

V. The Legal Basis of International as Inter-Systemic Relations according to International Legal Theory and in the Perception of Historiography

1. The Problematique of the Derivation of Legal Norms according to Positivist International Legal Theory

When, in 1876, Karl Magnus Bergbohm introduced the positivist distinction between contractual agreements (*rechtsgeschäftliche Verträge*) and legislative treaties (*rechtssetzende Verträge*), he provided a new formula for the juristic discussion of an old problem. The problem, which haunted him, resulted from the empirical observation that texts of bi- or multilateral agreements might feature binding stipulations through which new law might be generated. These agreements were structured to validate new general legal norms, even though they were binding only for the signatory parties. For one, the international convention about the amelioration of the condition of wounded in armies in the field of 1864 aimed at setting general law of war,¹ and, in this respect, differed from the common contractual agreements stipulating peace between two parties that had previously been at war, providing for alliance rules among parties facing the prospect of an impending war or seeking to facilitate or improve trade among the contracting parties. To the end of accommodating the principle that treaties could only be binding for their signatories with the demand that legislative treaties should become possible, international legal theory was given the task of providing for a procedure allowing the transfer of bi- or multilaterally agreed specific into generally valid norms. Bergbohm cast the theoretical problem into legal diction: how could the “basic norm”² *pacta sunt servanda* become applied under the condition that general law above states could be set only by way of bi- or multilateral legislative treaties? Even though that question was relevant for contractual agreements as well as for legislative treaties, it became further virulent by virtue of the theoretical principle that the enforcement of newly set international legal norms was impossible with respect to states not being parties to the legislative treaties in question. Consequently, the enforcement of newly set legal norms in the general international arena seemed impossible without ultimate recourse to the use of military force or at minimum diplomatic pressure. From this implication, Bergbohm drew the skeptical conclusion that legislative treaties were no agreements in the “proper”, legal sense but would credit them merely with the status of formal declarations or conventions not governed by the “basic norm” *pacta sunt servanda*.

¹ Convention on the Amelioration of the Condition of the Wounded in Armies in the Field, Baden – Belgium – Denmark – France – Hesse-Darmstadt – Italy – the Netherlands – Portugal – Prussia – Spain – Switzerland – Württemberg, Geneva, 22 August 1864, in: *CTS*, vol. 129, pp. 361-367.

² This term according to: Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, 1920), p. 106 [reprinted (Tübingen, 1928); (Aalen, 1960; 1981)].

For his approach to the solution of the problem he had raised, Bergbohm withdrew to psychopathology to explain the paradox that legislative treaties could not be considered as legally enforceable. He took the position that breaches of such treaties occurred, because a state will was at variance with itself, on the one side extralegally seeking to accomplish a certain political goal, while, on the other, seeking to abide by existing legal norms.³ In arguing this point, Bergbohm rejected the possibility of deriving the “basic norm” *pacta sunt servanda* from unset natural law, considered as a given in the world and tied to religious beliefs. He then positioned his distinction between contractual agreements and legislative treaties against the backdrop of the rejection of natural law theory as the characteristic hallmark of nineteenth-century mainstream international legal theory.

Nevertheless, Bergbohm’s problem of deriving international legal norms was not new at his time. However, under the prevalence of natural law theory, the problem had not been placed into the context of the legislation of new, but of the abidance by and the preservation of existing legal norms.⁴ Whereas natural law theory had been formulated in various parts of the world in universalistic terms without being perceived as demanding proactive government to its global enforcement, Bergbohm’s positivism was based upon the equation of universality with globality, whence universalistically conceived international legal norms could only be accepted as reasonable, if and as long as they could be held to be globally enforceable. This supposition was common in Europe and North America. The equation of universality with globality, however, had been accepted nowhere in the world up until the end of the eighteenth century, and came to be taken for granted in even Europe and North America only during the nineteenth century. By contrast, up until the nineteenth century, it was possible in Africa as well as in East Asia to claim universal validity for legal norms without postulating some need for their global enforceability. Prior to the beginning of the nineteenth century, the conceptual division between universality and globality had been boosted in Europe as well as in other parts of the world by the need of deriving universally valid unset legal norms from specific religious beliefs and restricting the validity of positively set legal norms to international systems of limited spatial extension. This practice had put the question on the agenda of how legal norms could be derived that were overarching religious communities. In many parts of the world, answers to this question had been drawn from the expectation that there were some universally valid unset legal norms embracing humankind as a whole.

2. *Natural Law Theories, Long-Distance Trading Companies as International Legal Subjects and*

³ Karl Magnus Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (Tartu, 1876), pp. 77-101, esp. at p. 81.

⁴ See above, Chapter IV.

the Application of International Law in America

The differences between positivist nineteenth-century and earlier natural law theories relating to the derivation of international legal norms had grave consequences for the conduct of international relations during both periods. The postulate of positivist theorists that international law could only come into existence within an international legal community, inevitably raised the question of which states were to be admitted into that club. Under the prevailing continuity of natural law theories up to the end of the eighteenth century, this question had not been asked. Wherever on the globe states had been in existence, they had been so by virtue of the *civitas maxima*. Natural law theories, therefore, had embraced inclusionistically all states on the globe. By contrast, nineteenth-century positivist theorists proceeded exclusionistically, in that they constructed a particularistic international legal community of European and North American origin and had it successively expand across the globe.⁵ Likewise, non-state ruling agents, such as private privileged long-distance trading companies, had been admitted as subjects under international law to the end of the eighteenth century,⁶ whereas European and North American theorists of the nineteenth and most of the twentieth centuries would admit only states as subjects under international law.⁷ Up until the turn towards the nineteenth century, then, there was a pluralism of types of ruling agents operating across international state borders as subjects under international law, which stood in part under universal natural law. Moreover, up until the end of the eighteenth century, no controversy arose among international legal subjects about the question of which types of ruling agents were to be admitted as conducting their relations in the international arena. Put differently: the criteria for deciding about the legality of the conduct of relations under international law, in times of peace and at war, appeared to be valid without purposeful human legislative acts. Up until the end of the eighteenth century, thus, there was

⁵ August Michael von Bulmerincq, *Das Völkerrecht oder das internationale Recht*, second edn (Freiburg, 1889), pp. 206 [first published (Freiburg, 1887)]. Franz von Holtzendorff, 'Staaten mit unvollkommener Souveränität', in: Holtzendorff, ed., *Handbuch des Völkerrechts auf Grundlage europäischer Staatenpraxis*, vol. 2 (Berlin and Hamburg, 1887), pp. 98-117. Lassa Francis Lawrence Oppenheim, *International Law*, Bd 1. (London and New York, 1905), pp. 263-264 [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)]. Likewise, more recently: Knut Ipsen, 'Regelungsbereich, Geschichte und Funktion des Völkerrechts', Rz 6, in: Ipsen, ed., *Völkerrecht*, sixth edn (Munich, 2014), pp. 1-45, at p. 3 [first published (Munich, 1979); third edn (Munich, 1990); fourth edn (Munich, 1999); fifth edn (Munich, 2004)]. For the postulate that the international system should have "expanded", see: Joel David Singer and Melvin Small, 'The Composition and Status Ordering of the International System. 1815-1940', in: *World Politics* 18 (1966), pp. 236-282.

⁶ Karl Friedrich Pauli [praes.] and Johann Andreas Buchholtz [resp.], *De iure belli societatis mercatoriae maioris privilegiatae*. LL.D. thesis (University of Halle, 1751).

⁷ Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, vol. 2 (Oxford, 1863), pp. 45-46 [second edn (Oxford, 1875); new edn of the second edn (Oxford, 1884); reprint of the edn of 1884 (Littleton, CO, 1985)]. Ipsen, 'Regelungsbereich' (note 5), pp. 1-45.

certainty that international legal norms were valid without specific acts of legislation, were credited with unchanging validity and were considered capable of providing the base for the conduct even of inter-systemic relations among international legal subjects. The *ius gentium voluntarium* of eighteenth-century European legal theory was compatible with natural law theories elsewhere in the world, as it formed the platform for contractual agreements across the boundaries of religion and international systems.

This certainty was shared not only by European agents in conduct of relations with Africa, America, West, South, Southeast and East Asia but also by their partners in these regions. On the European side, the long-distance trading companies were commonly taken to be in charge of these relations, including the making of treaties with governments in these parts of the world, even though rulers and governments of states often claimed competence for control of relations between Europe and America and although the Portuguese government, after the restoration to full sovereignty of the Kingdom of Portugal in 1640, did not privilege trading companies to perform as sovereign actors in areas beyond Europe, directly administered its overseas strongholds and concluded treaties with rulers in South Asia.⁸ The French government under Louis XIV exchanged diplomatic missions with

⁸ For treaties concluded between European, American and Asian states prior to the French Revolution of 1789 see: Treaty Ambon – Dutch East India Company (VOC), February 1605, in: Jan Ernst Heeres, ed., *Corpus diplomaticum Neerlandico-Indicum*, vol. 1 (Bijdragen tot de Taal-, Land- en Volkenkunde van Nederlandsch-Indië, 87) (The Hague, 1931), pp. 31-33. Treaty Dutch East India Company (VOC) – Johor, 17 May 1606, in: Heeres (as above), S. 41-45. Treaty Dutch East India Company (VOC) – Johor, 23 September 1606, in: Heeres (as above), pp. 47-48. Treaty Dutch East India Company (VOC) – Solor, 7 September 1618, in: Heeres (as above), pp. 138-142. Treaty Monomotapa – Portugal, ca 1629, in: Julio Firmino Judice Biker, ed., *Collecção de tratados*, vol. 1 (Lisbon, 1880), p. 234. Treaty Massachusetts Colony – Narragansett, Boston, 22 October 1636, in: *The Journal of John Winthrop. 1630 – 1649. Abridged Edition*, edited by Richard S. Dunn and Laetitia Yeandle (Cambridge, MA, and London, 1996), pp. 104-105. Treaty Dutch East India Company (VOC) – Shah Abbas II of Iran, 1641, in: Heeres (as above), pp. 370-380. Treaty Mapuche – Spain, 6 January 1641, in: José de Antonio Abreu Bertodano, ed., *Colección de tratados de paz, alianza, neutralidad, garantía, protección, tregua, mediación, reglamento de limites, comercio, navegación etc.*, vol. 3 (Madrid, 1740), p. 416 [not extant in diploma format; first published in: Alonso de Ovalle, *Histórica relación del reyno de Chile*, book VII, chap. IX (Rome, 1646), p. 309]. Treaty Dutch East India Company (VOC) – Mataram (Java), 1646, in: Heeres (as above), pp. 483-485. Treaty France – Iroquois, Quebec, 20 May 1666, Paris: Bibliothèque nationale de France, Manuscrits, Collection Baluze, vol. 196, fol. 72^r-77^v; Facsimile edn in: Christophe N. Eick, *Indianerverträge in Nouvelle France* (Schriften zur Rechtsgeschichte, 64) (Berlin, 1994), pp. 183-197. Treaty Dutch East India Company (VOC) – Mataram (Java), February 1677, in: Heeres (as above), pp. 39-47, 74-83. Treaty Hottoways/Naneymond/Pamunkey/Waonske – Great Britain, 29 May 1677, in: *CTS*, vol. 14, pp. 257-263 [peace and submission agreement]. Treaty France – Iroquois, 8 September 1700, in: Paris: Archives Nationales, C 11A, vol. 18, fol. 84^r-88^r; Facsimile edn in: Eick (as above), pp. 207-216. Treaty France – Chichi Catalo/Huronen/Iroquios/Kiskakons/Outoutagan/Sauks/Sinago Odwa, Montreal, 4 August 1701, in: Gilles Havard, *The Great Peace of Montreal. French-Native Diplomacy in the Seventeenth Century* (Montreal, 2001), pp. 100-188 (Facsimile of the original French version), pp. 210-215 (English version) [Daniel Richter, ‘To “Clear and King’s and Indians’ Title”. Seventeenth-Century Origins of North American Land Cession Treaties’, in: Saliha Belmessous, ed., *Empire by Treaties. Negotiating European Expansion. 1600 – 1900* (Oxford, 2015), pp. 45-77; this edn partly available in the internet since 2014]. Treaty Mahrattas – Portugal, 7 April 1712, in: *CTS*, vol. 27, pp. 227-229. Treaty English East India Company – Nawab Jaffier Ali Khan of Bengal, 15 July 1757, in: *CTS*, vol. 41, pp. 59-60. Edict in the name of the Portuguese Viceroy for India about an agreement with Sunda, Goa, 24 October 1760, in: *CTS*, vol. 42, pp. 35-37. Treaty English East India Company – Mahrattas, 14 September 1761, in: *CTS*, vol. 42, pp. 103-104. Treaty Mahrattas – Portugal, 24

the government of Siam-Thailand at the end of the seventeenth century⁹ and hosted a Persian diplomatic mission early in the eighteenth century.¹⁰ Under Louis XV, a French diplomatic envoy was dispatched to Madagascar after the end of the Seven Years War,¹¹ which resulted in the establishment of a French stronghold there between 1774 and 1776¹² and even in the creation of a temporary French “Protectorate” over Madagascar.¹³ A British initiative took place in 1788 in

December 1761, in: *CTS*, vol. 42, pp. 121-127. Edict in the name of the Portuguese Viceroy for India about an agreement with the Mahrattas, Goa, 16 January 1764, in: *CTS*, vol. 42, pp. 475-476. Edict in the name of the Portuguese Viceroy for India about an agreement with the Mahrattas, Goa, 25 December 1764, in: *CTS*, vol. 42, pp. 121-127. Treaty Seneca – UK, Johnsonhall, 3 April 1764, in: *CTS*, vol. 42, pp. 499-502. Treaty Hurons – UK, Niagara, 18 July 1764, in: Wilhelm Carl Georg Grewe, ed, *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 389-391. Edict in the name of the Portuguese Viceroy for India about an agreement with the Mahrattas, Goa, 25 December 1764, in: *CTS*, vol. 43, pp. 123. Treaty English East India Company – Nawab of Bengal, 16 August 1765, in: *CTS*, vol. 43, pp. 189-191. Treaty Kandy – Dutch East India Company (VOC), Colombo, 14 February 1766, in: *CTS*, vol. 43, pp. 263-269 [protection agreement]. Treaty Mahrattas – Portugal, 14 October 1768, in: *CTS*, vol. 44, pp. 217-227. Treaty Dutch East India Company (VOC) – Nabob of the Carnati, 23 November 1773, in: *CTS*, vol. 45, pp. 285-290. Treaty Delaware – USA (Continental Congress), 27 September 1778, in: *CTS*, vol. 47, pp. 87-89. Treaty English East India Company – Mahrattas, 24 November 1778, in: *CTS*, vol. 47, pp. 93-98. Treaty English East India Company – Mahrattas, 1779, in: *CTS*, vol. 47, pp. 101-102. Treaty Mahrattas – Portugal, 4 April / 17 December 1779, in: *CTS*, vol. 47, pp. 129-137 (Portuguese version), pp. 138-151 (English version). Treaty Dholpur – English East India Company, 2 December 1779, in: *CTS*, vol. 47, pp. 255-257. Treaty Baroda – English East India Company, 26 January 1780, in: *CTS*, vol. 47, pp. 261-267. Treaty English East India Company – Nagpur, 1781, in: *CTS*, vol. 47, pp. 405-406. Treaty French Africa Company – Tunis, 24 June 1781, in: *CTS*, vol. 47, pp. 491-493. Treaty English East India Company – Mahrattas, 17 March 1782, in: *CTS*, vol. 48, pp. 63-68. Treaty English East India Company – Mysore, 28 October 1782, in: *CTS*, vol. 48, pp. 205-210. Treaty Dutch East India Company (VOC) – Tidore, Ternate, 17 December 1783, in: Grewe (as above), pp. 392-405. Treaty Choctaw – Spain, Movila, 14 July 1784, in: *CTS*, vol. 49, pp. 109-112. Treaty Dutch East India Company (VOC) – Johor, 10 November 1784, in: *CTS*, vol. 49, pp. 177-186 (Niederländische Fassung), S. 187-196 (Französische Fassung). Treaty English East India Company – Mysore, 11 March 1784, in: *CTS*, vol. 49, pp. 27-30. Treaty Six Nations [Seneca, Mohawks, Onodagas, Cayugas, Oneida, Tuscarora] – USA, Fort Stanwix, 22 October 1784, in: *CTS*, vol. 49, p. 169 [auch in: Barbara Graymont, *The Iroquois in the American Revolution* (Syracuse, 1972), pp. 297-298]. Treaty USA – Wyandot, 21 January 1785, in: *CTS*, vol. 49, pp. 217-218. 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 Chickasaw – USA, Hopewell, 10 January 1786, in: *CTS*, vol. 49, pp. 457-459. Treaty English East India Company – Nawab von the Carnati, 24 February 1788, in: *CTS*, vol. 50, pp. 115-123. Treaty Dutch East India Company (VOC) – Selangor, 6 / 13 August 1788, in: *CTS*, vol. 49, pp. 205-210. Treaty Six Nations – USA, Fort Harmar, 9 January 1789, in: *CTS*, vol. 50, pp. 405-419. Treaty USA – Wyadot, Fort Harmar, 9 January 1789, in: *CTS*, vol. 50, pp. 413-414. For treaties between European and Southeast Asian parties see: Peter Borschberg, *The Singapore and Melaka Straits. Violence, Security and Diplomacy in the 17th Century* (Singapore, 2010), pp. 121-122, 158-159.

⁹ Dirk van der Cruysse, *Siam and the West. 1500 – 1700* (Chiang Mai, 2002) [first published (Paris, 1991)].

¹⁰ Maurice Herbette, *Une ambassade persane sous Louis XIV* (Paris, 1907), pp. 231-281. The mission resulted in the conclusion of a French-Iranian treaty on trade, 13 August 1715 [in: *CTS*, vol. 29, pp. 305-309], in which King Louis XIV came to be styled as “Prince Louis XIV, Empereur, Rois très chrétien de France et de Navarre” (p. 309). This treaty replaced the preliminary agreement that had been concluded in September 1708 [*CTS*, vol. 26, pp. 199-217]. It is extant in the form of the ratification edict in the name of Shah Kulikan. In this treaty, Louis XIV bears the title “le plus grand Roi de l’Europe, le Très excellent Empereur de France” (p. 199).

¹¹ Hubert Deschamps, *Histoire de Madagascar*, fourth edn (Paris, 1972), pp. 80-83, 88-91. H. Pouget de St André, *La colonization de Madagascar sous Louis XV* (Paris, 1886), pp. 1-186 (on Maudave’s mission), pp. 187-202 (on Benyowski’s mission).

¹² Moritz August von Benyowski [Móric Ágost Aladár Benyovszky], *Des Grafen Moritz August von Benyowsky Begebenheiten und Reisen. Von ihm selbst geschrieben. Wie auch Auszüge aus Hippolytus Stefanows russisch geschriebenen Tagebuch über seine Reise von Kamtschatka nach Makao*, vol. 2 (Hamburg, 1791), pp. 77-244, esp. pp. 77-78, 86, 90-96, 128, 212, 241-244 [first published (Paris, 1791)].

¹³ Treaty France – Madagascar, 1 April 1775, in: *CTS*, vol. 45, pp. 49-50.

support of the foundation of a settlement at Freetown near the mountain range known as Sierra Leone on the West African coast.¹⁴ In 1785, the French government had succeeded in obtaining control over a small area on the West African coast.¹⁵ But no permanent settlement under European government control came into being in Africa, West, South, Southeast and East Asia during the seventeenth and eighteenth centuries in addition to the Portuguese strongholds that had been founded during the fifteenth and sixteenth centuries, as the then existing European settlements in these parts of the world were established and controlled by long-distance trading companies. By contrast, in parts of America, there existed a mix of territories under state and company control, while governments of states entered in treaty relations with several Native American states during the seventeenth and eighteenth centuries.

