VII. Natural Law, International Law, Law of Hospitality. Why Migration Turned into a Problem for Politics

I. Introduction: A Human Right Guaranteeing the Freedom of Emigration

Article 13, 2 of the Universal Declaration of Human Rights of 10 December 1948 unequivocately stipulates: "Everyone has the right to freedom of movement and residence within the borders of each State."; and: "Everyone has the right to leave any country, including his own, and return to his country."[1] As a whole, the Declaration sets as inalienable the rights it lists: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[2] It thus pronounces them as valid even when and where they have not been legislated through municipal law and even when existent laws prohibit or appear to obstruct the use of these rights. In today's human rights, a legal idea has taken form which, irrespective of its precise expressions, is ancient.[3] This idea is based on the assumption that a few rights are in the world, even if they have never been legislated through purposeful human action. From Antiquity to the turn towards the nineteenth century, this idea has been enshrined in the doctrine of natural law, parts of which specifically late medieval theologians, took to be divine law.[4] In so far as that law was unset, it also provided a system of legal norms, the validity of which was acknowledged independently of answers to the question of whether or not these norms were actually enforceable.

As a universal human right, the freedom of emigration belongs to these norms. It does say that

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[1] Universal Declaration of Human Rights, UN General Assembly Resolution 217, 10 December 1948, Article 13 [printed in: Richard Plender, *Basic Documents on International Migration Law* (Dordrecht, Boston and London, 1988), pp. 5-6]. In Article VII of his draft constitution of 22 July 1789, the Abbé de Sièyes already used a similar formula. Accordingly, every human being was to be free to go or to stay, to depart from and to reenter any place within and even the Kingdom of France as a whole, whenever he or she should please to do so. See: Emmanuel Sieyès, *Préliminaire de la constitution française* (Paris, 1789) [further edn (Paris, 1791); English version (London, 1795)]. The Abbé thus combined the right of the free choice of residence with the right of emigration and remigration, both, however, defined a rights of French citizens, not as human rights in general.

[2] Universal Declaration, preamble.

[3] Hence, human right did exist long before they came to be cast into written legal diction during the American Revolution in the 1770s. On the process of the written codification of human rights see: Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte. Ein Beitrag zur modernen Verfassungsgeschichte* (Staats- und völkerrechtliche Abhandlungen. Series1, vol. 3) (Leipzig, 1895) [second edn (Leipzig, 1904); reprint of this edn (Leipzig, 1913); third edn (Munich, 1919); fourth edn (Munich, 1927); further reprints (Schutterwald, 1996); (Saarbrücken, 2006); (Berlin, 2013)].

[4] Thomas Aquinas, 'Summa theologiae', edited by Roberto Busa SJ, *Sancti Thomae Aquinatis Opera omnia*, vol. 2 (Stuttgart, 1980), pp. 573-768. Otto Schilling, *Das Völkerrecht nach Thomas von Aquin* (Das Völkerrecht, 7) (Freiburg, 1919), esp. p. 26.

anyone residing somewhere can legally run away from one day to the next., Instead, municipal laws can impose restrictions against the full use of the freedom of emigration. Anyone wishing to leave, then, is compelled to act in accordance with these restriction, of departure is to be legal. The freedom of emigration usually does not apply to persons charged with criminal offences, and only conditionally for those subject to draft. Moreover, municipal law can stipulate certain hurdles against emigration, such as the payment of a fee. But there is a far more significant restriction against the use of the freedom of emigration than these detailed norms. This is also contained in the Universal Declaration of Human Rights, albeit by implication only. The Declaration does not constitute a general freedom of immigration, the counterpiece to the freedom of emigration, and thereby excludes guest law from the canon of human rights. Hence, everyone can emigrate from every state on principle, but cannot on the same principle immigrate into eery state. Why and since when has this discrepancy between the freedom of emigration and the restriction of immigration been in existence?

Migrations across international borders of states represent a type of patterned action in spaces with reduced law-enforcement capability, whence they can become subject to municipal law only to a limited extent. Their legal regulation either demands something equivalent of world domestic law – in this case, migration would no longer take place in spaces with limited law-enforcement capability – or their legal regulation follows from norms that, in turn, have either been agreed upon in treaties under international law or have been recognised as valid without specific acts of legislation. If migrations extend across wide distances, migrants act globally or their actions can entail global effects. As migrants and residents communicate, migrations are also interactions, and interactions are actions that result in responses. These responses are global, if they come into existence within a conception of the world as a whole. They have global effects, if they occur within a conception of the world as a whole but were not intended to have global effects. With regard to interstatal and international relations, long-distance migration is the prototype of global actions or actions with global effects. Migrants or residents claim certain rights. Since the sixteenth century at the latest, these rights have been subsumed in jurisprudence under the concept of the law of hospitality (*ius peregrinationis*, also *ius hospitum*, *ius albinatum*). As a rule, the law of hospitality encompasses norms concerning residence and other forms of stay at a certain place not identified as the place of origin of migrating or travelling persons. The law of hospitality in this sense encompasses norm complexes regulating patterns of actions of diplomats, merchants and shipwrecks as well as, to some extent, providing norms for the maintenance of public hygiene. Within the literature on the history of international law, the law of hospitality has some times been featured as “the law of foreigners”.[5]

[5] Karl-Heinz Ziegler, *Völkerrechtsgeschichte*, second edn (Munich, 2007) [first published (Munich, 1994)]. The recent study by Tobias Schwarz, *Bedrohung, Gastrecht, Integrationspflicht. Differenzkonstruktionen im deutschen*

However, this term is misleading, because the word and the concept of the ‘foreigner’ came into use in Europe only during the later Middle Ages, next to words such as Old High German *elilenti* (also Latin *exsilium*, for residence in an aea different from the area of origin), which secondarily acquired the meaning of misery, and the cognate word *alienus* from the Latin tradition. These words later became generic terms, replacing the older usage of ethnic terms for individuals or groups, not belonging to the goups of residents at a certain place. By contrast, early forms of the current word ‘guest’ is first recorded as *-gastiz*^{R} in runes during the fifth century, thereby belonging to the earliest recorded words in the so-called ‘Germanic’ languages. This word has been derived from the Indo-European stem *$g^{h}osti$, which is the common ancestor for Latin *hostis*, recorded even earlier, and denoting jointly the guest, the foreigner and eventually also the enemy. Already Cicero played with the apparently widely diverse meaning of *hostis*. He lamented what appeared to him as the unduly wide extention of the meaning of the word, which, in his interpretation, had meant the foreigner only in the Law of the Twelve Tables, and seemed to have had acquired the meaning of enemy (*perduellis*) at some later point of time. Nevertheless, Cicero thought, the history of the word *hostis* indicated that conflicts among enemies termed *hostes* had originally been mere quarrels among foreigners, not among enemies. Therefore, he concluded, the gentleness of the original meaning of the word was reducing the harshness of warfare. Hence, already Cicero noted a change of meaning of the word *hostis*, in his own case, he classed the change as an extention and connected this process with the concept of war and the modalities of warfare. However, Latin *hostis* concurred with Latin *hospis*, which was used in laws recorded in the Late Antique Theodosian Code for the years 361, 384 and 398 as a technical term not only for the host of quartered legionaries but also, as a rule, for quartered legionaries themselves. Prior to the code, Tacitus had used the formula of the *ius hospitis* and recorded it as valid among the so-called Germanic groups. During the fifth century, Sidonius Apollinaris had applied *hospis* to the Vandal ruler Geiseric, after his conquest of Carthage in 439. Tacitus‘s *ius hospitis* was supposed to have prescribed friendly reception to known as well as unknown guests. The *hospitalitas* of the Theodosian Code stipulated norms for military quartering accommodating soldiers as guests for a longer period of time. In distanced Gallic perspective, Geiseric remained guest within the Roman empire, even after he had taken residence in Carthage. Later on, , historiography of the Lombards by Paul the Deacon featured the word *hospis* for the year 574, that is, six years after the recorded Lombard ‘invasion’ of the Italian Peninsula, thereby continuing to categorise the ‘invaders’ as guests even after their settlement. Words for guests thus appear to have jointly denoted guests and foreigners, if they stayed for a considerable span of time,

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Ausweisungsdiskurs (Bielefeld, 2010), pp. 151-157, used the phrase “law of hospitality” (Gastrecht) as a term for the right of residence. Herfried Münkler and Marina Münkler, *Die neuen Deutschen* (Berlin, 2016), p. 149, contended, without offering definitions and providing information about their sources, that some medieval “law of hospitality” (Gastrecht) had been transformed into some “aliens law” (Fremdenrecht) in the context of the establishment of the “institutional territorial state in Early Modern Europe” (institutionellen Flächenstaats im Europa der Neuzeit).

and this usage continued here and there throughout and beyond the Middle Ages, such as in Styrian local language well into the Modern Era, where *Gast* meant resident without a house of his or her own. Similarly, Archbishop Isidore of Seville explained that a guest (*hospis*) was someone having arrived somewhere, was living there under the law of hospitality and was expected to depart sooner or later. Obviously, the practice of accommodating unkown travellers even for a longer span of time was widespread during the eighth and ninth centuries. The younger version of the Salican Law provided for the possibility of moving residence into a new neighbourhood community, in which all newcomers could remain if no one among the residents objected within one year after the arrival. Once the objection deadline had passed, all immigrants were to be treated legally equally with the established residents. Apparently, quite a number of persons made use of this possibility, as ninth-century registers of land tenure record many instances of persons called *extranei* or *advenae* and residing in small cottages in proximity to land owners courts, could marry into kin groups of residents, could be used as serfs upon demand and, once they had been admitted as settlers, were obliged to pay the common fees and services. Already during the eighth century, norms were in force obliging groups of settlers to provide relief to the poor and to take care of decent people. Hence, guests might be treated as foreigners for longer spans of time but there was no legal obligation to treat them this way. A law promulgated in the name of King Ine of Wessex, probably in 694, mandated foreigners, doing business on the territory of the kingdom, to purchase goods in the presence of witnesses so as not to fall victims to suspicions of being thieves. That norm suggests that merchants were operating in spaces with reduced law-enforcement capacity in between political communities. As guests, they might be treated like foreigners at the places where they were trading, as long as they did not have relatives capable of protecting them and entitled to demand wergild and carry out acts of revenge in cases of severe injuries or even homicides.[6] Only at a later point of time

[6] Marcus Tullius Cicero, *De re publica* [various edns], book I, chap. 1, nr 37. Subsequently: Varro, *De lingua latina* [verschiedene Ausg.], book V, chap. 3. Cornelius Tacitus, *Germania*, chap. 21, edited by Rudolf Much, Herbert Jankuhn and Wolfgang Lange, third edn (Heidelberg, 1967), pp. 302-305, at p. 302. *Codex Theodosianus*, edited by Theodor Mommsen, Paul Krüger and Paul M. Meyer, *Theodosiani libri XVI cum constitutionibus Sirmondianis et leges novellae ad Theodosianum pertinentes*, vol. 1, part 2, book VII, chap. 8, nr 1: law issued by Emperor Gratian, 3 May 361; law issued by emperors Gratian, Valentinian and Theodosius, 16 September 384; book VII, chap. 8, nr 5: law issued by emperors Arcadius and Honorius 6 February 398 (Berlin, 1906), pp. 327, 328, 328-329 [reprints (Berlin, 1954; 1962; 1970; 1971); (Dublin, 1970); (Hildesheim, 1990; 1999; 2002; 2011)]. Sidonius Apollinaris, *Epistolae et carmina*, carmen 5, V 60, edited by Christian Luetjohann (Monumenta Germaniae historica, Auctores antiquissimi, 8) (Berlin, 1887), p. 189. Paul the Deacon, *Historia Langobardorum*, book II, chap. 32, edited by Georg Waitz (Monumenta Germaniae historica, Scriptores rerum Germanicarum in usum scholarum separatim editi, 48) (Hanover, 1878), p. 90. Isidore of Seville, *Etymologiarvm sive originvm libri XX*, edited by Wallace Martin Lindsay (Oxford, 1911), s. p., book XV, chap. III: "De habitacvlis": „Hospitium sermo Graecus est, ubi quis ad tempus hospitali iure inhabitat et iterum inde transiens migrat." The so far earliest written source for the word guest is extant in a runic incsription on the shorter horn of Gallehus, probably dating to the fifth century. The horn is now lost, the inscription has been edited in: Joachim Richard Paulli, *Zuverlässiger Abriss des Anno 1734 bey Tundern gefundenen Horns* (Copenhagen, 1734), fig I, pp. 3-9. On early medieval settlement law see: *Lex Salica*, 100-Titel-Text, edited by Karl August Eckhardt (Weimar, 1953), pp. 203-205. Jean-Pierre Devroey, ed. *Le polyptyche et les listes de cens de l'abbaye de Saint-Rémi de Reims* (Travaux de l'Académie nationale de Reims, 163) (Rheims, 1984), pp. 8, 30, 37, 48. Dieter Hägermann, Konrad Elmshäuser and Andreas Hedwig, eds, *Das*

did the word ‘guest’ lose the semantic dimension of alienness. If, by consequence, research in legal

Polyptychon von Saint-Germain-des Près (Cologne, Weimar and Vienna, 1993), pp. 58, 60, 69, 71-73, 76, 78, 85, 106-116, 160-161, 172-175, 181, 184-187, 192, 194, 196-199, 207-208, 212-213. Ingo Schwab, ed., *Das Prümer Urbar* (Rheinische Urbare, 5) (Düsseldorf, 1983), pp. 207, 211, 214, 256. Charles I, King of the Franks, ‘Admonitio generalis [23 March 789]’, in: Alfred Boretius, ed., Monumenta Germaniae historica, *Capitularia regum Francorum*, vol. 1 (Hanover, 1883), p. 60. On the prohibition against providing shelter for lawless strangers see: Canute, King of England, ‘Gesetze’, part II, § 15a, edited by Felix Liebermann, *Die Gesetze der Angelsachsen*, vol. 1 (Halle, 1903), pp. 278-370, at p. 318 [reprint (Aalen, 1960)]. On the role of kin groups as revengers see: Bishop Burchard of Worms, ‘Lex familiae Wormatiensis ecclesiae’, nr XXX, edited by Heinrich Boos, *Urkundenbuch der Stadt Worms*, vol. 1 (Worms, 1886), pp. 40-45, at pp. 43-44, who, early in the eleventh century, made an effort to restrict the execution of blood revenge among his subjects at Worms. On Tacitus see: Leopold Hellmuth, *Gastfreundschaft und Gastrecht bei den Germanen* (Sitzungsberichte der Österreichischen Akademie der Wissenschaften, Philos.-Hist. Kl. 440) (Vienna, 1984), pp. 5-8. Alfred Schulte, ‘Gästerecht und Gastgerichte in deutschen Städten des Mittelalters’, in: *Historische Zeitschrift* 101 (1908), pp. 473-528, at p. 526. Already the older juristic research literature referred to this passage; among others, see: Augustin Balthasar, *Dissertatio inauguralis juridica de jure peregrinorum, singulari circa processum*. LLD thesis (University of Greifswald, 1742), pp. 10-11. Carl Heinrich Möller [praes.] and Elias Masco [resp.], *Dissertatio juridica de judicio summario peregrinorum, Germanice vom Gast-Recht*. LLD thesis (University of Rostock, 1733), pp. 2, 8-9. On Lombards see: Walter Pohl, ‘Per hospites divisi. Wirtschaftliche Grundlagen der langobardischen Ansiedlung in Italien’, in: *Römische Historische Mitteilungen* 43 (2001), pp. 179-226, at pp. 189-196. On Ine of Wessex siehe: Ine, King of Wessex, ‘Gesetze’, §§ 25, 25,1, edited by Liebermann (as above), pp. 89-123, at p. 10. On the history of the meaning of the word guest see: Karl Bergmann, *Deutsches Leben im Lichtkreis der Sprache* (Frankfurt, 1926), pp. 162-163, who, without access to the Gallehus inscription, postulated some lack of legal status of strangers according to ancient Germanic law and concluded that the apparent emergence of hospitality was a consequence of the rise of trading activity in late medieval Europe. Bergmann’s position has been criticised by: Friedrich Schroeder, ‘Zur Bedeutungs-Geschichte von *Gast*’, in: *Zeitschrift für deutsche Philologie* 56 (1931), pp. 385-394. On the Gallehus norns see: Morten Axboe, Hans Freder Nielsen and Wilhelm Heizmann, ‘Gallehus’, in: *Reallexikon der Germanischen Altertumskunde*, vol. 10 (Berlin and New York, 1998), pp. 330-344. Heinz Klingenberg, *Runenschrift – Schriftdenken – Runeninschriften*, (Germanische Bibliothek, Reihe 3) (Heidelberg, 1973) [reprint (Heidelberg, 1995)]. On the position of strangers in medieval Europe see: Frank Roland Powell Akehurst and Stephanie Cain Van d’Elden, eds, *The Stranger in Medieval Society* (Minneapolis and London, 1997). Detlev Ellmers, ‘Der archäologische Nachweis von Fremden in mittelalterlichen Hafenorten’, in: Manfred Gläser, ed., *Archäologie der Mittelalters und Bauforschung im Hanseraum. Festschrift für Günther Peter Fehring* (Schriften des Kulturhistorischen Museums Rostock, 1) (Rostock, 1993), pp. 271-276. *Forestieri e stranieri nelle città basso-medievali. Atti del Seminario Internazionale di Studio Bagno a Ripoli (Firenze), 4 – 8 giugno 1984* (Quaderni di storia urbana e rurale, 9) (Florence, 1988). François-Louis Ganshof, ‘L’étranger dans la monarchie Franque’, in: *L’étranger* (Recueil de la Société Jean Bodin pour l’histoire comparative des institutions, 10) (Brussels, 1958), pp. 5-36. Guy Halsall, *Barbarian Migrations and the Roman West. 376 – 568* (Cambridge, 2007), p. 433, who offered the dictionary equation of late Classical Latin“hospites” with modern English “guests”, but would then relate the Latin word toquartered soldiers exclusively. Otto Hiltbrunner, ’Gastfreundschaft’, in: *Reallexikon für Antike und Christentum*, vol. 8 (1972), col. 1061-1123. Keechang Kim, *Aliens in Medieval Law. The Origins of Modern Citizenship* (Cambridge, 2000). Harald Kleinschmidt, *Understanding the Middle Ages* (Woodbridge, 2000), pp. 269-270. Theodor Mommsen, ‘Das römische Gastrecht’, in: Mommsen, *Römische Forschungen*, vol. 1 (Berlin, 1864), pp. 326-354. Hans Conrad Peyer and Elisabeth Müller-Luckner, eds, *Gastfreundschaft, Taverne und Gasthaus im Mittelalter* (Schriften des Historischen Kollegs, Kolloquien 3) (Munich, 1983). Peyer, *Von der Gastfreundschaft zum Gasthaus. Studien zur Gastlichkeit im Mittelalter* (Monumenta Germaniae Historica Schriften, 31) (Hanover, 1987), pp. 1-20. Gottfried Schramm, *Zweigliedrige Personennamen der Germanen. Ein Bildetyp als gebrochener Widerschein früher Heldenlieder* (Ergänzungsbände zum Reallexikon der Germanischen Altertumskunde, 82) (Berlin and New York, 2013), pp. 11-13: “Eine zählebige Konstellation: Vornehme Gastgeber, ein Sänger und kunstsinnige Zuhörer”. Claudia Seiring, *Fremde in der Stadt (1300 – 1800). Die Rechtsstellung Auswärtiger in mittelalterlichen und neuzeitlichen Quellen der deutschsprachigen Schweiz* (Europäische Hochschulschriften, Reihe 2, Bd 2566) (Frankfurt, 1999). Ernst Schubert, ‘Der Fremde in nordwestdeutschen Städten des Mittelalters’, in: *Niedersächsisches Jahrbuch für Landesgeschichte* 69 (1997), pp. 1-44. Hans Thieme, ‘Die Rechtsstellung von Fremden in Deutschland vom 11. bis zum 18. Jahrhundert’, in: *L’étranger* (as above), pp. 201-216. Claus-Dieter Wetzel, ‘Philologisch-sprachgeschichtliche Anmerkungen zu altenglisch fremðe “fremd” und seinen Derivaten’, in: Irene Erfen and Karl-Heinz Spieß, eds, *Fremdheit und Reisen im Mittelalter* (Stuttgart, 1997), pp. 7-16. Paul Wilutzky, *Vorgeschichte des Rechts*, vol. 3: Stammesverfassung und Anfänge des Staatsrechts (Berlin, 1903), p. 167.

history generally equates the law of hospitality with the law of foreigners, these processes of semantic change cannot be taken into consideration.

Next to this wide concept of the law of hospitality, seventeenth- and eighteenth-century juristic literature used a narrow term limited in reach to procedural issues and either confined to the complex of norms for court trials between guests and residents, mainly in cities,[7] or to the municipal concept of the law of inns, regulating the conditions under which hostels and inns were to operate.[8] As will be shown in what follows, neither the term "aliens law" is useful in the context of regulations defining the status of migrants nor the focus on procedural law or the law of inns.

Moreover, even though the definition of the concept of global action or action with global effects is a simple matter, tracing it in records encounters heuristic difficulties. This is so because global effects are usually not inherent to actions themselves but are ex-post constructs by retrospective generations. Historiography has long been familiar with these difficulties.[9] It used to solve this problem within the tricontinental world of Africa, Asia and Europe to the end of the fifteenth century by recourse to the projection of this tricontinental world as a universal perception, laid down in Arab, Greek and

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[7] Johannes Brunnemann [praes.] and Friedrich Movius [resp.], *Dissertatio juridica de jure peregrinorum*, §§ 17-28. LLD thesis (University of Frankfurt on the Viadra, 1662), fol. B 3^{r}-$C2^{v}$. Johann Georg Fichtner [praes.] and Johann Friedrich Carstens [resp.], *De jure peregrinorum*. JLLD thesis (University of Altdorf, 1717). Konrad Friedlieb, *Diascepsis iuridica de jure et privilegiis cum peregrinorum tam absentium* (Hamburg, c. 1669). Ahasver Fritsch [praes.] and Johann Georg Pertsch [resp.], *Tractatus de jure hospitalitatis. Oder Gast-Recht*, second edn (Jena, 1673). Daniel Gralath [praes.] and Balthasar Jakob Groddeck [resp.], *Exercitatio historico-iuridica de privilegio peregrinorum forensi quod Germanice Gastrecht vocatur*. Ph. D. thesis, Gedani [Gdansk], 1780). Möller, *Dissertatio* (note 6), pp. 3, 5-10, 13-14, 18-21. Samuel Friedrich Willenberg [praes.] and Johann Friedrich Krokisius [resp.], 'De judicio peregrinitatis. Vom Gast-Gerichte exercitatio', nr LXII, in: Willenberg, *Selecta jurisprudentiae civilis* (Gdansk, 1728), pp. 831-842, at p. 835. Heinrich Zöpfl, *Das alte Bamberger Recht als Quelle der Carolina. Nach bisher ungedruckten Urkunden und Handschriften* (Heidelberg, 1839), pp. 69-71. Ladislaus von Stoixner, *Das Gastrecht der kurpfalzbaierischen Haupt- und Residenzstadt München* (Munich, 1784), p. 3, who explicitly distinguished between the law of hospitality in the wider sense of a complex of norms for the regulation of aspects of guest status and the narrower sense of a complex of norms regulating aspects of the dopings of innkeepers. By contrast, Marianne Beth, 'Gastfreundschaft', in: Eduard Hoffmann-Krayer and Hanns Bächthold-Stäubli, eds, *Handwörterbuch des deutschen Aberglaubens*, vol. 3 (Berlin and Leipzig, 1930-1931), col. 307-312, at col. 310, believed to have to derive some "law of strangers" from the law of hospitality, which she described as the set of "obligations between innkeeper and guests". For a survey of records relating to the procedural law involving guests see: Hermann Rudorff, *Zur Rechtsstellung der Gäste im mittelalterlichen städtischen Prozeß, vorzugsweise nach norddeutschen Quellen* (Untersuchungen zur deutschen Staats- und Rechtsgeschichte, [A. F.] 88) (Breslau, 1907), pp. 147-194. Schulte, 'Gästerecht' (note 6), pp. 503-525.

[8] Johann Gotthard de Boeckel [Boecklerus], *Tractatio synoptica juridica politica materia valde utilis necessaria de jure hospitiorum, Germanice von Gast-Recht. Worinnen alles das ..., was zu dieser Materie gehörig, insonderheit vom Recht öffentlicher Gast- und Wirths-Häuser aufzurichten* (Quedlinburg, 1721) [first published (Helmstedt, 1677); another edn (Frankfurt, 1727)].

[9] For early reflections on this point see: Johann Martin Chladenius, 'Von Auslegung Historischer Nachrichten und Bücher', in: Chladenius, *Einleitung zur richtigen Auslegung vernünfftiger Reden und Schrifften* (Leipzig, 1742), pp. 181-370 [reprint, edited by Lutz Geldsetzer (Düsseldorf, 1969)]. Chladenius, *Allgemeine Geschichtswissenschaft, worinnen der Grund zu einer neuen Einsicht in allen Arten der Gelahrtheit geleget wird* (Leipzig, 1752), chap. I, § 14, p. 8; chap I, § 24, p. 14; chap. V, § 1, pp. 91-92 [reprint, edited by Christian Friedrich (Vienna, Cologne and Graz, 1985)].

