policy agencies, official titles, rules of accreditation and negotation practices. The principle of state sovereignty in conjunction with the principle of the legal equality forms the basis of this culture of diplomacy. Next to that, remnants of the former pluralism of cultures of diplomacy have continued to be in practice at an informal level, mainly with regard to patterns of communication. At these levels, power play is frequent, often to the disadvantage of those not raised within the European cultural tradition. At this informal level,

---

[259] Shidehara Kijūrō 幣原喜重郎, *Shidehara Kijūrō* (Tokyo, 1955), pp. 136-137. On Shidehara see: Thomas W. Burkman, *Japan and the League of Nations. Empire and World Order. 1914 – 1938* (Honolulu, 2008), pp. 16, 44.

[260] For the diversity of negotiation styles in international relations see: Jönsson, Christer: *Communication in International Bargaining* (London, 1990). Virginia M. S. Pearson and Walter G. Stephan, 'Preferences for Styles of Negotiation', in: *International Journal of Cultural Relations* 22 (1998), pp. 67-83. Richard Pipes, 'Diplomacy and Culture. Negotiation Styles', in: Richard F. Staar, ed., *Arms Control. Myth versus Reality* (Stanford, 1984), pp. 154-179. Anthony Best, 'The Role of Diplomatic Practice and Court Protocol in Anglo-Japanese Relations. 1867 – 1900', in: Markus Mösslang and Torsten Riotte, eds, *The Diplomats' World. The Cultural History of Diplomacy. 1815 – 1914* (Oxford, 2008), pp. 231-254. Verena Steller, 'Back to the Future. Rediscovery of Diplomatic Conduct and the Moment of Foreign Policy Transformation. Diplomacy between Versailles and Locarno. 1919-25', in: Gunther Hellmann, Andreas K. Fahrmeir and Miloš Vec, eds, *The Transformation of Foreign Policy. Drawing and Managing Boundaries from Antiquity to the Present* (Oxford, 2016), pp. 165-207.

inequality takes command. By consequence, two answers to the further question about the genesis of international relations are in place. On the one side, international relations have been conducted ever since groups have maintained relations with outsiders, have perceived these relations as systemically relevant and have left behind information about their activities. As a rule, these international relations were not global in scope. On the other side, and with regard to the globe as a whole, international relations have come into existence only at the time, at which a global culture of diplomacy began to be conducted and has subjected the entire globe to its systemic network, and this system of international relations has not been in operation for more than 150 or so years.

The transformation of international legal theory and the culture(s) of diplomacy confirm the changes of the models of the international system and their effects on international legal theory and diplomatic practice. Within a biologistically modelled international system, the derivation of theoretical statements from non-human agencies is impossible, and the application of international legal theories and guidelines for diplomatic practice without cultural prejudice is not given. In consequence of the European and North American insistence that international legal theory and diplomatic practice must be derived from principles purposefully set through human action, the need came on the international agenda to decide which international legal community should be identified as the only one capable of making and enforcing international legal norms and standards of diplomatic practice. That theorists and practicing diplomats in Europe and North America took the international legal community for granted, which had emerged in these parts of the world, was to be expected. Yet the expansion of that international legal community to the boundaries of the globe could not receive legitimacy with legal means; instead, legitimising the globalisation of the European and North American international legal community required the pursuit of power at the hands of governments of those European and North American sovereign states, in which the globalisation of the international system was taken to be a government task. By the standards of classical natural law theories, the implementation of that task was unjust. In the two subsequent chapters, the inherent contradiction between nineteenth- and early twentieth-century and natural law theories continuing in use elsewhere in the world, shall be analysed in their historiographic perception.