For the theories of international relations and of international law, the long-distance trading companies were of high significance. This was so because the companies as international legal subjects maintained usually maritime networks of relations with almost every part of the globe, and prevented legal theorists from conceiving inter-systemic relations solely with an eye on the activities of governments of sovereign states. Hugo Grotius's writings on international legal theory have been the case in point as evidence. As is well-known, Grotius, when just twenty years old, drafted a legal opinion for the Dutch East India Company (VOC), in which he defended, among other things, the company's *ius ad bellum*.

In his text, Grotius carefully avoided dispute over the question whether the VOC was entitled to conduct a "public war" like rulers in sovereign states. In 1604, Grotius was cautious with regard to this question because, at this time, several authors ranked only "public wars" as just and postulated that only rulers of sovereign states could be entitled to conduct "public wars".¹⁶ In arguing this position, these authors categorised "public war" as just war in the sense of the traditions of the law of war and peace and restricted the number of legitimate belligerents in "public wars" to rulers of sovereign states. Grotius remained within this tradition of the law of war and peace and even used

¹⁴ Carl Bernhard Wadström, *An Essay in Colonization*, 2 vols (London, 1794-1795) [reprint (New York 1968)]. Treaty Sierra Leone – UK, 22 August 1788, in: *CTS*, vol. 50, pp. 361-362 [Edict in the name of King Nambaner of Sierra Leone, countersigned by the British Crown representative, on the cession of land for the foundation of Freetown].

¹⁵ Treaty France – Joal, 25 March 1785, in: Archives Nationales du Sénégal, 19D1/59 [cession agreement]; partly printed in: Isabelle Surun, 'Une souveraineté à l'encre sympathique? Souveraineté autochtone et appropriations territoriales dans les traits franco-africaines au XIX^e siècle', in: *Annales* 69 (2014), pp. 319-320.

¹⁶ Johannes Althusius, *Politica*, book XVI, chap.4-9, 13, book XXXI, chap. 1 (Herborn, 1614) [first published (Herborn, 1603); newly edited by Carl Joachim Friedrich (Cambridge, 1932), pp. 119-121, 291 [reprint of the original edn (Aalen, 1981); reprint of Friedrich's edn (New York, 1979)]. Christoph Besold, *Discursus politici*, nr 5: De reipublicae formarum inter sese comparatione, chap. 1 (Strasbourg, 1624), p. 239. Serafim Freitas, *De iusto imperio Lusitanorum Asiatico Adversus Grotii Mare Liberum*, Chap. 11 [(Valladolid, 1625)], reprint, edited by Miguel Pinto de Meneses (Lisbon, 1983), p. 134.

the term “public war” (*bellum publicum*) in contradistinction against the feud as the main type of the “private war”. However, he skillfully shifted the question of the entitlement of the VOC to conduct a “public war” from the issue of the justice of war to the meaning of the word “public”. His response to this question overlapped with arguments that his opponent Serafim Freitas proposed subsequently, namely that “public matters” (*res publicae*) must be regarded as accessible to everyone. Yet both contenders differed with regard to the range of public accessibility. On the one side, Grotius, like John Dee in the sixteenth century, claimed that public accessibility would have to apply to humankind as a whole, Freitas would limit it to the territory of a state and the seaways attached to that territory. Grotius thus avoided an answer to the question whether the VOC was entitled to conduct a “public war” against the King of Spain (and Portugal). According to his argument, even if the VOC would not have been entitled to do so, no one could prevent the company legally from participating in “public matters” wherever they were. Hence, Grotius claimed that the law of war was to be applied to all “private wars” that were being conducted over the right to participate in “public matters”. According to the law of war, both the VOC and the King of Spain were thus equally entitled to conduct war in the Indian Ocean.¹⁷

Moreover, Grotius took the criteria for determining the justice of wars solely from the law of war and peace in the tradition of Augustine and Thomas Aquinas, thus allowing no other causes of just wars than defense, restoration of lost legal entitlements and punishment of infringers of the law.¹⁸ According to Grotius, the VOC, like the “States General” as a whole, were acting in defense of their established rights, which the crews of Portuguese-Spanish ships appeared to seek to contest unlawfully. In defense of their position, the Portuguese-Spanish crews seemed to rely on what Grotius categorised as a fictitious legal title, derived from edicts in the name of Pope Alexander VI of 1493. Using arguments that the Spanish jurist Metellus had proposed in the sixteenth century,¹⁹ Grotius ranked the privileges, which, in his view, had been granted to the kings of Portugal and Spain alike, in the literal meaning of the Latin word *donatio* as a gift of land by the Pope and not as an act of the legitimation of rule.²⁰ He then concluded from the wording of the texts that the edicts were of no relevance to states other than the kingdoms of Portugal and Spain, as the Pope had not

¹⁷ Hugo Grotius, *De praeda militari*, edited by Hendrik Gerard Hamaker (The Hague, 1868), p. 204 [reprint (Dobbs Ferry, 1964); microfiche edn (The Grotius Collection. International Law on Microfiche, GRI-112) (Leiden, 1995)].

¹⁸ *Ibid.*, p. 249.

¹⁹ Grotius, *Mare liberum* (Leiden, 1618) [written in 1604; first printed (Leiden, 1609); reprint, edited by Friedhelm Krüger-Sprengel, *Mare liberum – mare clausum* (Bibliotheca rerum militarium, 42) (Osnabrück, 1978); reprint of edn of 1609, edited by Robert Feenstra, *Mare liberum 1609 – 2009* (Leiden, 2009), pp. 1-158, pp. 24-27]. Johannes Metellus [Matalius], ‘Praefatio’, in: Hieronymus Osorius, *De rebvs Emmanvelis Lusitaniae Regis Invictissimi, virtute et avspicio Domi foriqve gestis libri dvodecim*, vol. 1 (Coimbra, 1791), pp. 1-204, at pp. 20-21 [first published (Cologne, 1580)]. On the use of the work of Metellus by Grotius see: Erik Staedler, ‘Hugo Grotius über die “donatio Alexandri” von 1493 und der Metellus-Bericht’, in: *Zeitschrift für Völkerrecht* 25 (1941), pp. 257-274, at p. 261.

²⁰ Grotius, *Mare* (note 19), pp. 24, 65, 93.

mentioned any other recipients of his privileges.²¹ Grotius further added that the Pope was not the universal ruler.²² According to Roman law, no one could donate without being in possession of what was to be donated, Grotius argued following Cicero.²³ But the Pope had not been the proprietor of the donated lands, and no one could legislate over some place in the middle of the ocean where no one could reside permanently.²⁴ Therefore, the Indian Ocean was accessible to anyone who wanted to go there.²⁵ Should Portuguese-Spanish ships seek to obstruct the VOC advance into the Indian Ocean, the VOC was entitled to defend itself.

The logic Grotius followed was straightforward and focused, as was appropriate for a legal argument. The rules of the law of war were to be valid and applicable for all humankind throughout the world, as Grotius perceived it. In his perception, the law of war flew from theories which had their origin in the Christian faith. But the specific religious origin of these theories was not to obstruct their universal application in military conflicts anywhere in the world. The law of war was to be valid for all kinds of war, no matter who the belligerents were. Sovereign rulers could not own the oceans and, consequently, the seaways that came to be called the Atlantic and the Indian Oceans could not be closed to anyone. In 1604, this line of argument was neither new nor was Grotius the only one to argue it in his time. Instead, the argument had been current with regard to the Atlantic throughout the sixteenth century.²⁶ But Grotius shifted the focus of the argument from the Atlantic to the Indian Ocean and from rulers of sovereign states to private long-distance trading companies as legitimate belligerents. Thereby, he extended the reach of the law of war in geographical respects as well as with regard to the number of types of sovereign belligerents. That he had written his text on the prize law to the end of legitimising VOC activities in the Indian Ocean, Grotius admitted himself early on.²⁷

Since its establishment from slightly older local companies in 1602, the VOC owned a privilege by the States General, constituting the company as a subject under international law when conducting its trade relations in areas east of the Cape of Good Hope. That meant that the States General

²¹ Ibid., p. 25.

²² Ibid., p. 26.

²³ Ibid., p. 38.

²⁴ Grotius, *Praeda* (note 17), p. 260.

²⁵ Ibid., p. 237.

²⁶ For an early case see: William Fulbeke, *The Pandectes of the Law of Nations* (London, 1602), pp. 34, 35, 37-39. For a study see: Gundolf Fahl, *Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 51) (Cologne, 1969).

²⁷ Hugo Grotius, 'Defensio capitis quinti Maris Liberi oppugnati a Gulielmo Welwodo', edited by S. Visschering, 'Over een drietal handschriften van Hugo Grotius korte inhoud eener mededeeling', in: *Verlagen en mededeelingen der Koninklijke Academie van Wetenschappen*, Afdeling Letterkunde 9 (1865), pp. 148-149, at p. 148 [the edn has been based on: *Maris liberi vindiciae adversus Gulielmum Welwodum De dominio maris* (The Hague, 1653)].

subjected themselves to a prohibition of entry (introitus) into all areas outside Europe, in which the Company was entitled to proceed with its businesses. In return for this privilege, the States General obliged the company to keep its trading fleet ready for military assistance against Portugues-Spanish ships when necessary. The company's *ius ad bellum* thus came into existence against the backdrop of the Eighty Years War. The company served as armed force of the States General to be deployed in waters east of the Cape of Good Hope against the enemies of the Dutch Republic, but could do so only under the condition that it received entitlement to conduct war at its own discretion. Grotius's arguments about the law of war must therefore be placed against the background of the given subjectivity under international law of the long-distance trading companies.²⁸

In addition to the privileges constituting the long-distance trading companies as subjects under international law, edicts in the names of host rulers and governments of states contained permissions trading activities to the companies. Some of these edicts have been extant, such as the permission in the name of Shōgun Ieyasu Tokugawa in Japan for the VOC of 1609,²⁹ by the same ruler and at the suggestion by King James I for the English East India Company (EIC) of 1613³⁰ and the draft treaty between the British King and the Great Mogul for the EIC of 1616.³¹ Occasionally, conflicts might arise about the proper adherence to these treaties, even temporary cessation of trading activities might occur, but the certainty remained uninterrupted and uncontested that rulers and governments in Africa, America, West, South, Southeast and East Asia as well as long-distance trading companies were principally capable of entering into treaty relations and that treaty commitments were to be honoured. By approval of the rulers and governments having privileged them, the long-distance trading companies operated under the same conditions of the application of natural law as did rulers

²⁸ Charter by the States General of the Netherlands for the Dutch East India Company (VOC), 20 March 1602, in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 171-176; also in: Ella Gepken-Jäger, Gerard van Solinge and Levinus Timmermann, eds, *VOC 1602 – 2002. 400 Years of Company Law* (Law of Business and Finance, 6) (Deventer, 2005), pp. 23-24. On this privilege see: Borschberg, *Singapore* (note 8), pp. 68-78

²⁹ Edict in the name of Ieyasu Tokugawa, Shōgun of Japan, for the Dutch East India Company (VOC), 25 August 1609, in: Jan Ernst Heeres, ed., *Corpus diplomaticum Neerlandico-Indicum*, vol. 1 (Bijdragen tot de Taal-, Land- en Volkenkunde van Nederlandsch-Indië, 87) (The Hague, 1931), pp. 69-70; also in: Ulrich Gerard Lauts, *Japan in zijne staatkundige en burgerkijke inrigtingen en het verkeer met Europesche natiën* (Amsterdam, 1847), p. 171; Oskar Nachod, *Die Beziehungen der Niederländischen Ostindischen Kompagnie zu Japan im siebzehnten Jahrhundert* (Leipzig, 1897), pp. XVII-XVIII; renewed in the name of Shōgun Hidetada Tokugawa, 15 September 1617, in: Heeres (as above), p. 133; also in: Lauts (as above), pp. 181-182; Nachod (as above), pp. IL-L.

³⁰ Edict in the name of Ieyasu Tokugawa, Shōgun of Japan, for the English East India Company, 1613, in: 'Minutes of Evidence', in: *Report of the Select Committee of the House of Commons on Commerical relations with China* (London, 1847), s. p.; also in: Thomas Rundall, *Memorials of the Empire of Japan* (Works Issued by the Hakluyt Society. Series I, vol. 8) (London, 1850), Notes, s. p. [reprint (New York, 1963)].

³¹ 'Articles of Amitye, Commerce and Entercourse betweene the Two most High and Mighty Princes, the Great Mogull, King of India, and the King of Great Brittain, France and Ireland', 26 March 1616 [draft], in: Thomas Roe, *The Embassy of Sir Thomas Roe to India 1615-19* [Letter by James I to Moghul Emperor Jehangir, Delhi 1615], edited by William Foster London, 1926), pp. 152-156 [reprint (Delhi, 1990); first published s. t.: *The Embassy to the Court of the Great Mogul* (Works Issued by the Hakluyt Society. Series II, vol. 1.) (London, 1899); reprint of this edn (Nendeln, 1967)].

and governments of sovereign states, such as the King of Portugal through the Estado do India. Consequently, the VOC explicitly instructed its employees to carefully abide by the law valid at the places where they were conducting trade.³²

It is at this point that the empirical aspects of long-distance trade relations met with international legal theory as explicated in the work of Grotius and other theorists.³³ There was no dissent among European long-distance trading companies, rulers and governments in areas where these companies were doing business, and theorists regarding the principle that trade should be managed and that rulers and governments were entitled to legislate about trading rulers on territories under their control. At no time did any member of European long-distance trading company call into question that competence of a local ruler or government. No one saw the need to act purposefully to the end of establishing agreement about some common legal basis upon which trade was to be regulated.³⁴ That means that the category of legal norms, classed as natural law in Europe, was practically regarded as valid elsewhere on the globe as well and that there was principal consensus about these unset legal norms. This principled agreement notwithstanding, dissent might come up with regard to some technical details of customary law of habits in existence in certain states and, therefore, not generally applied. In cases of conflict about these specific norms, however, the natural law principle of the *ius territorii* was usually and eventually accepted. There might also be disagreement about the structure of government of certain trading partners. For example, during the seventeenth and eighteenth centuries, the Japanese government regarded members of the VOC operating on Japanese soil as emissaries of some kingdom of the Netherlands, which was non-existent at the time. That habit, however, did not create any problems for the VOC, because both sides accepted the underlying principle that the choice of the name of the state of trading partner fell within the competence of the government in charge of the place where the trading was taking place. Hence, the VOC simply noted the discrepancy between its own status according to its privilege and how the Japanese government perceived the company. No problem arose from these discrepancies of

³² Andreas Cleyer, [Diary], edited by Eva Susanne Kraft, *Tagebuch des Kontors zu Nagasaki auf der Insel Deshima* (Bonner Zeitschrift für Japanologie, 6) (Bonn, 1985), pp. 189-190. Cleyer, [Letter to Sebastian Scheffer, dated 20 December 1683], edited by Wolfgang Michel, 'Ein Ostindianisches Sendschreiben', in: *Dokufutsu Bungaku Kenkyū* 41 (1991), pp. 15-98. On Cleyer see: Eva Susanne Kraft, 'Andreas Cleyer', in: Joachim H. Balde, ed., *Festschrift zum 86. Deutschen Ärztetag* (Kassel, 1983), pp. 25-40.

³³ [Josiah Child], 'A Discourse Concerning the East-India Trade. Wherein is Shewed, by Arguments Taken from a Treatise Written by Sir Josiah Child [*A New Discourse of Trade* (London, 1690)], that the Said Trade May be Carried on by a Regulated Company, to Much Greater Advantage of the Publick, than by a Company with a Joint-Stock', in: Walter Scott, ed., *A Collection of Scarce and Valuable Tracts on the Most Interesting and Entertaining Subjects ... of the Late Lord John Somers*, vol. 10 (London, 1813), pp. 634-652 [reprint (New York, 1965)].

³⁴ Even the Roman Emperor proved willing to conclude a bilateral agreements with the Bey of Tunis in 1725, whose predecessor had once been attacked by Charles V: Treaty Roman Emperor and Roman Empire – Bey of Tunis, 23 September 1725, in: *CTS*, vol. 32, pp. 215-218.

name-giving, as long as the main issue, namely the natural-law based recognition of the sovereignty of the trading partners remained unquestioned. There were as few difficulties regarding the use of treaties to legislate new law. Following natural law theory, the validity and enforceability of treaty stipulations was to be derived from the unmet natural law of treaties, featuring mainly the “basic norm” *pacta sunt servanda*. This principle applied even under the condition that one treaty partner had received its subjecthood under international law not by natural law but by government privilege. There was, then, no need for specific legal acts to establish the competence of parties to enter into treaty relations. The several treaties concluded among long-distance trading companies on the one side, rulers and governments in South ³⁵ and Southeast Asia³⁶ as well as Africa³⁷ confirm this principle for the seventeenth and eighteenth centuries.

In addition to these agreements, governments of some European states entered into treaty relations with Native American states both in North and in South America, even after colonial rule had been imposed upon the latter.³⁸ For one, in 1641, the Spanish colonial government concluded a border treaty with the Mapuche in what is southern Chile today, featuring the mutual recognition of the sovereignty of the treaty partners and regulating some aspects of the relations between the two states.³⁹ Elsewhere in South America, bilateral agreements came into existence between European and Native American states.⁴⁰ In North America, the governments of France and Great Britain (subsequently the United Kingdom), while pushing ahead with the expansion of the respective colonial rule, used the instrument of bilateral treaties under international law to enforce the cession of land to colonial institutions of governance in the course of the seventeenth and eighteenth centuries. In entering into treaty relations, however, the participating European governments recognised not only the statehood but also the sovereignty of their Native American partners. Likewise, to the end of the eighteenth century, European governments, and even the nascent US government, followed the then conventional practice of treaty-making in that they took for granted natural law as the legal source for the law of treaties and the treaty-making capability of their partners on the Native American side and regarded as redundant specific legislative acts to the end of establishing some form of legally binding treaty law. In 1763, following the Paris peace agreement with France, ending the seven Years War, the British government enacted a proclamation

³⁵ See above, note 8.

³⁶ See above, note 8.

³⁷ See above, note 8.

³⁸ See above, note 8.

³⁹ See above, note 8.

⁴⁰ For a study see: Jörg Fisch, ‘Völkerrechtliche Verträge zwischen Spaniern und Indianern’, in: *Jahrbuch für Geschichte von Staat, Wirtschaft und Gesellschaft Lateinamerikas* 16 (1979), pp. 245-252. Tamara Herzog, ‘Struggling over Indians. Territorial Conflict and Alliance Making in the Heartland of South America (Seventeenth and Eighteenth Centuries)’, in: Saliha Belmessous, ed., *Empire by Treaties. Negotiating European Expansion. 1600 – 1900* (Oxford, 2015), pp. 78-99 [partly available on the internet since 2014].

in the name of King George III, through which it unilaterally established what it termed a “Protectorate” over Native American groups west of the areas of origin of rivers flowing into the Atlantic Ocean.⁴¹ However, even that proclamation did not prevent the British government from concluding military alliances during its war against British colonists in North America. Likewise, the Spanish government, as late as in 1784, that is, after the end of the American War of Independence, entered into treaty relations with the Native American state of the Choctaw.⁴² Moreover, the nascent US government, already late in the 1770s, took over British practice and entered into alliances with Native American states. Thus, the Delaware were pressured into accepting, by treaty, movements of troops under the Command of the Continental Congress,⁴³ ordered to attack British strongholds in the area. Thereafter, the Seneca came under US “Protectorate” by treaty, immediately after the subsequent US government had been recognised as a sovereign by the Paris peace treaty of 1783.⁴⁴ Later, the governing institutions of the emerging USA proceeded unilaterally, as if the proclamation that had been issued in the name of King George III in 1762, had continued its binding force throughout and beyond the American Revolution and were transferable upon the USA.⁴⁵ After 1783, the US government concluded various war-ending agreements with Native American states, which had previously fought on the British side. In all these treaties, the governing institutions of the USA recognised their Native American treaty partners as sovereign states, even in areas, over which King George III’s unilateral “Protectorate” had been erected. The US government continued its practice of enforcing land cession treaties well into the nineteenth century.⁴⁶

In the course of the nineteenth century, the cession treaties perverted into an instrument facilitating state destruction in numerous cases, when Native American treaty partners were forced to cede to the USA all land then in the possession and resettle in “Reservations”. It was this practice,

⁴¹ UK, A Proclamation [in the name of King George III, broad sheet, 7 October 1763] (London, 1763); edited by Clarence S. Brigham, *British Royal Proclamations Relating to America. 1603 – 1783* (Transactions and Collections of the American Antiquarian Society, 12) (Worcester, MA, 1911), p. 215 [partly reprinted in: <http://indigenousfoundations.art.ubc.ca/home/g/>].