Latin *mappaemundi* in their spatial as well as temporal dimensions.[10] In doing so, historiographers equated actions with global effects with actions in the tricontinental world. Still in the eighteenth century, enlightenment historiography retained this perception, even while applying it to the planet earth, as it now appears within an ISS perspective. For one, historian Georg Andreas Will, in his Altdorf lectures on historics (*ars historica*) of 1766, took the view that history in general was "a diary of divine providence and government" (ein Tagebuch der Vorsehung und Regierung Gottes and contained the "history of the fates of peoples and states" (Geschichte von den Schicksalen der Völker und Staaten).[11] In the sense of Christian theology, Will thus generalised the meaning of the concept of world to the concept of world as such. The definition of what was to count as global action or action with global effects then appeared to fall into the province of historiography. As a theorist of "world history" during the 1960s and 1970s, Alfred Heuß took up this model of conceptualisation in its secularised form, modified through the theory of evolutionism, and coined the formula of the "wordliness" (Welthaftigkeit) to give expression to his perception of what was to constitute actions with global effects. He assumed that "worldliness" was in existence first in human history during his own time, while limiting the range of the applicability of his formula to certain systems of cultural norms and values he explicitly called "high cultures". He took this label as a given, seemingly drawing on records records from the past as the platform for his own judgments about which "cultures" might rank as "high".[12] As Heuß positioned himself as the intellectual

[10] 'Abd-ar-Rahmān Ibn-Muhammad Ibn-Haldūn, *An Arab Philosophy of History* (Princeton, 1987). Johannes Malalas, *Chronographia*, edited by Hans Thurn (Berlin, 2000). Paulus Orosius, *Historiarum adversum paganos libri VII*, edited by Carl Zangemeister (Corpus scriptorum ecclesiasticorum Latinorum, 5) (Vienna, 1882) [reprints (New York, 1966); (Hildesheim, 1967)]. Hartmann Schedel, *Das Buch der Croniken* (Nuremberg, 1493) [Facsimileedn, edited by Stephan Füssel (Cologne, 2001)], the latter two authors using the model of world age chronologies.

[11] Georg Andreas Will, 'Einleitung in die historische Gelahrtheit und die Methode, die Geschichte zu lehren und zu lernen [1766; Ms. Nuremberg: Stadtbibliothek, Will Papers (Bibliotheca Norica Williama), V.612[a]]', edited by Horst Walter Blanke, 'Georg Andreas Wills "Einleitung in die historische Gelahrtheit" (1766) und die Anfänge moderner Historik-Vorlesungen in Deutschland', in: *Dilthey-Jahrbuch für Geschichte der Geisteswissenschaften* 2 (1984), pp. 222-265 [also edited in: Horst Walter Blanke and Dirk Fleischer, eds, *Theoretiker der deutschen Aufklärungshistorie*, vol. 1: Die theoretische Begründung der Geschichte als Fachwissenschaft (Fundamenta historica, vol. 1, part 1) (Stuttgart, 1990), pp. 313-350]. For recent studies of Enlightenment historiography see: Horst Walter Blanke, 'Aufklärungshistorie und Historismus. Bruch und Kontinuität', in: Blanke, *Historiographiegeschichte und Historik. Aufklärungshistorie und Historismus in Theorie und Empirie* (Kamen, 2011), pp. 47-70 [first published in: Otto Gerhard Oexle and Jörn Rüsen, eds, *Historismus in den Kulturwissenschaften* (Beiträge zur Geschichtskultur, 12) (Cologne, Weimar and Vienna, 1996), pp. 69-98]. Arnd Brendecke, 'Darstellungsmaßstäbe universalhistorischer Zeit', in: Brendecke, Ralf-Peter Fuchs and Edith Koller, eds, *Die Autorität der Zeit in der Frühen Neuzeit* (Munster, 2007), pp. 491-521.

[12] Alfred Heuß, 'Möglichkeiten einer Weltgeschichte heute', in: Heuß, *Zur Theorie der Weltgeschichte* (Berlin, 1968), pp. 3-16, at pp 11-14 [reprinted in: Heuß, *Gesammelte Schriften*, vol. 1 (Stuttgart, 1995), pp. 581-594]. Heuß, 'Über die Schwierigkeit, Weltgeschichte zu schreiben', in: *Saeculum* 27 (1976), pp1-35, at pp. 3, 20-28 [reprinted in: Heuß, Schriften (wie oben), pp. 607-641]. Already more radically explicit in: Edmund Husserl, who would except only European though as principally universalisable and effective on the globe at large: Edmund Husserl, 'Die Krisen des europäischen Menschentums und die Philosophie [Lecture, Wiener Kulturbund, 7 and 10 October 1935]', in: Husserl, *Die Krise der europäischen Wissenschaften und die transzendentale Phänomenologie*, edited by Walter Biemel (Husserliana, vol. 6) (The Hague, 1954), pp. 314-348, at p. 320: "Die historische Menschheit gliedert sich nicht in immerfort gleicher Weise gemäß dieser Kategorie [des Wesensunterschieds von "Heimatlichkeit und Fremdheit"]. Wir erspüren das gerade an unserem Europa. Es liegt darin etwas Einzigartiges,

constructor of the "wordliness" of so-called "high cultures", his verdicts themselves remain within the arena of perceptions and, thereby, can at be used as historiographical constructs but not, contrary to Heuß's own claim, as the basis for the determination of what may have constituted global action or action with global effects in the past.[13] Hence, these patterned actions cannot retrospectively be imposed through perceptions of some culturally specific types of cultural systems credited with "worldliness". Instead, these patterns need to be retrieved from pragmatic actions recorded from the past, their global impacts also being traced from sources as close in time to recorded pragmatic actions as possible.

Empirical sources of that kind are available in normative as well as descriptive statements concerning interactions across continents not in the tricontinental Old World but also between the Old and the New World as well as between the Old World and the South Pacific as coming into sight of Europeans only during the second half of the eighteenth century. Empirical sources of that kind not only exist in travels reports European and East Asian travel reports from the later Middle Ages, but also in well-recorded perceptions of several members of European long-distance trading companies from East and Southeast Asia and the Caribbean during the seventeenth and eighteenth centuries as well as from holders of Spanish colonial rule interacting with Native Americans.[14] Moreover, printed formularies are extant from the fifteenth century featuring guarantees of the security of Christian pilgrims to the Holy Land and the monastery of St Catherine in Sinai Peninsula.[15] These guarantees can only have become possible, if some form of agreement existed among the organisers of pilgrimages as travel entrepreneurs and Muslim rulers in Palestine about the

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das als etwas, das, abgesehen von allen Erwägungen der Nützlichkeit, ein Motiv für sie [zum Beispiel Inder] sein wird, sich im ungebrochenen Willen zu geistiger Selbsterhaltung doch immer zu europäisieren, während wir, wenn wir uns recht verstehen, uns zum Beispiel nie indianisieren werden."

[13] Thus already the criticism of Heuß's arguments by: von Franz Hampl, 'Universalhistorische Betrachtungsweise als Problem und Aufgabe, ihre Bedeutung in Theorie und Praxis der modernen Geschichtswissenschaft', in: Hampl, *Geschichte als kritische Wissenschaft*, vol. 1: Theorie der Geschichtswissenschaft und Universalgeschichte, edited by Ingomar Weiler (Innsbrucker Beiträge zur Kulturwissenschaft, 17) (Innsbruck, 1974), pp. 132-181, at p. 152.

[14] For surveys see: Roderich Ptak, ed., *Die maritime Seidenstraße. Küstenräume, Seefahrt und Handel in vorkolonialer Zeit* (Munich, 2007). S. P. l'Honoré Naber, ed., *Reisebeschreibungen von deutschen Beamten und Kriegsleuten im Dienst der Niederländischen Ost- und Westindischenindischen Kompagnien. 1602 – 1797*, 13 vols (The Hague, 1930). For evidence regarding interactions between colonial rulers and states in Southeast Asia and America see, among others: Treaty Dutch East India Company (VOC) – Kandy, Colombo, 14 February 1766, in: Clive Parry, ed., *The Consolidated Treaty Series* [= *CTS*], vol. 43 (Dobbs Ferry, 1969), pp. 263-269, and the treaty Englische East India Company (EIC) – Mahrattas, 24 November 1778, in: *CTS*, vol. 47, pp. 93-97. Treaty Mapuche – Spain, 6 January 1641, in: José de Antonio Abreu Bertodano, ed., *Colección de tratados de paz, alianza, neutralidad, garantia, protección, tregua, mediación, reglamento de limites, comercio, navegación etc.*, vol. 3 (Madrid, 1740), p. 416 [transmitted, in non-diplomatic format, first in: Alonso de Ovalle, *Histórica relación del reyno de Chile*, book VII, chap. IX (Rome, 1646), p. 309].

[15] Bernhard von Breydenbach, 'De forma contractus cum patrono galee', in: Breydenbach, *Sanctarum peregrinationum in montem Syon ad venerandum Christi sepulcrum in Hierusalem et atque montem Synai ad divam virginem et martyram Katherinam opusculum* [written in 1486; first printed]Spyres, 1490)], edited by Folker E. Reichert and Margit Stolberg-Vowinckel, *Quellen zur Geschichte des Reisens im Spätmittelalter* (Ausgewählte Quellen zur Geschichte des Mittelalters. Freiherr-vom-Stein-Gedächtnisausgabe, 46) (Darmstadt, 2009), pp. 80-86.

application of the law of hospitality and the provision of assistance to shipwrecks. That norms pertaining to the law of hospitality as well as to the provision pf assistance to shipwrecks were accepted as valid, although they had not been legislated through formal treaties, is furthermore put on record in reports about initial contacts between members of groups settling far away from each other, such as, to name only the best known, Columbus's voyages, the incident in which a group of Portuguese shiprecks got stranded in a Chinese junk on the southern Japanese island of Tanegashima in 1542 or 1543 and were welcomed there as shipwrecks without any ado, receiving the required hospitality and assistance,[16] and, finally, the fate of the three Japanese shipwrecks, who, after a voyage across the northern Pacific of one and a half years, were washed on the shores of what is Washington State now (formerly Oregon Territory) in 1834 and receiving the necessary hospitality and assistance there as well. That is to say: up until the end of the eighteenth century, migrations and travels even across long distances rarely encountered political problems, as long as they were carried out without the use of force. There was, then, little need to legislate positive rules relating to global actions or actions of global effects at this time. This is important to observe, as long-distance migration, not only out from Europe, but also between East and Southeast Asia, was a common phenomenon and should not be underestimated The Dutch East India Company alone moved about one million people from Europe to places east of the Cape iof Good hope between 1698 and 1798.[17]

In what follows, I shall provide answers to the question about the genesis of the disparity between the freedom of emigration and the restriction of immigration in five steps. First, I shall define some basic terms, specifically and in decreasing conceptual range, natural law, international law and law of hospitality. Then, I shall sketch the processes of the devaluation of natural law and the transformation of interational law according to nineteenth-century legal theory, shall then discuss changes of the practical handling of the law of hospitality, with a focus on the nineteenth-century argument that the enforcement of the law of hospitality was not possible always and everywhere in the international arena, and then, thirdly, take a position via-à-vis the problem of which empirical possibilites are available to determine, whether or not unset legal norms existed. Fourthly, I shall examine the effects of these changes upon the transformation of perceptions about migration with a focus on the consequences of the downgrading of the significance of the law of hospitality for the formulation and implementation of migration policy from the nineteenth century. I shall conclude with some notes concerning the reconcilability of state and international law with the law of

[16] Fernão Mendes Pinto, *Peregrinação*, edited by Elisa Lopes da Costa, in: Jorge Manuel dos Santo Alves, ed., *Fernão Mendes Pinto and the Pereginação*, vol. 2 (Lisbon, 2010). Olof G. Lidin, *Tanegashima. The Arrival of Europe in Japan* (Nordic Institute of Asian Studies Monograph Series, 90) (Copenhagen, 2002).

[17] Harald Kleinschmidt, 'Bemerkungen zur Historischen Migrationsforschung am Beispiel der Auswertung der Schiffslisten der Niederländischen Ostindischen Kompagnie (VOC)', in: Andreas Gestrich, Kleinschmidt and Holger Sonnabend, eds, *Historische Wanderungsbewegungen* (Munster and Hamburg, 1991), pp. 9-17. Ders., *Legitimität, Frieden, Völkerrecht. Eine Begriffs- und Theoriegeschichte der menschlichen Sicherheit* (Beiträge zur Politischen Wissenschaft, 157) (Berlin, 2010), pp. 9-12.

hospitality .

II. Natural Law, International Law and Law of Hospitality

1. Natural Law, International Law and Mechanicism

Up until the early nineteenth century, the formula of "natural and international law" (*ius naturae et gentium*) was a common denominator for complexes of legal norms that were considered to be unset or not legislatable and, by consequence, had to be perceived as valid parts of a divinely willed stable or even static world. There were two schools of thought seeking to determine the precise relationship between both fields of law. The majority of theorists was ready to acknowledge natural or divine law as the complex of legal norms that appeared to be required for the preservation of the sociability of human beings,[18] whereas they regarded international law as that part of natural law stipulating rules

[18] Samuel von Pufendorf, *De jure naturae et gentium* (Amsterdam 1688 [reprint (Oxford and London, 1934); first published (London, 1672); newly edited by Frank Böhling (Pufendorf, Gesammelte Werke, vol. 4, parts 1. 2) (Berlin, 1998)], edn by Böhling, p. 148: "cuilibet homini, quantum in se, colendam et conservandam esse pacificam adversos alios societatem, indoli et scopo generis humani in universam congruentem." Jacques Bénigne Bossuet, *Politique tirée des propres paroles de l'Ecriture Sainte*, book I, art. 2 (Paris, 1709), pp. 13-21, derived the assemblage of states from the divinely willed community of humans: "De la Société Générale du Genre Humain naît la Société Civile, c'est-à-dire celle des Etats, des peuples et des nations." [further edn (Brussels, 1721); newly edietd by Jacques le Brun (Les classiques de la pensée politique, 4) (Geneva, 1967), pp. 11-17; English version (Cambridge, 1999)]. Against Bossuet, the secular derivation of the communiyt of humans from nature was proposed by: Emer[ich] de Vattel, *Le droit des gens. Ou Principes de la loi naturelle appliquées à la conduite et aux affairs des Nations et des Souverains*, Préliminaires, § 11 (London [recte Neuchâtel], 1758) [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)], p. 7 of the original edn: "La Société universelle du Genre-humain étant une Institution de la Nature elle-même, c'est-à-dire une conséquence nécessaire de la nature de l'homme; tous les hommes, en quelque état qu'ils soient, sont obligés de la cultiver *et* d'en remplir les devoirs. Ils ne peuvent s'en dispenser par aucune convention, par aucune association particulière. " Following Christian Wolff, Vattel postulated a *civitas maxima* as an instrument for the legitimation of the assemblage of states. Jean-Jacques Rousseau, *Du contrat social. Ou Essai sur la forme de la République*, book I, chap. II, edited by Simone Goyard-Fabre (Paris, 2010), "Première version [1761]", pp. 19-105, at pp. 22-32: "La société générale du genre humain", p. 22: "La force de l'homme est tellement proportionnée à ses besoins naturels et à son état primitif, que pour peu que cet état change et que ses besoins augmentent, l'assistance de ses semblables lui devient nécessaire, et, quand enfin ses désirs embrassent toute la nature, le concours de tout le genre humain suffit à peine pour les assouvir." [printed version, 1762, pp. 107-281]. Rousseau preteritalised Wolff's *civitas maxima* [Christian Wolff, *Jus gentium methodo scientifico pertractatvm* (Halle, 1749), pp. 6-9; reprint, edited by Marcel Thomann (Wolff, Gesammelte Werke, Series B, vol. 25) (Hildesheim and New York, 1972)], described it as a condition of human existence that had been overcome in the past, through the conclusion of the societal contract, and concluded that law among states without enforcement capabilities was an illusion in the international arena and, by consequence, was weaker than natural law; this, Rousseau believed, was so, because the law among states would be honoured only when and as long as it prescribed norms in accordance with the interests of political decision-makers in states: Rousseau, 'L'État de la guerre. Ou que l'état de guerre naît de l'état social [1755]', in: Rousseau, *The Political Writings of Jean Jacques Rousseau*, edited by Charles Edwyn Vaughan, vol. 1 (reprint (Oxford, 1962), pp. 293-307 [first publication of Vaughan's edn (Cambridge, 1915); also in: Stanley Hoffmann and David P. Fidler, eds, *Rousseau on International Relations* (Oxford, 1991), pp. 33-47, at p. 44. On this issue see: Georg Cavallar, *The Rights of Strangers. Theories of International Hospitality, the Global*

to be observed during peace and war.[19] By contrast, aminority of theorists opted for a position, according to which international law as the law among states was identical with natural law. Among adherents to the latter position were Geneva jurist Jean Jacques Burlamaqui[20] and Halle jurist Johann Gottlieb Heinecke (Heineccius). From his understanding of the law among states as "natural law applied to the social life of human beings" (das Naturrecht, angewandt auf das gesellschaftliche Leben des Menschen),[21] Heineccius derived the justification for his denial of the legislatability of the law among states. According to this position, natural law resulted from reason alone and was therefore not accomplishable through human legislative action. Against this minotrity position, the majority of theorists contended that natural law comprehended the "complete freedom" (völlige Freyheit) of political communities together with all those general unset norms hedging that freedom,[22] whereas the law among states as positive law was a distinct field of law in its own right resulting from contractual agreements among states.[23] Several terms concurred for this field of law. Göttingen historian, jurist and statistician Gottfried Achenwall referred to it as the "general hypothetical law among states" (ius gentium universale hypotheticum), including the law of treaties among states.[24] Joachim Georg Darjes at Jena termed it "the positive law among states" (ius gentium positivum), but also used Achenwall's formula.[25] Christian Wolff at Halle distinguished between "voluntary law among states, law of treaties and customary law" (jus gentium voluntarium,

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Community and Political Justice since Vitoria (Aldershot, 2002), pp. 284-305. Cavallar, 'From Francisco de Vitoria to Alfred Verdross. The Right to Preach the Gospel, the Right of Hospitality and the International Community', in: Kirstin Bunge, Andreas Wagner, Anselm Spindler and Stefan Schweighöfer, eds, *Kontroversen um das Recht. Beiträge zur Rechtebegründung von Vitoria bis Suárez* (Politische Philosophie und Rechtstheorie des Mittelalters und der Frühen Neuzeit. Series II, vol. 4) (Stuttgart, 2013), pp. 1-36. In his edition of Rousseau's text, Robert Derathé would not trace the chapter heading to Vattel, but to Bossuet. Siehe: Rousseau, *Du contrat social*, edited by Robert Derathé (Paris, 1993), s. v. On Bossuet as historian see: Guido Abbatista, 'The Historical Thought of the French *Philosophes*', in: José Rabasa, Masayuki Sato, Edoardo Tortarolo and Daniel Woolf, eds, *The Oxford History of Historical Writing*, Bd 3: 1400 – 1800 (Oxford, 2012), pp. 406-427, at p. 415.

[19] Hugo Grotius, *De jure belli ac pacis libri tres* (Paris, 1625) [reprint of the edn (Amsterdam, 1646) (Washington, 1913); newly edited by Bernardina Johanna Aritia de Kanter-van Hettinga Tromp (Leiden, 1939). Reprint of this edn (Aalen, 1993); further reprint, edited by Richard Tuck, *The Rights of War and Peace. Hugo Grotius from the Edition by Jean Barbeyrac* (Indianapolis, 2005)], Prologue, nr 18; book I, chap. 1, § 14.

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

[21] Johann Gottlieb Heineccius [Heinecke], *Elementa iuris naturae et gentium* (Halle, 1738) [new edn (Venice, 1791); German version s. t.: *Grundlagen der Natur- und Völkerrechts*, edited by Christoph Bergfeld (Bibliothek des deutschen Staatsdenkens, 2) (Frankfurt, 1994), p. 315].

[22] Leopold Friedrich Fredersdorf, *System des Rechts der Natur auf bürgerliche Gesellschaften, Gesetzgebung und das Völkerrecht angewandt*, §§ 323, 331-334 (Brunswick, 1790), pp. 535, 541-554; Johann Friedrich Schneider [praes.] and Christian Samuel Heuckenrott [resp.], *Jus gentium naturale*. LLD thesis (University of Leipzig, 1729). Christoph Friedrich Schott, *Dissertatio juris naturalis de iustis bellum gerendi et inferendi limitibus*. LLD thesis (Tübingen, 1758). Johann Sigismund Stapff [praes.] and Ferdinand Sebastian von Sickingen Hohenburg [resp.], *Jus naturae et gentium*. LLD thesis (University of Mainz, 1735).

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

[24] Gottfried Achenwall, *Juris naturalis pars posterior*, chap. III (Göttingen, 1763), pp. 215-222.

[25] Joachim Georg Darjes, *Observationes ivris naturalis, socialis et gentium ad ordinem systematis svi selectae*, book VIII, chap. 3 (Jena, 1751), pp. 554-560. Darjes, *Institutiones jurisprudentiae universalis*, new edn (Frankfurt and Leipzig, 1754) [first published in: *Philosophischer Büchersaal* 1 (1742), pp. 520-542, 646-656].

pactitium, consuetudinarium) as fields of positive law not dictated by nature.[26] This complex of positive law among states, in Wolff's view, was a law of reason like natural law, common to all humankind and not tied to any religion. Vienna natural law theorist Carl Anton Martini followed Darjes and named Hugo Grotius as the theorist, who had first described "a positive international law" (zuerst ein positives Völkerrecht as the sum of norms relating to the law among states and resulting from treaties and custom.[27] Consequently, the argument is untenable that Grotius should not have had any significant impact on international law theory during the eighteenth century.[28]

Wolff's position reflected the widening eighteenth-century practice of the conclusion of treaties across religious boundaries. This is put on record not just through the numerous agreements between rulers in Latin Christendom, including the Roman Emperor, on the one side, and Muslim rulers of the so-called "Barbary States"[29] and the Ottoman Turkish Sultan on the other, without the legitimate treaty-making capacity of the signatory parties and the obligation to honour existing agreements being called into question on any side. In addition, the Estado da India, the Portuguese colonial government in South Asia, entered into several agreements with the Mahrattas in the course of the eighteenth century,[30] as did the English East India Company with the Mahrattas, Dholpur, Baroda and Nagpur[31] and the Dutch East India Company with Kandy, Tidore and Johor,[32] whereby the latter treaty even featured a protection clause ("beschermen"),[33] and the French Africa Company in an agreement with the ruler of Tunis.[34] Likewise, there were treaties between Native Americans on the

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

[27] Carl Anton von Martini, *Lehrbegriff des Natur-, Staats- und Völkerrechts*, vol. 4: Welcher das Völkerrecht enthält (Vienna, 1784), pp. 10-11.

[28] Wilhelm Georg Carl Grewe, *Epochen der Völkerrechtsgeschichte*, second edn (Baden-Baden, 1988), p. 257 [*Habilitationsschrift* (University of Königsberg, 1941); first, unpublished printing (Leipzig, 1945); first book trade edn (Baden-Baden, 1984); English edn (Berlin, 2000)]. Joseph Gabriel Starke, 'Grotius and International Law in the Eighteenth Century', in: Charles Henry Alexandrowicz, ed., *Studies in the History of the Law of Nations* (Grotius Society Papers, 3) (The Hague, 1972), pp. 162-176, at p. 173.

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

[30] Edict in the name of the Portuguese Vice-Roy for India on an Agreement with the State of the Mahrattas, Goa, 16 January 1764, in: *CTS*, vol. 42, pp. 475-476. Edict in the name of the Portuguese Vice-Roy for India on an Agreement with the State of the Mahrattas, Goa, 25 December 1764, in: *CTS*, vol. 42, pp. 121-127. Treaty Mahrattas – Portugal, 14 October 1768, in: *CTS*, vol. 44, pp. 217-227.

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

[32] Treaty Kandy – VOC (note 14), pp. 263-269. Treaty Dutch East India Company (VOC) – Tidore, Ternate, 17 December 1783, in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 392-405. Treaty Dutch East India Company (VOC) – Johor, Riow, 10 November 1784, in: *CTS*, vol. 49, pp. 177-187 (Dutch version), pp. 187-196 (French version).

[33] Treaty Johor-VOC (note 32), art. V, p. 180.