⁴² See above, note 8.

⁴³ See above, note 8.

⁴⁴ See above, note 8.

⁴⁵ The rulings by the US Supreme Court relating to US land law from 1831 and 1832 still referred to the Proclamation: USA, Supreme Court; *The Cherokee Nation v. State of Georgia*, 30. U. S. (5 Peters) 1. 1831, January 1831 [<http://caselaw.lp.findlaw.com/scripts/getca>]. USA, Supreme Court; Samuel Arthur Worcester v. State of Georgia, 31. U. S. (15 Peters) 15. 1832, January 1832 [<http://caselaw.lp.findlaw.com/scripts/getca>].

⁴⁶ Treaty Creek – USA, 7 August 1790, in: *CTS*, vol. 51, pp. 37-41. Treaty Cherokee – USA, Holston, 2 July 1791, in: *CTS*, vol. 51, pp. 169-173. Treaty Cherokee – USA, Philadelphia, 26 June 1794, in: *CTS*, vol. 52, pp. 225-226 [implementation agreement on the treaty of Holston, 1791]. Treaty Six Nations [Cayuga, Mohawk, Onodaga, Oneida, Seneca, Tuscarora = Haudenosaunee = The People of the Longhouse] – USA, Canangaigua [Konondaigua], 11 November 1794, in: *CTS*, vol. 52, pp. 233-242 [peace and border agreement]. Treaty Oneida – USA, 2 December 1794, in: *CTS*, vol. 52, pp. 275-276 [compensation by the US government for damages and losses of its alliance partner during the War of Independence]. Thus also: Thomas Jefferson, [Address to Congress, 18. January 1803], in: Reuben Gold Thwaites, ed., *Original Journals of the Lewis and Clark Expedition. 1804 – 1806*, vol. 7 (New York, 1905), pp. 206-209, at p. 206 [reprint, edited by Bernard De Voto (New York, 1969)].

dramatically obvious between 1828 and 1835 in the series of cession agreements between the Cherokee, previously recognised as a sovereign state on the territory of the US federal state of Georgia, and the USA,⁴⁷ that marked the end of the acceptance of natural law as the source of binding norms of the law of treaties. Up until the end of the eighteenth century, then, there was no uncontroversial legal evidence against the continuing general recognition of natural law as the legal basis for the law of treaties among states. The argument that legal positivism had already found its way into the practice of treaty-making during the eighteenth century,⁴⁸ has been based on the correct observation of the increase in the number of treaties being concluded and entered into printed public treaty collections principally available to everybody everywhere. However, this argument has been drawn on symptoms rather than on the legal base of these symptoms. That base had been Christian Wolff's inclusionistic *civitas maxima*, in which all states had been sovereign simply by virtue of their being states and their rulers and governments recognising universal natural law.⁴⁹ Hence, prior to the nineteenth century, that particular aspect of positivist international legal theory was unknown, according to which purposeful human action should have been required to the ends of establishing an exclusionistic international legal community and its positioning as the main, if not the sole precondition for abidance by international legal norms.

3. Contractualist Theory and the Conception of Rule Governed by the Law

At the same time, it became possible to categorise imperial law as the “particular European law among states ... of the German nation” (besondere europäische Völkerrecht ... der deutschen Nation). Imperial law was now understood to cover “the essence of positive agreements, which contain (1)

⁴⁷ Treaty Cherokee – USA, 6 May 1828, in: *CTS*, vol. 78, pp. 294-298. Treaty Cherokee – USA, 14 February 1833, in: *CTS*, vol. 83, pp. 174-177. Treaty Cherokee – USA, New Echota, 29 December 1835, in: *CTS*, vol. 85, pp. 410-420. President Andrew Jackson, who had been commander general of the US forces in the war against Native Americans in 1814, enforced the deportation. See: John H. Eaton, [Letter to William Carroll, Governor of Tennessee, 29 May 1829, Washington: Office of Indian Affairs, Letters sent; Microfilm in Washington: National Archives], partly printed in: Rogin, *Fathers* (as below), p. 225. In 1830, the US government proclaimed the Cherokee “too ignorant and barbarous to submit to state laws” and “too ignorant and barbarous to establish and maintain a government of their own” [Lewis Cass, ‘Removal of the Indians’, in: *North American Review* 31 (1830), p. 102]. According to the treaty of New Echota of 1835 (as above, Art. 12, p. 415), formally establishing the “Protectorate” by the US government, the sole category of persons exempted from the enforcement of the deportation were those, who “are qualified to take care of themselves and their property” and would acquire US nationality. See: Grant Foreman, *Indian Removal. The Emigration of the Five Civilized Tribes of Indians* (Norman OK, 1932), pp. 251-293 [reprints (The Civilization of the American Indians, 2) (Norman, OK, 1953; 1956)]. Michael Paul Rogin, *Fathers and Children. Andrew Jackson and the Subjugation of the American Indians* (New York, 1975), pp. 113-125, 206-248.

⁴⁸ Kinji Akashi, *Cornelius van Bynkershoek. His Role in the History of International Law* (International Law in Japanese Perspective, 4) (The Hague, 1998). Charles Henry Alexandrowicz, ‘Empirical and Doctrinal Positivism in International Law’, in: *British Yearbook of International Law* 47 (1977), pp. 286-289.

⁴⁹ Christian Wolff, *Jus Gentium methodo scientifico pertractatum* (Halle, 1749), pp. 6-9 [reprint, edited by Marcel Thomann (Wolff, Gesammelte Werke, Section B, vol. 25) (Hildesheim and New York, 1972)].

the rights and duties of the Empire and the other European states among themselves; (2) the rights and duties among European states themselves; and (3) the rights and duties of the Empire and foreign states among themselves” (den Inbegriff der Gesetze welche 1) die Rechte und Verbindlichkeiten des teutschen Reiches und der übrigen europäischen Staaten unter sich; 2) die Rechte und Verbindlichkeiten der europäischen Staaten unter sich; 3) die Rechte und Verbindlichkeiten der Staaten des teutschen Reichs und auswärtigen Staaten unter sich).⁵⁰ Within this framework of legally binding agreements among states within and beyond the European system, the Empire appeared as the “core of the European Republic and the European balance of power”.⁵¹ Thus understood, the European law among states was identical with the law of the “European system”⁵² and the sovereigns assembled therein. It became equally possible to employ the theory of the government contract as the means not only for the derivation of the bindingness of particular treaty obligations among signatory parties but also for the setting of general legal norms of the law among states. To accomplish this task, theorists resorted to analogy. They claimed that the multitude of treaties made among rulers and governments transformed original “moral persons” (*personae morales*) from the state of nature into the community of contractually associated and bound states⁵³ in the same way, as the government contract founded a state within a political community.⁵⁴ Within this contractual society of states, war became the means of regulated public conflict, with the implication that private wars, as just wars, could take place only among individuals in the state of nature. From the middle of the eighteenth century, theorists adopted the view that the state of nature was a condition of humankind that, in Europe, had existed in the remote past.⁵⁵

⁵⁰ Daniel Nettelblatt, *Erörterungen einiger einzelner Lehren des teutschen Staatsrechts* (Halle, 1773), pp. 39-40.

⁵¹ Adam Christian Gaspari, *Versuch über das politische Gleichgewicht der europäischen Staaten* (Hamburg, 1790), p. 18. Johann Michael von Loën, *Entwurf einer Staats-Kunst* (Frankfurt, 1747), pp. 245-248, at pp. 228-232 [further edn (Frankfurt and Leipzig, 1751)]. Jean-Jacques Rousseau, ‘Extrait du Projet de paix perpétuelle de M. l’Abbé de Saint-Pierre’, in: *The Political Writings of Jean Jacques Rousseau*, edited by Charles Edwyn Vaughan, vol. 1, reprint (Oxford, 1962), pp. 364-396, at p. 372 [first publication of Vaughan’s edn (Cambridge, 1915)].

⁵² Henry Saint-John, Viscount Bolingbroke, *Works*, edited by David Mallet, vol. 2 (London, 1754), p. 417 [reprint, edited by Bernhard Fabian (*Anglistica et Americana*, 13) (Hildesheim, 1968)]. Emer[ich] de Vattel, *Le droit des gens. Ou Principes de la loi naturelle appliquées à la conduite et aux affaires des Nations et des Souverains*, book III, chap. 3, nr 47 (London [recte Neuchâtel], 1758), p. 39-40 [second edn (Paris, 1773); third edn (Amsterdam, 1775); Nouvelle édition, edited by Silvestre Pinheiro-Ferreira, Jean Pierre Baron de Chambrier d’Oleires and Paul Louis Ernest Pradier-Fodéré (Philadelphia, 1863); reprint of the first edn, edited by Albert de Lapradelle (Washington, 1916); reprint of the reprint (Geneva, 1983)].

⁵³ Julius Bernhard von Rohr, *Einleitung zur Staatsklugheit* (Leipzig, 1718), pp. 66-94.

⁵⁴ Georg Friedrich von Martens, *Erzählungen merkwürdiger Fälle des neueren Europäischen Völkerrechts in einer practischen Sammlung von Staatschriften aller Art in teutscher und französischer Sprache. Nebst einem Anhang von Gesetzen und Verordnungen, welche in einzelnen Europäischen Staaten über die Vorrechte auswärtiger Gesandten ergangen sind* (Göttingen, 1800).

⁵⁵ Johannes Ihre [praes.] and Paulus Nöring [resp.], *Dissertatio politica de bello privato* (Uppsala, 1751). Andreas Wexonius, *De bello hominis privato* (Basle, 1742). Johann Christoph Adelung, *Versuch einer Geschichte der Cultur des menschlichen Geschlechtes* (Leipzig, 1782). Isaak Iselin, *Ueber die Geschichte der Menschheit*, vol. 1 (Frankfurt and Leipzig, 1764), pp. 81-162, 163-243. Henry Lord Kames, *Historical Law Tracts* (London, 1758) [second edn (Edinburgh, 1761); fourth edn (Edinburgh, 1792); new edn of the fourth edn (Edinburgh, 1817)]. Christoph Meiners, ‘Historische Bemerkungen über die sogenannten Wilden oder über Jäger- und Fischer-Völker’, in: *Göttingisches historisches Magazin* 6 (1790), pp. 273-311. Johann Gottlieb Steeb, *Versuch einer allgemeinen*

European international legal theory turned the “European System” into an ordering frame for the establishment and maintenance of peace and the balance of power. The system was not to exist merely as a theoretical construct but also impact on diplomatic practice, which was to become recognisable, among others, in the formulation and edition of war manifestos.⁵⁶ The significance of these, mainly learned, treatises for the practical conduct of relations among states is well documented through the eighteenth century by discussions about the question of whether or not a war could be just against a state the government of which became noted for increasing its military strength at times of peace. These discussion peaked during the Silesian Wars. The starting point of the discussions was the problem of how rulers should respond to recognisable efforts by neighbouring rulers or otherwise affected states at the purposeful transformation of what had been regarded as the existing balance of power. Put differently, whenever, at time of peace and without any ascertainable external military threat, a ruler took steps to increase the number of soldiers in the armed forces of the state, took measures to increase the economic achievements of the state population by imposing new trade and taxation regimes, sought to increase the number of settlers through an active policy of enhancing immigration, built fortifications at borders or elsewhere on state territory or even occupied territories of another state, were such measures to be taken as efforts to alter the balance of power and, by consequence, as acts jeopardising the stability of the international system? And, if so, was an ensuing preventive war to the end of thwarting the full implementation of these measures, that is, a war to prevent the concentration of power in the hands of a single ruler, a just war? The continuous vigilance, resulting from mutual rivalry, against potentially status-altering activities of rulers and governments counted as the core instrument for the maintenance of the balance of power in the international system at large during the eighteenth century.⁵⁷ By contrast, Grotius had contended himself with the simple advice that a ruler, feeling threatened by a newly built fortification on the border of a neighbouring state, should best place an opposing fortress against that threat.⁵⁸

Beschreibung von dem Zustand der ungesitteten und gesitteten Völker nach ihrer moralischen und physicalischen Beschaffenheit (Karlsruhe, 1766), pp. 13-53.

⁵⁶ Gottfried Achenwall, *Staatsklugheit*, third edn (Göttingen, 1774), pp. 15-17 [first published (Göttingen, 1763)]. Adam Friedrich Glafey, *Vernunft- und Völker-Recht*, § 5 (Frankfurt and Nuremberg, 1723), p. 4 [third edn (Nuremberg, Frankfurt and Leipzig, 1752)]. *Staats-Betrachtungen über gegenwärtigen Preußischen Krieg in Teutschland in wie fern solcher das allgemeine Europäische, vornehmlich aber das besondere Teutsche Interesse betrifft* (Vienna, 1761), pp. 24, 25, 29, 31, 36.

⁵⁷ Johann Jacob Moser, *Betrachtungen über das Gleichgewicht von Europa und Deutschland* (Frankfurt and Leipzig, 1785), pp. 6-7. Vattel, *Droit* (note 52), book III, chap. 3, nr 44, pp. 34-37.

⁵⁸ Hugo Grotius, *De jure belli ac pacis libri tres* [(Paris, 1625)], book II, chap. 22, § 5, nr 2 [reprint of the edn (Amsterdam, 1646) (Washington, 1913); newly edited by Bernardina Johanna Aritia de Kanter-van Hettinga Tromp (Leiden, 1939). Reprint of this edn (Aalen, 1993); further reprint, edited by Richard Tuck, *The Rights of War and Peace. Hugo Grotius from the Edition by Jean Barbeyrac* (Indianapolis, 2005)].

The majority of the participants in the debate opted for declaring just a preventive war conducted to thwart acts with the apparent capacity of transforming the balance of power. In doing so, they supported the view that rulers had the legal obligation to keep the European states system in balance. The majority of participants in the debate classed wars as a contribution to the preservation of peace in the long term and the maintenance of stability in the states system, even if these wars were fought against states, whose rulers had not committed acts of military aggression against another state, but seemed to be creating the capacity for future aggressive acts. In support of their stance, these theorists adduced the argument that securing the balance of power might require the deployment of military means and might be necessary in order to guarantee the equality of states in accordance with natural law.⁵⁹ Moreover, they insisted that the temporary interruption of peace was mandated, if wars could ease the restoration of peace in a more stable manner.⁶⁰ Third, they claimed that the obligation of keeping the balance of power was itself a legal norm, infringements of which were not to be tolerated.⁶¹ Some adherents to this view conceded that power without recognisable determination to inflict damages could not be a threat and that the mere increase of the power of a state could not transform the balance as such.⁶² Yet, if the ruler of a state had a record of promoting injustice, showing greed and ambition and seeking to dominate other states, a preventive war against the aggrandisement of such a state was just. This was the position Maria Theresa took in her demand for the release of information about Prussian armaments in 1756, claimed that the provision of such information was mandatory to allow her assessments of the goals of Prussian military policy and proceeded with war preparations, once she deemed the received information insufficient.⁶³ By contrast, a minority of participants in the debate denied categorically that the preservation of the balance of power could under any circumstance be a just cause of a war. This, they argued, was so, because the balance of power was in itself the guarantor of the stability of states and, in this capacity a factor of peace. Therefore, the balance of power could only be kept by peaceful means, whereas it could never be protected through war. Moreover, these theorists denied that there was a legal obligation to preserve the balance of power, which, by consequence, could be altered without

⁵⁹ Gottfried Achenwall, *Juris naturalis pars posterior*, § 266 (Göttingen, 1763), p. 237. Nicolaus Hieronymus Gundling, *Erörterung der Frage ob wegen der anwachsenden Macht der Nachbarn man den Degen entblößen können*, new edn (Frankfurt and Leipzig, 1757) [first published (Halle, 1716)]. Gundling, *Commentatio de statu naturali Hobbesii in corpore iuris civilis* (Halle, 1735).

⁶⁰ Glafey, *Vernunftrecht* (wie Anm. 56), pp. 207-208. Johann Friedrich Kayser [praes.] and Eberhard Georg Wittich [resp.], *Dissertatio iuris gentium et pblici de tvendo aequilibrio Evroepae*, §§ XIV, XIX. LLD. thesis (University of Gießen, 1723), pp. 24-26, 32-34.

⁶¹ Gottlob August Tittel, *Erläuterungen der theoretischen und praktischen Philosophie. Abhandlungen über einzelne wichtige Materien* (Frankfurt, 1786), p. 227 [reprint (Brussels, 1973)].

⁶² Gaspari, *Versuch* (note 51), p. 21.

⁶³ Vattel, *Droit* (note 52), book III, chap. 3, nr 44, pp. 34-37. Maria Theresa, Archduchess of Austria, Queen of Bohemia and Hungary, [Circular Rescript, 30 July 1756], in: Johann Jakob Moser, *Versuch des neuesten europäischen Völker-Rechts in Friedens- und Kriegs-Zeiten*, part 7 (Frankfurt, 1779), pp. 30-32, at p. 31. Frederick II, King in Prussia, [Reply to the Circular Rescript by Maria Theresa of 3 July 1756, August 1756], in: Moser, *Versuch* (as above), pp. 32-35.

infringements upon the law among states.⁶⁴

Inside as well as outside the Holy Roman Empire, the idea that government stood under the rule of law was current in Europe already in the fourteenth-century legal theory⁶⁵ and continued to be present during the sixteenth and seventeenth centuries.⁶⁶ In addition, sixteenth-century theories supported the use of the right of resistance against unlawful rule,⁶⁷ and the Dutch rebels availed themselves of these theories when formulating their ideologies of resistance against the Spanish government. Even violent opposition against urban elites as well as acts of disobedience of farmers⁶⁸ articulated the demand that government should be subject to the law.

Sixteenth-, seventeenth-, and eighteenth-century theorists took the enforcement of the law among states to be difficult, at least to be loaded with problems, whereas the idea that relations among state should be governed by the law was uncontested in accordance with the theory of the law of nature. Contrary to previous periods, the argument that the law of nature was valid in humankind at large, received support, during the eighteenth century, not merely through theoretical speculations but even upon empirical evidence. The evidence came mainly from employees of the Dutch East India Company (VOC), who were most productive in reporting on legal and political matters in areas where they were engaged in their trading businesses.⁶⁹ More or less comprehensive travel reports, for example on Japan, found their ways into carefully assembled library collections, were meticulousness listed in bibliographies and served as sources for statistics.⁷⁰ One of the most

⁶⁴ Wolff, *Jus* (note 49), §§ 646-649, pp. 520-523. Ludwig Julius Friedrich Höpfner, *Naturrecht des einzelnen Menschen und der Völker*, second edn (Gießen, 1783), pp. 208-209 [first published (Gießen, 1780)]. Johann Michael von Loën, 'XXIX. Brief: Von der Gerechtigkeit des Krieges', in: Loën, *Kleine Staats-Schriften, welche bei Gelegenheit der Wahl und Krönung Carl des Siebenden und andern Begebenheiten sind aufgesetzt worden* (Loën, Kleine Schriften, edited by J. C. Schneider) (Frankfurt and Leipzig, 1750), pp. 348-395, at pp. 376-377 [reprint (Frankfurt, 1972)]. Wolff, *Jus* (note 49), §§ 646-649, pp. 520-523.