[34] Treaty France – Madagascar, 1 April 1775, in: *CTS*, vol. 45, pp. 49-50. Treaty France – Joal, 25 March 1785, in: Dakar: Archives Nationales du Sénégal, 19D1/59; partly printed in: Isabelle Surun, 'Une souveraineté a l'encre sympathique? Souveraineté autochtone et appropriations territoriales dans les traits franco-africaines au XIX^{e} siècle', in: *Annales*, vol. 69, issue 2 (2014), pp. 319-320. Treaty Monomotapa – Portugal, c. 1629, in: Julio Firmino

one side, the Spanish colonial authority,[35] the United Kingdom and the nascent United States of America,[36] even after, in 1763, the Proclamation in the name of King George III had claimed some form of suzerainty ("protectorate") of the British Crown over Native American west of the Apallachian Mountains.[37] The law of treaties among states, according to which signatory parties mutually recognised each other as sovereign equals on the basis of natural law, was the platform for these agreements upon which, in perception of the European parties, no doubt was admissible with regard to the treaty-making capacity of their partners in other parts of the world. There is no evidence that European ruling institutions in any way held doubts about or hesitated to follow this practice of treaty-making. That implies that, even during the eighteenth as during the previous century, the practice of treaty-making transcended the bounds of religion and the borders of continental international systems, resting on the belief in natural law as the common and unset base for the possibility of entering into binding treaty obligations.

At the same time, it became possible to define the law of the Holy Roman Empire as the "specific European international law ... of the German Nation" (besondere europäische Völkerrecht ... der teutschen Nation) and to include in it "the gist of established treaties, containing 1) the mutual rights and obligations of the Empire and the other European states; 2) the mutual rights and obligations among European states; 3) the mutual rights and obligations of the Empire and foreign states." (den

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Judice Biker, ed., *Colleção de tratados*, vol. 1 (Lisbon, 1880), p. 234. On this treaty see: Beatrix Heintze, 'Der portugiesisch-afrikanische Vasallenvertrag in Angola im 17. Jahrhundert', in: *Paideuma* 25 (1979), pp. 195-223. Treaty French Africa Company – Tunis, 24 June 1781, in: *CTS*, vol. 47, pp. 491-493.

[35] Treaty Mapuche – Spain (note 14). Treaty Choctaw – Spain, Movila, 14 July 1784, in: *CTS*, vol. 49, pp. 109-112. On agrrements made out under Spanish colonial rule see: Jörg Fisch, 'Völkerrechtliche Verträge zwischen Spaniern und Indianern', in: *Jahrbuch für Geschichte von Staat, Wirtschaft und Gesellschaft Lateinamerikas* 16 (1979), pp. 245-252.

[36] Treaty Massachusetts Colony – Narragansett, Boston, 22 October 1636, in: Richard S. Dunn and Laetitia Yeandle, eds, *The Journal of John Winthrop. 1630 – 1649. Abridged Edition* (Cambridge, MA, and London, 1996), pp. 104-105. 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 im Nouvelle France* (Schriften zur Rechtsgeschichte 64) (Berlin, 1994), pp. 183-197. Treaty Hottoways/Naneymond/Pamunkey/Waonske – Great Britain, 29 May 1677, in: *CTS*, vol. 14, pp. 257-263. Treaty Maryland/Virigina – Six Nations [Native Americans], Lancaster, PA, 26 June 1744, in: *A Treaty Held at the Town of Lancaster in Pennsylvania by the Honourable the Lieutenant-Governor of the Province, and the Honourable the Commissioners for the Provinces of Virginia and Maryland, with the Indians of the Six Nations, in June 1744* (Philadelphia, 1744); also edited by James H. Merrell, *The Lancaster Treaty* (Boston, 2008). Treaty Seneca – UK, Johnsonhall, 3 April 1764, in: *CTS*, vol. 42, pp. 499-502. Treaty Huronen – UK, Niagara, 18 July 1764, in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 389-391. Treaty Six Nations [Cayuga, Mohawk, Onodaga, Oneida, Seneca, Tuscarora = Haudenosaunee = The People of the Longhouse] – USA, Fort Stanwix, 22 October 1784, in: *CTS*, vol. 49, p. 169; also in: Barbara Graymont, *The Iroquois in the American Revolution* (Syracuse, 1972), pp. 297-280. 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.

[37] 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 edited in: http.//indigenousfoundations.art.ubc.ca/home/g].

Inbegriff der Gesetze [= gesetzte, geschlossene Verträge] 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.)[38] This definition positioned the Holy Roman Empire as the "central point of the European republic and the European balance" (Mittelpunkt der europäischen Republic und des europäischen Gleichgewichts).[39] The European law among states, defined in this way, was equivalent of the law of the "Euroepan system" (europäischen Systems)[40] and of the sovereigns tied together through it. Likewise, it became possible to use the contemporary theory of contractual legitimacy as the means not only of justifying the bindingness of particular mutual obligations among treaty partners but also of the legislation of general legal norms within the law among states. In order to accomplish that goal, theorists availed themselves of an analogy. They argued that, just as the government contract could establish a state within a political community, it was possible to employ treaties in order to convert an original "moral persons" (personae morales) in the state of nature[41] into a community of states tied together by mutually agreed obligations.[42] In this community of states, then, war turned into a regulated public controversy carried out by martial arms. Accordingly, private wars as conflicts among individuals could, as just wars, only occur in the state of nature, whereby eighteenth-century theorists dated the state of nature, they postulated, back to the remote past.[43]

All these arguments and perspectives shared the common assumption that the law of nature and international law emerged from reason and were firm parts of a stabel, even static world. Seventeenth- and eighteenth-century theorists were inclined to present their discourse in a

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

[39] 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. 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); first English edn in: *The Works of Jean-Jacques Rousseau*, vol. 10 (Edinburgh, 1774), pp. 182-191; edited by Charles Edwyn Vaughan, Rousseau, *A Lasting Peace Through the Federation of Europe* (London, 1917), pp. 5-35; also edited by E. M. Nuttall, *Rousseau, A Project of Perpetual Peace* (London, 1927); also in: Stanley Hoffman and David P. Fidler, eds, *Rousseau on International Relations* (Oxford, 1991), pp. 53-100].

[40] Henry Saint-John Viscount Bolingbroke, *Works*, edited by David Mallet, vol. 2 (London, 1754), p. 417 [reprint, edited by Bernhard Fabian (Anglistica et Americana, 13) (Hildesheim, 1968)]. Vattel, *Droit* (note 18), book III, chap. 3, nr 47, pp. 39-40.

[41] Matthias Lutz-Bachmann, '"Das Recht der Autorität". Überlegungen zur Geschichte des Begriffs der "moralischen Person" und der Rechtsperson', in: Eckart Klein and Christoph Menke, eds, *Der Mensch als Person und Rechtsperson. Grundlage der Freiheit* (Berlin, 2011), pp. 109-120.

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

[43] Johannes Ihre [praes.] and Paulus Nöring [resp.], *Dissertatio politica de bello privato* (University of Uppsala, 1751). Isaak Iselin, *Ueber die Geschichte der Menschheit*, vol. 1 (Frankfurt and Leipzig, 1764). 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; Andreas Wexonius, *De bello hominis privato* (Basle, 1742).

mechanicist imagery, thereby representing the world and its parts as complex machines within solid frames. The mechanicist metaphorics dominated the language of politics and law.[44] For one, Thomas Hobbes described the state as a machine body,[45] and Jean-Jacques Rousseau equipped the Holy Roman Empire, he gave out as a machine, with the capability of repairing itself and thus become undestructable.[46] The law among states in Europe was to combine states into a "system", which appeared to be constructed in accordance with the machine model as well.[47] Christian Wolff perceived the entire globe as an unchangeable "*civitas maxima*", existing without human contributions and establishing, legitimising and preserving the sovereignty and legal subjecthood of states in inclusionistic terms and universalistic ones at that. Such inclusionism and universalism of the law among states was not compatible with the trans-Atlantic slave trade and slavery in America,

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[44] For studie see: Arno Baruzzi, *Mensch und Maschine. Das Denken sub specie machinae* (Munich, 1973). Georges Benrekassa, 'Montesquieu et l'imagination mécanique dans l'Esprit des Lois', in: *Revue des sciences humaines* 186-187 (1982/83), pp. 244-252. Roger Clark, 'La cité mécanique. Topographie de l'imaginaire', in: *Revue des sciences humaines* 186-187 (1982/83), pp. 231-239. Karl Wolfgang Deutsch, 'Mechanism, Organism and Society. Some Models in Natural and Social Science', in: *Philosophy of Science* 18 (1951), pp. 230-252. Gotthardt Frühsorge, *Der politische Körper. Zum Begriff des Politischen im 17. Jahrhundert und in den Romanen Christian Weises* (Stuttgart, 1974). Sigfried Giedion, *Mechanization Takes Command* (Oxford, 1948). Heikki Kirkinen, *Les origines de la conception moderne de l'homme machine* (Annales Academiae Scientiarum Fennicae. Series B, vol. 122) (Helsinki, 1960). Michael Landau, 'On the Use of Metaphor in Political Analysis', *Social Research* 28 (1961), pp. 331-343. Klaus Maurice and Otto Mayr, eds, *Die Welt als Uhr* (Munich and Berlin, 1980). Otto Mayr, *Authority, Liberty and Automatic Machinery in Early Modern Europe* (Baltimore and London, 1986). Ahlrich Meyer, 'Mechanische und organische Metaphorik politischer Philosophie', in: *Archiv für Begriffsgeschichte* 13 (1969), pp. 128-147. Dietmar Peil, *Untersuchungen zur Staats- und Herrschaftsmetaphorik in literarischen Zeugnissen von der Antike bis zur Gegenwart* (Münsterische Mittelalter-Schriften, 50) (Munich, 1983), pp. 489-595, 835. Francesca Rigotti, *Metafore della politica* (Bologna, 1989), pp. 61-83. Wolfgang Röd, *Geometrischer Geist und Naturrecht* (Abhandlungen der Bayerischen Akademie der Wissenschaften, Philosophisch-Historische Klasse, N. F., vol. 70) (Munich, 1970). Giuseppa Saccaro-Battisti, 'Changing Metaphors of Political Structure', in: *Journal of the History of Ideas* 44 (1983), pp. 31-54. Carl Schmitt, 'Der Staat als Mechanismus bei Hobbes und Descartes', in: *Archiv für Rechts- und Sozialphilosophie* 30 (1936/7), pp. 622-632. Gérard Simon, 'La machine au XVIIe siècle', in: *Revue des sciences humaines* 186-187 (1982/83), pp. 9-31. Stefan Smid, 'Recht und Staat als Maschine', in: *Der Staat* 27 (1988), pp. 325-350. Barbara Stollberg-Rilinger, *Der Staat als Maschine* (Historische Forschungen, 30) (Berlin, 1986), pp. 101-201 Aram Vartanian, *La Mettrie's L'homme machine* (Princeton, 1960), pp. 57-94. Wolfgang Zuber, 'Die Staatsperson Pufendorfs im Lichte der neueren Staatslehre', in: *Archiv für öffentliches Recht* 30 (1939), pp. 33-70.

[45] Thomas Hobbes, *Leviathan* [London 1651], 'Preface', edited by Crawford Brough Macpherson (Harmondsworth, 1981); further edn by Richard Tuck (Cambridge, 1991), p. 9 (= p. 1 of the original edn).

[46] Rousseau, 'Extrait' (note 39).

[47] Hans Blumenberg, 'Paradigmen zu einer Metaphorologie', in: *Archiv für Begriffsgeschichte* 6, 1960, pp. 7-142. Friedrich Kambartel, '"System" und "Begründung" als wissenschaftliche und philosophische Ordnungsbegriffe bei und vor Kant', in: Jürgen Blühdorn and Joachim Ritter, eds, *Philosophie und Rechtswissenschaft* (Frankfurt, 1969), pp. 100-112. Meyer, 'Metaphorik' (note 44), pp. 147-163. Manfred Riedel, 'System, Struktur', in: Otto Brunner, Werner Conze and Reinhart Koselleck, eds, *Geschichtliche Grundbegriffe*, vol. 6 (Stuttgart, 1990), pp. 285-322. Otto Ritschl, *System und systematische Methode in der Geschichte des wissenschaftlichen Sprachgebrauchs und der philosophischen Methodologie* (Bonn 1906, esp. p. 58. Bernd Roeck, *Reichssystem und Reichsherkommen. Die Duskussion über die Staatlichkeit des Reiches in der politischen Publizistik des 17. und 18. Jahrhunderts* Veröffentlichungen des Instituts für Europäische Geschjichte Mainz, Abteilung für Universalgeschichte, 112 = Beiträge zur Sozial- und Verfassungsgeschichte des Alten Reichs, 4) (Stuttgart, 1984), pp. 30-31, 34. Alois von der Stein, 'Der Systembegriff in seiner geschichtlichen Entwicklung', in: Alwin Diemer, ed., *System und Klassifikation in Wissenschaft und Dokumentation* (Meisenheim, 1968), pp. 3-9. Christian Strub, 'System und Systemkritik in der Neuzeit', in: Joachim Ritter and Karlfried Gründer, eds, *Historisches Wörterbuch der Philosophie*, new edn, vol.10 (Basle, 1998), pp. 825-856.

often in combination with the genocide of Native Americans and their subjection to colonial rule. Nevertheless the execution of these crimes as obvious violations of natural law and of the law among states neither entailed the questioning of the principal validity of basic norms of natural law nor did most of the natural law theorists see a reason to take a critical stance against these crimes. Instead, to the extant that comments came up at all, excuses prevailed to feign justifications for the crimes, such as the concocted argument by theologians John Major and Juan Ginés de Sepúlveda, who claimed that Native Americans would not qualify for the moral status of humanity as they appeared, in their view, to live like animals, or the utilitarian argument used by slave-trader William Snelgrave, who in all seriousness classed deported Africans as prisoners of war at the time, when they were forced to board slave ships, turned them into slaves only after they had been sold on American soil and even suggested that deported Africans as slaves in America could lead better lives than at their homes in Africa. Behind these excuses lurked the dark side of the conventionalism, whose propagandists had long cast doubts on the applicability of natural law beyond the confines of the tricontinental Old World of Africa, Asia and Europe, as represented in medieval *mappaemundi*, and then concluded that the "New World" could not come under the rule of natural law. Although, early in the sixteenth century, Bartolomé de Las Casas had already harshly criticised the denial of the moral status of humankind to Naive Americans, he did defend the trans-Atlantic slave trade and slavery in America. Open criticism of the denial of the moral status of humanity to deported and enslaved Africans arose only early in the eighteenth century, first and foremost in the work by Anton Wilhem Amo from Axim in present-day Ghana, who, in his Halle philosophical doctoral dissertation, demanded the recognition of the moral status of humanity to Africans in the diaspora. However, the limitations of the applicability of natural law beyond the Old World did not exclude the making of treaties among states between European and Native American states during the seventeenth and eighteenth centuries.[48]

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[48] Wolff, *Jus* (note 18). On this issue see: Cavallar, *Rights* (note 18), pp. 208-221. Emmanuelle Jouannet, *Emer de Vattel et l'émergance doctrinale du droit international classique* (Paris, 1998), pp. 86-100. Nicholas Greenwood Onuf, 'Civitas maxima. Wolff, Vattel and the Fate of Republicanism', in: *American Journal of International Law* 88 (1994), pp. 280-303 [reprinted in a modified version in: Onuf, *The Republican Legacy in International Thought* (Cambridge, 1998), pp. 60-70]. Wolfgang Röd, *Geometrischer Geist und Naturrecht* (Abhandlungen der Bayerischen Akademie der Wissenschaften, Philos-Hist. Kl. N. F., vol. 70) (Munich, 1970), p. 139. Walter Schiffer, *The Legal Community of Mankind* (New York, 1954), pp. 68-73. John Major, *In secvndvm librum sententiarvm* (Paris, 1519), fol. CLXXXVII^{r}. Juan de Betánzos, [Revocation of his argument of 1534 that Native Americans are like children and not accessible to missionary efforts, in 1549], edited by Manuel Giménez Fernández, *Fray Bartolomé de Las Casas, Tratado de Indias y el doctor Sepúlveda* (Caracas, 1962), pp. 184-186. Juan Ginés de Sepúlveda, *Juan Ginés de Sepúlveda y su Crónica Indiana*, edited by Demetrio Ramos, Lucio Mijares and Jonas Castro Toledo (Valladolid, 1976), pp. 201-202. Cajetan [Tomasso de Vio aus Gaeta, Kardinal], *Sancti Thomae Aquinatis doctoris angelica opera omnia cum commentariis*, vol. 9 (Rome, 1897), p. 94. Bernardino de Sahagún, *Historia general de la cosas de Nueva España*, edited by Angel María Garibay, vol. 1 (Mexico City, 1969), p. 27. Bartolomé de Las Casas, *Aqui se contiene vna disputa o controueris entre el obispo don fray Bartholome de las Casas o Casaus Obispo que fue dela ciudad Real de Chiapa que es en las Indias parte dela nueva España, y el doctor Gines de Sepulueda Coronista del emperador nuestro señor, sobre que el doctor contendia que las conquistas delas Indias contra los Indios eran licitas y el Obispo por el contrario defendío y affirm auer si do y ser impossible no serlo tiranicas, injustas y iniquas* (Valldolid, 1552) [new edn (Barcelona, 1646); reprint of the edn

2. International Law and Biologism

Adherence to the perception of the world as a static entity did, however, encounter increasing dissatisfaction, even resistance, towards the end of the eighteenth century.[49] Ever more evidence appeared to be irreconcilable with mechanicist theoretical propositions. Whereas the world appeared to have existed for little more than a total of 6000 years in theoretical chronological calculation up until the 1750s,[50] from then on the time dimension, in which natural scientists placed the world,

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(Barcelona, 1646) (Zug, 1985); also edited in: (Biblioteca de derecho internacional y ciencias auxiliares, 2) (Madrid, 1908)]. Las Casas, [Apologia, um. 1552. Hs. Paris: Bibliothèque nationale de France, Fonds Lat. 12926]. English version s. t.: *In Defense of the Indians. The Defense of the Most reverend Lord, Don Fray Bartolomé de Las Casas, of the Order of Prechers, Late Bishop of Chiapa, against the Persecutors and Slaunderers of the Peoples of the New World Discovered across the Seas*, edited by Stafford Poole (DeKalb, IL, 1992). On these texts see: Lewis Hanke, *All Mankind is One. A Study of the Disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians*（DeKalb, IL, 1974). William Snelgrave, *A New Account of Some Parts of Guinea and the Slave-Trade* (London, 1734), pp. 157-165. Anton Wilhelm Amo, *De iure Maurorum in Europa* [Ph. D. thesis (University of Halle, 1729), the printed version has, apparently, been lost; the report about the theis defense, including a review of the contents by Johann Peter von Ludewig, is extant in: *Wöchentliche Hallische Frage- und Anzeigungs-Nachrichten* (28 November 1729)]. On Amo see, among others: Burchard Brentjes, *Antonius Guilelmus Amo Afer in Ghana. Student, Doktor der Philosophie, Magister Legens an den Universitäten Halle, Wittenberg, Jena. 1727 – 1747*, 2 vols (Halle, 1968). Brentjes, 'Anton Wilhelm Amo in Halle', in: *Mitteilungen des Instituts für Orientforschung* 15 (1969), pp. 57-76. Brentjes, *Anton Wilhelm Amo. Der schwarze Philosoph in Halle* (Leipzig, 1976). Brentjes, ed., *Der Beitrag der Völker Afrikas zur Weltkultur. Materialien einer wissenschaftlichen Arbeitstagung zu Ehren des Philosophen Anton Wilhelm Amo (1727 – 1747 in Halle, Wittenberg und Jena)* (Wissenschaftliche Beiträge der Martin-Luther-Universität Halle-Wittenberg, Series I. 1997, Nr 32) (Halle, 1977). Brentjes, 'Anton Wilhelm Amo zwischen Frühaufklärung und Pietismus', in: Gerhard Höpp, ed., *Fremde Erfahrungen. Asiaten und Afrikaner in Deutschland* (Zentrum Moderner Orient-Studien 4) (Berlin, 1996), pp. 29-33. On treaties between Native American and European states see above, notes 14, 35, 36.

[49] Johann Gottlieb Fichte, 'Beitrag zur Berichtigung der Urteile des Publikums über die Französische Revolution [(Gdansk, 1793)]', in: Fichte, *Schriften zur französischen Revolution* (Leipzig, 1988), pp. 37-270, at pp. 91, 93-94 [Microfiche edn of the original edn (Munich, 1990); also edited by Reinhard Strecker (Leipzig, 1922)]. Woldemar Friedrich von Schmettow, *Patriotische Gedanken eines Dänen über stehende Heere, politisches Gleichgewicht und Staatsrevolution*, second edn (Altona, 1792) [first published (Altona, 1792)], pp. 57-58, rejected, with an eye on the Old World, balance-of-power politics as "Charlatanerey" committed by government officials.

[50] Georg Horn, *Dissertatio de vera aetate mundi* (Leiden, 1659). Benjamin Hederich, *Anleitung zu den fürnehmsten Historischen Wissenschaften* (Berlin, 1709), pp. 99-110. Giambattista Vico, *Principij di scienza nuova d'intorno alla commune natura delle nazione* (Naples, 1744), s. p.: "Tavola cronologica". Johann Christoph Gatterer, 'Vom historischen Plan und der darauf sich gründenden Zusammenfügung der Erzählungen', in: Gatterer, ed., *Allgemeine historische Bibliothek*, vol. 1 (Halle, 1767), pp. 15-89 [also edited in: Horst Walter Blanke and Dirk Fleischer, eds, *Theoretiker der deutschen Aufklärungshistorie*, vol. 1 (Fundamenta historica, vol. 1) (Stuttgart, 1990), pp. 621-662]. Gatterer, *Einleitung in die synchronistische Universalhistorie zur Erläuterung seiner synchronistischen Tabellen* (Göttingen, 1771). August Ludwig von Schlözer, *Vorstellung seiner Universalhistorie* (Göttingen and Gotha, 1772), p. 52 [reprint, edited by Horst Walter Blanke (Beiträge zur Geschichtskultur, 4) (Hagen, 1990)]. Thomas Burnett, *Sacred Theory of the Earth* (London, 1681), p. 273 [reprint, edited by Basil Willey (Carbondale, IL, 1965)]. John Beaumont, *Considerations on a Book Entituled The Theory of the Earth* (London, 1693). James Hutton, *Theory of the Earth*. Reprint, edited by Victor A. Eyles and George W. White (Darien, 1970), pp. 125, 128 [first printed in: *Transactions of the Royal Society of Edinburgh*, vol. 1, part 2 (1788), pp. 209-304]. Thomas Robinson, *The Anatomy of the Earth* (London, 1695). John Woodward, *An Essay toward a Natural History of the Earth* (London 1695 [second edn (London, 1702); third edn (London, 1723)]. On these texts see: Dennis R. Dean, *James Hutton and the History of Geology* (Ithaca and New York, 1992). Ruth Groh and Dieter Groh, 'Zum Wandel der Denkmuster im geologischen Diskurs des 18. Jahrhunderts', in: *Zeitschrift für historische Forschung* 24 (1997), pp. 575-604. Michael Kempe, 'Die Sintfluttheorie von Johann Jakob Scheuchzer', in: *Zeitschrift für*

grew exponentially to three million and more years during the 1780s extending back into the past.[51] Whereas organic nature seemed to be representable as an unchangeable system of species to the 1760s,[52] it turned into a laboratory for change thereafter.[53] Whereas the view had prevailed until the 1780s that "revolutions" were either regular movements of the stars[54] or types of political and government action with limited effect and designed to preserve long-held traditions,[55] from the late

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Geschichtswissenschaft 44 (1996), pp. 485-501. David Oldroyd, *Thinking about the Earth. A History of Ideas in Geology* (London, 1996). Martin John Spencer Rudwick, *The Meaning of Fossils*, second edn (Chicago and London, 1985) [first published (London, 1972)]. Donald J. Wilcox, *The Measurement of Time. Pre-Newtonian Chronologies and the Rhetoric of Relative Time* (Chicago and London, 1987).

[51] Georges Louis Le Clerc, Comte de Buffon, *Les époques de la nature* (Buffon, Œuvres complètes, vols 9, 10) (Paris, 1778).

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

[53] Johann Gottfried Herder, *Ideen zur Philosophie der Geschichte der Menschheit* [1784-1791], edited by Bernhard Suphan, in: Herder, *Sämmtliche Werke*, vol. 13 (Berlin, 1887), pp. 261-262.

[54] Nikolaus Kopernikus, *De revolutionibus [orbium coelestium] libri sex*, edted by Heribert Maria Nobis and Bernhard Sticker (Kopernikus, Gesamtausgabe, vol. 2) (Hildesheim, 1984) [first printed edn (Nuremberg, 1543)]. On the terminology see: Reinhart Koselleck, Christian Meier, Jörg Fisch and Neithard Bulst, 'Revolution', in: Otto Brunner, Werner Conze and Reinhart Koselleck, eds, *Geschichtliche Grundbegriffe*, vol. 5 (Stuttgart, 1984), pp. 653-788, at pp. 714-717.

[55] *Historischer Discurs von alten und neuern Staats-Revolutionen in den vornehmsten Reichen und Herrschaften des bewohnten und bekannten Erd-Krayses* (Frankfurt, 1735), p. 2: in this statistical survey, the waxing and waning of nations shall be described. Gottfried Achenwall, *Vorbereitung zur Staatswissenschaft der heutigen europäischen Reiche und Staaten* (Göttingen, 1748), p. 10. David Hume, 'Of National Characters', in: Hume, *Essays Moral, Political and Literary*, edited by Thomas Hill Green and Thomas Hodge Grose, vol. 1 (London, 1882), pp. 244-258 [reprint (Aalen, 1964)], p. 244. Steeb, *Versuch* (note 43), pp. 100-101. Georg Andreas Will, 'Einleitung in die historische Gelahrtheit und die Methode, die Geschichte zu lehren und zu lernen [Hs. Nürnberg: Stadtbibliothek, Nachlass Will (Bibliotheca Norica Williama), V.612ª; 1766]', edited by Horst Walter Blanke, 'Georg Andreas Wills "Einleitung in die historische Gelahrtheit" (1766) und die Anfänge moderner Historik-Vorlesungen in Deutschland', in: *Dilthey-Jahrbuch für Geschichte der Geisteswissenschaften* 2 (1984), pp. 222-265 [also in: Horst Walter Blanke and Dirk Fleischer, eds, *Theoretiker der deutschen Aufklärungshistorie*, Bd 1 (Fundamenta historica, Bd 1) (Stuttgart, 1990), pp. 313-350, at p. 320]. Gatterer, 'Plan' (note 50), pp. 62-63. Gatterer, *Einleitung* (note 50), part I, pp. 1-8: „Vorerinnerung", at o. 1: "die Historie der grösern Begebenheiten, der Revolutionen." Schlözer, *Vorstellung* (note 50), p. 1. Friedrich Carl von Moser, *Patriotische Briefe* (s. l., 1767), p. 32: the German constitution has "unter allen Revolutionen und Abwechslungen sich noch immer so erhalten". Ferdinand Friedrich von Nicolai, Betrachtungen über die vorzüglichsten Gegenstände einer zur Bildung angehender Officiers anzuordnenden Kriegsschule [Ms. Stuttgart: Württembergische Landesibliothek, Cod. Milit. 2º 33 (1770), fol. 235ᵛ], hrsg. von Daniel Hohrath, in: *Militärgeschichtliche Mitteilungen* 41 (1992), pp. 115-141, at p. 123. Johann Georg Wiggers, 'Versuch, die verschiedenen Pflichten eines Geschichtsschreibers aus einem Grundsatze herzuleiten', in: Ders., *Vermischte Aufsätze* (Leipzig, 1784), pp. 1-73 [also in: Blanke, *Theoretiker* (as above), pp. 429-452, at p. 451]. Gottlob David Hartmann, 'Ueber das Ideal einer Geschichte', in: *Der Teutsche Merkur* 6 (1774), pp. 195-213 [reprinted in: Hartmann, *Nachgelassene Schriften*, edited by Christian Jakob Wagenseil (Gotha, 1779), pp. 245-270; also in: Blanke, *Theoretiker* (as above), pp. 688-697, at p. 689]. Claude François Xavier Millot, *Universalhistorie alter, mittlerer und neuer Zeiten, deutsche Fassung*, edited by Wilhelm Ernst Christiani, part 9 (Leipzig, 1787) [first published (Paris, 1772-1773); English version (London, 1779)]. Ewald Graf von Hertzberg, 'Mémoire sur les révolutions des états, externes, internes et religieuses [1786/87]', in: *Mémoires de l'Académie Royale* (Berlin, 1791), pp. 665-673. Johann Friedrich Freiherr von und zu Mansbach, *Gedanken eines norwegischen Officiers über die Patriotischen Gedanken eines Dänen über stehende Heere, politisches Gleichgewicht und Staatsrevolution* (Copenhagen, 1794). Schmettow, *Gedanken* (note 49), p. 111: "Nimmt man bey Beurtheilung der Revolutionen die Geschichte zu Hülfe, so zeigt sich, daß es zweyerley Arten von Revolutionen giebt, die von jeher Statt gefunden haben und in Zukunft immer Statt finden werden, nemlich die sanfte durch bloße Aufklärung bewirkte und die gewaltsame durch Empörung." Schmettow, *Erläuternder Commentar zu den Patriotischen Gedanken* (Altona, 1793). For a statement regarding the need zo promote change in ther aftermath of urban rebellions and under the goal of restoration the "age-old form of government" (uralten Regimentsform) see, for example, the report on the activities of an imperial commission dispatched to Hamburg in

1780s, "revolutions" came to be fundamental, quick and violent replacements of an existing system of state government by a new one.[56] Whereas, up until the 1790s, the practice of returning in peace

1708 with the mandate to end "all abuses and counteractions having sneeked in any way into the magistrate as well as the citizenry against the age-old form of government" (alle gegen die uralte Regimentsform irgend, von Seiten E. E. Magistrat sowohl als der Bürgerschaft eingeschlichene Mißbräuche und Contraventionen); in: Heinrich Hübbe, *Die kaiserlichen Commissionen in Hamburg* (Hamburg, 1855), pp. 124-125. Willibald Steinmetz, '40 Jahre Begriffsgeschichte. *The State of the Art*', in: Heidrun Deborah Kämper and Ludwig M. Eichinger, eds, *Sprache – Kognition – Kultur. Sprache zwischen mentaler Struktur und kultureller Prägung* (Institut für Deutsche Sprache, Jahrbuch 2007) (Berlin and New York, 2008), pp. 174-197, at pp. 188-189, misjudged the political sgnificance of the word *revolution* as a term for major transforming occurrences during the seventeenth and eighteenth centuries, when he seeks to derive fears of authorities of coordinated acts of unrest and rebellion from evidence dated c. 1800 and featuring the then novel concept of revolution: "Der Frühneuzeithistoriker Andreas Suter hat diesen Vorgang ["Das zur Verfügung stehende Vokabular reicht nicht mehr aus, um das 'Unerhörte' des Neuen begrifflich zu fassen."] an einem schönen Beispiel, den sprachlichen Reaktionen der Beteiligten auf den Schweizer Bauernkrieg von 1653, verdeutlicht. Als die Bauernaufstände begannen, reagierten die Obrigkeiten in den Schweizer Kantonen gelassen; sie meinten, es handele sich um eine der üblichen 'Unruhen', 'Revolten' oder 'Widersetzlichkeiten', die ihnen vertraut waren und für deren Niederschlagung sie Routinen entwickelt hatten. Die Ausweitung des Aufstandes auf weite Teile der Schweiz jagte den Obrigkeiten jedoch panischen Schrecken ein. ... Und genau in dieser Situation, in der etwas geschah, was sie sich vorher 'nyt hetten ynbilden können', begannen die Obrigkeiten nun, die Unruhen' anders zu bezeichnen, nämlich als 'Generalverschwörung' oder – und das war sogar im europäischen Rahmen eine begriffliche Innovation – als 'Revolution' [Andreas Suter, 'Kulturgeschichte des Politischen – Chancen und Grenzen', in: Barbara Stollberg-Rilinger, ed., *Was heißt Kulturgeschichte des Politischen?* (Zeitschrift für Historische Forschung, Beiheft 35) (Berlin, 2005), pp. 27-55, 32-32]. ... // Worin nun der Mehrwert des Worts 'Revolution' gegenüber den älteren Bezeichnungen ‚Unruhe', 'Revolte' usw. in der Situation des Schweizer Bauernkriegs bestand, vermag ich mangels empirischer Sachkenntnis nicht zu sagen. Allgemein lässt sich vermuten, dass der höhere Grad an Abstraktion, der im Bild der *revolutio* enthalten war, ein Grund für die Wahl gerade dieses (metaphorischen) Ausdrucks war." The parallel is, self-evidently, the British "Glorious Revolution" of 1689.

[56] Nicolaus [Niklas] Vogt, *Anzeige wie wir Geschichte behandelten, benutzten und darstellen werden bei Gelegenheit der ersten öffentlichen Prüfung der philosophischen Klasse* (Mainz, 1783), p. 3. Edmund Burke, 'Thoughts on French Affairs [1791]', in: Burke, *The Works*, vol. 3 (London, 1903), pp. 347-393, at p. 358: "It is in these [den kirchlichen Kurfürstentümern] electorates [innerhalb des Heiligen Römischen Reichs] that the first impressions of France are likely to be made, and if they succeed, it is over with the Germanic body [according to Kurt von Raumer, 'Absoluter Staat, korporative Libertät, persönliche Freiheit', in: *Historische Zeitschrift* 183 (1957), pp. 55-96, at p. 76, a term for the Empire used in eighteenth-century diplomatic jargon] as it stands at present. A great revolution is preparing in Germany; and a revolution, in my opinion, likely to be more decisive upon the general fate of nations than that of France itself; other than as in France is to be found the first source of all the principles, which are in any way likely to distinguish the troubles and convulsions of our age. If Europe does not conceive the independence and the equilibrium of the empire to be the very essence of the system of balanced power in Europe, and if the scheme of public law, or mass of laws, upon which that independence and equilibrium are founded, be of no leading consequence, as they are preserved or destroyed, all politics of Europe for more than two centuries have been miserably erroneous." Friedrich Julius Stahl, *Was ist die Revolution?* (Berlin, 1852) [second edn (Berlin, 1852); third edn (Berlin, 1853)], p. 3: "Die Revolution ist nicht ein einmaliger Akt. Sie ist ein fortdauernder Zustand, eine neue Ordnung der Dinge. Empörung, Vertreibung der Dynastie, Umsturz der Verfassung hat es zu allen Zeiten gegeben. Die Revolution aber ist die eigenthümliche weltgeschichtliche Signatur unseres Zeitalters."; p. 4: "Revolution ist die Gründung des ganzen öffentlichen Zustandes auf den Willen des Menschen statt auf Gottes Ordnung und Fügung, daß alle Obrigkeit und Gewalt nicht von Gott sei, sondern von dem Menschen, vom Volke." Georg Friedrich Wilhelm Roscher, *Politik. Geschichtliche Naturlehre der Monarchie, Aristokratie und Demokratie* (Stuttgart, 1891) [second edn (Stuttgart, 1892; 1893); third edn (Stuttgart, 1908)], pp. 14-15: "Daß jede Revolution, auch wenn die von ihr bewirkte Veränderung noch so sehr Bedürfniß war, doch an sich ein ungeheueres Unglück ist, eine schwere, zuweilen tödtliche Krankheit des Volkslebens: das leuchtet von selbst ein. Der sittliche Schaden, welchen der Anblick siegenden Unrechts fast immer stiftet, kann gewöhnlich erst im folgenden Menschenalter wieder heilen. … // Daher die bekannte Thatsache, daß in revolutionärer Zeit so häufig die Schlechtesten siegen. Jene Gegenrevolution, welche der Revolution gerne folgt, und zwar oft mit entsprechender Heftigkeit, ist eine Genugthuung nur für den ganz Kurzsichtigen. Sie läßt die Krankheit, nämlich die Gewöhnung des Volkes an Rechtswidrigkeiten, fortdauern, ja die bisher noch gesunden Organe mitergreifen." On the concept of revolution see: Ernst Wolfgang Becker, *Zeit der Revolution! – Revolution der Zeit?*

treaties to the status quo ante positioned as having existed prior to the beginning of a war, criticism of this practice was mounting at the end of the century with the argument that conflicts which had precipitated war, could not be removed from the world in this way.[57]

In short, during the second half of the eighteenth century, not only did confidence in the stability of the world wane step by step, but also doubts became vocal that the maintenance of the stability of the world was desirable at all. In this context, international legal theorists revoked the proposition that international law should be taken to be part of natural law. They now took the view that natural law was purely speculative, pieced together from legal norms that only existed in legal textbooks but not in practice, would not come into existence through legislative and government executive action and, by consequence, were not legitimate and could not be enforced at that.[58] Late in the eighteenth century, international legal theorists had initially opposed the suspicion that international law could be abused for the concoction of ideologies with the argument that the conclusion of treaties among states, as a rule bilateral agreements, would form "sources" of international law, and they had promoted the publication of voluminous printed collections of treaties to be made available to everybody everywhere and for all times.[59] Needless to say that treaties had been publicly available in print from the sixteenth century in contents lists,[60] but it was only late in the eighteenth century that the systematic and continuous listing of all open treaties became habitual.[61] Making treaties public could, obviously, not *eo ipso* guarantee their binding force. But at least, a record was existing showing which government had taken up what treaty obligation when and with whom.

Nevertheless, nineteenth-century theorists of contractual law took a step further in specifying the

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Zeiterfahrungen in Deutschland in der Ära der Revolutionen. 1789 – 1848/49 (Kritische Studien zur Geschichtswissenschaft, 129) (Göttingen, 1999), pp. 38-48. Karl-Heinz Bender, *Revolutionen. Die Entstehung des politischen Revolutionsbegriffs in Frankreich zwischen Mittelalter und Aufklärung* (Munnich, 1977), pp. 149-183. Karl Griewank, *Der neuzeitliche Revolutionsbegriff* (Weimar, 1955), pp. 187-209 [second edn (Frankfurt,' 1969); third edn (Hamburg, 1992)]. Koselleck, 'Revolution' (note 54), pp. 653, 714-718, 721-726. Koselleck, 'Historische Kriterien des neuzeitlichen Revolutionsbegriffs', in: Koselleck, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten* (Frankfurt, 1979), pp. 67-86. Franz Wilhelm Seidler, *Die Geschichte des Wortes Revolution*. Ph. D. thesis, typescript (University of Munich, 1955).

[57] Georg Friedrich von Martens, *Einleitung in das positive Völkerrecht, auf Verträge und Herkommen gegründet* (Göttingen, 1796), p. 12 [first published s. t.: *Précis du droit des gens moderne de l'Europe fondée sur les traités et l'usage* (Göttingen, 1789); English version (Phildaelphia, 1795)].

[58] John Austin, *The Province of Jurisprudence Determined* (London, 1832) [newly edited byHerbert Lionel Adolphus Hart (London, 1954); seconed edn of Hart's edn (Burt Franklin Research and Source Works Series, 569 = Selected Essays in History, Economics and Social Science, 185) (New York, 1970); also edited by Wilfrid E. Rumble (Cambridge, 1995); and by David Campbell (Dartmouth, 1998)], edn by Hart (1954), pp. 237-239.

[59] Georg Friedrich von Martens, *Über die Erneuerung der Verträge in den Friedensschlüssen der Europäischen Geschichte* (Göttingen, 1797).

[60] Jean du Tillet Sieur de la Bussière, *Recueil des guerres et des traictés de paix* (Paris, 1588).

[61] Georg Friedrich von Martens, *Recueil des principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce … conclus par les puissances de l'Europe depuis 1761*, Series I, 7 vols (Göttingen, 1791-1801); Supplements, 4 vols (Göttingen, 1802-1808); *Nouveau Recueil* (Göttingen et al., 1817-1907) reprint (New York, 1967)].

procedures leading to the validification of treaties among states. They refused to derive this type of contractual law from the law of nature; instead, they sought to position some positive law above the law of treaties as a "source". Because there could not be any formal legislative process in the international arena above statesand as the usual type of bilateral agreements could bind only their signatory parties, the legal norms constituting the "source" of contractual law could only be stipulated in a specific type of agreements, ranked as capable of setting general procedural norms for the conclusion of treaties. This specific, legislative type of agreements,[62] however, in contradistinction against conventional natural law, could no longer be claimed to be a priori universal in scope, because it had to find approval by governments of states before it could achieve validity. Theorists advocating this novel approach to contractual law during the nineteenth and early twentieth centuries agreed that no possibility existed of subjecting all states of the globe to one single contractual legislative agreement setting rules for the making and validification of treaties among states. Consequently, these theorists brought on the agenda of international politics the demand that some club of states as the "Family of Nations" should be established, in which rulers and governments had agreed to implement procedural norms of contractual law and lay down thier agreement in binding agreements under international law. Theorists restricted membership in this club to the Christian states of Europe and ascribed to them "civilisation" as the basis for abidance by contractual law.[63]

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[62] Thus the phrasing in late nineteenth-century legal diction by: Karl Magnus Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (Tartu, 1876), pp. 77-101.

[63] Theodor Anton Heinrich von Schmalz, *Das europäische Völkerrecht* (Berlin, 1817) [reprint (Frankfurt, 1970); Italian version, 2 vols (Pavia, 1821)], pp. 4-5: "Völker-Stämme aber, welche noch nicht Eigenthum am Grundboden erworben haben, – und dies wird, wie alles Eigenthum, nach natürlichem Rechte, nur durch Bearbeitung erworben – können durch ihren Verein zu bürgerlicher Gesellschaft nicht alle Rechte schützen, deren der Mensch fähig ist. Denn sie können, stets in den Wüsten umherschweifend, grade das Eigenthum am Grundboden nicht schützen und gewähren. Und dies Recht, des Ackerbaues Mutter und Tochter zugleich, ist gleichwohl das wichtigste aller erworbenen Rechte der Menschen, weil alle Ausbildung der Menschheit darauf bedingt ist. Darum hat auch unsre Sprache die Vereine der Völker ohne Grundeigenthum durch den Namen der Horden von den Staaten, als Vereine der Völker mit Grundeigenthum unterschieden. Ein Staat kann nicht ohne bestimmtes Gebiet gedacht werden, worin er seiner Mitbürger Freiheit gegen Uebel der Natur oder Bosheit der Menschen schirmet: und darum unterwirft sich jeder, mit dem Schreiten in seine Grenzen, auch nothwendig seinen Gesetzen." Julius Schmelzing, *Systematischer Grundriß des praktischen europäischen Völker-Rechtes*, § 3, vol. 1 (Rudolstadt, 1818), pp. 4-5: "Der Staat als politischer Körper bedarf eines physischen Haltpunkts. Ohne Gebiet ist kein Staat denkbar. Daher wird ein unherschweifender Verein von Menschen ohne Grundeigenthum, ohne bestimmtes Gebiet, Horde genannt. Mit dem Worte: Nation bezeichnet man ein Volk, in wieferne sich dasselbe von einem andern durch seine Kultur, Sitten, Lebensweise, physische Eigenthümlichkeiten, geistige Bildung u. s. w. unterscheidet. Daher die Benennung: Nationalität – Volksthümlichkeit. Durch die Bezeichnung: Staat wird gewöhnlich das schon constituirte Gemeinwesen angedeutet – das Volk – als eine moralische Person – wenn auch repräsentirt durch ein Staatsoberhaupt. Die Begriffe von Nationalität und politischer Konstitution sind in der Bezeichnung: Volk vereint, obgleich dieses Wort sehr oft auch nur allein zur Bezeichnung der sogenannten Volksthümlichkeit gebraucht wird." Henry Wheaton, *Elements of International Law*, English edn, third edn, edited by Alexander Charles Boyd (London, 1889) [second edn (London, 1880); third edn (London, 1889); first published (London and Philadelphia, 1836); third US edn (Philadelphia, 1846); newly edited by William Beach Lawrence (Boston, 1855); second edn of Lawrence's edn (Boston and London, 1863); edighth edn, edited by Richard Henry Dana (Boston and London, 1866); first English edn, edited by Alexander Charles Boyd (London, 1878); 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

By consequence, the range of the validity of international law, which Christian Wolff had still projected as global in kind, had shrunk to states in Europe and the European settler colonies in America and the South Pacific. From the turn twoards the nineteenth century, the neologism of "international law" came into use for this newly defined positive law, first in English, then in Spanish and thereafter in several further European languages.[64] The club of states no longer counted as an institution dictated by nature, but derived its origin from the activities of governments of European states tied together in it. The admission of new members appeared to be possible through cooptation by agreement from already existing members. In accordance with nineteenth-century biologism, the club of states seemed to embrace its members like a living body encompasses its organs. As late as in 1987, sociologist Niklas Luhmann could claim with unabashed matter-of-factliness that it made "little sens to say that societies were no organisms or to distinguish, in the sense of school tradition, between organic bodies (consisting of coherent parts) and societal bodies (consisting of non-coherent parts)." (wenig sinnvoll zu sagen, Gesellschaften seien keine Organismen oder im Sinne der Schultradition zwischen organischen Körpern (bestehend aus zusammenhängenden Teilen) und gesellschaftlichen Körpern (bestehend aus unzusammenhängenden Teilen) zu unterscheiden). Luhmann thus equated what he termed "social systems" with living bodies and, like Schopenhauer, used the word "organ" for the purpose of denominating a totality "of coherent parts". In doing so, Luhmann, however, no longer limited the scope of his claim to abstract thoughts but included apparently concret social systems of all kinds, from local "systems of elementary interaction" (Systemen elementarer Interaktion) established ad hoc, to global or les-than-global world systems as the largest thinkable connectives and independently of the time and place of their respective existence. Luhmann gave out the transformation of the meaning of system

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(New York, 1972); reprint of the edn by Dana, edited by George Crafton Wilson (Oxford, 1936); reprint of this edn (New York, 1972); reprint fo the edn by Dana (New York, 1991); Chinese version, edited by William Alexander Parsons Martin (= Wei-Liang Ding) s. t.: *Wànguó gōngfǎ* (The Public Law of the Ten Thousand States), 1864], second edn by Lawrence, p. 16: "Is there a uniform law of nations? There certainly is not the same one for all nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or those of European origin. This distinction between the European law of nations and that of the other races of mankind has long been remarked by publicists [e. g., Grotius, *De Jure belli ac pacis* (Paris, 1625), lib. I, cap. 1, § XIV.4]." For criticisms of this statement see: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005), pp. 53-65. Brett Bowden, *The Empire of Civilization. The Evolution of an Imperial Idea* (Chicago, 2009), pp. 129-159. Harald Kleinschmidt, *Geschichte des Völkerrechts in Krieg und Frieden* (Tübingen, 2013), pp. 295-300. Frédéric Mégret, 'From "Savage" to "Unlawful Combatants". A Post-Colonial Look at International Humanitarian Law's "Other"', in: Anne Orford, ed., *International Law and Its Others* (Cambridge, 2006), pp. 265-317.

[64] Apparently first recorded in: Jeremy Bentham, 'Principles of International Law [1786 – 1789]', in: *The Works of Jeremy Bentham*, edited by John Bowring, vol. 2 (London, 1838), pp. 535-560 [reprint (New York, 1962)]. A further early record is in: Andres Bello, *Principios de derecho de jentes*, § 1 (Santiago de Chile, 1832), p. 1: "El derecho internacional o de jentes es la colección de las leyes o reglas generales de conducta que las naciones deben oberservar entre sì para su seguridad y bienstar comun." Early record in German texts: August Michael von Bulmerincq, *Das Völkerrecht oder das internationale Recht*, second edn (Freiburg, 1889) [first published (Freiburg, 1887)].

as a negligible matter of the history of terminology: In his view, former theorists, who had used the word *systema* from Antiquity, had realised that "the whole was the totality of its parts" (das Ganze die Gesamtheit der Teile); but they had not been able to explain how "the whole" "could be brought to fruition at the level of the parts" (auf der Ebene der Teile als Einheit zur Geltung gebracht werden könne). That possibility, Luhmann argued, had become available only "during the transition to modern society" (im Übergang zur modernen Gesellschaft), that means, under the dominance not of the additive mechanistic but the integrative biologistic model of the system.[65] Luhman thus levelled up to general systems theory an argument that had been popular in nineteenth-century European political and legal discourse.

In line with that same argument, governments as members of the European club of states not merely faced the task of applying international law within the club of states but also enforce that law all across the globe in what they perceived as an anarchical international system and either through diplomatic means, that is through the conclusion of legislative agreements on the enforcement of the norms of the law of treaties among states valid within the club, or through military force, that means through the subjection of the losing side under the norms of the law of the same club,[66] even without

[65] *Locus classicus* for the biologistic imagery in political and legal diction is: Otto von Gierke, *Das Wesen der menschlichen Verbände. Rede bei Antritt des Rektorats am 15. Oktober 1902* (Leipzig, 1902), p. 12: "Die organische Theorie betrachtet den Staat und die anderen Verbände als soziale Organismen. Sie behauptet also das Dasein von Gesamtorganismen, deren Teile die Menschen sind, über den Einzelorganismen."; p. 13: "Wir sprechen von einem gesellschaftlichen Körper oder einer Körperschaft, von dem Haupte und den Gliedern eines Verbandes, von seiner Organisation, seinen Organen und deren Funktionen, von Einverleibung oder Eingliederung u. s. w. Eine Ähnlichkeit muss also vorhanden sein." For the reception of biologism in sociological theory see: Niklas Luhmann, *Soziale Systeme* (Frankfurt, 1987), pp. 17, 20-21. On biologism see: F. Barnard, 'Metaphors, Laments and the Organic Comments', in: *Canadian Journal of Economics and Political Science* 32 (1966), pp. 281-301. Ernst-Wolfgang Böckenförde, 'Der Staat als Organismus', in: Böckenförde, *Recht, Staat, Freiheit* (Frankfurt, 1991), pp. 263-272. Helmut Coing, 'Bemerkungen zur Verwendung des Organismusbegriffs in der Rechtswissenschaft des 19. Jahrhunderts in Deutschland', in: Gunter Mann, ed., *Biologismus im 19. Jahrhundert* (Studien zur Medizingeschichte des neunzehnten Jahrhunderts 5) (Stuttgart, 1973), pp. 147-157 Francis William Coker, *Organismic Theories of the State* (New York, 1910). Karl M. Figlio, 'The Metaphor of Organization', in: *History of Science* 14 (1976), pp. 17-53. Erich Kaufmann, 'Über den Begriff des Organismus in der Staatslehre des 19. Jahrhunderts', in: Kaufmann, *Rechtsidee und Recht* (Göttingen, 1960), pp. 46-66. Gunter Mann, 'Medizinisch-biologische Ideen und Modelle in der Gesellschaftslehre des 19. Jahrhunderts', in: *Medizinhistorisches Journal* 4 (1969), pp. 1-23. Tadeusz Rachwał / Tadeusz Sławek, eds, *Organs, Organism, Organizations. Organic Form in the 19th-Century-Discourse* (Frankfurt, 2000). Judith E. Schlanger, *Les métaphores de l'organisme* (Paris, 1971). James Weinstein, *The Corporate Ideal in the Liberal State. 1900 – 1918* (Boston, 1968). Among the few sceptical or even critical nineteenth-century authors are: Carl Friedrich Wilhelm von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts*, second edn (Leipzig, 1869) [first published (Leipzig, 1865); third edn (Leipzig, 1880); reprint of this edn (Aalen, 1969)], third edn, pp. 217-225: "Beilage I. Der Staat als Organismus". Albert Theodor van Krieken, *Über die sogenannten organischen Staatstheorien. Ein Beitrag zur Geschichte des Staatsbegriffes* (Leipzig, 1873), esp. pp. 130-141.