⁶⁵ Bartolus of Sassoferrato, *In secvndvm Digesti noui partem commentaria* (Bartolus, Opera, vol. 6) (Venice, 1570-1571), fol. 217^v.

⁶⁶ Justus Lipsius, *Politicorum sive de doctrina civilis libri sex* (Leiden, 1589) [newly edited by Jan Waszink (Assen, 2004), p. 540; reprint of the edn of 1704, edited by Wolfgang Weber (Hildesheim, 1998)].

⁶⁷ Kurt Wolzendorff, *Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht des Volkes gegen rechtswidrige Ausübung der Staatsgewalt* (Untersuchungen zur deutschen Staats- und Rechtsgeschichte, [A. F.] 126) (Berlin, 1916) [reprint (Aalen, 1961)].

⁶⁸ Andreas Würigler, *Unruhen und Öffentlichkeit* (Frühneuzeit-Forschungen, 1) (Tübingen, 1995).

⁶⁹ Veit Hammer, *Der Blick von Außen und das europäische Wissen über Japan um 1700. Die Beispiele Andreas Cleyer (1638 – 1697/98) und Georg Meister (1653 – 1713)*. Ph. D. thesis, typescript (University of Halle, 2012).

⁷⁰ Johann Beckmann, *Litteratur der älteren Reisenbeschreibungen*, 2 vols (Göttingen, 1808-1810). For seventeenth-century travel reports on Japan see: François Caron, *Beschrijvinghe van het machtigh Coninckrijk Japan* (Amsterdam, 1645) [further edn (Amsterdam, 1661)]; German version as: Caron and Jodocus Schouten, *Wahrhaftige Beschreibung zweyer mächtigen Königreiche, Jappan und Siam* (Nuremberg, 1663); further German version (Nuremberg, 1669; 1672); excerpt newly edited in Peter Kapitza, *Japan in Europa*, vol. 1 (Munich, 1990), p. 560; partly edited by Detlef Haberland, *Beschreibung des mächtigen Königreichs Japan* (Fremde Kulturen in alten Berichten, 10) (Stuttgart, 2000); English version: Caron, *A True Description of the Mighty Kingdoms of Japan & Siam* (London, 1663); reprint, edited by Charles Ralph Boxer (London, 1935); another reprint (Bangkok, 1986)]. Pierre François-Xavier Charlevoix, *Histoire et description générale du Japon*, vol. 1 (Paris, 1736).

comprehensive travel reports, tantamount to a statistical survey, is extant in the work of the Lemgo physician Engelbert Kaempfer (1651 – 1716) on Japan, where he stayed from 1690 to 1692. In his report, Kaempfer dealt at length with the forms of government.⁷¹ Kaempfer's report gave empirical testimony to the factuality of the rule of law within a state outside the European states system. Hence,

Christoph Frik, *Ost-Indianische Raysen- und Krieges-Dienste* (Ulm, 1692); rare print [Stadtbibliothek Ulm, 6397, 2] [newly edited (Berlin, 1926); excerpts in: Hertha von Schulz, 'Bibliographische Forschungen zur japanischen Kulturgeschichte im Japaninstitut zu Berlin', in: *Japanisch-deutsche Zeitschrift* N. F. 1 (1929), pp. 50-54. English version s. t.: Christ Fryke, Elias Hesse and Christoph Schweitzer, *A Relation of Two Several Voyages Made into the East-Indies* (London, 1700); new edn of this edn (London, 1929); reprint of the new edn (New Delhi, 1997); Dutch versions s. t.: Christophorus Frikius, Elias Hesse and Christophorus Schweitzer, *Drie seer aanmerkelijke reysen na en door veelerley gewesten in Oost-Indien* (Utrecht, 1694); (Amsterdam, 1705)]. Georg Meister, *Der Orientalisch-Indianische Kunst- und Lust-Gärtner*, new edn, edited by Friedemann Berger and Wilfried Bonsack (Weimar, 1972) [first published (Dresden, 1692)]. Johann Jacob Merklein, *Reise nach Java, Vorder- und Hinterindien, China und Japan. 1644 – 1653*, edited by S. P. L'Honoré Naber, *Reisebeschreibungen von deutschen Beamten und Kriegsleuten im Dienst der niederländischen West- und Ostindischen Kompagnien*, vol. 3 (The Hague, 1930) [first published (Nuremberg, 1663); further edn (Nuremberg, 1672)]. Arnoldus Montanus [Arnold van den Berghe], *Gedenkwaerdige Gesandtschappen der Oost-Indische Maetschappij in't Vereenigde Nederland aen de Kaisaren van Japan* (Amsterdam, 1669). Caspar Schamberger, *Der Ost-Indischen und angrenzenden Königreich vornehmste Seltenheiten betreffende kurze Erläuterung*, edited by Wolfgang Michel (The Faculty of Languages and Cultures Library, 1) (Fukuoka, 2010). Caspar Schmalkalden, *Die wundersamen Reisen des Caspar Schmalkalden nach West- und Ostindien. 1642 – 1652*, edited by Wolfgang Joost (Weinheim, 1983). Zacharias Wagener, *An Account of Two Voyages, the First of Fedor Iskowitz Backhoff, the Muscovite Envoy into China; the Second of Mr Zachary Wagener, a Native of Dresden in Misnia, thro' a Great Part of the World, as also into China*, in: *A Collection of Voyages and Travels*, vol. 2 (London, 1742). Olof Erikson Willman, *Een kort beskriffningh på een reesa till Ostindien och för beskreffne Japan then an Swänsk mann och skeps capiteen* (Wijsingborgh, 1667).

⁷¹ Engelbert Kaempfer, *Heutiges Japan*, edited by Wolfgang Michel and Barend J. Terwiel (Kaempfer, Werke, vol. 1) (Munich, 2001). Kaempfer, *Amoenitatum exoticarum politico-physico-mediciarum fasciculi V*, Fasc. I (Lemgo, 1712) [reprint (Tehran, 1976); partly edited by Walther Hinz, *Engelbert Kaempfer am Hofe des persischen Großkönigs. 1684 – 1685. Das erste Buch der Amoenitates exoticae* (Quellen und Forschungen zur Geschichte der Geographie und Völkerkunde, 7) (Leipzig, 1940); reprint of this edn (Tübingen, 1977); digital edn of parts of the original text. (Editiones electronicae Guelferbytanæ, 5) (Bonn, 2010)]. Kaempfer, *The History of Japan*, edited by Johann Caspar Scheuchzer, vol. 1 (London, 1727) [new edn (Glasgow, 1906); reprint of this edn (New York, 1971); Richmond, SY 1993]. Kaempfer, *Geschichte und Beschreibung von Japan*, edited by Christian Wilhelm Dohm, 2 vols (Lemgo, 1779) [reprint, edited by Hanno Beck (Quellen und Forschungen zur Geschichte der Geographie und der Reisen, 2) (Stuttgart, 1964)]. On Kaempfer see: Beatrice M. Bodart-Bailey, 'Kaempfer Restor'd', in: *Monumenta Nipponica* 43 (1988), pp. 1-33. Bodart-Bailey and Derek Massarella, eds, *The Furthest Goal. Engelbert Kaempfer's Encounter with Tokugawa Japan* (Folkestone, 1995). Gerhard Bonn, *Engelbert Kaempfer (1651 – 1716). Der Reisende und sein Einfluß auf die europäische Bewußtseinsbildung über Asien* (Europäische Hochschulschriften. Series III, vol. 968.) (Frankfurt and Bern, 2003) Yu-Ying Brown, 'Japanese Books and Manuscripts. Sloane's Japanese Library and the Making of the History of Japan', in: Arthur MacGregor, ed., *Sir Hans Sloane* (London, 1994), pp. 278-290. Detlef Haberland, *Engelbert Kaempfer 1651 – 1716. A Biography* (London, 1996) [first published (Bielefeld, 1990)]. Haberland, ed., *Engelbert Kaempfer (1651 – 1716). Ein Gelehrtenleben zwischen Tradition und Innovation* (Wolfenbütterler Forschungen, 104) (Wiesbaden, 2004). Hans Hüls, 'Zur Geschichte des Druckes von Kaempfers Geschichte und Beschreibung von Japan und zur sozialökonomischen Struktur von Kaempfers Lesepublikum im 18. Jahrhundert', in: *Engelbert Kaempfers Geschichte und Beschreibung von Japan. Beiträge und Kommentar* (Berlin, Heidelberg and New York, 1980), pp. 65-94. Tadashi Imai, 'Engelbert Kaempfer und seine Quellen', 'Sprachliche und landeskundliche Anmerkungen zu Engelbert Kaempfers Geschichte und Beschreibung von Japan', in: Hans Hüls and Hans Hoppe, eds, *Engelbert Kaempfer zum 330. Geburtstag* (Lippische Studien, 9) (Lemgo, 1982), pp. 63-81, 83-121. Sabine Klocke-Daffa, Jürgen Scheffer and Gisela Wilbertz, eds, *Engelbert Kaempfer (1651 – 1716) und die kulturelle Begegnung zwischen Europa und Asien* (Lippische Studien, 18) (Lemgo, 2003). Josef Kreiner, *Kenperu no mita Nihon* (Tokyo, 1996). Wolfgang Michel, 'His Story of Japan. Engelbert Kaempfer's Manuscript in a New Translation', in: *Monumenta Nipponica* 55 (2000), pp. 109-120. Barend J. Terwiel, 'Kaempfer and Thai History. The Documents behind the Printed Texts', in: *Journal of the Royal Asiatic Society* 1 (1989), pp. 64-80.

the relations between Europe and Japan also were based on the law and not in need of the exercise of power. In describing the position of the rulers as subject to the law, Kaempfer categorised Japan as a law-governed state, in which the demand for the recognition of the rule of law, as enshrined in European political theory, had actually been implemented. In Japan, then, the rule of law appeared as a real-world fact, while European theorists positioned it as the goal of reforms they requested.⁷²

Kaempfer established this empirical record of the implementability of the rule of law through his interpretation of the then already well-known complicated dualism of ruling institutions in Japan. In European perception, government appeared to be distributed upon two rulers, and European travellers found it hard to correlate their respective rights and duties. Even authors of early seventeenth-century travel reports had laboured upon the dualism of rulership in Japan. Bernhard Varen, the first author of a statistical handbook on Japan, approached the problem through the lense of power politics. Like earlier seventeenth-century statisticians, he interpreted the coexistence of the Tennō, the ruler in Kyōto, and the Shōgun, the ruler in Edo, as the result of a long-standing rivalry, which had led to shifts in power. According to this interpretation, the Shōgun had usurped an essential part of his power from the Tennō and forced the latter to cede ruling competences. Varen dated this shift to wars of the late fifteenth and early sixteenth centuries, having entailed the loss of power of the Tennō.⁷³ Kaempfer realised the inappropriateness of the power-politics approach, reduced it to the level of past propaganda and juxtaposed this interpretation against the model of regulated dualism of ruling offices similar to the relationship of the Emperor as the holder of secular power and the Pope as the holder of spiritual power in Europe. For the Tennō, Kaempfer used the terms “Spiritual Hereditary Emperor” (Geistliche Erbkaisere), “born popes” (gebohrene Päpste) or “personified pontifical idol” (presente pontificiale Abgott),⁷⁴ the latter of which Kaempfer’s

⁷² Jean-Louis Castilhon, *Considérations sur les causes physiques et morales de la diversité du genie, des moeurs et du government des nations* (Bouillon, 1769), pp. 244-248.

⁷³ Bernhard Varen, *Descriptio regni Japoniae*, chap. 4 (Amsterdam, 1649). German version, edited by Horst Hammitzsch and Martin Schwind (Darmstadt, 1974), p. 56. Similarly: Pierre d’Avity, *Les estats, empires et principautez du monde* (Paris, 1615), pp. 888-895: ‘Discours du Japon’, at p. 889. On Varen see: John Norman Leonard Baker, ‘The Geography of Bernhard Varenius’, in: *Transactions and Papers of the Institute of British Geographers* 21 (1955), pp. 51-60. Horst Walter Blanke, ‘Marco Polo, Bernhard Varenius und Engelbert Kaempfer. Vom Hörensagen über die gelehrte Recherche zum Autopsiebericht. Drei Stationen der europäischen Japankunde’, in: Wolfgang Griep, ed., *Bernhard Varenius (1622 – 1650). Der Beginn der modernen Geographie. Begleitband zur gleichnamigen Ausstellung der Eutiner Landesbibliothek* (Veröffentlichungen der Eutiner Landesbibliothek, 5) (Eutin, 2001), pp. 36-49 [second edn (Eutin, 2001); third edn (Eutin, 2009)]. Siegmund Günther, *Varenius* (Leipzig, 1905) [reprint (Amsterdam, 1970)]. Martin Schwind, ‘Die wissenschaftliche Stellung der “Descriptio regni Japoniae”’; Blanke, ‘Die Aneignung und Strukturierung von Wissen in der Polyhistorie. Ein Fallbeispiel: Bernhard Varenius’; Reinhard Düchting, ‘Die *Descriptio Regni Japoniae* in der literarischen Tradition der europäischen „descriptiones”’; Folker E. Reichert, ‘Reise- und entdeckungsgeschichtliche Grundlagen der *Descriptio regni Japoniae*’, all in: Margret Schuchard, ed., *Bernhard Varenius (1622 – 1650)* (Brill’s Studies in Intellectual History, 159) (Leiden, 2004), pp. XVII-XXXIX, 119-144, 145-162, 163-189. Schwind, ‘Die älteste Japanbeschreibung in europäischer Sprache. Descriptio Regni Japoniae von Bernhard Varen 1649’, in: *Chirigaku Hyōron* 46 (1973), pp. 81-91.

⁷⁴ Kaempfer, *Japan* (note 71), pp. 124, 125, 174. Kaempfer’s interpretation of the dualism of Japanese rule was

translator Johann Caspar Scheuchzer rendered into the formula “Japanese Pope”.⁷⁵ According to this model, the Shōgun was the legitimate holder of secular power and no longer a usurper, while the Tennō was the spiritual head of the state and acted as the supreme legitimator the secular rule. Kaempfer was not the first to apply the title of emperor to the Shōgun,⁷⁶ yet he interpreted the dualism of rulers as the result of the legal differentiation between institutions of secular and spiritual rule. As Kaempfer took for granted that only a secular ruler could perform the duties of the head of a state, only the Shōgun could be the bearer of sovereignty. Therefore, the imperial title was applicable solely to the Shōgun. Applying the imperial title to the Shōgun, Kaempfer categorised Japan as a state, which was equal in rank not merely with the Holy Roman Empire but also with China.⁷⁷ Kaempfer thus was apparently the first European observer to consider states outside the European system not merely as legal equals with European states but also as ranking at the same level as the Holy Roman Empire. According to the same criteria, the imperial title needed to be applied to the head of the Chinese state. Hence, Kaempfer described Japan as an autonomous state in its relations with China, thereby taking issue with previous European reports, which had featured Japan as a Chinese dependency. Later in the eighteenth century, Kaempfer’s use of the imperial title for rulers in Asia obtained legal quality, as the practice of making treaties between Europeans and rulers in South and Southeast Asia adopted the usage. For one, the VOC concluded a treaty with the ruler of Kandy (Sir Lanka) on 14 February 1766. This was an agreement ending a war and establishing “never changeable amity” (*une amitié à jamais inaltérable*) and styling the Kandy ruler “L’Empereur de Candy”.⁷⁸

At the turn towards the nineteenth century, the contents of peace treaties changed fundamentally in

drawn on the model of the distinction between the Church as the holder of ecclesiastical and the Empire as the holder of secular rule, conventional in Latin Christendom, but described this distinction as non-conflictual and regulated under the law. Holders of papal and of imperial rule could appear as rivals in power-political terms within the constitutional frame of the Holy Roman Empire as well as in Latin Christendom as a whole. In his capacity as ruler of the Papal States, the Pope, together with some archbishops, bishops, abbots and abbesses as imperial estates could be holders of secular power in addition to their ecclesiastical duties. Yet, in Japan, the “emperor” (= Shōgun) and the Tennō as the “pontifical deity” (*pontificiale Abgott*) were both placed under the overarching municipal law that regulated the relations between both rulers. Kaempfer thus presented Japan as an empirical case, showing the possibility of subjecting rulership to the law, even though in relation with one state only. With regard to Japan, the subjection of supreme rulers under legal control was possible, as theorists envisaged it for the Holy Roman Empire and for Latin Christendom as a whole, while they expected that in these realms it would be difficult to accomplish.

⁷⁵ Kaempfer, *History* (note 71), vol. 1, p. 206.

⁷⁶ Caron, *Beschrijvinghe* (note 71), edn by Kapitza, p. 538. Varen, *Descriptio* (note 235), chap. 7, p. 69. Willman, *Beskrieffningh* (note 230), pp. 140-142.

⁷⁷ Kaempfer, *Geschichte* (note 71), p. 420.

⁷⁸ Treaty Kandy (note 8), art. I, II, p. 264. On the war between Kandy and the VOC see: Alicia Schrikker, ‘Een ongelijke strijd? De oorlog tussen de Verenigde Oost-Indische Compagnie en de koning van Kandy. 1760 – 1766’, in: Gerrit Knaap and Gerke Teitler, eds, *De Verenigde Oost-Indische Compagnie tussen oorlog en diplomatie* (Verhandelingen van het Koninklijke Instituut voor Taal-, Land- en Volkenkunde, 197) (Leiden, 2002), pp. 379-406.

the context of the rejection of natural law theories. While, to the end of the eighteenth century, peace treaties had most commonly been war-ending agreements, a new orientation of the contents was added to the formulary of peace treaties from the early nineteenth century, designed to create the legal base for the establishment of diplomatic and trade relations. For the practice of concluding treaties under international law, the change meant that treaties using the formulary of peace agreements might come into existence, even when no war had previously occurred among the signatory parties and, moreover, when previously concluded indefinite peace treaties continued to be in force. The use of the formulary of peace treaties for “legislative” treaties, in contradistinction against simple contractual agreements, had the paradoxical consequence that the practice of including non-reciprocal stipulations, as the usual dispositive features of war-ending treaties, into agreements, the actual purpose of which would have been the establishment of relations among legally equal sovereigns, specifically regarding the maintenance of diplomatic and trade relations on an equal footing. The turn against natural law, then, resulted in the rejection of the a priori recognition of the principle of the legal equality of sovereigns,⁷⁹ even though the maintenance of diplomatic and trade relations would have had to be based on reciprocal dispositive stipulations. Instead, the introduction of non-reciprocal stipulations into peace treaties meant to establish the platform for diplomatic and trade relations among states, introduced power politics into the legal practice of treaty-making, as the government of the state to which non-reciprocal diplomatic and trade privileges were allocated in accordance with a treaty, could claim to have the power to enforce these privileges over another state. Hence, the fusion of the formularies of the peace treaties and the diplomatic and trade agreements lent legal validity to the sharp rejection of natural law through the instrument of the public law of treaties among states.⁸⁰

4. The European Public Law of Treaties among States during the Nineteenth Century

The transformation of the European public law of treaties among states is on record, first and foremost, in the treaties themselves. Already in 1816, the US government concluded a peace treaty with the Cherokee,⁸¹ even though the same type of agreement had been made out already in 1785 and had continued to be in force, with the Cherokee having been involved as partners in an alliance with the USA in war against the Creek in 1814.⁸² Whereas the agreement of 1785 had been a conventional war-ending treaty, the agreement of 1816 did not confirm the peace that had been

⁷⁹ Achenwall, *Jus* (note 59), p. 237.