[66] For examples of the application of diplomatic pressure see: Treaty Sierra Leone – UK, 22 August 1788, in: *CTS*, vol. 50, pp. 361-362 [transmitted in the form of an 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 the settlement of Freetown]. Treaty North Bulloms (Sierra Leone) – UK, 2 August 1824, in: *CTS*, vol. 74, pp. 389-393. Treaty Sherbro – UK, Plantain Island, 24 September 1825, in: *CTS*, vol. 75, pp. 380-384; these were two cession treaties cast into the format of peace agreements, by whhich the governments of North Bullom (on the mainland) and of Sherbro (an island off Sierra Leone) transferred to the British government rights to rule over land on the mainland,

consideration of incompatible procedures of treaty-making elsewhere on the globe.[67] The specificities of European procedural law of treaties among states consisted mainly in two aspects that, however, remained unmentioned in treaties as a rule. The first aspect concerned the "basic norm"[68] *pacta sunt servanda*. As such it was known and accepted worldwide; but European governments interpreted it restrictively in limiting its range to what had explicitly been agreed upon through the texts of treaties. In conjunction with that aspect, anything not explicitly stated in the text of a treaty was considered equivalent of not having been agreed upon at all and, by consequence, did not fall under the "basic norm" *pacta sunt servanda*. By far most of the treaties that European and the US governments concluded with governments in other parts of the world during the nineteenth century, featured unilateral, that means non-reciprocal material stipulations, mainly granting rights and privileges to the European side and conveying duties of their treaty partners,[69] whereby these specific stipulations followed general statements in preambles and introductory articles confessing to the recognition of the sovereign equality of the signatory parties. In consequence, many treaty partners to European and the US governments elsewhere in the world responded with consternation, once they became aware of the implication that they had become subject to often severe duties but been granted few if any rights, could not change the situation at their onw discretion and, consequently developed thoroughly critical attitudes towards the procedural as well as material aspects of the European practice of concluding treaties among states. The additional obligation to lay down agreements in writing further enhanced these difficulties. From the turn towards the nineteenth century, European and the US governments insisted upon the use of writing in all agreements they intended to enter into with partners anywhere on the globe, even were their partners were following orality as their standard of communicaion. In conjunction with the "basic norm" *pacta sunt servanda*, the enforcement of the use of writing as the medium of communication generated the practice according to which, in European perspective, every treaty between states had to be implemented with regard to every letter a text might contain, that divergent interpretations of the conditions of the

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jointly with the granting of purported "protection" agains the neigbouring state of Kusso. For an example of a treaty imposed after the end of a war by the victorious side see: Treaty China – UK, Nanjing, 29 August 1842, in: *CTS*, vol. 93, pp. 466-474. For a recent restatement of the nineteenth-century creed that the international system must be anarchic, unless there is some big-power ordering force, see: Ulrich Menzel, *Die Ordnung der Welt* (Berlin, 2015), p. 29.

[67] The existence of local peace agreement procedures was confirmed even at the end of the nineteenth century by British imperialist Frederick John Dealtry Lugard, *The Rise of Our East African Empire*, vol. 2: Uganda (Edinburgh, 1893), pp. 33, 579 [reprints (London, 1968); (Hoboken, 2013)].

[68] This is the term used in: Hans Kelsen, *Reine Rechtslehre* (Leipzig and Vienna, 1934), p. 66 [second edn (Vienna, 1960); English version (Berkeley, 1978; 2003; 2005); (Oxford, 1996; 2007); repriont of the English version (Glocester, MA, 1989); reprints of the German verion (Vienna, 1967; 2000); further reprint, edited by Stanley L. Paulson (Aalen, 1985); paperback edn, edited by Matthias Jestaedt (Tübingen, 2008)].

[69] Among others the obligation to grant the freedom of trade for merchants coming from the partner state on the European side, or the cession of certain territories; for early cases see: Treaty Ashanti – UK, Kumasi, 7 September 1817, in: *CTS*, vol. 68, pp. 5-7; 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)]. Treaty Sherbro 1825 (note 66).

validifications were not admitted and that nothing could be regarded as agreed upon, unless it had been referred to explicity in that text. Should there be a lack of compatibility of interpretations among the signatoriy parties, the European side usually raised the accusation of breach of treaty and, in the long run, stiffened its attitude by claiming that their treaty partners elsewhere in the world were totally lacking any "legal consciousness".[70]

The expansion of international law beyond Europe thus mainly took place in the form of the enforcement of the European public law of treaties among states by way of the use of diplomatic and military instruments of power.[71] Resistance against this procedure came up not only in Japan[72] and in Africa during the nineteenth century,[73] but even in Europe itself criticisms became vocal at the turn towards the twentieth century rejecting as arbitrary the construct of the European club of states and demanding the recognition of natural law as the platform for the legal regulation of relations among states. Like Christian Wolff in the eighteenth century, proponents of that critisism raised the point that at least some norms of European public law of treaties among states, mainly the "basic norm" *pacta sunt servanda*, could neither be legislated nor derived from positive law.[74] Other took

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[70] 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, at pp. 115-116. Thomas Joseph Lawrence, *The Principles of International Law*, §§ 44, 90 (London and New York, 1895), pp. 58, 136 [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); 7seventh edn, edited by Percy H. Winfield (Boston, 1923)]. 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 Maximilian Fleischmann (Berlin, 1925)]. Ferdinand Carl Ludwig Ahasverus von Martitz, 'Das Internationale System zur Unterdrückung des Afrikanischen Sklavenhandels in seinem heutigen Bestande', in: *Archiv des öffentlichen Rechts* 1 (1885), pp. 3-107, at pp. 16-17. 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.

[71] Thuis explicitly: Otfried Nippold, 'Das Geltungsgebiet des Völkerrechts in Theorie und Praxis', in: *Zeitschrift für Völkerrecht und Bundesstaatsrecht* 2 (1908), pp. 460-492.

[72] Japan, Gaimushō, [Notification by the Meiji Government, dated 8 February 1868, on the treaties concluded between Japan and other states, written by Toshimichi Ōkubo and Munemitsu Mutsu], in: *Dai Nihon gaikō monjo*, nr 97, vol. 1 (Tokyo, 1938), pp. 227-228.

[73] Treaty Opobo – UK, 1 July 1884, in: *CTS*, vol. 163, pp. 158-159. Jaya [Jubo Jubogha], King of Opobo, [Letter to Lord Salisbury, 26 March 1886, Ms. London: British National Archives, FO 84/1762, nr 1], partly printed in: Sylvanus John Sochienye Cookey, *King Jaja of the Niger Delta, 1821–1891* (New York, 1974), p. 120 [reprint (London, 2005)], complained about the breach of this treaty by the British government: "We, of course, signed [the] Treaty with Her Majesty's Government upon the sole basis that there should be no interference whatever with regard to our laws, rights and privileges of our markets etc., but at the present we are at a loss to find that we have been misled; that is after gratuitously arranging to come under Her Majesty's Government Protectorate, and preventing other nations coming in as have been previously agreed." The treaty provoked a law suit between Cameroon and Nigeria, because the British government placed parts of Opobo territory under the colonial administration of the Cameroons: 'Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria', in: *ICJ Reports* (2002), § 207, p. 103. On the case see: Matthew C. R. Craven, 'Introduction. International Law and Its Histories', in: Craven, Malgosia Fitzmaurice and Maria Vogiatzi, eds, *Time, History and International Law* (Leiden and Boston, 2007), pp. 1-25, at pp. 19-20.

[74] Karl Ludwig von Bar, 'Grundlage und Kodifikation des Völkerrechts', in: *Archiv für Rechts- und Wirtschaftsphilosophie* 6 (1912), pp. 145-158. Ernst von Beling, *Die strafrechtliche Bedeutung der Exterritorialität*.

the view that positive international law was too narrowly defined and had to supplemented by some more comprehensive unset "world law" (Weltrecht).[75] However, these approaches did not materialise beyond the 1920s [76] but became submerged by the continuous suspicion that appeals to natural law were simply ideologies of domination.[77]

3. The Law of Hospitality

The rejection of natural law as the basis for the legitimacy of international legal norms, together with the demand for the recognition of positive international law has had consequences for the formation of the legal bases, on which migration across the international borders of states might take place. This has been so, because migration as an interactive type of global action or action with global effects, in its capacity of transgressing state borders, cannot be fully subjected to the rule of municipal law and legislation. Put differently: municipal migration law becomes effective for global action or action with global effects only at the moment that this type of action has become manifest on state territory. With regard to this type of action, international law as a regulatory instrument might be requested, but it fails almost entirely. Whereas the Geneva Convention of the Status of Refugees of 28 July 1951,[78] the Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969[79] and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 18. Dezember 1990, in force since 2003 [80] provide

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Beiträge zum Völkerrecht und zum Strafrecht (Breslau, 1896), p. 11: "Das lediglich auf dem zusammengeschlossenen Willen mehrerer einzelner Staaten beruhende Recht wäre überdies ein gebrechliches Gebilde."; 12: "Die als Einheit gefaßte Staatengemeinschaft diktiert den Rechtssatz Pacta sunt servanda."

[75] Rudolf Stammler, *Theorie der Rechtswissenschaft* (Halle, 1911), pp. 282-283 [second edn (Halle, 1923); reprint (Aalen, 1970)]. Heinrich Hugo Edwin Lammasch, *Das Völkerrecht nach dem Kriege* (Publication de l'Institut Nobel, 3) (Oslo, 1917), pp. 80-83. Leonard Nelson, *Die Rechtswissenschaft ohne Recht. Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts, insbesondere über die Lehre von der Souveränität* (Leipzig, 1917), pp. 3-50 [second edn (Göttingen, 1959); reprint of the second edn (Hamburg, 1971)].

[76] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, 1920), pp. 103, 111-119 [reprints (Tübingen, 1928); (Aalen, 1960; 1981)]. Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf der Grundlage der Völkerrechtsverfassung* (Tübingen, 1923), pp. 8-10, 62-76. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna, 1926), pp. 29, 31.

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

[78] United Nations, General Assembly, Convention Relating to the Status of Refugees (Geneva, 28 April 1951) [also in: Bundesrepublik Deutschland, *Bundesgesetzblatt* II (1953), pp. 559ff], jointly with the Protocoll on the Status of Refugees of 31 January 1967.

[79] Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969 (in force since 20 June 1974), in: United Nations, *Treaty Series*, nr 1469 [unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted-html].

[80] United Nations, General Assembly, Resolution 45/158: Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18. Dezember 1990) [ohchr.org/En/Professionalinterest/Pages/CMW.aspx. Druck. Paris 2003; also in: *International Migration Review* 25 (1991), pp. 873-919], in force since 2003. On the convention see: T. Alexander Aleinikoff and Vincent Chetail, Migration and International Legal Norms (The Hague, 2004). However, the convention comprises only international legal norms relating to the regulation of the state competence of migration legislation, on forced

collections of positive norms relating to migration, they do no more than setting some general guidelines for municipal legislation on migration without directly regulating international movements of people. That is to say: despite these international legal conventions, migrants come under the migration legislation of sovereign states just once they have entered the territory of a state.

The reason for the reluctance of international law vis-à-vis migration is the concept of the state, as it has evolved in Europe since the nineteenth[81] and has been canonised in positive international law during the twentieth century.[82] Accordingly, a state can only exist, when and as long as the triad of

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migration, human rights, on the so-called "migrant workers", their integration and access to health services within signatory states, thereby not featuring genuinely international legal norms intended to directly affect migration.

[81] Georg Jellinek, *Allgemeine Staatslehre* (Berlin, 1900) [second edn (Berlin, 1905); third edn (Berlin, 1913); reprints of the third edn (Darmstadt, 1959); (Bad Homburg, 1960; 1966); (Kronberg, 1976)], third edn, pp. 394-395: "Das Land, auf welchem der staatliche Verband sich erhebt, bezeichnet seiner rechtlichen Seite nach nach dem Raum, auf dem die Staatsgewalt ihre spezifische Tätigkeit, die des Herrschens, entfalten kann. In diesem rechtlichen Sinne wird das Land als Gebiet bezeichnet. Die rechtliche Bedeutung des Gebietes äußert sich in doppelter Weise: negativ dadurch, daß jeder anderen, dem Staate nicht unterworfenen Macht es untersagt ist, ohne ausdrückliche Erlaubnis von seiten des Staates Herrschaft zu üben; positiv dadurch, daß alle auf dem Gebiete befindlichen Personen der Staatsherrschaft unterworfen sind. … Die Notwendigkeit eines abgegrenzten Gebietes für Dasein des Staates ist erst in neuester Zeit erkannt worden. Die antike Staatslehre faßt den Staat als Bürgergemeinde auf, dessen Identität nicht notwendig mit deren Wohnsitz verknüpft ist. Keine der uns aus dem Altertum überlieferten Staatsdefinitionen erwähnen des Staatsgebietes. … Erst Klüber hat, so viel ich sehe, den Staat als eine bürgerliche Gesellschaft 'mit einem bestimmten Landbezirk' definiert [Oeffentliches Recht des teutschen Bundes. 1. Aufl. 1817, § 1]."; pp. 406-407: "Die dem Staate zugehörigen Menschen bilden in ihrer Gesamtheit das Staatsvolk. Gleich dem Gebiete hat das Volk im Staate eine doppelte Funktion. Es ist ein Element des staatlichen Verbandes, gehört dem Staate als dem Subjekt der Staatsgewalt an; wir wollen es der Kürze halber das Volk in subjektiver Qualität nennen. Sodann aber ist das Volk in anderer Eigenschaft Gegenstand staatlicher Tätigkeit, Volk als Objekt. … Eine Vielheit von Menschen, die unter einer gemeinsamen Herrschaft stehen, ohne die subjektive Qualität eines Volkes zu besitzen, wäre kein Staat, weil jedes die einzelnen zu einer Einheit verbindende Moment mangelte."; p. 427: "Eine jede aus Menschen bestehende Zweckeinheit bedarf einer Leitung durch einen Willen. Dieser die gemeinsamen Zwecke des Verbandes versorgende Wille, der anordnet und die Vollziehung seiner Anordnungen leitet, stellt die Verbandsgewalt dar. Daher hat jeder noch so lose Verband, wofern er nur als eine von seinen Mitgliedern verschiedene Einheit erscheint, sein ihm eigentümliche Gewalt."; p. 429: "Herrschergewalt hingegen ist unwiderstehliche Gewalt. Herrschen heißt unbedingt befehlen und Erfüllungszwang üben können." Jellinek prägte den Staatsbegriff, den Max Weber dann für die Sozialwissenschaften kanonisierte. Max[imilian] Weber, *Wirtschaft und Gesellschaft*, § 17, paperback edn, edited by Johannes Winckelmann, fifth edn (Tübingen, 1980) [first published (Tübingen, 1922); English version s. t.: *Max Weber on Law in Economy and Society*, edited by Max Rheinstein; translated by Edward Shils and Max Rheinstein (20th Century Legal Philosophy Series, 6) (Cambridge, 1954); new translation (Berkeley and Los Angeles, 1978)], p. 29: "Politischer Verband soll ein Herrschaftsverband dann und insoweit heißen, als sein Bestand und die Geltung seiner Ordnungen innerhalb eines angebbaren geographischen Gebiets kontinuierlich durch Anwendung und Androhung physischen Zwangs seitens des Verwaltungsstabes garantiert werden. Staat soll ein politischer Anstaltsbetrieb heißen, wenn und insoweit sein Verwaltungsstab erfolgreich das Monopol legitimen physischen Zwangs für die Durchführung der Ordnungen in Anspruch nimmt." On Jellinek and Weber, both of whom were members of the Heidelberg intellectual circle in the 1890s, see: Stefan Breuer, *Georg Jellinek und Max Weber. Von der sozialen zur soziologischen Staatslehre* (Würzburger Vorträge ur Rechtsphilosophie, Rechtstheorie und Rechtssoziologie, 25) (Baden-Baden, 1999). Gangolf Hübinger, 'Staatstheorie und Politik als Wissenschaft im Kaiserreich. Georg Jellinek, Otto Hintze, Max Weber', in: Hans Maier, Ulrich Matz and Kurt Sontheimer, eds, *Politik, Philosophie, Praxis. Festschrift für Wilhelm Hennis zum 65. Geburtstag* (Stuttgart, 1988), pp. 143-161. On Weber's concept of the state, see the recent publication by: Hans-Jürgen Burchardt, 'Mit Max kein Staat mehr zu machen? Von Webers Anstaltsstaat zur kontextsensiblen Staatsforschung', in: Burchardt and Stefan Peters, eds, *Der Staat in globaler Perspektive. Zur Renaissance der Entwicklungsstaaten* (Frankfurt, 2015), pp. 61-83.

[82] Montevideo Convention on the Rights and Duties of States [approved by the Seventh International Conference of American States, signed 26 December 1933; http://www.avalon.law.yale.edu/20th_century/inf]. Albert Bleckmann,

unities of territory, population and government exists without any defect. According to this concept, governments of sovereign states are obliged to provide for the unity of resident populations under their control, and, from the nineteenth century, they have usually implemented this obligation by enacting restrictive immigration policies. The purpose and goal of such legislation – caused by the mandate of the preservation and enhancement of the unity of resident populations – has commonly be the prevention of so-called "undesirable immigrants" from entering state territory.[83] Hence, municipal migration legislation has sought to obstruct immigration as the relocation of the place of residence across the international border of a state. Simultaneously, international legal theorists took a step further and, like some state legislators, classified groups, whose members held nationalities in states outside Europe and the European settler colonies collectively as "nomads",[84] who apparently had no idea of property in land. These theorists denied to the populations they discriminated as "nomads" as "uncivilised" people,[85] furthermore declared them "savages" and positioned them as

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Allgemeine Staats- und Völkerrechtslehre. Vom Kompetenz- zum Kooperationsvölkerrecht (Cologne, Berlin, Bonn and Munich, 1995), p. 113.

[83] UK, *Aliens Act*, 11 August 1905 (5 Edward VII, c. 131), in force since 1 January 1906, printed in: Myer Jack Landa, *The Alien Problem and Its Remedy* (London, 1911), pp. 299-308, at pp. 299-300: "Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembed, and by the authority of the same, as follows: 1. Power to Prevent the Landing of Undesirable Immigrants. (1). An immigrant shall not be landed in the United Kingdom from an immigrant ship excdept at a port at which there is an immigration officer appointed under this Act, and shall not be landed at any such port without the leave of that officer given after an inspection of the immigrants made by him on the ship, or elsewhere if the immigrants are conditioally disembarked for the purpose, in company with a medical inspector, such inspection to be made as soon as practicable, and the immigration officer shall withhold leave in the case of any immigrant who appears to him to be an undesirable imigrant within the meaning of this section. (2) Where leave to land is so withheld in the case of any immigrant, the master, owner or agent of the ship, or the immigrant, may appeal to the immigration board of the port, and that board shall, if they are satisfied that leave to land should not be withheld under this Act, give leave to land, and leave so given shall operate as the leave of the immigration officer. (3) For the purposes of this section an immigrant shall be considered an undesirable immigrant – (a) if he cannot show that he has in his possession or is in a position to obtain the means of decently supporting himself and his dependents (if any); or (b) if he is a lunatic or an idiot, or owing to any disease or informity appears likely to become a charge upon the rates or otherwise a detriment to the public; or (c) if he has been sentenced in a foreign country with which there is an extradition treaty for a crime, not being an offence of a political character, which is, as respects that country, an extradition crime, within the meaning of the Extradition Act 1870; or (d) if an expulsion order under this Act has been made in his case; but, in the case of an immigrant who proves that he is seeking admission to this country solely tp avoid persecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger ro life or limb, on account of religious beliefs, leave to land shall not be refused on the ground merely of want of means, or the probability of his becoming a charge on the rates." The justification of immigration restriction by recourse to some duty of presering the unity of the state population is explicitly on record for France in: Hippolyte Taine, *Les origines de la France contemporaine*, vol. 2 (Paris, 1986), pp. 524-525 first pubölished (Paris, 1876)]; and for the UK in retrospect on the nineteenth century in: Oliver MacDonagh, 'Emigration and the State. 1835 – 55. An Essay in Administrative History', in: *Transactions of the Royal Historical Society*. Fifth Series, vol. 5 (1955), pp. 133-159.

[84] République Française, Law against Nomads, dated 16 July 1912. Previous immigration restriction laws had been promulgated under the titles Alien Law, dated 2 December 1849 and Nationality Law, dated 26 June 1889.

[85] James Lorimer, *The Institutes of the Law of Nations*, vol. 1 (Edinburgh and London, 1884), pp. 182-215. John Westlake, *Chapters on the Principles of International Law* (Cambridge, 1894) [reprints (Littleton, CO, 1982); (Charleston, 2009); reprinted in: Westlake, *The Collected Papers on Public International Law*, edited by Lassa Francis Lawrence Oppenheim (Cambridge, 1914), pp. 1-282], at pp. 131-193: "Territorial Sovereignty, Especially with Relation to Uncivilised Regions" (129-189 of the original edn), p. 136 (of the original edn): "The form which

incapable of governing themselves and, apart from a few individual cases, barred them off from legally immigrating to Europe.

By contrast, under the aegis of the unset law among states, migration across state borders was subject to natural law and was regulated in terms of the inclusionist law of hospitality. In this context, general migration law (*ius peregrinationis*) was taken as a given.[86] As an unset system of legal

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has been given to the question, namely *what facts are necessary and sufficient in order that an uncivilized region may be internationally appropriated in sovereignty to a particular state?* implies that it is only the recognition of such sovereignty by the members of the international society which concerns us, that of uncivilized natives international law takes no account. This is true, and it does not mean that all rights are denied to such natives, but that the appreciation of their rights is left to the conscience of the state within whose recognized territorial sovereignty they are comprised, the rules of the international society existing only for the purpose of regulating the mutual conduct of its members. Seen from that point of view the proposition, which is at first startling, becomes almost axiomatic. A strongly organized society may enact rules for the protection of those who are not its members, as is seen in the case of a state which legislates for the protection of foreigners, or against cruelty to animals. But this is scarcely possible for a society so weakly organized as the international one, in which, for want of a central power, the enforcement of rules must be left in the main to the mutual action of the members as independent states. In such a society rules intended for the benefit of outsiders would either fall into desuetude and oblivion, or be made pretexts for the more specious promotion of selfish interests." Lassa Francis Lawrence Oppenheim, *International Law*, vol. 1 (London and New York, 1905); vol. 2 (London and New York, 1906) [second edn (London and New York, 1912); third edn, edited by Ronald F. Roxburgh (London and New York, 1920-1921); fourth edn, edited by Arnold Duncan McNair (London and New York, 1926); fifth edn, edited by Hersch Lauterpacht (London and New York, 1935); sixth edn, edited by Hersch Lauterpacht (London and New York, 1944); seventh edn, edited by Hersch Lauterpacht (London and New York, 1948; 1952-1953); eighth edn, edited by Hersch Lauterpacht (London and New York, 1955; 1957; 1963); ninth edn, edited by Robert Yewdall Jennings and Andrew Watts (Harlow, 1992; 1996; 2008; 2010)], vol. 1, § 226, pp. 280-281: "The growing desire to acquire vast territories as colonies on the part of States unable to occupy effectively such territories at once has, in the second half of the nineteenth century, led to the contracting agreements with the chiefs or natives inhabiting unoccupied territories, by which these chiefs commit themselves to the 'protectorate' of States that are members of the Family of Nations. These so-called protectorates are certainly not protectorates in the technical sense of the term designating the relation that exists between a strong and a weak State through a treaty by which the weak State surrenders itself into the protection of the strong and transfers to the latter the management of its more important international relations. Neither can they be compared with the protectorate of members of the Family of Nations exercised over such non-Christian States as are outside that family, because the respective chiefs of natives are not the heads of States, but the heads of tribal communities only. Such agreements, although they are named 'Protectorates', are nothing else than steps taken to exclude other Powers from occupying the respective territories. They give, like discovery, an inchoate title, and are preparations and precursors of future occupations." [second edn, pp. 296-297].