⁸⁰ See, among many: Friedrich Adolf Schilling, *Lehrbuch des Naturrechts oder der philosophischen Rechtswissenschaft*, § 117 (Leipzig, 1859), pp. 177-180.

⁸¹ Treaty Cherokee (note 47), pp. 326-327.

⁸² Rogin, *Fathers* (note 47), p. 156.

arranged before but constituted a new peace.⁸³ The 1816 treaty was not reciprocal in its main stipulations and established a new legal base for the relations between the Cherokee and the USA as legally equal sovereigns, while subjecting both signatory parties to unequal rights and duties. The treaty obliged the Cherokee, among other provisions, to cede land to the USA and to accepted US government commissaries to be dispatched to Cherokee lands the demarcate the new borders.⁸⁴

At the same time, the British government proceeded similarly elsewhere in the world. Already the earliest British and French agreements with rulers and governments in West Africa featured the full formulary of treaties under international law. That does not mean that all treaties featured that formulary completely, as specifically preambles could be rudimentary. But the British and French emissaries brought the European treaty formulary as such to Africa and used it as the basis for the agreements they were determined to make, and ignored African practices of treaty-making. For one, when the British government, in 1788, entered into a treaty with King Nambaner of Sierra Leone, it obliged the King to cede to the it some stretch of coastal land for the establishment of the colony of Freetown, designed to provide shelter for freed slaves returning to Africa. The same government, through the governour of its Cape Coast Castle, concluded a treaty with the King of Ashanti (Asantehene) in what is Ghana today on 7 September 1817.⁸⁵ The agreement was a peace treaty not ending a war. The treaty loaded upon the Ashanti the duties of guaranteeing the security of the British Gold Coast Colony (Art. III), of accepting a British diplomatic resident in the capital city Kumasi (Art. V) and of ensuring the freedom of trade (Art. VI). The British governour obtained the privilege to provide “protection” to Ashanti (Art. VII) and to sit in court over criminal cases (Art. VIII).⁸⁶ These stipulations were non-reciprocal, most of them enforcing rights for the British and obligations for the Ashanti side.

Moreover, the British government reserved for itself the otherwise rarely recorded privilege of providing education for royal princes and princesses in missionary schools at Cape Coast Castle. The privilege put the British government into a position in which it could expose subsequent generations of Ashanti rulers to the European Christian educational tradition. This is a remarkable initiative in view of the practice of literacy as the standard of communication in what contemporary British observers described as a bureaucratic government in Ashanti. The Ashanti–British treaty of 1817

⁸³ Treaty Cherokee (note 47), Art. 1, p. 326.

⁸⁴ Treaty Cherokee (note 47), Art. 3, 4, pp. 327. A further cession agreement to the disadvantage of the Cherokee followed in 1819 (note 47).

⁸⁵ Treaty Sierra Leone – UK, 22 August 1788, in: *CTS*, vol. 50, pp. 361-362 [extant as edict in the name of King Nambaner of Sierra Leone, countersigned by the British Crown Representative]. Treaty Ashanti – UK, Kumasi, 7 September 1817, in: *CTS*, vol. 68, pp. 5-7, at pp. 6-7; also printed in: Thomas Edward Bowdich, *Mission from Cape Coast Castle to Ashantee* (London, 1819), pp. 126-128 [second edn (London, 1873); reprint of the first edn (London, 1966)].

⁸⁶ Treaty Ashanti (note 85), pp. 6-7.

thus confirmed that the British government did not at that time pursue a policy of literalisation but sought to accomplish the imposition of European cultural norms and values in a state that appeared as “civilized” in contemporary European perspective.⁸⁷

Not in every case were British privileges in states on the West African coasts restricted to the accomplishment of long-term cultural changes and to the provision of “protection”, but could become more extensive. Thus the treaty between North Bullom (Sierra Leone) and the UK of 2 August 1824 transferred some North Bullom areas into the property of the British governour of the colony of Freetown.⁸⁸ In the following year 1825 the peace treaty between Sherbro Bullom (Sierra Leone) and the UK, which belonged to the few instruments not featuring articles, enforced the surrender to the British of all territories belonging to Sherbro Bullom by exclusive, complete, free and unlimited right, title, ownership and sovereignty in an area specified in the treaty. The British governour of Freetown obliged himself to provide “protection” to Sherbro Bullom against the neighbouring state of Kusso. The preamble to the treaty narrated the events which had led to the agreement. According to the narration, Sherbro Bullom had been engaged in war with Kusso for some time, British subjects had been affected by the war and persons from Sherbro Bullom had been enslaved.⁸⁹ The treaty, obliging Sherbro Bullom to end these practices, was a cession agreement to the disadvantage of a state that the British government had recognised as sovereign. The text gave out the agreement as part of a civilising mission and, at the same time, placed it into the context of the campaign for the ban of the slave trade. In 1848 and 1849, Sherbro Bullom became included into the British-stipulated network of legal instruments seeking to enforce the ban of the slave trade.⁹⁰ The Sherbro Bullom–UK treaty of 7 July 1849 bore the formulary of a peace agreement, styling itself as an instrument to “pacify” relations between Sherbro Bullom and its neighbours. It imposed British consular jurisdiction, enforced the freedom of trade and permitted missionary activities.⁹¹ On the basis of the agreement of 1817, a similar “pacification” mission also led to the treaty concluded in 1831 between Ashanti and Fante on the one side, the UK on the other. This treaty obliged the Asantehene to maintain peace with Fante in what constituted a partial waiver of his *ius ad bellum* and to provide two princes as hostages to guarantee the agreement. The King also was to renounce

⁸⁷ Contemporary British sources confirmed the use of Arabic for government record keeping in Ashanti are: Bowdich, *Mission* (note 85). Joseph Dupuis, *Journal of a Residence in Ashantee* (London, 1824) [reprint, edited by H. E. T. Ward (London, 1968); Microfilm edn (Hildesheim, 1994)].

⁸⁸ Treaty North Bulloms (Sierra Leone) – UK, 2 August 1824, in: *CTS*, vol. 74, pp. 389-393.

⁸⁹ Treaty Sherbro – UK, Plantain Island, 24 September 1825, in: *CTS*, vol. 75, pp. 380-384.

⁹⁰ Treaty Sherbro – UK, 12 February 1848, in: *CTS*, vol. 102, pp. 398-400. Treaty Sherbro – UK, 4 / 7 July 1849, in: *CTS*, vol. 103, pp. 197-202.

⁹¹ Treaty Sherbro (note 89), Art. I, VII, VIII, IX, pp. 199-200. On these images see: Adam Kuper, *The Reinvention of Primitive Society. Transformations of a Myth*, second edn (London, 2005) [reprints (Oxford, 2009); first published s. t.: *The Invention of Primitive Society. Transformations of an Illusion* (London and New York, 1988); reprints (London, 1997; 2003)].

all rights to tribute from Fante, while the Fante had to promise not to offend the Asantehene.⁹² Also, the freedom of trade was imposed. In the case of this treaty, then, the British government combined its “pacification” mission with the goals of reconstituting inter-state relations in West Africa and of enforcing the freedom of trade for British merchants.

The treaty between Bonny and the UK of 1836 is a further example for the penetration of the European law of treaties into West Africa. The agreement regulated the relations between the Kingdom of Bonny, an island in the Bight of Bonny (until 1972: Bight of Biafra) in what is Nigeria today, and the UK. The treaty styled the Bonny ruler as “King” and, like the earlier European–West African treaties, recognised the legal equality between Bonny and the UK. It imposed extraterritoriality of British subjects in Bonny (Art. 1), prescribed the peaceful resolution of conflicts between crews of British ships and subjects of the King of Bonny (Art. 2) according to a formalised procedure (Art. 3), stipulated the need for the confirmation of all trading agreements by a British officer in charge or, in the case of the absence of this officer, by the captain of a British ship anchoring at Bonny (Art. 4), demanded the concession of the full freedom of trade for every British ship arriving in Bonny after payment of customs duties (Art. 5), guaranteed the integrity of the property of British captains and traders on ships as well as in warehouses on the shore (Art. 6), made the King of Bonny responsible for the payment of debts incurred by Bonny subjects to captains of British ships and, in return, obliged captains of British ships to compensate Bonny traders for all British debts prior to the departure (Art. 7).⁹³ This treaty was thus a bilateral trading agreement, whereby the main trading good was plant oil. It was non-reciprocal in that it regulated the doings of British captains and traders in Bonny, but not of Bonny captains and traders in the UK. It guaranteed many rights to British traders in Bonny, while imposing few obligations upon them. Conversely, it prescribed only obligations to the King of Bonny and Bonny subjects.

At the same time, the French government proceeded similarly in conducting its relations with states in West Africa. Already in 1819, it concluded a treaty of cession with the Kingdom of Wallo (Senegal), which it recognised as a sovereign state. The goals of the alleged “pacification” of and the maintenance of public security in Wallo served as the pretext for the transfer of territory to French control. The French government further reserved for itself the right to build a fortification and the establish an alliance between the “French institutions in Senegal and the Kingdom of Wallo” (établissements Français du Sénégal et le Royaume de Wallo).⁹⁴

⁹² Treaty Ashanti/Fante – UK, Cape Coast Castle, 27 April 1831, art. I-II, in: *CTS*, vol. 81, pp. 455-457, at p. 456.

⁹³ Treaty New Calabar/Bonny – UK, 9 April 1837, in: *CTS*, vol. 86, pp. 419-423, at pp. 420-422.

⁹⁴ Treaty France – Wallo (Senegal), 8 May 1819, art. 2, 3, 8, in: *CTS*, vol. 70, pp. 127-131, at pp. 128-129.

This practice of treaty-making not only confirmed the rejection of natural law as a source of international legal norms, even before international legal theorists took steps to revise the principles informing European public law of treaties among states in accordance with emerging positivism,⁹⁵ but also anticipated the newly establishing consensus about the perception that all law should be considered as human made and that even customary law should be recognised as valid solely within an international legal community as the community of intercourse among states.⁹⁶ Henceforth, that community was to be positioned exclusionistically as a club of essentially European states and, thereby, raised questions about the origin and the modes of dissemination of already set as well as to be legislated international legal norms. European and North American international legal theorists,

⁹⁵ Henry Wheaton, *Elements of International Law*, second edn of the edn by William Beach Lawrence (Boston and London, 1863) [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)]; second edn, edited by Lawrence, pp. 20-22: “According to Savigny, ‘there may exist between different nations the same community of ideas which contributes to form the positive unwritten law (das positive Recht) of a particular nation. This community of ideas, founded upon common origin and religious faith, constitutes international law as we see it existing among the Christian States of Europe, a law which was not unknown to the people of antiquity, and which we find among the Romans under the name *ius fetiale*. International law may therefore be considered as a positive law, but as an imperfect positive law (eine unvollendete Rechtsbildung) both on account of the indeterminateness of its precepts, and because it lacks that solid basis on which rests the positive law of every particular nation, the political power of the State and a judicial authority competent to enforce the law. The progress of civilization, founded on Christianity, has gradually conducted us to observe a law analogous to this in our intercourse with all the nations of the globe, whatever may be their religious faith, and without reciprocity on their part.’ [reference to: Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. 1 (Berlin, 1840), book I, chap. 2, § 11].”; pp. 317-318: “No particular form of words is essential to the conclusion and validity of a binding compact between nations. The mutual consent of the contracting parties may be given expressly or tacitly; and in the first case, either verbally or in writing. It may be expressed by an instrument signed by the plenipotentiaries of both parties, or by a declaration, and counter declaration, or in the form of letters or notes exchanged between them. But modern usage requires that verbal agreements should be, as soon as possible, reduced to writing in order to avoid disputes and all mere verbal communications preceding the final signature of a written convention are considered as merged in the instrument itself. The consent of the parties may be given tacitly, in the case of an agreement made under an imperfect authority, by acting under it as if duly concluded [reference to: Georg Friedrich von Martens, *Einleitung in das positive Völkerrecht, auf Verträge und Herkommen gegründet* (Göttingen, 1796), book II, chap. 2, §§ 49, 51, 65; August Wilhelm Heffter, *Das europäische Völkerrecht der Gegenwart*, § 87 (Berlin, 1844), p. 162].” The passages from Wheaton’s textbook stand against the argument that legal positivism should have taken roots only during the second half of the nineteenth century, then in apparent response against the methodology of the sciences. For this view see: Oliver Lepsius, ‘Die juristische Wirklichkeitswahrnehmung, 1880 – 1932’, in: Otto Gerhard Oexle, ed., *Krise des Historismus – Krise der Wirklichkeit. Wissenschaft, Kunst und Literatur. 1880 – 1932* (Veröffentlichungen des Max-Planck-Instituts für Geschichte, 228) (Göttingen, 2007), pp. 313-358, at p. 325. Tomoko T. Okagaki, *The Logic of Conformity. Japan’s Entry into International Society* (Toronto and Buffalo, 2013), pp. 107-108 [first published s. t.: *The Sovereign State and Its Conformists. Japan’s Entrance into International Society*. Ph. D. thesis, typescript (Ann Arbor: University of Michigan, 2005)]. Instead of epistemological and methodological factors, strategies of the expansion of European government control appear have boosted the spread of positivism in international legal theory.

⁹⁶ Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Freiburg, 1892), p. 298. 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, 622-665, at pp. 622-665.

like the treaty-negotiating practitioners of diplomacy, self-evidently took the stance that norms to be laid down in international treaties were to be European in origin, no matter where the partners of European and the US governments were located, that, in other words, the spreading of international legal norms of European origin beyond the confines of Europe and North America was to be a major government task. Enforcing these norms, then, required purposeful activity of governments on European states and the USA, as these states appeared to be the original members of the international legal community. The legal acts of legislating international law thus turned into a device of the power politics of the governments of these states. Explicitly, these governments reserved for themselves the option of deploying military force to the end of enforcing international legal norms elsewhere in the world, wherever they detected a lack of willingness to adopt these norms.⁹⁷ Treaties among European and North American governments on the one side, rulers and governments in Africa, West, South, Southeast, East Asia, the South Pacific and Native Americans on the other, having come into existence under these premises, were, as a rule, non-reciprocal. By way of enforcing these treaties, European and North American governments simultaneously enforced the European public law of treaties among states in conjunction with the rejection of natural law theory.⁹⁸

The gist of the contents of European public law of treaties among states was the “basic norm” *pacta sunt servanda*, which agreements never featured explicitly, and, in combination with this “basic norm”, the customary norm that treaties under international law should be laid down in writing. By contrast, the treaty formulary, in its constituent parts, followed the models that had been established from the seventeenth century and, in turn, drew on the formulary of solemn imperial and royal diplomas in existence from the seventh century.⁹⁹ This formulary demanded an introductory

⁹⁷ Rogin, *Fathers* (note 47), p. 241. Francis Lister Hawks, *Narrative of the Expedition of an American Squadron to the China Seas and Japan under the Commodore M[atthew] C[albraith] Perry, United States Navy* (Washington and New York, 1856), pp. 239-240, 244, 256-257, 259-260 [new edn (New York, 1857); reprints of the original edn (New York, 1952); (New York, 1967); (Stroud, 2005)]. Roger Pineau, ed., *The Japan Expedition. 1852 – 1854. The Personal Journal of Commodore Matthew [Calbraith] Perry* (Smithsonian Institution Publication, 4743) (Washington, 1968), pp. 105, 168-169 [reprint (Richmond, SY, 2002)]. Laurence Oliphant, *Narrative of the Earl of Elgin’s Mission to China and Japan in the Years 1857, ’58, ’59*, vol. 2 (Edinburgh, 1859), pp. 248-249 [reprint (New York, 1969)].

⁹⁸ Georg Jellinek, *Die rechtliche Natur der Staatsverträge. Ein Beitrag zur juristischen Konstruktion des Völkerrechts* (Vienna, 1880), p. 49.

⁹⁹ See: Ludwig Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (Berlin, 1924). Franz Dölger and Johannes Karayannopoulos, *Byzantinische Urkundenlehre*, vol. 1: Die Kaiserurkunden (Handbuch der Altertumswissenschaft. Section 12, vol. 3, part 1) (Munich, 1968), pp. 94-104. Walter Heinemeyer, ‘Studien zur Diplomatik mittelalterlicher Verträge vornehmlich des 13. Jahrhunderts’, in: *Archiv für Urkundenforschung* 14 (1936), pp. 321-413. Michael Hochedlinger, *Aktenkunde* (Vienna and Munich, 2009), pp. 98-99, 133-166, 219-221. Heinhard Steiger, ‘Peace Treaties from Paris to Versailles’, in: Randall Lesaffer, ed., *Peace Treaties and International Law in European History* (Cambridge, 2004), pp. 59-99, at pp. 79-96 [reprinted in: Steiger, *Von der Staatengesellschaft zur Weltrepublik? Aufsätze zur Geschichte des Völkerrechts aus vierzig Jahren* (Studien zur Geschichte des Völkerrechts, 22) (Baden-Baden, 2009), pp. 513-552].

preamble, naming the signatory parties as well as their empowered negotiators, narrating the course of events leading up to the treaty negotiations and stating the main purposes of the agreement to be signed, continued with the dispositive general and specific stipulations and ended with arrangements concerning the enforcement, duration and dating of the treaty before the signatures of the persons having acted as negotiators. The dispositive stipulations were usually structured as “articles”, whereby this structure did not follow from the formulary of solemn diplomas but was borrowed from oaths and Articles of War.¹⁰⁰ The practice of entering agreements under international law into printed and generally available collections, widening during the eighteenth century, strengthened the habit of prefixing preambles to treaties that were to be enforced.

Therefore, treaties concerning trade relations, when implementing the formulary of peace agreements, were designed to lay the legal foundations for the conduct of trade. As a rule, these agreements were indefinite, thereby remained platforms for the regulation of international trade relations among their signatory partners, until they were replaced by new agreements. The underlying principle was that unilateral changes of treaty stipulations or entire treaties were not to be permitted under the European public law of treaties among states, even though this principle was not entered explicitly into any agreement. Thus, the treaties were the vehicles of the expansion of the European public law of treaties among states already early in the nineteenth century, specifically in those parts of Africa and Asia, which were at that time not subjected to European colonial rule. On the contrary, European public law of treaties among states could spread into these parts of the world, precisely because European and North American governments were then not only applying technical terms such as “state” but were also recognising their treaty partners as fully sovereign subjects of international law.¹⁰¹ Moreover, bilateral treaties under international law then served the US government to implement the 1823 US Supreme Court verdict, which had admitted only one way of legally acquiring titles of ownership in land that had previously been in Native American possession, namely through the US government as the initial acquiring agent. These treaties, of which the US government concluded many up until the second half of the nineteenth century, regularly featured, in their main stipulations, either the cession of land or state destruction as legal entitlements,¹⁰² unless

¹⁰⁰ See: Siegfried Pelz, *Die preußischen und reichsdeutschen Kriegsartikel. Historische Entwicklung und rechtliche Einordnung*. LL.D. thesis, typescript (University of Hamburg, 1979). Volker Schmidtchen, ‘Ius in bello und militärischer Alltag. Rechtliche Regelungen in Kriegsordnungen des 14. bis 16. Jahrhunderts’, in: Horst Brunner, ed., *Der Krieg im Mittelalter und in der Frühen Neuzeit. Gründe, Begründungen, Bilder, Bräuche, Recht* (Imagines medii aevi, 3) (Wiesbaden, 1999), pp. 25-56.

¹⁰¹ Thus explicitly: David Dudley Field, ‘De la possibilité d’appliquer le droit international européen aux nations orientales’, in: *Revue de droit international et de législation comparée* 7 (1875), pp. 659-668, at pp. 659, 661, 667-668.

¹⁰² On cession see: Carl Wilhelm von Tröltsch, *Versuch einer Entwicklung der Grundsätze, nach welchen die rechtliche Fortdauer der Völkerverträge zu beurtheilen ist. Eine gekrönte Preisschrift*, § 21 (Landshut, 1808), pp. 58-59. Examples of cession treaties are: Treaties Aago/Adaffie/Adinnar/Aghwey/Badagry/Blockhouse/Bussama//Dahomey/ Egba/Grand Popoe/Jaboo/Little Popoe

the US government chose the strategy of establishing “protectorates” under its control.¹⁰³ These strategies of the expansion of rule equaled strategies pursued by European governments, which had similarly fused preambles featuring the recognition of the legal equality of sovereign signatory parties, with unequal and non-reciprocal dispositive stipulations. Yet, the cession and “protectorate” agreements, which the US government enforced upon Native Americans, went beyond contemporary treaties among European, African, Asian and South Pacific governments in removing sovereignty and often also statehood from the treaty partners to the US government.

Next to the inscription of legal equality to the sovereign status of treaty partners, European public law of treaties among states provided for two further norms, which were tacitly applied, that is, not laid down in agreements. First, there was the “basic norm” *pacta sunt servanda*. Under the condition of the implicit norm of voluntariness of treaty-making,¹⁰⁴ which, however, did usually not apply to treaties of cession or on the modalities of the imposition of colonial rule,¹⁰⁵ the “basic norm” *pacta sunt servanda* obliged the contracting parties to the unconditional abidance by the wordings of those dispositive stipulations that were considered legally binding. Thus, it included the implicit threat of the enforcement of sanctions, should any of the stipulations not be honoured, including the right to go to war in that case. When treaties were made out indefinitely, the “basic norm” *pacta sunt servanda* was to imply furthermore that treaties among states, specifically peace agreements, were to be considered binding not only for the rulers and governments that had signed them, but also for their heirs and successors, as Grotius had already insisted. Again, this norm was usually not stated explicitly in the text of the treaties themselves.

The latter implication that the “basic norm” *pacta sunt servanda* stood for the threat to deploy military force in the case of perceived breaches of treaties, was crucial to the expansion of European public law of treaties among states, specifically because the second major feature of that law, taken to be customary law until 1969, remained equally implicit and demanded, from the sixteenth century, the use of writing as the main condition for accomplishing validity of dispositive stipulations in agreements under international law. What this meant was the claim that stipulations could from the European point of view, only be considered valid and enforceable as far as the exact wording of a written text confirmed what material contents had actually been agreed upon in a stipulation.

Porto Novo – UK, 29 /30 January 1852, 2 / 25 / 28 February 1852, 9 / 18 March 1850, in: *CTS*, vol. 107, pp. 423-456. Treaties Chasta/Chippewa/Choctaw and Chicksaw/Creek/Delaware/Iowa/Kaskasia/ Kickapoo/Menominee/Miami/Nisqualli/Omaha/Oto and Missouri/Peoria/Puyallup/Rogue River/Sauk and Foxes/Shawnee/Umpqua und Kalapuya – USA, 15 / 16 March, 6 / 10 / 12 / 17 / 18 / 30 May, 5 / 13 June, 30 September, 4 / 15 / 18 / 39 November, 9 / 26 December 1854, in: *CTS*, vol. 112, pp. 318-374.

¹⁰³ Treaty Choctaw – USA, 27. September 1830, in: *CTS*, vol. 81, pp. 121-130.

¹⁰⁴ Wheaton, *Elements* (note 95), § 253, pp. 356-357 (edn by Boyd).

¹⁰⁵ Gerrit W. Gong, *The Standard of “Civilization” in International Society* (Oxford, 1984), p. 43 [first published as Ph. D. thesis, typescript (University of Oxford, 1980)].

Customary treaty law went even further in positing that additional stipulations could not be generated unilaterally but would require new negotiations the results of which were to be laid down in new or supplementary treaties. In view of European treaty parties, the implementability of the “basic norm” *pacta sunt servanda* was conditional upon the application of the principle of literacy, at least for agreements that were considered to have a binding force.¹⁰⁶ However, as the principle of the literacy of treaties was nowhere laid down explicitly in the text of any formal agreement, the principle necessarily remained unintelligible to partners of European and North American governments in Africa, Asia, the South Pacific and among Native Americans.

Last but not least, European public law of treaties among states prescribed the norm that agreements made out indefinitely should remain in force until the contracting parties had agreed to replace them by new treaties. Most of these agreements, as they came to be signed between European and North American governments on the one side, and rulers as well as governments in Africa, Asia, the South Pacific and of Native Americans on the other came into existence without any definite term of expiration. When, towards the end of the nineteenth century, strategies of partition of Africa, South and Southeast Asia as well as the South Pacific turned into maxims of government action in Europe and North America, European public law of treaties among states put on the agenda of international politics the question of how to handle treaties that were in force indefinitely with states in Africa, South and Southeast Asia as well as the South Pacific. Lack of a feasible answer to this question would have cast doubts on the legitimacy of the erection of European and US colonial rule over these parts of the world.¹⁰⁷ This was so, because, through these agreements, European and North American governments had recognised the sovereign statehood of their treaty partners, and these acts of recognition excluded the unilateral erection of legitimate overrule over these states. Consequently, either the existing agreements had to be declared null and void or strategies of the expansion of colonial rule had to be given up on the European and US sides, unless entire continents were to be subjected to European and US control through the application of force. The first option was rarely applied,¹⁰⁸ because the government when pursuing expansionist strategies, were engaged in rivalries among themselves and would not be willing to expose themselves to the accusation that they had broken treaty law. The latter option was not available, because withdrawal from the policy

¹⁰⁶ Jan Klabbers, *The Concept of Treaty in International Law* (Developments in International Law, 22) (Leiden and Boston, 1996), pp. 12, 249.

¹⁰⁷ In view of the numerous cession agreements that Native Americans were forced to sign with the US government in the course of the nineteenth century, the same question is relevant also for North America. These agreements effectively provoked the destruction of numerous Native American states, even though these states had been credited with fully-fledged legal existence in a Supreme Court ruling of 1832 (note 45). For the context see: David E. Stannard, *American Holocaust. Columbus and the Conquest of the New World* (New York and Oxford, 1992).

¹⁰⁸ Robert Stephenson Smyth Baden-Powell of Gilwell, *The Downfall of Prempeh. A Diary of Life with the Native Levy in Ashanti. 1895–96*, second edn (London, 1898), pp. 17-23 [first published (London, 1896); reprint of the first edn (Freeport, 1972)].

of the expansion of colonial rule was not considered accomplishable among governments competing about the subjection of the largest possible portion of the surface of the globe to colonial rule. In fine, the military option failed due to lack of sufficient human and material resources.¹⁰⁹

International legal theorists found a way out of the dilemma. They construed a conceptual difference between statehood, sovereignty and subjecthood under international law and insisted that not all states were sovereigns and not all sovereigns were subjects under international law. They argued that non-sovereign states were institutions to which the term “state” might be applied, such as the US federal states, but were subject to a higher governing agency.¹¹⁰ European and North American theorists would admit sovereign states, as recognised by treaties, as subjects under international law only, after they had been accepted as members of the international legal community.¹¹¹ They not willing to acknowledge that condition as fulfilled in the cases of all states over which European and the US governments were intending to establish their colonial overrule.

International legal theorists thus recommended the paradoxical combination of the conclusion of treaties under international law for the purpose of establishing colonial rule over sovereign states. With these agreements, arranging for the establishment of so-called “Protectorates”, states in Africa, South and Southeast Asia as well as the South Pacific remained in existence, while losing their status as subjects under international law. Governments of these states were bound, by stipulation in these treaties, to surrender their competence of the conduct of relations with other states to the suzerain institutions of government acting as colonial rulers and becoming self-appointed holders of rights over “Protectorates”. Partners to these treaties in Africa, South, as well as Southeast Asia and the South Pacific were, so to speak, second-class states, confined in their own governing competence to domestic political affairs and with “restricted foreign policy”, limited to the maintenance of relations to the “Protectorate” holder:¹¹² “The emphasis on the independence of the inferior state, often manifest in the protectorate treaties, is not to be regarded as decisive, instead, the main point is the nature of the protectorate itself.” (Die in den Protektoratsverträgen vielfach vorkommende Betonung der Unabhängigkeit des Unterstaates dürfte hier nicht entscheidend sein; maßgebend ist die Natur des Protektorats überhaupt), the Munich publicist Emanuel von Ullmann and

¹⁰⁹ The sole exception was the agreement to the “Open-Door-Policy” vis-à-vis China, which left the sovereignty of the Chinese state formally untouched, while excluding China from the club of states of the international legal community. See: 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].

¹¹⁰ Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Vienna, 1882), pp. 46, 256-257, 262-263, 278, 284-289 [reprint, edited by Walter Pauly (Bibliothek des Öffentlichen Rechts, 3) (Goldbach, 1996)].

¹¹¹ See above, notes 95, 96.

¹¹² Karl Gareis, *Institutionen des Völkerrechts*, § 15, second edn (Gießen, 1901), p. 61 [first published (Gießen, 1888)].

contemporary jurists pontificated.¹¹³ That is to say that international legal theorists classed states into groups of “superior” and “inferior” institutions,¹¹⁴ refused to succumb to the otherwise painstakingly observed recourse to law texts and used the potential in their statements. In the international system, which appeared to be under the control of the international legal community as a club of states, not only non-state actors, such as the long-distance trading companies, could no longer be holders of subjecthood under international law (as some of them had still been early in the nineteenth century),¹¹⁵ nor so could states be that had been placed under a “Protectorate” regime. Reichschancellour Otto von Bismarck, in an address to the Imperial Diet on 26 June 1884, argued in support of placing the exploitation of “Protectorates” under the management of commercial companies, while insisting that the government of the German Empire stayed in control through specially appointed consular agents on the spot.¹¹⁶ The revised version of the Imperial Protectorates Act (Reichsschutzgebietsgesetz), dated 19 March 1888,¹¹⁷ thus featured norms concerning the structure of commercial colonial companies and placed them under government surveillance. Nevertheless, these companies nowhere performed as holders of public rights to rule and, in addition, suffered from chronic shortage of funds. Likewise, most of the sovereign states existing on the globe at the turn towards the nineteenth century, were not granted admission to the international legal community any more.¹¹⁸ International law perverted into cheap ideology in service to colonial rule as the straightforward manifestation of inequality. It also, in the last resort, denied to the victims of colonial rule the right of resistance. “The primitive state must not perform any act of government directed against the interests of the protectorate holder”, was the verdict of Munich publicist Karl

¹¹³ Emanuel von Ullmann, *Völkerrecht*, § 26, second edn (Das öffentliche Recht der Gegenwart, 3) (Tübingen, 1908), p. 108 [first published (Tübingen, 1898)]. Henri Bonfils, *Manuel de droit international public (droit des gens)*, nr 545, sixth edn (Paris, 1912), p. 358 [first published (Paris, 1894); second edn (Paris, 1898); third edn (Paris, 1901; 1904); fourth edn (Paris, 1905); fifth edn (Paris, 1908); seventh edn (Paris, 1914); eighth edn (Paris, 1921-1926); German version (Berlin, 1904)]. Pasquale Fiore, *Nouveau droit international publique*, nr 342, second edn, vol. 1 (Paris, 1885), p. 301 [first French edn (Paris, 1868); first published (Milan, 1865); second Italian edn (Turin, 1884)].

¹¹⁴ Holtzendorff, ‘Staaten’ (note 5), § 27, pp. 115-116.

¹¹⁵ Wheaton, *Elements* (note 95), § 294, p. 313 (edn by Dana). Thomas Joseph Lawrence, *The Principles of International Law*, § 54 (London and New York, 1895), pp. 79-82 [second edn (London, 1895); third edn (London and Boston, 1900; 1909); fourth edn (London and Boston, 1910; 1911); fifth edn (London and Boston, 1913); sixth edn (London and Boston, 1915); seventh edn, edited by Percy H. Winfield (Boston, 1923)]. Georg Friedrich Wilhelm Roscher, *Kolonien, Kolonialpolitik und Auswanderung*, second edn (Leipzig, 1856), p. 419 [first published in: *Archiv der politischen Oekonomie*. N. F., vol. 6-7 (1847/48); third edn (Leipzig, 1885)].

¹¹⁶ Otto von Bismarck, [Address to the Imperial Diet on the Issue of the Establishment of Protectorates, 26 June 1884], in: Wilhelm Böhm and Alfred Dove, eds, *Fürst Bismarck als Redner*, vol. 13 (Berlin, 1891), pp. 278-326, at p. 304.

¹¹⁷ German Empire, Act on Legal Relationships in the German Protectorates (Gesetz betreffend die Rechtsverhältnisse der deutschen Schutzgebiete [Reichsschutzgebietsgesetz]), dated 19 March 1888, §§ 8-10, in: Norbert B. Wagner, ed., *Archiv des Deutschen Kolonialrechts*, second edn (Brühl and Wesseling, 2008), pp. 28-30 [first published in: *Reichsgesetzblatt* (1888), p. 75; revised version of the act, dated 17 April 1886, in: *Reichsgesetzblatt* (1886), p. 75].

¹¹⁸ Oppenheim, *Law* (note 5), vol. 1, § 94, pp. 139-140.

Gareis.¹¹⁹ Put differently: international law as an ideology of colonial rule admitted belligerent status only to states that had been credited with subjecthood and, in that capacity alone, were considered to be able to act in their own right within the international system.

Already at the end of the eighteenth century, the rhetoric of “civilisation” entered the diction of treaties under international law. In its agreement with the Creek of 1790, the US government went ahead using the phraseology of “civilisation” in an effort to legitimise its inclusion of unequal and non-reciprocal dispositive stipulations into the treaty. It did so by committing itself to the expectation “[t]hat the Creek nation may be led to a greater degree of civilization and to become herdsmen and cultivators instead of remaining in a state of hunting”. In other words, the treaty was to lay the foundation for a process in consequence of which the Creek would pass out of the alleged state of nature and would be assisted by the US government by the provision of animals for husbandry and translators.¹²⁰ In the course of the nineteenth century, the rhetoric of “civilisation” swell into the key instrument for the justification of the denial of admission into the international legal community, while then used in pursuit of different goals. Whereas, at the end of the eighteenth century, the alleged “civilisation” was to provoke changes of the way of life among Native Americans as treaty partners to the US government, governments in Europe and North America applied the same rhetoric late in the nineteenth century in order to give credit to the belief that states in Africa, South and Southeast Asia as well as in the South Pacific were not ready for “civilisation” and should not be considered as states at all.

At the turn towards the twentieth century, international legal theory quickly adopted the legal framework created at the Berlin Africa Conference. The Munich publicists Franz von Holtzendorff and Karl von Stengel, together with the criminalist Franz von Liszt, then counting as a liberal reformer, took a stand against the wording of the treaties and claimed that the “protectorates” which European governments had subjected to their control, were neither organised as states nor “semi-sovereign” nor “overseas protectorates” at all: “First and foremost, no reference can be made to the conditions, here under review, as states newly formed on deserted land or in areas inhabited by nomads. Any contractually agreed distinction between superior and inferior states is impossible for the sole reason that chiefs of barbarian tribes entirely lack elementary concepts of the life of states.” (Zunächst kann bei den hier in Betracht kommenden Verhältnissen von neustaatlichen Bildungen auf wüsten oder von Nomadenstämmen bewohnten Gebieten überhaupt keine Rede sein. Vertragsmäßig vereinbarte Abgränzung staatlicher Kompetenzen zwischen Unterstaaten und

¹¹⁹ Gareis, *Institutionen* (note 112), § 15, p. 61.

¹²⁰ Treaty Creek (note 46), Art. XII, p. 40. Similarly progressist was the argument in: Jefferson, ‘Address’ (note 46), p. 206.

Oberstaaten wird schon aus dem Grund unmöglich, weil den Häuptlingen barbarischer Völkerstämme die Elementarbegriffe des staatlichen Lebens überhaupt fehlen.)¹²¹

Holtzendorff, for one, thus took for granted that the European perception of population groups in Africa, West, South, Southeast Asia and the South Pacific as allegedly “uncivilised nomadic tribes” (unzivilisierte Nomadenstämme) was based on facts gathered by some purportedly “scientific anthropology and ethnology” (wissenschaftliche Menschen- und Völkerkunde),¹²² and he added the conclusion that population groups inhabiting these dependencies should not be credited with the status of residents of states. In Holtzendorff’s perspective, territories that appeared neither to be demarcated in terms of linear borders nor inhabited by sedentary population groups, were, when they came under the sway of European colonial governments, not to be considered as subsumable into the then popular European concept of the state.¹²³ Holtzendorff would not admit the counter-evidence of the wording of most of the treaties, as he denied the status of executive governments to the treaty partners of the European colonial governments in Africa, West, South, Southeast Asia and the South Pacific. Their representatives were, to him, allegedly non-governmental “chiefs” of “barbarian tribes”, completely lacking “any legal consciousness” (überhaupt jedes Rechtsbewusstsein)¹²⁴ Because the treaty partners to the European governments appeared to lack the capability of exercising “stable rule of the entire state” (stabiler Herrschaft über den gesamten Staat),¹²⁵ the conclusion was that the treaties were not to be seen as related to the so-called “natives” but to Europeans that happened to be present on the spot. Holtzendorff and his fellow jurists left no

¹²¹ Holtzendorff, ‘Staaten’ (note 5), § 27, pp. 115-116. Franz von Liszt, *Das Völkerrecht systematisch dargestellt*, § 10, ninth edn (Berlin, 1913), p. 98 [first published (Berlin, 1898); second edn (Berlin, 1902); third edn (Berlin, 1904); fourth edn (Berlin, 1906); fifth edn (Berlin, 1907); sixth edn (Berlin, 1910); seventh edn (Berlin, 1911); eighth edn (Berlin, 1912); tenth edn (Berlin, 1915); eleventh edn (Berlin, 1920); twelfth edn, edited by Max Fleischmann (Berlin, 1925)]. Karl Michael Joseph Leopold Freiherr von Stengel, ‘Die Deutschen Schutzgebiete, ihre rechtliche Stellung, Verfassung und Verwaltung’, in: *Annalen des Deutschen Reiches für Gesetzgebung, Verwaltung und Statistik* (1889), pp. 1-212, at p. 14.

¹²² Carl Friedrich Vollgraff, *Erster Versuch einer wissenschaftlichen Begründung sowohl der allgemeinen Ethnologie durch die Anthropologie wie auch der Staats- und Rechts-Philosophie durch die Ethnologie oder Nationalität der Völker*, part 2: Ethnognosie und Ethnologie oder Herleitung, Classification und Schilderung der Nationen nach Maasgabe der Cultur- und Race-Stufen (Marburg, 1853); part 3: Polignosie und Polilogie. Oder: Genetische und comparative Staats- und Rechts-Philosophie auf anthropologischer, ethnologischer und historischer Grundlage (Marburg, 1855). Vollgraff, *Staats- und Rechtsphilosophie auf Grundlage einer wissenschaftlichen Menschen- und Völkerkunde*, part 1: Die Menschen- und Völkerkunde als wissenschaftliche Grundlage der Staats- und Rechtsphilosophie, new edn, §§ 14-17 (Frankfurt, 1864), pp. 26-34 [first published (Frankfurt, 1851)].