[86] Francisco de Vitoria, 'De Indis recenter inventis relectio prior', book I, chap.1-4, edited by Ernest Nys (Washington, 1917), pp. 217-268, at pp. 218-223 [reprints (New York, 1964); (Buffalo, 1995); also in: Walter Schaetzel, ed., *Klassiker des Völkerrechts*, vol. 2 (Tübingen, 1954), pp. 18-117; Vitoria, *Vorlesungen*, edited by Ulrich Horst, vol. 2 (Theologie und Frieden, 8) (Stuttgart, 1997), pp. 370-541; Facsimile edn of the edn of1696, in: Nys (as above), pp. 299-409; Facsimile edn of the Palencia Codex of 1539 (Madrid, 1989); English version in: Vitoria, *Political Writings*, edited by Anthony Pagden and Jeremy Lawrence (Cambridge, 1991), pp. 233-292; also in: Vitoria, *The Principles of Political and International Law in the Work of Francisco de Vitoria*, edited by Antonio Truyol y Serra (Madrid, 1946)]. On the text see: Cavallar, *Rights* (note 18), pp. 84-89. Joseph Höffner, *Kolonialismus und Evangelium. Spanische Kolonialethik im Goldenen Zeitalter*, second edn (Trier, 1969) [third edn (Trier, 1972), pp. 348-354; first published s. t.: *Christentum und Menschenwürde* (Trier, 1947)]. Heinz-Gerhard Justenhoven, *Francisco de Vitoria zu Krieg und Frieden* (Cologne, 1991). James Muldoon, *The Justification for Conquest in the Seventeenth Century* (Philadelphia, 1994), pp. 1-3. Anthony Pagden, 'Dispossessing the Barbarian. Rights and Property in Spanish America', in: Pagden, *Spanish Imperialism and the Political Imagination. Studies in European and Spanish-American Social and Political Theory. 1513 – 1830* (New Haven, 1990), pp. 13-36, at pp. 18-22 [abridged version first published in: Pagden, *The Language of Political Theory in Early Modern Europe* (Cambridge, 1987), pp. 79-80].

norms, the law of hospitality covered the right to conduct trade under the condition that persons engaged in trading activities, like all other guests, subjected themselves to norms that might have specifically enacted for them at the trading spot, and to the habits and customs of trade practiced there.[87] The unset law of hospitality also regulated the rights of diplomatic envoys, without requiring specific bilateral agreements among sending and receiving governments on the exchange of envoys, as it also set the rules for the treatment of shipwrecks.[88] Migrants as guests, then, enjoyed the

[87] 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. Wolff, *Ius* (note 18), §§ 75, 187, pp. 44, 98.

[88] L. Alt, *Handbuch des europäischen Gesandtschafts-Rechtes* (Berlin, 1870). Christoph Besold [praes.] and Michael Rasch [resp.], *Themata juridico-politica de legatis et legationibus*. LLD thesis (University of Tübingen, 1622). Christian Gotthelf Ahnert, *Lehrbegriff de Wissenschaften, Erfordernisse und Rechte der Gesandten*, 2 vols (Dresden, 1784). Cornelis van Bynkershoek, *De foro legatorum tam in causa civili quam criminali liber singularis* (Leiden, 1721) [reprinted in: Bynkershoek, *Opera Minora* (Leiden, 1730); second edn of the *Opera Minora* (Leiden, 1744), pp. 427-571, at pp. 451-456; reprint of this edn (Oxford, 1946)]. Stephanus Cassius, *De jure et judice legatorum diatribe*, edited by Karl Otto Rechenberg (Frankfurt, 1717). Heinrich von Cocceji [Koch] [praes.] and Friedrich W. von Lüderitz [resp.], *Dissertatio juris gentium publici de legato sancto, non impuni*. LLD thesis (University of Frankfurt on the Viadra, 1699). Cocceji [praes.] and Johann Victor Kothe [resp.], *Dissertatio juridica inauguralis de legato rei propriae et alienae*. LLD thesis (University of Frankfurt on the Viadra, 1701) [reprinted in: Cocceji, *Exercitationum curiosarum*, vol. 1 (Lemgo, 1722), pp. 473-484]. Hermann Conring [praes.] and Haro Antonius Bolmeier [resp.], *Disputatio politica de legatis*. LLD thesis (University of Helmstedt, 1660). Johann Gryphiander [Johann Griepenkerl] [praes.] and Georg Schubhard [resp.], *Velitatio politica de legatis*. LLD thesis (University of Jena, 1615). Wolfgang Heider [praes.] and Johann Ernst Krosnitzki [resp.], *Exercitatio de legationibus*. LLD thesis (University of Jena, 1610). Johann Nikolaus Hert, *Elementa juris prudentiae civilis* (Gießen, 1690) [further edns s.t.: *Elementa prudentiae civilis* (Frankfurt, 1703); (Frankfurt, 1712)]. Ulrich Huber, *De jure civitatis libri III*, book III, section III, chap. III (Franeker, 1684), pp. 716-723 [second edn (Franeker, 1694); fourth edn (Frankfurt and Leipzig, 1752)]. Hermann Kirchner, *Legatus*, book II, chap 1 (Lich, 1604), pp. 263-358 [second edn (Marburg, 1610); third edn (Marburg, 1614)]. Reinhard König [praes.] and Johann Eppinger [resp.], *Disputatio XI: De legatis et legationibus*. Ph. D. thesis (University of Gießen, 1618). Octavianus Magius [Ottaviano Maggi], *De legato libri duo* (Hanau, 1596) [first published (Venice, 1566)]. Frederik van Marselaer, *Κηρυκεῖον. Sive legationum insignae in duos libros distribuntur* (Antwerp, 1626) [first published (Antwerp, 1618)]. Marsealer, *Legatvs libri dvo ad Philippvm IV. Hispanicvm Regem* (Antwerpen, 1626) [further edns (Amsterdam, 1644); (Antwerp, 1666)]. Georg Friedrich von Martens, *Erzählungen merkwürdiger Fälle des neueren Europäischen Völkerrechts in einer practischen Sammlung von Staatsschriften aller Art in teutscher und französischer Sprache. Nebst einem Anhange von Gesetzen und Verordnungen, welche in einzelnen Europäischen Staaten über die Vorrechte auswärtiger Gesandten ergangen sind* (Göttingen, 1800), pp. 154-170. Alexander Miruß, *Das europäische Gesandschaftsrecht* (Leipzig, 1847). Friedrich Carl von Moser, 'Die Gesandten nach ihren Rechten und Pflichten', in: Moser, *Kleine Schriften zur Erläuterung des Staats- und Völkerrechts*, vol. 3 (Frankfurt, 1752), pp. 133-331. Franz Xavier von Moshamm, *Europäisches Gesandtschaftsrecht* (Landshut, 1805). Johann Freiherr von Paccassi, *Einleitung in die sämmtlichen Gesandtschaftsrechte*, second edn (Vienna, 1777), pp. 82-106 [first published (Vienna, 1773)]. Christian Heinrich von Römer, *Versuch einer Einleitung in die rechtlichen, moralischen und politischen Grundsätze über die Gesandtschaften und die ihnen zukommenden Rechte* (Gotha, 1788). Gerhard von Stökken, *De iure legationum*. LLD thesis (University of Altdorf, 1657). Christian Thomasius, *Institutiones jurisprudentiae divinae* (Frankfurt and Leipzig, 1688) [second edn (Halle, 1694); third edn (Halle, 1702), pp. 614-629; sixth edn (Halle, 1717); seventh edn s. t.: *Institutionum jurisprudentiae divinae libri tres* (Halle, 1730); reprint of this edn (Aalen, 1963); English version, edited by Thomas Ahnert (Indianapolis, 2011)]. Jean [Johann] Gottlieb Uhlich, *Les droits des ambassadeurs et des autres ministers publics les plus éminents* (Leipzig, 1731). Gonzalo García de Villadiego, 'Tractatus de legato [geschrieben 1485]', in: *Tractatus universi juris*, vol. 13 (Venice, 1584) [Spanish version, partly edited by L. García Arias, 'Doctrina diplomática expuesta por Gonzalo de Villadiego', in: *Cuadernos de historia diplomática* 3 (1956)]. Krysztof Warszewicki [Christophorus Warsevicius], *De legationibus adeundis luculentissima oratio* (Lich, 1604) [first publiehd (Crakow, 1595); further edns (Rostock, 1597); (Gdansk, 1646)]. Abraham de Wicquefort, *L'Ambassadeur et ses fonctions* (Cologne, 1677) [first published s. t.: *Mémoires touchant les ambassadeurs et les ministres publics* (Cologne, 1676); English version (London, 1716); reprint of the English version, edited by Maurice Keens-Soper (Leicester, 1997); German version (Frankfurt, 1682)]. On these texts see: Linda S. Frey and Marsha L. Frey, *The History of Diplomatic*

freedom of migration under natural law, as long as they did not claim any right of recognition as residents.[89] Next to this freedom of migration under natural law, rulers might enact specific laws guranteeing the freedom of emigation, as did the Duke of Württemberg for his subjects through the Tübingen treaty of 1514.[90] The law of hospitality left untouched the competence of sovereign rulers and governments to enforce legal norms relating to emigration as well as immigration, including even general prohibitions of emigration[91] and immigration prohibitions for certain groups, such as

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Immunity (Columbus, OH, 1999). Alain Wijffels, 'Le statut juridique des ambassadeurs d'après la doctrine du XVIe siècle', in: *Publication du Centre Européen d'Etudes Bouguignonnes* 32 (1992), pp. 127-142. An early case of a treaty setting norms for the law of hospitality relating to diplomats is: Treaty France – Ottoman Empire, February 1535 [= 25. Chaban 941], in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 71-80; also in: Gabriel Noradounghian, ed., *Recueil d'actes internationaux de l'Empire Ottoman*, vol. 1 (Paris, 1897), pp. 83-87 [reprint (Nendeln, 1978); on this treaty see also the report of the Venetian emissary to the Senate; according to the report, France I defended his contacts with Sultan Süleyman on the grounds that he was in need of finding a counterpoise against the Emperor; in: Niccolò Tommasseo, ed., *Relations des ambassadeurs vénitiens sur les affairs de France au XVIe siècle*, vol. 1 (Collection des documents inédits sur l'histoire de France, Sér. 1) (Paris, 1838), p. 67]. On shipwrecks, see below, notes 253-295.

89 Vitoria, 'De Indis' (note 86), Book III, chap. 2, pp. 257-258 (edn by Nys): "Hispani habent ius peregrinandi in illas provinciis et illic degendi, sine aliquo tamen nocumento barbarorum, nec possunt ab illis prohiberi. Probatur primo ex iure gentium, quod vel est ius naturale vel derivatur ex iure naturali. ... Secundo, a principio orbis (cum omnia essent communia) licebat unicuique, in quamcumque regionem vellet, intendere et peregrinari. Non autem videtur hoc demptum per rerum divisionem; nunquam enim fuit intentio gentium per illam divisionem tollere hominum invicem communicationem et certe temporibus Noë fuisset inhumanum."; dto. (edn by Schaetzel), p. 92: "Hispani habent ius peregrinandi in illas provinciis et illic degendi, sine aliquo tamen nocumento barbarorum, nec possunt ab illis prohiberi. Probatur primo ex iure gentium, quod vel est ius naturale vel derivatur ex iure naturali. ... Secundo, a principio orbis (cum omnia essent communia) licebatunicuique, in quamcumque regionem vellet, intendere e peregrinari. Non autem videtur hoc demptum per rerum divisionem; nunquam enim fuit intentio gentium per illam divisionem tollere hominum invicem communicationem et certe temporibus Noë fuisset inhumanum."

90 Württemberg, [Treaty between Duke Ulrich and the Württemberg Estates, Tübingen, 8 July 1514], edited by Götz Adriani and Andreas Schmauder, 'Neu-Transkription der gedruckten Urkunde Herzog Ulrichs vom 23. April 1515 über den Vertrag vom 8. Juli 1514 zu Tübingen [Original mit Siegel im Stadtarchiv Tübingen]', in: *1514. Macht – Gewalt – Freiheit. Der Vertrag zu Tübingen in Zeiten des Umbruchs* (Ostfildern, 2014), pp. 194-199 [contains, without pagination, the facsimile of the original print]. On the context see: Gerhard P. Bassler, 'Auswanderungsfreiheit und Auswandererfürsorge in Württemberg. 1815 – 1855', in: *Zeitschrft für württembergische Landesgeschichte* 33 (1974), p. 117-160. Harald Focke, 'Friedrich List und die südwestdeutsche Amerikaauswanderung. 1817 – 1846', in: Günter Moltmann, ed., *Deutsche Amerikaauswanderung im 19. Jahrhundert* (Stuttgart, 1976), pp. 63-85. On emigration from Württemberg at the turn towards the nineteenth century see: Georg Christian Heinrich Bunz, *Über die Auswanderungen der Wirtemberger* (Tübingen, 1796), pp. 65-66. Max Miller, 'Ursachen und Ziele der schwäbischen Auswanderung', in: *Württembergische Vierteljahrshefte für Landesgeschichte* 42 (1936), pp. 184-218.

91 On the restrictive regulation of emigration see: Eberhard Ludwig, Duke of Württemberg, General Rescript, dated 1717 [against the "nonsense of moving to America" (Unsinn nach Amerika zu ziehen)], edited in: Bernd Ottnad, 'Geschichtliche Beziehungen zwischen Baden-Württemberg und den Vereinigten Staaten', in: *Beiträge zur Landeskunde* 2/3 (1963), p. 6. Joseph II., Roman Emperor, Edict against Emigration, Vienna, 7 July 1768. Print, edited in: August Ludwig von Schlözer, ed., *Staats-Anzeigen*, vol. 6 (Göttingen, 1784), p. 215 [also in: Theodor Bödiker, 'Die Einwanderung und Auswanderung des Preußischen Staates', in: *Preußische Statistik* 26 (1874), p. XLI]; the Edict mandated mayors and councils of towns and cities to control migration, issued the prohibition of providing shelter to migrants in inns and banned the transport of migrants on ships; the edict did not apply to migration to Hungary. *Allgemeines Landrecht für die Preußischen Staaten* [1794], part II, title XVII, section 2, § 130, edited by Hans Hattenhauer (Frankfurt and Berlin, 1970), p. 624; according to this article, provincial legislation was to promulgate detailed rules relating to the prohibition migration for "certain classes of state subjects" (bestimmte Klassen von Bewohnern des Staates). On prohibitions of migration in Japan see the early report by: Engelbert Kaempfer, *Heutiges Japan*, edited by Wolfgang Michel and Barend J. Terwiel (Kaempfer, Werke, vol. 1) (Munich, 2001), p. 254.

beggars.[92]

Already Immanuel Kant was aware of the significance of the law of hospitality for the maintenance of relations among states. He understood the original unity of humankind not as a community of proprietors of land but, like Pufendorf, as a community based on interaction capability, and he ascribed to the law of hospitality the special rank of a condition for world peace.[93] In doing so, he explicitly rejected the possibility of justifying any type of the use of force through colonial settlement. Kant thus posited that, in every state, the right of residence of the existing population had priority, that residents had a legitimate demand for protection against intruders, and also acknowledged the competence of the Japanese government to implement comprehensive migration restrictions.[94] Hence, the law of hospitality and the law of residence were opposing poles. The law of hospitality, as derived from natural law, did not allow its abuse as a figleaf for the justification of settlement colonisation in America. Therefore, sixteenth-century theorists derived, what they gave out as a justification for European settlement colonisation, neither from some right to the freedom of trade nor from *ius peregrinationis* as law of hospitality, but from the claimed need to implement the divine mandate of plying the soil, as laid down in the Book of Genesis, and from the papal mandate demanding the conversion of Native Americans, as stipulated in edicts in the name of Pope Alexander VI.[95]

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[92] For Brandenburg see: Otto Christian Mylius, ed., *Corpus Constitionum Marchiarum*, part 5, appendix (Berlin and Halle, 1748), p. 60. Prince Abbot of Lübeck, *Bettlerordnung*, 1736, Lübeck: Archiv der Hansestadt Lübeck, Abt. 268, Nr 650.

[93] Immanuel Kant, 'Zum ewigen Frieden [zuerst, Königsberg 1795]', in: Kant, *Werke in zwölf Bänden*, edited by Wilhelm Weischedel, vol. 11 (Frankfurt, 1968), pp. 193-251, at pp. 212-214 [English version in: Carl Joachim Friedrich, ed., *The Philosophy of Kant* (New York, 1949), pp. 430-476; also in: Kant, *Political Writings*, edited by Hans Reiss (Cambridge, 1991)]. following: Samuel von Pufendorf, *De jure naturae et gentium*, new edn, edited by Frank Böhling (Pufendort, Gesammelte Werke, vol. 4, part 1) (Berlin, 1998), p. 148: "cuilibet homini, quantum in se, colendam et conservandam esse pacificam adversos alios societatem, indoli et scopo generis humani in universam congruentem." [first published (London, 1672)]. On Kant's theory of the law of hospitality see: Cavallar, *Rights* (note 18), pp. 321-389, at pp. 360-368. Klaus Dicke, 'Das Weltbürgerrecht soll auf die Bedingungen der allgemeinen Hospitalität eingeschränkt sein', in: Dicke and Klaus-Michael Kodalle, eds, *Republik und Weltbürgerrecht. Kantische Anregungen zur Theorie politischer Ordnungen nach dem Ende des Ost-West-Konflikts* (Weimar, Cologne and Vienna, 1998), pp. 115-130. Pauline Kleingeld, 'Kant's Cosmopolitan Law. World Citizenship for a Global Order', in: *Kantian Review* 2 (1998), pp. 72-90. Günther Patzig, 'Kants Schrift "Zum ewigen Frieden"', in: Patzig, *Gesammelte Schriften*, vol. 1 (Göttingen, 1994), pp. 275-296 [reprinted in: Reinhard Merkel and Roland Wittmann, eds, *"Zum ewigen Frieden"* (Frankfurt, 1996), pp. 12-30; reprint of this edn (Frankfurt, 2008)]; Patzig believed, at p. 286, that "hospitality" might appear as "somewhat exotic" (etwas exotisch) at first sight, but then added that Kant's argument contained a critique of colonialism and was drawn on the general privilege of the use of the inhabitable part of the surface of the globe available to all humankind.

[94] Kant, 'Frieden' (note 93), pp. 212-214.

[95] Vitoria, 'De Indis' (note 86), book III, chap. 9-12, pp. 262-264 (edn by Nys). The edicts in the name of Pope Alexander VI have been edited in: Alexander VI, Pope, 'Bulla Inter caetera [3 May 1493]', edited by Josef Metzler, *America Pontificia primi saeculi evangelizationis. 1493 – 1592*, nr 1, vol. 1 (Vatican City, 1991), pp. 72-75. Alexander VI, 'Bulla Eximiae devotionis [3 May 1493]', ibid., nr 2, pp. 76-78. Alexander VI, 'Bulla Inter cetera [4 May 1493]', ibid., nr 3, pp. 79-83. Alexander VI, 'Bulla Piis fidelium [25 June 1493]', ibid., nr 4, pp. 83-86. Alexander VI, 'Bulla Dudum siquidem [26 September 1493]', ibid., nr 5, pp. 87-89.

III. The Downgrading of Natural Law and the Priviledging of Positive International Law during the Nineteenth Century

1. The Theory of Legal Sources, the „Basic Norm“ *pacta sunt servanda*, the Principle of Literacy in European Public Law of Treaties among States and the Principle of the Legal Equality of Sovereigns

Natural Law did not disappear abruptly in the beginning of the nineteenth century. It continued to feature in university curricula[96] and served as a platform for arguments, which the reform movement in German-speaking areas employed in their campaigns and programmes well into the 1820s.[97] However, at the time, it did encounter widening opposition. Opponents to natural law theory insisted upon the principle that all law should flow from human action, thus should be willed, in order to have a chance of becoming accepted as just. Hence, positivist theorists even derived customary law from what they termed “people’s law” (Volksrecht), seemingly drawn on some general will of a group that these theorists equipped with a common collective identity (“Volkswille”).[98] From the French Revolution of 1789, they destilled the strength of their arguments from the criticism that supporters of natural law theory had, at least on some occasions, appeared to have been discredited by promoting despotism.[99] Subsequently, more radical positivists held the view that even that

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[96] Jan Schröder and Ines Pielemeier, ‘Naturrecht als Lehrfach an den deutschen Universitäten des 18. und 19. Jahrhunderts’, in: Otto Dann and Diethelm Klippel, eds, *Das europäische Naturrecht im ausgehenden 18. Jahrhundert* (Studien zum 18. Jahrhundert, 16) (Hamburg, 1995), pp. 255-269, at p. 261.

[97] Diethelm Klippel, ‘Naturrecht und Politik im Deutschland des 19. Jahrhunderts’, in: Karl Graf Bellestrem, ed., *Naturrecht und Politik* (Philosophische Schriften, 8) (Berlin, 1993), pp. 27-48. Klippel, ‘Naturrecht und Rechtsphilosophie in der ersten Hälfte des 19. Jahrhunderts’, in: Klippel and Otto Dann, eds, *Das europäische Naturrecht im ausgehenden 18. Jahrhundert* (Studien zum 18. Jahrhundert, 16) (Hamburg, 1995), pp. 270-292. Klippel, ed., *Naturrecht und Staat* (Schriften des Historischen Kollegs, Kolloquien 57) (Munich, 2006).

[98] Georg Beseler, *Volksrecht und Juristenrecht* (Leipzig, 1843). [Appendix by] Georg Friedrich Puchta (Leipzig, 1844), pp. 230-245: ‘Das Volksrecht in seinem Verhältnisse zur Gesetzgebung’ (skepticism vis-à-vis the law-establishing achievement of legislative institutions). Puchta, *Gewohnheitsrecht*, 2 vols (Erlangen, 1828-1837), vol. 2, p. 125: “Der Inhalt des Rechtsbewußtseins des Volkes ist das Recht.” [reprint (Darmstadt, 1965)]. Puchta, *Pandekten*, § 10, second edn (Leipzig, 1844), p. 16: “Das Recht ist eine gemeinsame Überzeugung der in rechtlicher Gemeinschaft Stehenden. Die Entstehung eines Rechtssatzes ist daher die Entstehung einer gemeinsamen Überzeugung, welche die Kraft in sich trägt, das, was sie als Recht erkennt, zur wirklichen Ausführung zu bringen.”; pp. 16-17: “Gewohnheitsrecht ist das in dem Bewußtsein des Volkes unmittelbar entstandene und in seiner Sitte (Übung, Gewohnheit) erscheinende Recht.” [reprint of this edn (Frankfurt, 2008); first published (Leipzig, 1838); third edn (Leipzig, 1845); fourth edn (Leipzig, 1848); fifth edn (Leipzig, 1850); sixth edn (Leipzig, 1852); seventh end (Leipzig, 1853); eighth edn (Leipzig, 1856); ninth edn (Leipzig, 1863); tenth edn (Leipzig, 1866); eleventh edn (Leipzig, 1872); twelth edn (Berlin and Leipzig, 1877); repritn of th twelfth edn (Goldbach, 1999)]. See also above, note 63.

[99] Emmanuel Sieyès, *Qu’est-ce que le Tiers état?*, edited by Roberto Zapperi (Les classiques de la pensée politique, 6) (Geneva, 1970), pp. 119-218, 137-144: “Première demande. Que les représentations du Tiers état ne soient choisis que parmi les citoyens qui appartiennent véritablement au Tiers”; at pp. 140-141: “Je demande surtout qu’on fasse attention aux nombreux agens de la féodalité. C’est aux restes odieux de ce régime barbare que nous devons la division, encore subsistante pour la malheur de la France, de trois orders ennemis l’un et l’autre. Tout seroit perdu si les mandataires de la féodalité venoient à usurper la deputation de l’ordre commun.”

derivation of the so-called "people's law" from some national "legal consciousness" came close to concealed natural law thinking, and they demanded a more radical rejection of any concept of natural law: "In a word, the weed of natural law must be extirpated remorselessly, wherever it appears, whether openly or timidly." (Es muß m[it] e[inem] W[ort] das Unkraut Naturrecht, in welcher Form und Verhüllung es auch auftreten möge, offen oder verschämt, ausgerottet werden, schonungslos, mit Stumpf und Stiel.)[100] In so far, it is not surprising that precisely liberal theorists harshly turned agains natural law.[101] Nevertheless, the replacement of natural law by positive law as a source of legal norms was in no field more dramatic than in international law. In this field, theories gained wide currency, whose proponents would admit natural law in operation as the basis of international law only in some "primitive" state of nature, flatly deny the existence of international law as a whole and, in its place, just grant some international morality as a kind of voluntary self-obligation.[102]

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[100] Karl Magnus Bergbohm, *Jurisprudenz und Rechtsphilosophie*, treatise 1: Das Naturrecht der Gegenwart (Leipzig, 1892), p. 118 [reprint (Glashütten, 1973)]. For explicit criticism of Puchta's argument see: ibid., pp. 499-500: "In der That stellen die Führer der Historischen Schule die Behauptung auf: 'Der Inhalt des Rechtsbewußtseins des Volkes ist das Recht.' [Puchta, *Gewohnheitsrecht*, vol. 2, p. 125; Puchta, *Pandekten*, eleventh edn, § 10, p. 19: 'Das Recht ist eine gemeinsame Überzeugung der in rechtlicher Gemeinschaft Stehenden.'] Hierdurch wird aber nichts an ihrer These geändert, derzufolge eben die Diktate des Rechtsbewußtseins an sich perfektes Recht sind, und diese These als solche statuiert ein anonymes Naturrecht."

[101] For liberal attitudes towards natural law see: Robert von Mohl, *Geschichte und Literatur der Staatswissenschaften*, vol. 2 (Erlangen, 1856), pp. 561-577 [reprint (Graz, 1960)].

[102] Johann Baptist [Giovanni Battista] Fallati, 'Keime des Völkerrechts bei wilden und halbwilden Stämmen', in: *Zeitschrift für die gesammte Staatswissenschaft* 6 (1850), pp. 151-242, at p. 152: "Nichtsdestoweniger kann der Eindruck im Allgemeinen nur der sein, dass dort eine unendlich niedrigere, hier eine unendlich höhere Entwicklung vorliegt. Für Jeden, dem eine ursprüngliche Vollkommenheit des Menschengeschlechts unglaublich ist, schliesst sich hieran von selbst der Gedanke an, dass jene Zustände auch die früheren, diese die späteren seien." Austin, *Province* (note 58), loc. cit. Carl Victor Fricker, 'Das Problem des Völkerrechts', in: *Zeitschrift für die gesamte Staatswissenschaft* 28 (1872), pp. 1-89, 347-386, at p. 375. Luitpold von Hagens, *Staat, Recht und Völkerrecht. Kritik juristischer Grundbegriffe*. LLD thesis Munich, 1890), pp. 12-13: "Zwischen Staaten ist aber eine Rechtsordnung nicht möglich; denn diese setzt einen höchsten Herrscherwillen als Rechtsquelle voraus. ... Es gibt darum kein Völkerrecht." Adolf Lasson, *Princip und Zukunft des Völkerrechts* (Berlin, 1871), pp. 57-58: a "Verabredung des Mächtigen mit dem Schwachen hat gar keinen Sinn – der Mächtige bricht den Vertrag, der Schwache kann sich nicht widersetzen." … Treaties among states are "so lange vernünftig, als sie das gegenseitige Verhältnis der Macht zwischen den Paciscierenden im wesentlichen correct ausdrücken." Max von Seydel, *Grundzüge einer allgemeinen Staatslehre* (Würzburg, 1873), pp. 31-32: "Zwischen den Staaten ist aber eine Rechtsordnung nicht möglich; denn diese setzt einen höchsten Herrscherwillen als Rechtsquelle voraus. ... Zwischen den Staaten kann mithin kein Recht sein, zwischen ihnen gilt nur Gewalt. Es gibt darum kein Völkerrecht." Karl Michael Joseph Leopold Freiherr von Stengel, *Der ewige Friede* (Munich, 1899), pp. 29-32 [third edn (Munich, 1899); reprint (New York, 1972)]. Friedrich Adolf Trendelenburg, *Lücken im Völkerrecht* (Leipzig, 1870), p. 26: "Es ist eine mißliche Lage des Völkerrechts, daß keine höhere Hand da ist, die es schützt. ... Die Weiterbildung des Völkerrechts ist das wohlthätige Werk von Staatsverträgen, namentlich auf Friedenskongressen." Philipp Karl Ludwig Zorn, 'Die deutschen Staatsverträge', in: *Zeitschrift für die gesamte Staatswissenschaft* 36 (1880), pp. 1-39, at pp. 9-10: "Ein zwischenstaatlicher ‚Vertrag' schafft nicht ipso jure Recht [Ref. Paul Laband, *Deutsches Staatsrecht*, vol. 4, p. 153]. Er trägt zunächst gar keinen juristischen – auch keinen völkerrechtlichen – Charakter, sondern lediglich den einer des Rechtsschutzes völlig ermangelnden factischen Verabredung auf Treu und Glauben zwischen den Vertretern zweier oder mehrerer Staaten – auch wenn die Souveräne diese Vertreter sind, liegt die Sache gar nicht anders – dahingehend: 1) das Eingreifen der anderen Staatsgewalt in die eigene Rechtssphäre gemäss der geschehenen Verabredung sich gefallen zu lassen, 2) diese Verabredung zum Recht, d. i. zu dem die Untertanen bindenden Imperativ zu erheben."

However, when turning against natural law, international legal theorists left unnoticed the problem that the three main elements constituting European public law of treaties among states, namely the "basic norm" *pacta sunt servanda*, the principal demand to lay down treaties in writing and the further principle of the recognition of treaty partners as legally equal sovereigns, resisted derivation from human-made positive law. Already Hugo Grotius had made it clear that the obligation to honour valid treaties under international law could only be derived from natural law;[103] hence, once only treaties would count as sources of international legal norms, the "basic norm" *pacta sunt servanda* turned underivable, because no treaty could *ipso facto* become subject to that "basic norm".[104]

The principal demand to lay down treaties in writing, as already mentioned, remained under customary law, until the Vienna Convention on the Law of Treaties of 1969 produced the first positive document of treaty law.[105] The third principle, relating to the recognition of the legal equality of sovereign treaty partners emerged from the demand, coming up in Europe during the second half of the sixteenth century, that all sovereigns should recognise one another as legal equals, irrespective of differences in economic, military and political power.[106] In correlation with the far older custom, on record already in the Ancient Near East, of restricting treaty-making capacity to sovereign rulers and governments, this demannd implied that treaties under international law, once they had been agreed upon, situated the parties as legal equals. However, in Europe, this implication did not become habitually accepted in the practical conduct of international relations before the eighteenth century, as the Roman emperors refused to recognise their treaty partners as legal equals prior to the treaties of Westphalia of 1648, and, for another century thereafter continued to confine the application of this principle to bilateral agreements. Only from the middle of the eighteenth century did the number of multilateral agreements increase.[107] The enforcement of the principle

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[103] Grotius, *De Jure* (note 19), prologue, nr 1.

[104] Kelsen, *Souveränität* (note 76), loc. cit.

[105] Vienna Convention on the Law of Treaties, 23 May 1969, art. 2 [in force since 27 January 1980], edited by Olivier Coxton and Pierre Klein, *The Vienna Conventions on the Law of Treaties*, 2 vols (Oxford, 2011).

[106] Jean Bodin, *Les six livres de la République*, book I, chap. 7 [first published (Paris, 1576)]. Newly edited by Christiane Frémont, Marie-Dominique Couzinet and Alain Rochais (Paris, 1986), pp. 151-157.

[107] Treaty France – Roman Emperor and Roman Empire [Instrumentum Pacis Monasteriense], Munster, 24 October 1648, edited by Antje Oschmann, *Die Friedensverträge mit Frankreich und Schweden*, part 1: Urkunden (Acta Pacis Westphaliae. Series III, section B, vol. 1) (Munster, 1998), pp. 271-318 [also in: *CTS*, vol. 1, pp. 3-94; also in: Acta Pacis Westphalicae Supplementa electronica, vol. 1: Die Westfälischen Friedensverträge vom 24. Oktober 1648; http://www.pax.westfalica.de/ipmipo/index.html]. Treaty Roman Emperor and Roman Empire – Sweden [Instrumentum Pacis Osnabrugense], Osnabrück, 24 October 1648, edited by Antje Oschmann, as above, pp. 97-170 [also in: *CTS*, vol. 1, pp. 119-197; Acta Pacis Westphalicae Supplementa electronica, vol. 1: Die Westfälischen Friedensverträge vom 24. Oktober 1648; http://www.pax.westfalica.de/ipmipo/index.html]. For the history of the conclusion of multilaterla agreements see: Treaty [Definitive Peace Agreement] France – States General of the Netherlands – UK, Aix-la-Chapelle, 18 October 1748, in: *CTS*, vol. 38, pp. 301-398. On the practice of multilaterla treaty-making see: Christian Wikton, *Multilateral Treaty Calendar. 1648 – 1995* (The Hague, 1998), pp. 3-19.

outside Europe turned out to be a difficult issue well into the nineteenth century. Specifically, the Chinese government strictly opposed the recognition of any other government as equal in rank, let alone as a legal equal, and successfully insisted upon recognition of its own claim of priority of rank vis-à-vis European governments dispatching mission to China.[108] Even after the Treaty of Nanjing of 29 August 1842, which was thoroughly disadvantageours for the Chinese side, the Qīng government, albeit recognising its British counterpart as a legal equal, continued to place itself in a superior rank through the use of technical terms for texts featuring various types of official communication between itself and the British side, and the British government failed to understand the implications of that terminology.[109]

The principle of the recognition of the legal equality of sovereigns, then, represented an aspect of the European public law of treaties under international law that might theoretically have become part of agreements, should their signatory parties been willing to join in accepting the principle. Yet, in their negotiations with partners elsewhere on the globe, European governments became aware of the difficulty that the enforcement of the principle would have required procedural treaties on this matter ahead of the material agreements they sought to accomplish, and they took into account the likelihood that the intention of concluding such procedural agreements might encounter resistance among their envisaged treaty partners, and, in this case, would have demanded the threat or even the actual use of military force. Hence, in order to avoid the risk of the protraction or even the collapse of negotiations about material agreements, European governments decided to tacitly apply the conjunction "and" in preambles specifying the names of the treaty partners and waived explicit statements of the principle of the recognition of the sovereign equality of the signatory parties. Late in the nineteenth century, then, European governments avoided the explicit recognition of the

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[108] George Macartney, [Confirmation of the Instruction for His Mission to China, 4 January 1792; Ms. London: India Office, China-Macartney, 6/12/9], edited. in: Alain Peyrefitte, *L'empire immobile. Ou Le choc des mondes* (Paris, 1989), p. 107. Macartney, *An Embassy to China. Being the Journal Kept by Lord Macartney during His Embassy to the Emperor Ch'ien-lung. 1793 – 1794*, edited by John Lancelot Cranmer-Byng (Britain and the China Trade, vol. 8) (London, 2000) [first publication of this edn (London, 1962)]. Johann Christian Hüttner, *Nachricht von der Brittischen Gesandtschaftsreise durch China* (Berlin, 1797) [newly edited (Berlin, 1879); further edn, edited by Sabine Dabringhaus (Fremde Kulturen in alten Berichten, vol. 1) (Sigmaringen, 1996); Microfiche edn (German Books on China from the Late 15th Century to 1920, Teil 1, Bde 260/261) (Munich, 2004)]. George Leonard Staunton, *An Historical Account of the Embassy to the Emperor of China* (London, 1797) [Microfiche edn (Hildesheim, 1994-1998); German version (Berlin, 1799-1800); excerpt (Leipzig, 1798);the excerpt is also in: *Historisch-genealogischer Kalender* (1798); French version (Paris, 1804)]. Staunton, *Notes of Proceedings and Occurrences during the British Embassy to Peking* (London, 1824). John Lancelot Cranmer-Byng, 'Lord Macartney's Embassy to Peking in 1793. From Official Chinese Documents', in: *Journal of Oriental Studies*, vol. 4, issues 1-2 (1957/58), pp. 117-187.

[109] Treaty Nanjing (note 66). Supplementary treaty of Hu-mun Chase, 8 October 1843, in: *CTS*, vol. 95, pp. 325-327. On the difficulties of reading Chinese characters and their reproduction in the British Foreign Office see: Larry Schaaf, 'Henry Collen and the Treaty of Nanking', in: *History of Photography*, vol. 6 (1982), pp. 353-366, vol. 7 (1983), pp. 163-165. R. Derek Wood, Photocopying the Treaty of Nanking in January 1843 [http://www.midley.co.uk/Nanking/Nanking.htm].Wood, 'Photocopying in January 1843. The Treaty of Nanking', in: *Darkness and Light. The Proceedings of the Oslo Symposium, 25 – 28 August 1994* (Oslo, 1995), pp. 145-150. Wood, 'The Treaty of Nanking', in: *Journal of Imperial and Commonwealth History* 24 (1996), pp. 181-196.

sovereign equality to discriminate their treaty partners, mainly in Africa and the South Pacific, as unequal even in legal terms.[110] In these cases, the use of the unconspicuous use of the conjunction "and" was method of concealing, in written texts of treaties, the perception of the European side that their counterparts on the African and South Pacific sides were unequal sovereigns.[111]

2. European Public Law of Treaties among States

The victory of positivist international legal theory entailed grave problems for which positivists found a solution only towards the end of the nineteenth century, althought their proposals have remained controversial. From the 1880s, the Heidelberg publicist Georg Jellinek and, following him, the Leipzig, later Berlin publicist Heinrich Triepel focused on the main issue of constituting the European public law of treaties among states. In accordance with the biologistic system model, Jellinek categorised states as quasi living persons and assumed that the "establishment and maintenance of communication with other states" (Herstellung und Aufrechterhaltung des Verkehrs mit anderen Staaten) should be counted among the essential purposes of states.[112] Even if no state could be coerced into establishing communication with another state, the same conditions for the establishment and maintenance of communication should be accepted as valid for "all reasonable individual persons" (für alle vernünftigen Individualitäten) and for states alike. Accordingly, every individual, wishing to take up communication with another individual was obliged to recognise that other individual as a "legal subject" (Rechtssubjekt). Likewise, a state should "recognise as a legal subject any other state with which it wants to take up communication" (den anderen als Rechtssubjekt anerkennen, wenn er überhaupt mit ihm in Verkehr treten will). Jellinek was willing to credit this "nature of inter-state communication" (Natur der Staatenbeziehungen) with objective existence and was thereby binding upon the will of the state. Inter-state communication thus brought into existence the „community (*societas*)" of states: "Every state is formally free to decide whether it wants to join the *societas* or not. But if it has done so, it has opted for *jus* in conjunction with *societas*."[113] According to Jellinek, the *societas* of states was founded upon "objective features" (objectiven Merkmalen), "regulating this living communicative relationship" (welche dieses Lebensverhältnis regeln). These features "convert into law at the very moment, in which the state accepts them into its will through establishing the communicative relationship" (werden zum Rechte

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[110] Alphonse Pierre Octave Rivier, *Lehrbuch des Völkerrechts*, book 1, § 1, second edn (Stuttgart, 1899), p. 3. Westlake, *Chapters* (note 85), p. 103.

[111] Westlake, *Chapters* (note 85), pp. 177-178. Oppenheim, *Law* (note 85), vol. 1, § 226, p. 281; in technical terms expressed as the distinction between sovereignty recognised through treaties under international law and the recognition of subjecthood, politically ascertained through admission to membership in the "Family of Nations" and the granting of entitlement for autonomous decision-making under international law.

[112] Georg Jellinek, *Die rechtliche Natur der Staatsverträge. Ein Beitrag zur juristischen Konstruktion des Völkerrechts* (Vienna, 1880), p. 42.

[113] Ibid., p. 48.

in dem Augenblicke, wo der Staat sie durch das Eingehen des betreffenden Verhältnisses in seinen Willen aufnimmt).[114] According to that reasoning, international law was a kind of law of communication, Jellinek believed in agreement with contemporary jurists.[115] Hence, the will of the state was "tied to the objective nature of inter-state relations" (gebunden an die objective Natur der Staatenbeziehungen),[116] which, in turn, were not subjected to the will of the state. With the assumption of the objective "nature of inter-state relations", every contracting state would be entitled to maintain its own "right of judging the legal quality of contractual obligations" (Recht für die Beurtheilung der von ihm eingegangenen Verbindlichkeiten), and a "treaty as the coming together of several wills" (ein Vertrag als Übereinkunft mehrerer Willen; *conventio plurium in idem placitum*) was impossible outside the *societas* of states.[117] Jellinek did not treat this "community of states" as a person capable of legal action and refused to "derive it from the state", as he would not derive "the state from an isolated human being" (ebenso wenig aus dem Wesen des Einzelstaates deducirt werden wie der Staat aus dem des isolirten Menschen). Nevertheless, to Jellinek, the community of states was "a given fact for the civilised states, whose legal nature … has to be acknowledged" (für die Cultur-Staaten eine gegebene Thatsache, deren rechtliche Natur ... zu constatiren ist).[118]

However, Jellinek's idea of the *societas* as the community of states tied together through mutual communication was not that of the free traders, seeking to justify their demands for the "opening" if states for the purpose of establishing trade relations. Instead, he drew this idea from early nineteenth-century regulations that had been agreed upon to secure the freedom of traffic on international rivers such as the Danube and the Rhine.[119] Already in the middle of the century, the idea had been expanded into the postulate that the international law of treaties might evolve into some "world legal order for the protection of intercourse" (den Verkehr schützende Weltrechtsordnung).[120] This expectation came close to the political argument, subsequently promoted by the international peace movement around 1900, that the states of the world would not be able to avoid subjecting themselves to the norms of some "world domestic policy" (Weltinnenpolitik) as a result of their close communicative ties. This argument was thus prefigured in Jellinek's theory of the sources of international law. Put differently, once states had

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[114] Ibid., p. 49.

[115] Ferdinand Walter, *Naturrecht und Politik im Lichte der Gegenwart*, § 463, second edn (Bonn, 1871), p. 346 [first published (Bonn, 1863)]. Leopold August Warnkönig, 'Die gegenwärtige Aufgabe der Rechtsphilosophie nach den Bedürfnissen des Lebens und der Wissenschaft', in: *Zeitschrift für die gesamte Staatswissenschaft* 7 (1851), pp. 219-281, 473-536, 622-665, at pp. 625-628, 630].

[116] Jellinek, *Natur* (note 112), p. 48.

[117] Ibid., p. 47.

[118] Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Freiburg, 1892), p. 298.

[119] Jellinek, *Natur* (note 112), pp. 160-162.

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

been “opened” for communication, they had become subject to the rule of law. Jellinek apparently realised that his claims placed him in proximity to eighteenth-century natural law theory, specifically Christian Wolff’s *civitas maxima*. Jellinek used the word “nature” when reasoning about the foundation of the legal bonding of the state will.[121] He anticipated that his reasoning might be misunderstood as acceptance of natural law theories and built a defense line against the potential subsequent criticism that he was a natural law theorist. According to his preemptive defense, natural law theorists held beliefs in metaphysical, somehow wooden mechanisms and expected that these mechanisms would have effects on the decision-making of governments of sovereign states. By contrast, he insisted, the “objective features of the communicative relationships of international life“ (objectiven Merkmale der internationalen Lebensverhältnisse) did not have any “legal nature independent of the will of the state”, but would “as merely imagined, purely potential relations among states be empty barns receiving their flesh and blood, life and movement only through the creative will of the state” (als nur gedachte, als rein potentielle Beziehungen von Staat zu Staat leere Scheunen, die Fleisch und Blut, Leben und Bewegung erst durch den schöpferischen Willen des Staats erhalten).[122]

Jellinek thus reinterpreted natural law theory in the light of nineteenth-century biologistic creeds. As he analysed the state with the model of the living body, he had to reject eighteenth-century natural law theory which had been based on the machine model and had derived core parts of the law among states from non-human sources. Despite his disavowal, Jellinek adduced the natural law assumption of a superior force, based in reason, regulating the communicative inter-state relations and binding the will of the state, as the sole basis on which the legislative activity of the will of the state could come into existence. This was so, because the “basic norm” *pacta sunt servanda* could only be derived from this superior force of the “objective nature of inter-state intercourse”: “Formally, this norm follows from the contracting wills, because it is impossible to want something and not want it at the same time.” (Formell folgt dieser Satz aus dem vertragschließenden Willen, denn es ist unmöglich, Etwas zugleich zu wollen und nicht zu wollen.)[123] No natural law theorist could have provided a more cogent explication of the basic norm *pacta sunt servanda*.[124] Moreover, in providing this explication, Jellinek, like contemporary jurists,[125] took issue with the then current argument that the “basic norm” *pacta sunt servanda* had been transferred into international law from ancient Roman civil law.[126] Jellinek rejected this derivation with the argument that such a transfer by

[121] Warnkönig, ‘Aufgabe’ (note 115), pp. 622-653.
[122] Jellinek, *Natur* (note 112), p. 49.
[123] Ibid., p. 57.
[124] Walter, *Naturrecht* (note 115), p. 355.
[125] Ernst Meier, *Über den Abschluss von Staatsverträgen* (Leipzig, 1874), p. 37.
[126] Franz von Holtzendorff, *Encyclopädie der Rechtswissenschaft in systematischer Darstellung* (Holtzendorff, Encyclopädie der Rechtswissenschaft, part 1), second edn (Leipzig, 1873), p. 954 [first published (Leipzig, 1870);

way of analogy would require recognition in the area of law into which the transfer was to occur.[127] As, however, such recognition was nowhere on record, the basic norm *pacta sunt servanda* could not have moved into international law from another area of law but followed directly from the effects of the "objective features which are recognised by contracting states through the fact that they have entered into a contract" (objective Momente, welche von den in Vertragsverhältnissen stehenden Staaten vermöge der Thatsache, dass sie mit einander contrahirt haben, anerkannt werden).[128]

Although Jellinek imagined the *societas* of states as independent from the will of the state, he was in full agreement with contemporary international legal theorists who were determined to restrict the arena of validity of international law to the predominantly European "family of nations" as the community of "states with Christian faith" (Staaten christlicher Gesinnung) within the "community of Occidental civilisation" (abendländischen Kulturwelt).[129] Jellinek took this view because it seemed to him that the "largest part of international legal titles" (grösste Theil der völkerrechtlichen Ansprüche) were based "on explicit agreements in the form of conventions and treaties" (auf ausdrücklichen Verabredungen in der Form von Vereinbarungen und Verträgen) among the then limited number of members of that "family of nations".[130] In order to fulfill the demands of the *societas* of states, Jellinek demanded, the members had to be "civilised", located in vicinity to one another, tied together through a long history as well as common tasks and engaged in permanent mutual communication: "By virtue of their tasks, which are not solvable with the means of individual states, and specifically in consequence of their common culture, which does not end at their joint international boders, the civilised states stand in a community becoming explicit in incessant intercourse. On the basis of their common culture and common interests, this community of states arises as the result from the entire historical evolution." (Die civilisirten Staaten stehen kraft ihrer nicht durch die Mittel des Einzelstaates allein lösbaren Aufgaben, sodann kraft historisch wirkender Kräfte, vor Allem kraft der gemeinsamen Staatsgrenzen nicht ihr Ende findenden Cultur in einer socialen, in ununterbrochenem Verkehr sich äussernden Gemeinschaft. Auf Grund gemeinsamer Cultur und gemeinsamer Interessen erhebt sich die Staatengemeinschaft, die durch die gesamte geschichtliche Entwickelung gegeben.)[131] This *societas* could by itself recognise "no status of states" (keinen Status der Staaten), because the "community of states is not capable of acting

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tird edn (Leipzig, 1877); fourth edn (Leipzig, 1882); fifth edn (Leipzig, 1889)].

127 Jellinek, *Natur* (note 112), pp. 50-51.

128 Ibid., p. 52.

129 Georg Jellinek, 'Die Zukunft des Krieges [Vortrag, Gehe-Stiftung, Dresden, 15. März 1890]', in: Jellinek, *Ausgewählte Schriften*, vol. 2 (Berlin, 1911), pp. 515-541, at pp. 519-520 [reprint (Aalen, 1970)]. Hans Delbrück, 'Deutschlands Stellung in der Weltpolitik', in: Ders., *Vor und nach dem Weltkrieg. Politische und historische Aufsätze 1902-25* (Berlin, 1926), pp. 9-17, at p. 13. Ernst Immanuel Bekker, *Das Recht als Menschenwerk und seine Grundlagen* (Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philos.-Hist. Kl. 1912, nr 8) (Heidelberg, 1912), p. 8. John Atkinson Hobson, *Imperialism* (London, 1902), pp. 204-205, 208.

130 Jellinek, *System* (note 118), pp. 307, 308.

131 Ibid., p. 298.

legally as a community forming one single person" (die Staatengemeinschaft als nicht zur Persönlichkeit gediehene Gemeinschaft rechts- und handlungsunfähig ist): "Instead, all rights and obligations of states fall apart in rights and obligations of all against all." (Vielmehr lösen sich alle Rechte und Pflichten der Staaten auf in Rechte und Pflichten Aller gegen Alle.)[132] The capability of states to perform as actors within their *societas* was, therefore, not rooted in natural rights but "legally granted and acknowledged capability of acting forms the essence of all subjective international rights. The category of permission, strictly speaking, does not exist in international law at all, as giving permission presupposes the existence of a power that might as well be entitled to prohibit." (Die Handlungsfähigkeit der Staaten in ihrer Gemeinschaft beruht daher nicht auf natürlichen Rechten, sondern rechtlich gewährtes und anerkanntes Können bildet den Inhalt aller subjektiven völkerrechtlichen Rechte. Die Kategorie Erlauben existiert streng genommen für das Völkerrecht überhaupt nicht. Denn Erlauben setzt eine Macht voraus, die verbieten könnte.)[133] Yet the *societas* of states knew "no rulers' commands" (keine Herrschergebote).[134] Therefore, according to Jellinek, the community of states was not an institution for the recognition of states and their actions, entitled to act at its own discretion. But, like every state was independent from the will of its nationals, the community of states was independent of the will of its state members.[135]

Heinrich Triepel, Jellinek's junior contemporary, was not satisfied with that line of argument. Contrary to Jellinek's warnings, he indeed censured his senior for operating "fairly close" to natural law, when he appeared to have derived international law from the "nature" of states. In Triepel's perspective, reference to the "nature" of states was "certainly no less awkward" (etwas sicherlich nicht minder Bedenkliches) than the postulate of some power capable of enforcing law above states.[136] Accordingly, Triepel claimed that Jellinek had done no more than establish some "general law" for members of the *societas* of communicating states but "no law mutually binding states" (kein die Staaten gegenseitig bindendes Recht). This, Triepel argued, had not happened because Jellinek appeared to have allowed for the possibility that a state could renounce the norms of international law without breaking that same law. Triepel adduced "experience", which he did not specify any further and according to which states were renounce norms of international law even if they faced the danger of becoming excluded from the *societas* of communicating states.[137] Hence, Triepel concluded, the derivation of the binding force of international law would have to start at a

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[132] Ibid., p. 300.