¹²³ Johann Caspar Bluntschli, *Allgemeines Statsrecht*, fourth edn, book III, chap. V/1 (Munich, 1868), p. 261 [first published (Munich, 1851); sixth edn (Munich, 1876)]. Conrad Bornhak, *Allgemeine Staatslehre* (Berlin, 1896), p. 10. Georg Jellinek, *Allgemeine Staatslehre* (Berlin, 1900), pp. 394-434 [second edn (Berlin, 1905); third edn (Berlin, 1913); seventh reprint of the third edn (Bad Homburg, 1960)].

¹²⁴ Alphonse Pierre Octave Rivier, *Lehrbuch des Völkerrechts*, book 1, § 1, second edn (Stuttgart, 1899), p. 3 [first published as: *Principes du droit des gens*, 2 vols (Paris, 1896)].

¹²⁵ John Westlake, *Chapters on the Principles of International Law* (Cambridge, 1894), pp. 142-143 [reprints (Littleton, CO, 1982); (Charleston, 2009); reprinted in: Westlake, *The Collected Papers on Public International Law*, edited by Lassa Francis Oppenheim (Cambridge, 1914), pp. 1-282, at p. 103].

doubt¹²⁶ that the treaties did not provide “protection” to the so-called “natives”. Instead, according to Karl Gareis, the “establishment of protectorate power” (Errichtung einer Schutzgewalt) was to be understood as a “justifiable restriction of the power of a native state” (zu rechtfertigende Beschränkung der Staatsgewalt des Eingeborenenstaates) with a “population at a lower level of culture” (kulturell tiefer stehender Bevölkerung).¹²⁷ In this perspective, colonial governments appeared to be legitimised to categorise as “lordless” all land in the “protectorates” that did not appear to be identifiable as standing in private ownership according to European ownership standards. The land was then classed as unused by seemingly roving “nomads” and could, Stengel believed, be transferred into the ownership of settler colonists for agricultural exploitation.¹²⁸ Holtzendorff and other jurists concurred explicitly by granting to colonial European governments some “right of conquest” (Eroberungsrecht) or even something equivalent of a right to state destruction.¹²⁹

Shortly after Gareis, Holtzendorff, Liszt and Stengel, Oppenheim refused to apply the legal statutes of “protectorates” beyond the confines of Europe. Instead, Oppenheim postulated that areas termed “protectorates” in treaties were simply being and reserved for future occupation by European colonial governments.¹³⁰ Not merely Oppenheim and Westlake but also Lorimer constructed the American and European “family of nations” as a club of privileged holders of claims to rule over overseas dependencies.¹³¹ Religious confession, Oppenheim opined, was not decisive alone as a criterion for admission, but what mattered more was the standard of “civilisation” that a population group appeared to have reached. No guarantee of the use of European public law of treaties between

¹²⁶ Ferdinand Lentner, *Das internationale Colonialrecht im neunzehnten Jahrhundert* (Vienna, 1886), pp. 42-50.

¹²⁷ Karl Gareis, *Deutsches Kolonialrecht*, second edn (Gießen, 1902), p. 2 [first published (Gießen, 1888)].

¹²⁸ Karl Michael Joseph Leopold Freiherr von Stengel, ‘Deutsches Kolonialstaatsrecht mit Berücksichtigung des internationalen Kolonialrechts und des Kolonialstaatsrechts’, in: *Annalen des Deutschen Reiches für Gesetzgebung, Verwaltung und Statistik* (1887), pp. 309-398, 865-957, at pp. 329-330. Stengel, ‘Schutzgebiete’ (note 121), p. 25.

¹²⁹ Franz von Holtzendorff, *Eroberungen und Eroberungsrecht* (Sammlung gemeinverständlicher wissenschaftlicher Vorträge, series 6, vol. 144) (Berlin, 1871). Pasquale Fiore, ‘Du protectorat colonial et de la sphère d’influence (hinterland)’, in: *Revue générale de droit international publique* 14 (1907), pp. 148-159, at p. 150. Vico Mantegazza, *Tripoli e i diritti della civiltà* (Milan, 1912), p. 23. The full extent of the discriminatory practice of the making of treaties between European and the US governments on the one side, rulers and governments in Africa, West, South, Southeast and East Asia as well as the south Pacific has not been recognised in the research literature on the history of treaties by international law. For insufficient studies see: Charles Henry Alexandrowicz, *The European-African Confrontation. A Study of Treaty-Making* (Leiden, 1973), pp. 29-105. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005), pp. 65-100. Jan-Hendrik Conrad, *Die Geschichte der ungleichen Verträge im neueren Völkerrecht* (Wissenschaftliche Beiträge aus dem Tectum-Verlag. Reihe Rechtswissenschaften, 6) (Marburg, 1999). Matthew C. R. Craven, ‘What Happened to Unequal Treaties? The Continuities of Informal Empire’, in: Craven and Malgosia Fitzmaurice, eds, *Interrogating the Treaty. Essays in the Contemporary Law of Treaties* (Nijmegen, 2005), pp. 43-80. Gerry J. Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge, 2004), pp. 62-88, 91-131.

¹³⁰ Oppenheim, *Law* (note 5), vol. 1, § 226, pp. 280-281.

¹³¹ James Lorimer, *The Institutes of the Law of Nations*, vol. 1 (Edinburgh and London, 1884), p. 101.

states could, by consequence, be extended to treaty partners of European colonial governments, when these treaty partners would not qualify for admission to the “family of nations”. According to this doctrine, the victims of European colonial rule were under occupation even when the wording of treaties put on record the recognition of their existence as sovereign states. Oppenheim explicitly referred to Bluntschli and even radicalised the position of the latter: the status of the so-called “protectorates”, allocated to apparently “depending countries” under “chiefs of tribes”, was, he made clear, just an “inchoate title” for future occupation recognised among European colonial governments.¹³² Hence, Oppenheim summed up his position, treaties between holders of “protectorates” and those “chiefs” had no binding effect on the relations between the signatory parties. The establishment and maintenance of European and US colonial rule were thus identical with the abrogation of subjecthood under international law to the states falling victim to colonial suppression, although these states continued to remain tied to European states and the USA to treaties. In this way, international law served as the most important vehicle for the legitimisation of colonial rule.

The use of international law as a device for legitimising colonial rule continued well in the 1920s and even impacted on the legal framework of the League of Nations. Following a suggestion by Boer General and South African politician Jan Christiaan Smuts,¹³³ Article XXI of the Covenant constituted the League of Nations as the facilitator for shifts of control over territories under colonial rule and invested governments in Europe, South Africa, the South Pacific and East Asia with so-called “Mandates” over population groups under colonial suppression. Accordingly, holders of these “Mandates” were to become obliged to administer territories by League of Nations commission and for the benefit of population groups under their control. Smuts’s proposal grew out of the same paternalistic thinking that had already conditioned ideologies of colonial rule during the nineteenth century, thereby continuing the standards for the execution of colonial rule well into and beyond World War II.¹³⁴ These standards included the principle that only “civilised” states could effectively represent interests of population groups under their sway, thus be accepted as members of the League and perform the tasks ascribed to holders of “Mandates”. The underlying argument was that, as during the nineteenth century, only “civilised” states were to be recognised as “well organised”.¹³⁵

¹³² Oppenheim, *Law* (note 5), vol. 1, §§ 91, 94, pp. 136, 140.

¹³³ Jan Christiaan Smuts, ‘The League of Nations. A Practical Consideration [16 December 1918]’, in: David Hunter Miller, ed., *The Drafting of the Covenant*, vol. 2 (New York and London, 1928), pp. 23-60 [separately printed (London, 1918)]. Already John Atkinson Hobson, ‘Imperialism and the Lower Races’, in: Hobson, *Imperialism. A Study* (London, 1902), pp. 235-304, at p. 294 [fourth edn (London, 1954); fifth edn (London, 1954); further edn (London, 1988)], had demanded the establishment of an international organisation to the end of maintaining “trust” with regard to the legitimisation of colonial rule. Smuts does not seem to have noted this request.

¹³⁴ Donald Cameron, *Native Administration in Nigeria and Tanganyika* (Journal of the Royal African Society, vol. 36, Supplement) (London, 1937), p. 7.

¹³⁵ Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933), p. 117 [reprints

According to the Covenant, some of the population groups residing within the “Mandated” territories were classed as standing far from the states of “civilisation”,¹³⁶ whereby colonial rule by League of Nations “Mandate” came to be structured as a civilising mission following nineteenth-century ideologies of colonial rule. Consequently, League of Nations policies also covered such practical aspects as restrictions in the consumption of alcohol among the “natives” settling in “Mandated” territories.¹³⁷ In order to accomplish the transfer of colonial rule, the League, soon after its inauguration, established a special commission. This “Mandates Commission” had the task of supervising the administration of “Mandated” territories in accordance with the Covenant. Holders of “Mandates” had to report on their activities annually. Population groups settling in “Mandated” territories were excluded from political participation rights and were not directly represented in the League. To the extent that “native” governments continued in these territories, these governments were not considered capable of entering into treaty relations with subjects under international law and were thus excluded from the international legal community. In full agreement with nineteenth-century international legal theory, the framers of as well as the practical administrators in the League of Nations would admit states, and the “Dominions” of the British Empire treated as states, only as treaty-making subjects under international law, once they had been admitted into the international legal community.¹³⁸ Nevertheless, pre-colonial states continued to exist in most of the territories under colonial rule.¹³⁹

(Hamden, CT, 1966); edited by Isidore Silver (New York, 1973); (Union, NJ, 2000); (Oxford, 2011; 2012)].

¹³⁶ Covenant of the League of Nations, Art. XXII, nr 6, in: David Hunter Miller, ed., *The Drafting of the Covenant*, vol. 2 (New York and London, 1928), pp. 720-743, at p. 737 [reprint (New York and London, 1969)]. First printing of the Covenant in: *The Treaty of Peace between the Allied and Associated Powers and Germany* (London, 1919); also in: Hans Wehberg, ed., *Die Pariser Völkerbundsakte nebst den Urkunden über die Pariser Verhandlungen*, second edn (Berlin, 1919); Wilhelm Georg Carl Grewe, ed., *Fontes historiae iuris gentium*, vol. 3, part 2 (Berlin and New York, 1995), pp. 810-822].

¹³⁷ Japan, Nan'yō Chō, [Edict of the South Sea Bureau, dated 11 October 1922], in: *Annual Report to the League of Nations on the Administration of the South Sea Islands under Japanese Mandate for the Year 1926* (Tokyo, 1927), Annex (s. p.).

¹³⁸ Viktor Bruns, ‘Völkerrecht als Rechtsordnung’, in: *Zeitschrift für ausländisches öffentliches und Völkerrecht*, vol. 1 (1929), pp. 1-56, vol. 3 (1933), pp. 445-487, at pp. 10, 11, 16 [reprints (Libelli, 13) (Darmstadt, 1954; 1962); part I also in: Internationale Vereinigung für Vergleichende Rechtswissenschaft und Volkswirtschaftslehre, *Abhandlungen und Mitteilungen*, vol. 3 (Berlin, 1929), pp. 101-156]. For a critical comment see: S. James Anaya, *Indigenous People in International Law*, second edn (Oxford, 2004), pp. 23-27 [first published (Oxford, 2000)].

¹³⁹ Explicitly stated in: Daudi Chwa II, Kabaka of Buganda, [Letter to William George Arthur Ormsby-Gore, dated 29 October 1927], in: *Papers Relating to the Question of Closer Union of Kenya, Uganda and the Tanganyika Territory* (Colonial, 57) (London, 1931), pp. 78-79 [partly edited in: Donald Sylvester Rothchild, ed., *Politics of Integration. An East African Documentary* (EAPH Political Studies, 4) (Nairobi, 1968), pp. 21-22]. The continuity of precolonial states under colonial rule not only in Africa, but also in West, South, Southeast Asia and the South Pacific has been left unnoticed in descriptions of decolonisation processes and analyses of the structure of post-colonial states. See: Reinhart Kößler, *Postkoloniale Staaten. Elemente eines Bezugsrahmens* (Schriften des Deutschen Übersee-Instituts Hamburg, 25) (Hamburg, 1994), pp. 86-88, 118, 120. For critical comments see: Harald Kleinschmidt, ‘Decolonisation, State Succession, and a Formal Problem of International Public Law’, in: *German Yearbook of International Law* 58 (2015) [published 2016], pp. 265-316. Obiora Chinedu Okafor, *Re-Defining Legitimate Statehood. International Law and State Fragmentation in Africa* (The Hague, 2000), pp. 20-38. Olufemi O. Vaughan, ‘Decolonization and Legitimacy in Nigeria’, in: Vaughan and Terence Osborn Ranger, eds, *Legitimacy and the State in Twentieth-Century Africa. Essays in Honour of Anthony H. M.*

5. *Perspectives of the Historiography of International Law on the Nexus between Might and Right*

When consulted with regard to changes of the relationship between might and right, historiography of international law reveals a disturbing result. Up to the end of the eighteenth century, norms derived from natural law formed the base for relations among states beyond the boundaries of international systems. This base provided, among others, norms regulating the practice and procedure of concluding treaties under international law, the competences of governments of states and of the recognition of statehood and sovereignty. As norms derived from natural law, they were untested. There was a high degree of consensus in many parts of the world regarding the validity of these general norms. Consequently, specific norms establishing the validity of natural law were redundant, conflicts about their recognition were few. Relations among states, therefore, remained subject to the law, not merely in legal theory but also in the practice of political decision-making. That natural law could be infringed upon remained uncontroversial. But breaches of the law did not imply the absence of the law.

At the turn towards the nineteenth century, the relationship between might and right converted into its very opposite. Natural law becoming strongly rejected, government measures towards the manifestation of the legislative international legal community became recognisable during the meeting of the Vienna Congress of 1814/15 on the occasions of the enforcement of the Declaration respecting the abolition of slavery and the slave trade. Representatives of states participating in the Vienna Congress claimed for themselves the competence to legislate norms, which they took to be valid across the globe, in banning slavery and the slave trade, explicitly ascribed to themselves “civilisation” and matter-of-factly expected that they were in a position to legitimately impose these norms upon rulers and governments in Africa none of which had participated in the Congress.¹⁴⁰ Bi- and multilateral agreements among European governments later supplemented the Congress decisions.¹⁴¹ Further on during the nineteenth century, specifically the British government entered into agreements with governments in Africa under the declared goal of enforcing the Vienna Congress decisions deemed to be globally valid international law.¹⁴²

Kirk-Greene (Basingstoke, 1993), pp. 135-166.

¹⁴⁰ Austria-Hungary – France – Portugal – Prussia – Russia – Spain – Sweden – UK, ‘Déclaration des Puissances sur l’abolition de la traite des Nègres’, Vienna, 8 February 1815, in: *CTS*, vol. 63, pp. 474-475. On the rating of this agreement as a document for the agency of “world society” see: Ian Clark, *International Legitimacy and World Society* (Oxford, 2007), pp. 37-59.

¹⁴¹ Treaty Portugal – UK, 28 July 1817, in: *CTS*, vol. 67, pp. 396-417. Treaty Spain – UK, 23 September 1817, in: *CTS*, vol. 68, pp. 46-81. Treaty Austria-Hungary – France – Prussia – Russia – UK (quintuple agreement), 20 December 1841, in: *CTS*, vol. 92, pp. 438-469.

¹⁴² For examples see: Treaties Comoro/Epe/Mohilla (Ostafrika) – UK, 16 / 20 / 28 September 1854 in: *CTS*, vol. 112,

However, most states in Africa, South, Southeast and East Asia as well as the South Pacific, together with the then continuing Native American states, remained excluded from the international legal community throughout the nineteenth century. Yet, the European public law of treaties among states became imposed to the boundaries of the globe through hundreds of mainly bilateral agreements, with European and North American diplomatic emissaries acting as the agents of the expansion. Beyond the confines of Europe, the Mediterranean area and America overwhelmed culturally specific legal systems, such as in China, Japan and also in the case of the Ashanti in West Africa. In economic respects, European and North American governments took charge of the task of putting into effect rules of the so-called “free” trade and, to that end, employed the threat of the use of military force, just as they did with regard to the imposition of the norms of the public law of treaties among states.¹⁴³ In some cases, military force was actually used and, when that happened, European and North American governments claimed that these acts were in line with and covered by norms of the law of war that the international legal community appeared to have agreed upon. The gist of such norms had been approved in the Brussels convention of the law of war of 1874¹⁴⁴ and was put into force through the Hague convention on the laws and customs of land warfare of 1899.¹⁴⁵ However, these conventions excluded states, which had not been accepted into the international legal community, specifically all states in areas that had come under colonial rule. Hence, the so-called “colonial wars” took place outside the legal framework of the international conventions on the law of war and were not regulated under international law.¹⁴⁶ The public law of treaties among states,

pp. 203-209. Treaty UK – Zanzibar, 5 June 1873, in: *CTS*, vol. 146, pp. 210-212.

¹⁴³ See: John Gallagher and Ronald Edward Robinson, ‘The Imperialism of Free Trade’, in: *Economic History Review*. Second Series, vol. 6 (1953), pp. 1-15 [German version in: Hans-Ulrich Wehler, ed., *Imperialismus* (Cologne and Berlin, 1970), pp. 183-200]. 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). George Armitage-Smith, *The Free Trade Movement and Its Results* (London, 1898) [second edn (London, Glasgow and Dublin, 1903; 1907); reprint (New York, 1969); Microfiche edn (Cambridge, 1991)]. Charles Poor Kindleberger, ‘The Rise of Free Trade in Western Europe. 1820 – 1875’, in: *Journal of Economic History* 35 (1975), pp. 20-55. Francis Valentine Moulder, *Japan, China and the Modern World Economy* (Cambridge, 1977). Richard F. Teichgraber, *Free Trade and Moral Philosophy. Rethinking the Sources of Adam Smith’s Wealth of Nations* (Durham, 1986). For a case of the threat of the use of military force in conjunction with its actual deployment vis-à-vis Japan see: Thierry Mormanne, ‘La prise de possession d’Urup par la flotte anglo-française en 1855’, in: *Cipango* 11 (2004), pp. 209-236. Oliphant, *Narrative* (note 98).

¹⁴⁴ Final Protocol of the Brussels Conference on the Rules of the War on Land [Belgium – Denmark – France – German Empire – Greece – Italy – the Netherlands – Portugal – Russia – Spain – Sweden-Norway – Switzerland – Turkey – UK], 27 August 1874, in: *CTS*, vol. 148, pp. 133-136; also in: Ferdinand Lentner, *Das Recht im Kriege. Kompendium des Völkerrechts im Kriegsfall* (Vienna, 1880), pp. 33-57.

¹⁴⁵ International Convention on the Laws and Customs on the War on Land [Austria-Hungary – Belgium – Bulgaria – Denmark – France – German Empire – Greece – Italy – Japan – Luxembourg – Mexico – Montenegro – the Netherlands – Portugal – Roumania – Russia – Serbia – Siam – Spain – Sweden-Norway – Turkey – UK – USA], The Hague, 29 July 1899, in: *CTS*, vol. 187, pp. 430-442; also edited by James Brown Scott, *Texts of the Peace Conferences at the Hague 1899 and 1907* (Boston, 1908); also edited by Shabtai Rosenne, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration Reports and Documents* (The Hague, 2001).

¹⁴⁶ For details see: Harald Kleinschmidt, ‘Wie neu sind die ‚Neuen Kriege‘?. Kriegsdanken im langen 20. Jahrhundert’, in: *Jahrbuch Politisches Denken* (2014), pp. 155-182.

trade law and the law of war, thus, came to be employed as devices for the discrimination of states in Africa, South, Southeast and East Asia as well as the South Pacific and, worse even, operated as the legitimising instrument for the destruction Native Americans states.¹⁴⁷ The swelling rhetoric of “civilisation” served as the means for international legal theorists, who readily took over the task of legitimising colonial rule. These theorists dated what they defined as the state of nature into the remote past and placed it at the very beginning of the “evolution” of humankind. They claimed that Europeans had not only departed from the state of nature but had left it furthest behind.¹⁴⁸ In other parts of the world, in their view, alleged “savages” appeared to remain confined to the state of nature or not having moved out of it far enough and seemed to warrant “civilising” missions through governments engaged in the expansion of their colonial rule.¹⁴⁹ In European perception, then, population groups in Africa, Asia and the South Pacific, as well as Native Americans, represented “peoples without history”, seemingly fossilised as recent witnesses of a distant past, exposed to the

¹⁴⁷ For a summary see: Harald Kleinschmidt, *Diskriminierung durch Vertrag und Krieg. Zwischenstaatliche Verträge und der Begriff des Kolonialkriegs im 19. und frühen 20. Jahrhundert* (Historische Zeitschrift. Beihefte. N. F., vol. 59) (Munich, 2013). For the Cherokee in context see: Stuart Banner, *How the Indians Lost Their Land. Law and Power on the Frontier* (Cambridge, MA, 2005), pp. 214-226. Christophe N. Eick, *Indianerverträge im Nouvelle France* (Schriften zur Rechtsgeschichte, 64) (Berlin, 1994). Foreman, *Removal* (note 47), pp. 229-312. Thomas A. Hatley, *The Dividing Paths. Cherokees and South Carolinians Through the Era of Revolution* (New York, 1993), pp. 142-143. Jill Norgreen, *The Cherokees. Two Landmark Federal Decisions in the Fight for Sovereignty* (Norman, OK, 2004). Theda Perdue, ed., *The Cherokee Removal. A Brief History with Documents* (Boston, 1995). Francis Paul Prucha, *Cherokee Removal* (Lincoln, NE, 1981), esp. pp. 246-247, 250-254. Prucha, *The Great Father. The United States Government and the American Indians*, 2 vols (Lincoln, NE, 1984). Prucha, *American Indian Treaties. The History of a Political Anomaly* (Berkeley and Los Angeles, 1994), esp. pp. 96-99, 156-182. Lindsay Gordon Robertson, *Conquest by Law. How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford and New York, 2005), pp. 118-138. Rogin, *Fathers* (note 47). Kenneth W. Treacy, ‘Another View on Wirt in the Cherokee Nation’, in: *American Journal of Legal History* 5 (1961), pp. 385-388. Charles F. Wilkinson, *American Indians, Time and the Law. Native Societies in a Modern Constitutional Democracy* (New Haven, 1987), pp. 93-105.

¹⁴⁸ Johann Christoph Adelung, *Versuch einer Geschichte der Cultur des menschlichen Geschlechtes* (Leipzig, 1782) [narrated as the history of humankind in analogy to the life cycle of a person]. Friedrich Ast, *Ueber den Geist des Alterthums und dessen Bedeutung für unser Zeitalter* (Landshut, 1805), pp. 5-6 [dto]. Isaak Iselin, *Ueber die Geschichte der Menschheit*, vol. 1 (Frankfurt and Leipzig, 1764), pp. 81-243. Christoph Meiners, ‘Betrachtungen über eine Stufenleiter der Humanität’, in: Meiners, *Untersuchungen über die Verschiedenheiten der Menschennaturen in Asien und den Südländern, in den ostindischen und Südseeinseln nebst einer historischen Vergleichung*, vol. 3 (Stuttgart, 1815), pp. 110-138. Johann Gottlieb Steeb, *Versuch einer allgemeinen Beschreibung von dem Zustand der ungesitteten und gesitteten Völker nach ihrer moralischen und physicalischen Beschaffenheit* (Karlsruhe, 1766), pp. 13-53.

¹⁴⁹ Friedrich Schiller, ‘Was heisst und zu welchem Ende studiert man Universalgeschichte? Eine akademische Antrittsrede [May 1789]’, in: Schiller, *Werke. Nationalausgabe*, vol. 17: Historische Schriften, part 1, edited by Karl-Heinz Hahn (Weimar, 1970), pp. 359-376, at pp. 364, 367 [first published in: *Der Teutsche Merkur* (November 1789), pp. 105-135; also in: Horst Walter Blanke and Dirk Fleischer, eds, *Theoretiker der deutschen Aufklärungshistorie*, vol. 1 (Fundamenta historica, 1) (Stuttgart, 1990), pp. 521-535; Schiller, *Historische Schriften und Erzählungen*, edited by Otto Dann (Schiller, Werke und Briefe, vols 6. 7 = Bibliothek deutscher Klassiker, 171), vol. 1 (Frankfurt, 2000), pp. 411-431]. For an example of the positioning of Native Americans in the alleged state of nature see: Horace Greeley, [Commentary by the Presidential Candidate after a Journey through the North American West, 1859]: “The Indians are children. Their arts, wars, treaties, alliances, habitation, crafts, properties, commerces, comforts, all belong to the very lowest and rudest ages of human existence.”, in: James Parton, *Life of Andrew Jackson*, vol. 1 (Boston, 1866), p. 401.

voyeurism of European travellers and isolated into museums objects.¹⁵⁰ Within international legal theory and the practical application of international law, well into the twentieth century, this perception shaped the relations between states that had been admitted into the international legal community and the population groups, to which the jargon of contemptuousness came to applied, into the categories not of the law but of power.¹⁵¹

In continuing to employ the power-political perceptions informing this international legal theory, the historiography of international law has not just carried into the twenty-first century European perceptions of a power-based community of states as the exclusionistic international legal community and helped expand it to the boundaries of the globe, but it also imposed the same perception retrospectively upon the history of international law at large.¹⁵² As many historiographers of international law were focused on the history of international legal theory, they arrived at the strange conclusion that no international legal community ever had existed prior to the globalisation of European colonial rule and that, by consequence, international law had then either not been possible at all¹⁵³ or had been a merely contingent “law among powers”.¹⁵⁴ The few historiographies of international law, which not only acknowledged the great tradition of international law but also narrated it, posited the existence of some “international legal ordering system” embracing international legal subjects as an essential condition for the appearance of an international legal community and, in doing so, continued to operate within the confines of nineteenth-century

¹⁵⁰ Afor a discussion of these issues, see, among others: Christoph Marx, “*Völker ohne Schrift und Geschichte*”. *Zur historischen Erfassung des vorkolonialen Afrika in der deutschen Forschung des 19. und frühen 20. Jahrhunderts* (Stuttgart, 1988), pp. 203-307. Jürgen Osterhammel, “‘Peoples without History’ in British and German Historical Thought”, in: Benedikt Stuchtey and Peter Wende, eds, *British and German Historiography. 1750 – 1950* (Oxford, 2000), pp. 265-287.

¹⁵¹ Explicitly, among many: Oppenheim, *Law* (note 5), vol. 1, § 226, pp. 280-281. James Bryce, *International Relations. Eight Lectures Delivered in the United States in August 1921* (New York, 1922), pp. 242-243 [further edn (New York, 1927); reprint (Port Washington, 1972)].

¹⁵² Wilhelm Georg Carl Grewe, *Epochen der Völkerrechtsgeschichte*, second edn (Baden-Baden, 1988) [*Habilitationsschrift* (University of Königsberg, 1941); first, unpublished print (Leipzig, 1945); first book-trade edn (Baden-Baden, 1984); English version (Berlin, 2000)]. For a critical comment on Grewe’s approach see: Heinhard Steiger, ‘Probleme der Völkerrechtsgeschichte’, in: *Der Staat* 26 (1987), pp. 103-126.

¹⁵³ Wilhelm Georg Carl Grewe, ‘Vom europäischen zum universellen Völkerrecht’, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 42 (1982), pp. 449-479 [reprinted in: Grewe, *Machtprojektionen und Rechtsschranken. Essays aus vier Jahrzehnten über Verfassungen, politische Systeme und internationale Strukturen* (Baden-Baden, 1991), pp. 169-195].

¹⁵⁴ Heinhard Steiger, ‘Zum fränkischen Kriegerrecht des karolingischen Großreiches (741 – 840)’, in: Wilhelm Fiedler, ed., *Verfassungsrecht und Völkerrecht. Gedächtnisschrift für Wilhelm Karl Geck* (Cologne, 1989), pp. 803-829, at p. 829. Steiger, *Die Ordnung der Welt. Eine Völkerrechtsgeschichte des karolingischen Zeitalters (741 – 840)* (Cologne, 2010), pp. 245-293. Steiger, ‘Zwischen-Mächte-Recht im Frühmittelalter’, in: Michael Jucker and Martin Kintzinger, eds, *Rechtsformen internationaler Politik* (Zeitschrift für Historische Forschung, Beiheft 45) (Berlin, 2011), pp. 47-74. For a comment see: Ingo J. Hueck, ‘Völkerrechtsgeschichte. Hauptströmungen, Tendenzen, Perspektiven’, in: Wilfried Loth and Jürgen Osterhammel, eds, *Internationale Geschichte. Themen, Ergebnisse, Aussichten* (Studien zur Internationalen Geschichte, 10) (Munich, 2000), pp. 267-286. Hueck, ‘The Discipline of the History of International Law’, in: *Journal of the History of International Law* 3 (2001), pp. 194-217.

international legal theory.¹⁵⁵ In this general context, the long transmission of bilateral treaties under international qua natural law remained unnoted, beyond specialist studies,¹⁵⁶ to the end of the twentieth century.¹⁵⁷ Likewise, the mere fact remained unnoticed that, in the context of the decolonisation of colonial administrative zones into so-called “newly independent states” according to the European concept of state succession,¹⁵⁸ the massive destruction of numerous pre-colonial states came to be enforced, which had continued to exist under colonial rule, and it remained equally unnoticed that the destruction of the pre-colonial states significantly jeopardised the stability of the post-colonial states.¹⁵⁹ In these respects, historiography of international law has not only perpetuated

¹⁵⁵ Wolfgang Preisler, *Frühe völkerrechtliche Ordnungen der außereuropäischen Welt* (Sitzungsberichte der Wissenschaftlichen Gesellschaft der Johann-Wolfgang-Goethe-Universität Frankfurt/Main, 1976, Nr 4/5) (Wiesbaden, 1976), p. 97, defined an international order as the framework, in which “herrschaftsfreie Staaten sich gegenseitig als unabhängige Rechtssubjekte anerkennen, wenn zwischen ihnen ein kontinuierlicher Verkehr kultureller, wirtschaftlicher und politische Art besteht, der rechtlicher Regelung bedarf oder rechtliche Konsequenzen nach sich zieht, und wenn die an diesem Verkehr Beteiligten von der Überzeugung geleitet sind, daß die auf Vereinbarung oder Gewohnheit beruhenden Regeln, nach denen er sich vollzieht, bindende Sätze einer rechtlichen Ordnung darstellen, deren schuldhaftige Nichteinhaltung rechtliche Sanktionen hervorruft.”

¹⁵⁶ Dietz-Otto Edzard, ‘Der Vertrag von Ebla mit A-ba-QA’, in: Pelio Fronzaroli, ed., *Literature and Literary Language at Ebla* (Quaderni de semitistica, 18) (Florence, 1992), pp. 187-212. Katrin Schmidt, *Friede durch Vertrag. Der Friedensvertrag von Kadesh von 1270 v. Chr., der Friede von Altalkidas von 386 v. Chr. und der Friedensvertrag zwischen Byzanz und Persien von 562 n. Chr.* (Europäische Hochschulschriften. Series II, vol. 347) (Frankfurt, 2002). Edmond Sollberger, ‘The So-Called Treaty between Ebla and “Ashur”’, in: *Studi Eblaiti*, vol. 3, issue 9 (1980), pp. 129-155.

¹⁵⁷ Martinus Garatus of Lodi [Laudensis], ‘Tractatus de confederatione, pace et conventionibus’, in: Garatus, *Tractatus universi iuris* (Venice, 1584), fol. 302-303 [also in: Garatus, *Solennes et quotidiani ac practicabiles tractatus* (Lyons 1530); newly edited by Alain Wijffels, in: Randall Lesaffer, ed., *Peace Treaties and International Law in European History* (Cambridge, 2004), pp. 412-440]. Harald Kleinschmidt, ‘Establishing Peace and Making Peace Treaties. The Contradictoriness of the European Public Law of Relations between States and Big-Power Foreign Policy at the Middle of the Nineteenth Century’, in: *Publikationsportal Friedensverträge* (Veröffentlichung des Instituts für Europäische Geschichte, Mainz, Veröffentlichung der Projektgruppe Europäische Friedensverträge der Vormoderne) (Mainz, 2008-11-18), section 1-58 [<http://www.ieg-mainz.de/publikationsportal/index.html>]. Randall Lesaffer, ‘Peace Treaties and the Formation of International Law’, in: Bardo Fassbender and Anne Peters, eds, *The Oxford Handbook of the History of International Law* (Oxford, 2012), pp. 71-93. Renate Roll, ‘Politisches Kalkül und diplomatische Praxis. Zu den Verträgen und Vertragsverhandlungen zwischen Zar und Kaiser vom Ende des 15. bis in das 18. Jahrhundert’, in: Heinz Duchhardt and Martin Peters, eds, *Kalkül – Transfer – Symbol. Europäische Friedensverträge der Vormoderne* (Veröffentlichungen des Instituts für europäische Geschichte Mainz. Beiheft online, 1) (Mainz, 2006), pp. 53-62 [<http://ieg-mainz-de/vieg-online-beiheft/01-2006.html>].

¹⁵⁸ The concept of the “newly independent states” has been defined in the Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, in: Andreas Zimmermann, *Staatennachfolge in völkerrechtliche Verträge* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 141) (Berlin and Tokyo, 2000), pp. 866-889, thereby raising it to the level of international law. It attempted to exempt post-colonial states from the legal obligations that had arisen from the European tradition of international law, according to which successor states had to take over obligations from their predecessor states. The theory of the succession of post-colonial states was based on the argument that these states had acquired new “identity”, which was standing against the requirement to take over obligations from the former colonial zones. For the problems enshrined in this logic, see: Matthew C. R. Craven, ‘The Problem of State Succession and the Identity of States under International Law’, in: *European Journal of International Law* 9 (1998), pp. 142-162. The theory did not take into consideration that most post-colonial states had not acquired their “independence” through free agreements, but by acts of grace from the withdrawing colonial governments, and had, equally importantly, become obliged to take over essential constitutional elements from the colonial centres and had, by consequence, had little possibility to generate their own “identity”.

¹⁵⁹ For the discussion of problems surrounding state succession with regard to decolonisation processes see:

ideologies of colonial rule, but has also placed its narratives upon culturally specific perceptions of the past as a dynamic process of change, contrary to extant evidence, has claimed that these perceptions are manifested in purported facts and has imposed these specific vistas retrospectively even upon the distant past and disseminates them across the globe through institutions like the Hague Academy of International Law.¹⁶⁰

Emmanuel G. Bello, 'Reflections on Succession of States in the Light of the Vienna Convention on Succession of States in Respect of Treaties 1978', in: *German Yearbook of International Law* (1980), pp. 296-322. Albert Bleckmann, *Das französische Kolonialreich und die Gründung von Staaten. Die Rechtsentwicklung in Syrien/Libanon, Indochina und Schwarzafrika* (Cologne, 1969). Konrad G. Bühler, *State Succession and Membership in International Organizations* (Legal Aspects of International Organization, 38) (The Hague, London and Boston, 2001), pp. 37-50. Lung-Fong Chen, *State Succession Relating to Unequal Treaties* (Hamden, CT, 1974). Taslim Olawale Elias, *The Modern Law of Treaties* (Dobbs Ferry, 1974). Maurice Flory, B. Etienne, G. Fouilloux and J.-C. Santucci, eds, *La succession d'état en Afrique du Nord* (Paris, 1968). Rainer Goerdeler, *Die Staatensukzession in multilaterale Verträge. Eine Darstellung der Praxis der Gebietsnachfolger Frankreichs in Afrika* (Schriften zum öffentlichen Recht, 9) (Berlin, 1970). Gerhard Hafner and Gregor Novak, 'State Succession in Respect of Treaties', in: Duncan B. Holliss, ed., *The Oxford Companion to Treaties* (Oxford, 2012), pp. 396-427. Anthony Paul Lester, 'State Succession to Treaties in the Commonwealth', in: *International and Comparative Law Quarterly* (1965), pp. 475-507. Oliver J. Lissitzyn, 'Territorial Entities Other than Independent States in the Law of Treaties', in: *Recueil des cours* 125 (1968, part III), pp. 1-91, at pp. 17-18. Yilma Makonnen, 'State Succession in Africa. Selected Problems', in: *Recueil des cours* 200 (1986, part V), pp. 93-234, at pp. 118-119, 121-148. Werner Morvay, *Souveränitätsübergang und Rechtskontinuität im Britischen Commonwealth, Ein Beitrag zur Lehre von der Staatensukzession* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 65) (Berlin and New York, 1974), pp. 22-24. Mudimuranwa A. B. Mutiti, *State Succession to Treaties in Respect of New Independent African States* (Kampala, 1977). Daniel Patrick O'Connell, *State Succession in Municipal and International Law*, 2 vols (Cambridge Studies in International and Comparative Law, 7) (Cambridge, 1967). O'Connell, 'Recent Problems of State Succession in Relation to New States', in: *Recueil des cours* 130 (1970, part II), pp. 95-206. O'Connell, 'State Succession and the Theory of the State', in: Charles Henry Alexandrowicz, ed., *Studies in the History of international Law* (Grotian Society Papers, 1972) (The Hague, 1972), pp. 23-75. T. T. Poulouse, *Succession in International Law. A Study of India, Pakistan, Ceylon and Burma* (New Delhi, 1974). Michael Godeau Robles, *Völkerrechtliche Probleme der bei Gewährung der Unabhängigkeit abgeschlossenen Verträge*. LLD thesis, typescript (University of Munich, 1969). Earle E. Seaton and Sosthenes T. Maliti, *Tanzania Treaty Practice* (Nairobi, 1973). Okon Udokang, *Succession of New States to International Treaties* (Dobbs Ferry, 1972). Karl Zemanek, 'State Succession after Decolonization', in: *Recueil des cours* 116 (1965, part III), pp. 181-300, at pp. 189, 191, 193, 195-202, 213-314, 217-218, 245-247. Andreas Zimmermann, *Staatennachfolge in völkerrechtliche Verträge* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 141) (Berlin and Tokyo, 2000), pp. 23-24.

¹⁶⁰ For one, jurist Han-Qin Xue, 'Chinese Contemporary Perspectives on International Law. History, Culture and International Law', in: *Recueil des cours* 355 (2011, part III), pp. 41-234, at pp. 92-93, could declare with full conviction: "The concept of sovereignty originated from Europe in the middle of the sixteenth century. The idea did not take root in European political life until much later. ... The outcome of the Thirty Years War was that the treaties of Westphalia enthroned and sanctified European kings and gave them powers domestically and independence externally. By accepting the status of sovereign States, the system simplified the set of crisscross allegiances that gave rise to a series of wars under the order of medieval Europe. ... // Basically, the Westphalian system served to maintain a stable structure for inter-State relations through the so-called 'the [sic] pluralist European society of states', namely, tolerance of domestic differences among European States and intolerance toward attempts to disrupt the balance of power. This is the original meaning of sovereignty and non-interference." Equally uncritically used European projections on the history of treaties helped Xue derive the Chinese government doctrine on non-intervention into the domestic affairs of states, even though this doctrine is supposed to be part of the so-called "Five Principles", seemingly of purely Chinese origin. The acknowledgement of the Chineseness of these principles was demanded at the same place by: Tie-Ya Wang, 'International Law in China', in: *Recueil des cours* 221 (1990, part II), pp. 195-369, at pp. 263-280.