[133] Ibid., p. 301. Likewise: David Dudley Field, 'De la possibilité d'appliquer le droit international européen aux nations orientales', in: *Revue de droit international et de législation comparée* 7 (1875), pp. 659-668, at pp. 662-663, with explicit reference to treaties as the core source of international law.

[134] Jellinek, *System* (note 118), p. 299.

[135] Ibid., p. 298.

[136] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), pp. 80-81 [new edn (Tübingen, 1907); reprint (Aalen, 1958); French version (Paris, 1920)].

[137] Ibid., p. 81.

more fundamental level. To reach that level, Triepel withdrew to early nineteenth-century theories of the derivation of customary law, explicitly to the work of the Berlin jurist Georg Friedrich Puchta.[138] Like Puchta, who had argued that not just statutory but also customary law required the existence of some legal community in order to obtain enforceability, Triepel postulated that international law could only become enforceable if what he termed the "single wills" (Einzelwillen) of states could be "merged" (zusammenfließen) into a "plurality of persons capable of setting the law" (zur Rechtsschöpfung befähigte Personenmehrheit). According to Triepel, this "plurality of persons" as a group of legal actors constituted the "common will" (Gemeinwillen), but it was not identical with the general "community of states", but a group in which "the 'commanders are at the same time the executors'", quoting an eighteenth-century expression.[139] The "common will" was to come into existence through the conclusion of "agreements" (Vereinbarungen) among states forming the "plurality of persons". These "agreements" were different from usual bilateral treaties between states, which could not produce the "common will". Usual treaties between states could not produce the "common will" because, as in the case of peace treaties, they represented the coming together of opposing "single wills"; elaborating on Bergbohm's approach, Triepel insisted that the "common will" would have to arise from "single wills" moving in the same direction. Only "agreements" specifically made to the end of setting norms of international law could establish the "common will". As such, these "agreements" could not produce their own binding force, as Triepel conceded. However, the binding force would be accomplished at the very moment at which the "common will" had completely come into existence and enforced the "agreements" with their norms. Norms having been enforced through the "common will" would be transferred into the municipal law of states, as Triepel expected in accordance with the theories advocated by the contemporary international peace movement.[140] By consequence, acts against the norms set by the "common will" were breaches of the law.[141] The conclusion of an "agreement" on the establishment of the "common will" was not an act of self-obligation of the contracting states, as Triepel noted, but the result of the fusion of "single wills" of several states into the "common will".[142] Therefore, the "common will" was binding only for the states that had contracted to establish it. Hence, Triepel concluded, there were no general norms of international law but only "particular ones" (partikulare),[143] namely those which the states, having formed the "common will", had validated through their own particular "agreement".

Triepel was aware of the fact that the "agreement" setting the "common will" was not the highest

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[138] Ibid., pp. 76, 80.
[139] Ibid., pp. 80-81; Adam Friedrich Glafey, *Vernunfft- und Völcker-Recht* (Frankfurt and Nuremberg, 1723), p. 194 [third edn (Nuremberg, Frankfurt and Leipzig, 1752)].
[140] Triepel, *Völkerrecht* (note 136), pp. 75-76.
[141] Ibid., pp. 49-50, 45, 70-71, 74, 110.
[142] Ibid., pp. 77, 79.
[143] Ibid, pp. 80, 83-84.

"source" of the law. But, he insisted, this defect was not specific for international law but applied to all legal fields. This was so because every legal norm required another legal norm in order to obtain binding force. With regard to international law, Triepel postulated that the political "single will" of every contracting state was the highest extra-legal source. Even though, evidently, each "single will" of a state could not be identical with the "common will", the "common will" was not totally alien to but part of the combined "single wills".[144] Triepel posited the "plurality of persons" as a *societas* of a few states and as an international legal community, which, as Puchta had argued, could produce a legal consciousness and, specifically, set legal norms.[145] Thus Triepel drew on elements of the contract theory of rulership of the seventeenth and eighteenth century, which he combined with the early nineteenth-century theory of the legal community. He did not, it is true, construct his contractual "plurality of persons" as a state; for the "agreement" he postulated as the instrument of establishing the "common will" in its own right neither produced a binding force nor was it a law or a kind of formal decision of some federation of states.[146] et Triepel had his "plurality of persons" come into existence through an act of will of the contracting states. Consequently, Triepel's legal community producing the "common will" had the same task as Christian Wolff's *civitas maxima*, namely laying the foundations for setting legal norms, which could restrict the freedom of decision-making of governments of sovereign states. However, contrary to Wolff, who had imagined the *civitas maxima* as a universal community established by nature, Triepel limited membership in his "plurality of persons" to states, which he and contemporary theorists of international law were ready to recognise as "civilised", and assumed that his "plurality of persons" had come into existence through human action.

Jellinek as well as Triepel, although taking different starting points, thus arrived at the same concluding point of their theories. Both jurists tried to derive the binding force of international legal norms using only theoretical instruments of legal positivism. In doing so, they introduced the community of states "as an association capable of creating law" (als eine zur Rechtserzeugung befähigte Genossenschaft). This community alone was, in their view, the locus of the establishment of the "common will". In this perspective, international law was neither a given of natural law nor some form of customary law, even though the "plurality of persons" might for itself also recognise as binding norms of customary law.[147] But their attempt failed. Eventually, both theorists had to employ elements from older natural law theories, thereby involuntarily proving the lack of possibility to derive the binding force of international legal norms solely from positive law. At the

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144 Ibid., pp. 82-83.
145 Paul Heilborn, 'Les sources du droit international', in: *Recueil des cours* 11 (1926, part I), pp. 1-63, at p. 14.
146 Heinrich Triepel, *Die Zukunft des Völkerrechts* (Vorträge der Gehe-Stiftung, issue 8, nr 2) (Leipzig and Dresden, 1916), p. 87.
147 Jellinek, *Natur* (note 112), p. 42; Triepel, *Völkerrecht* (note 136), pp. 82-83.

very point, where they had to argue why governments of states were willing to cooperate, both theorists were compelled to withdraw to extra-legal, that is, political reasons. Whereas Jellinek assumed some a priori decision to join the *societas* of communicating states, Triepel postulated an a priori willingness to engage in a contractual obligation to establish a "common will". Within both theories, the argument entailed the conclusion that the "community of states" as an international legal community was not only not to be universal but, instead, had to be a community that was narrowly limited to allegedly "civilised" states and in need of specific acts of admission. Neither Jellinek nor Triepel were thus ready to accept the starting point of the inclusionistic natural-law theory for their derivation of the binding force of legal obligations of states. This starting point had consisted in the belief that the general rules of natural law were binding for all humankind and therefore enforceable on the globe at large. Instead, neither Jellinek nor Triepel were in a position to establish the ground for the binding force of the "basic norm" *pacta sunt servanda*. They had to rank that norm as "particular" in the sense that they could regard it as binding only for the members of the community of states as an international legal community with limited membership. In doing so, they offered an exclusionistic international legal theory that justified the discriminating application of international law through the colonial governments in Europe and North America. The community of states as an international legal community, which Jellinek and Triepel postulated, was no more than a club of the allegedly "civilised" "family of nations", whose house law was to be international law. The American and European club of states could hardly constitute a Kantian "federalism of nations" in pursuit of the maintenance of world peace, as the international peace movement expected even at the time of World War I.

3. The "Family of Nations"

As theoretically conceived by Jellinek and Triepel, positive international law was restricted in scope to a complex of norms valid only for a limited number of states. It excluded the vast majority of the globe's population from membership in the club of essentially European states. Since the turn towards the twentieth century, the formula of the "Family of Nations" became considered as an appropriate term for this club, mainly in Anglophone international legal theory. The exclusionist construct of the "Family of Nations" was easily available as an instrument for the justification of colonial rule, in that it helped establish the categories through which the so-called colonial "protectorates" could be imposed upon the many pre-colonial states tied together as sovereign equals with states in Europe and North America but barred off from access to the "Family of Nations". Most notably, the exclusion related to the waiving of the validity of norms of the law of war, as it was being established within the club. Henceforth, any kind of military resistance against the superimposition of colonial rule within the dependencies could be treated as acts of rebellion and

their repression fell outside the constraints of the law of war. Therefore, those legal doctrine that positioned the "Family of Nations" as the sole legitimate legislative institution above states, created the postulate not only of a space of reduced law enforcement capability beyond states, but of a completely lawless international arena. With this postulate, international legal theorists have deeply influenced the theory of international relations of the entire twentieth century.[148] Even the various

[148] Oppenheim, *Law* (note 85), vol. 2, pp. 454-455: "In the second half of the nineteenth century, the desire of States to acquire as colonies vast territories which they were not able to occupy effectively at once, led to agreements with the chiefs of natives inhabiting unoccupied territories, by which these chiefs committed themselves to the 'protectorate' of States that are members of the Family of Nations. These so-called protectorates are certainly not protectorates in the technical sense of the term. Which denotes that relationship between a strong State and a weak State, where by a treaty the weak State has put itself under the protection of the strong and transferred to the latter the management of its more important international relations. Neither can they they be compared with the protectorate which members of the Family of Nations exercise over such non-Christian states as are outside that family, because the respective chiefs of natives are not the Heads of States, but Heads of tribal communities only. Such agreements, although they are named 'protectorates', are nothing else than steps taken to exclude other Powers from occupying the respective territories, They give, like discovery, an inchoate title and the precurors of future occupations." LIkewise: Peter Resch, *Das Völkerrecht der heutigen Staatenwelt europäischer Gesittung*, second edn (Graz and Leipzig, 1890), pp. 26-27 [first published (Graz and Leipzig, 1885)]. For an elaborate recent analysis of systems transformations as sequences of the rise and fall of "big powers" allegedly providing "international public goods" for humankind in a seemingly "anarchical" world system, see: Menzel, *Ordnung* (note 66), pp. 29-36. The explicitiness of these statements by international legal theorists around 1900 stands fundamentally against the contention that the purported "expansion" of the world system at this time should have been the result of predominantly or at least significantly economic factors as self-organising forces. Rather than an "incorporation" taking place at this time into a system of whatever kind, processes of the deliberate destruction or at least the purposeful exclusion from the "family of nations" of large numbers of states took place, which had until then been in existence as sovereigns and subjects under international law. Moreover, the contemporaneous destruction of fully fledged international systems ("world-systems" in Chase-Dunn's and Frank's terminology), mainly in East Asia and various parts of Africa has been left unnoticed among social-science systems theorists. And these theorists have commonly treated colonial dependencies as states (even though no European colonial government had established them as states) and have completely ignored the continuing existence, under the shelter of international treaties, of pre-colonial states within these dependencies. See: Christopher K. Chase-Dunn and Thomas D. Hall, *Rise and Demise. Comparing World-Systems* (Boulder, 1997), pp. 187-199. Chase-Dunn, *Global Formation. Structures of the World-Economy* (Lanham, MD, 1998), pp. 218-220, 272-294. Chase-Dunn, 'Globalization. A World-Systems Perspective', in: *Journal of World-Systems Research* 5 (1999), pp. 165-185 [http://www.jwsr.org/wp-content/uploads/2013/05/Chase-Dunn/v5n2/pdf]. Chase-Dunn, Hiroko Inoue, Teresa Neal and Evan Heimlich, 'Globalgeschichte und Weltsysteme', in: *Zeitschrift für Weltgeschichte*, vol. 17, nr 2 (2016), pp. 11-46. Thomas D. Hall, 'Incorporation into and Merger of World-Systems', in: Salvatore J. Babones and Christopher K. Chase-Dunn, eds, *Routledge Handbook of World-Systems Analysis* (London and New York, 2012), pp. 47-55. Immanuel Maurice Wallerstein, *The Modern World-System*, vol. 3: The Second Era of Great Expansion of the Capitalist World-Economy. 1730 – 1840s (San Diego, New York, Berkeley, Boston, London, Sydney, Tokyo and Toronto, 1989), pp. 129-130: "In the course of the renewed economic expansion (and monetary inflation) of the period 1733 – 1817 (more or less), the European world-economy broke the bounds it had created in the long sixteenth century and began to incorporate vast new zones into the effective division of labor it encompassed. ... These incorprations took place in the second half of the eighteenth and the first half of the nineteenth centuries. The pace, as we know, then accelerated and, eventually, by the end of the nineteenth century and the beginning of the twentieth, the entire globe, even those regions that had never been part even of the external arena of the capitalist world-economy, were pulled inside. ... Incorporation into the capitalist world-economy was never at the initiative of those being incorporated. The process derived rather from the need of the world-economy to expand its boundaries, a need, which was itself the outcome of pressures internal to the world-economy. ... Previously in this work, we have sought to distinguish systemtatically those zones, which (in the long sixteenth century) were in the periphery of the world-economy, and those which were in its external arena. ... The question we are dealing with now is the nature of the process, by which a zone, which was at one point in time in the external arena of the world-economy, came to be, at a later point in time, in the periphery of that same world-economy. ... // Incorporation means fundamentally that at least some significant production processes in a given geographic location become integral to various of the commmodity chains that constitute the ongoing divisioning of labor of

versions of critical world systems theories have shared the common attempt to categorise world systems mainly in economic terms, with no more than subsidiary attention paid to politics and without any recourse to the law.[149]

Thus, the harsh rejection of natural law as the source of international legal norms during the nineteenth century ushered in the restriction not merely of the validity but also of the acceptance of

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the capitalist world-economy. ... A production process can only be considered to be thus integrated, if its production respond in some sense to the ever-changing ‚market conditions' of this world-economy (whatever the source of these changes) in terms of efforts by those, who control these production processes to maximize the accumulation of capital within this ‚market' – if not in the very short run, at least in some reasonable middle run. As long as this cannot be said to be happening by and large, as long as the vagaries of the particular production processes can be accounted for by considerations other than those, which permit the maximal accumulation of capital in the world-economy, then the zone, in which these particular processes are located, must be considered to remain in the external arena of the world-economy, despite the existence of trade links and no matter how extensive or profitable the ongoing ‚trade' seems to be." Wallerstein, *World-Systems Analysis. An Introduction* (Durham and London, 2004) [reprint (Durham and London, 2005)], pp. 42-59: "The Rise of the States-System. Sovereign Nation-States, Colonies and the Interstate System"; p. 55: "the weakest states are those we call colonies, by which we mean administrative units that are defined as non-sovereign and fall under the jurisdiction of another state, normally distant from it. The origin of modern colonies is in the economic expansion of the world-system. In this expansion, strong states at the core tried to incorporate new zones into the processes of the modern world-system."; pp. 55-56: "The colonies performed internally the same kinds of functions that sov-//ereign states performed: they guaranteed property rights; they made decisions about traversal of boundaries; they arranged modes of political participation (almost always extremely limited); they enforced decisions about the workplaces and often decided on what kinds of production were to be pursued or favored in the colony. But of course, the personnel, who made these decisions, were overwhelmingly persons sent out by the colonizing power and not persons of the local population. The colonial powers justified their assumption of authority and the distribution of roles to persons from the 'metropolitan' country by a combination of arguments: racist arguments about the cultural inferiority and inadequacy of the local populations; and self-justifying arguments about the 'civilizing' role the colonial administration was performing. The basic reality was that the colonial state was simply the weakest kind of state in the interstate system, with the lowest degree of real autonomy and therefore maximally subject to exploitation by firms and persons from a different country, the so-called metropolitan country." In order to come to grips with the process of the alleged "expansion" of his "world-system" at c. 1900, Wallerstein introduced the undefined category of the "inter-state system", which seems to comprise states that Wallerstein took to have remained un-"incorporated". On the exclusion of the majority of the world's population from the validity and applicability of the law of war 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.

[149] Chase-Dunn, *Rise* (note 148), pp. 8, 99 Chase-Dunn and Eugene Newton Anderson, *The Historical Evolution of World-Systems* (Basingstoke and New York, 2005), p. X. André Gunder Frank and Barry K. Gills, 'The 5000 Year World System', in: Frank and Gills, eds, *The World System. Five Hundred Years or Five Thousand?* (London and New York, 1993), pp. 3-55 [reprints (London and New York, 1996; 1999); first published in: *Humboldt Journal of Social Relations* 18 (1992), pp. 1-79]. Frank, *ReOrienting the 19th Century. Global Economy in the Continuing Asian Age*, edited by Robert A. Denemark (Boulder, 2014), pp. 100-102, 181-182, 283-284. Barry K. Gills, 'World System Analysis, Historical Sociology and International Relations. The Difference a Hyphen Makes', in: Stephen Hobden and John Hobson, eds, *Historical Sociology of International Relations* (Cambridge, 2002), pp. 141-161. Immanuel Maurice Wallerstein, 'The Rise and Future Demise of the World Capitalist System', in: *Comparative Studies in Society and History* 16 (1974), pp. 387-415 [reprinted in: Wallerstein, *The Essential Wallerstein* (New York, 2000), pp. 71-105]. Wallerstein, 'The States in the Institutional Vortex of the Capitalist World Economy', in: *International Social Science Journal* 32 (1980), pp. 743-751. Wallerstein, 'World-Systems Analysis. Theoretical and Interpretative Issues', in: Wallerstein, Terence K. Hopkins, Robert L. Bach, Christopher Chase-Dunn and Ramkrishna Mukherjee, eds, *World-Systems Analysis* (Beverly Hills, London and New Delhi, 1982), pp. 91-103. Wallerstein, 'World System versus World-Systems', in: Andre Gunder Frank (as above), pp. 292-298 [first published in: *Critique of Anthropology* 11 (1991)]. Wallerstein, ed., *The Modern World-System in the Longue Durée* (Boulder, 2004), pp. 1-3.

international legal norms. The very attempt to derive any law above states from human action was possible only under the postulate of some "legal consciousness" as the basis for that action. But that postulate was incompatible with the construct of the "Family of Nations", which, in turn, presupposed the expectation that any legal norm could receive their validity only if and as long as some specifiable group was willing and able to recognise them as valid. Because this „legal consciousness" appeared to have to be tied to some manifest group and some action resulting from the habits of that group, it could neither be taken as a given of nature nor as coming about as a single global or universal or inclusionist entity by way of purposeful human action. World wide action or action of worldwide effects beyond international borders of states thus turned out to be beyond control on the globe as such, but only among the states assembled within the European "Family of Nations". Ever since the nineteenth century, the global governance of migration has been an unsolvable problem of international law in the perception of legal positivists.

IV. Legal Practice: the Ascertainability of the Validity of International Legal Norms

1. The Search for an Empirical Proof of either the Willingness or the Refusal to Accept International Legal Norms

The rejection of natural law and ensuing positivist legal theoretical skepticism that international legal norms might be legislated and enforced, have thus raised the problem of determining how or under which conditions the global acceptance of international legal norms may, beyond theoretical speculations, be ascertained empirically, no matter in what way they may have been derived. Put differently: how can it become possible to prove either the willingness or the refusal to accept international legal norms? The difficulty in finding answers to this question consists in determining whether the often ascertainable willingness to honour treaties among states can be based on the partial interests of the signatory parties or must be drawn on the prima facie acknowledgment of the binding force of agreements. As an instrument of the regulation of interactive cross-border action, worldwide or with worldwide impact, the law of hospitality can be the test case, precisely because it has remained unset law in its core respects. Urban immigration law, the law relating to diplomacy, international trade law and the law relating to the provision of aid to shipwrecks are the core aspects of the law of hospitality that can provide answers.

In long-term perspective, evidence shows that, to the beginning of the twentieth century, migration across international borders of states was hardly ever under government surveillance. Although emigration restrictions, even prohibitions, did exist, the international borders of states were usually

not guarded consistently across space and time, even when urban councils commonly had inner areas of free cities encircled by enceintes as well as thoroughly guarded and defended.[150] Not just in Europe, but also in Japan, where a government edict prohibited emigration between 1633 and 1866, longer stretches of international terrorial boundaries were left unfortified to the middle of the nineteenth century.[151] Likewise, the prohibition of immigration, in force in almost all seaports of Japan from 1637 to 1854, did not only not trigger measures of military defence against potential external aggression to the 1840s, but the government even had military theorist Hayashi Shihei arrested, who, already in 1786, had warned against the possiblity of a seaborne attack on the archipelago from any place across the ocean and had pointed to the lack of fortifications of Japanese coasts in the eventuality of such attacks. But Hayashi's warning did not provoke the government to take immediate action, and Hayashi died in prison.[152] Even where international borders in Europe were actually fortified and guarded, no general control of the identity of passers-by took place, because passports would not be issued to the general population.[153] Instead, active military personnel

[150] Gabriele Isenberg and Barbara Scholkmann, eds, *Die Befestigung der mittelalterlichen Stadt* (Städteforschung. Reihe A, Bd 45) (Cologne, Weimar and Vienna, 1997). Martin Romeiß, 'Die Wehrverfassung der Reichsstadt Frankfurt am Main im Mittelalter', in: *Archiv für Frankfurts Geschichte und Kunst*. V Series, vol. 1 (1953), pp. 5-63 [first published as Ph. D. thesis, typescript (University of Frankfurt, 1944)].

[151] In France, there was the system of the so-called Vaubun fortresses, which did obstruct access on some major inroads into the Kingdom. But these fortresses were not aimed at the prevention of immigration, but served the purpose of deterring potential invaders. For studies see: Ulrich Reinisch, 'Angst, Rationalisierung und Sublimierung. Die Konstruktion der bastionierten, regulären Festung als Abwehr von Angstzuständen', in: Bettina Marten, Ulrich Reinisch amd Michael Korey, eds, *Festungsbau. Geometrie, Technologie, Sublimierung* (Berlin, 2012), pp. 269-313. For Japan the lack of fortifications against seaborne invaders is on record at the time of the incident provoked by the British ship *Phaeton* in 1808, which attempt to land at Nagasaki port. The ship was equipped with 48 cannon, was approaching the port under the Dutch flag. Port authorities denied the landing of the ship, once it had become clear that it was a British vessel coming from the Dutch stronghold at Batavia on Java. The Dutch *Opperhoofd*, stationed on the island of Deshima in Nagasaki port, refused to copperate with the British crew and supported the Japanese government in its request that the ship should leave the port. When the crew did not act as instructed, the government mobilised its fighting force. However, less than ten percent of the required men were ready for action around the Nagasaki bay area, and the main contingents had to be moved from garrisons which were a two-days' journey away. Once the troops were present on the spot, the British crew withdrew. On the incident see: Hendrik Doeff, *Herinneringen uit Japan* (Haarlem, 1833), pp. 171-174 [reprint (Classica Japonica. Section 3, series I, vol. 6) (Tenri and Tokyo, 1973); English version (Tokyo, 2003)]. William George Aston, H.M.S. '*Phaeton* at Nagasaki', in: *Transactions of the Asiatic Society of Japan* 7 (1879), pp. 323-336 [reprinted in: Aston, *Collected Works*, edited by Peter Francis Kornicki, vol. 1 (Bristol and Tokyo, 1997), pp. 105-120]. Noell Wilson, 'Tokugawa Defense Redux. Organizational Failure in the *Phaeton* Incident of 1808', in: *Journal of Japanese Studies* 36 (2010), pp. 1-32.

[152] Hayashi Shihei, *Kaikoku heidan* [1785], new edn (Tokyo, 1916), separate pagination, preface, p. 1, book 1, pp. 1-3 [also in: Tokuhei Yamagishi and Masami Sano, eds, *Shinpen Hayashi Shihei zenshū*, vol. 1: Heigaku (Tokyo, 1978), pp. 77-288; Facsimile of the edn by Asaka Gorō [1856], in: ibid., pp. 313-984; partly re-edited from Asaka's edn by Friedrich Lederer, *Diskurs über die Wehrhaftigkeit einer Seenation* (Munich, 2003); partly translated in: Donald Keene, *The Japanese Discovery of Europe. 1720 – 1830*, second edn (Stanford, 1969), pp. 39-45, 321-322; first edn of this edn (London, 1952)]. On the text see: Yoshihiko Amino, 'Les Japonais et la mere', in: *Annales ESC* 50 (1995), pp. 235-258.

[153] For the history of passports see: Jochen Baumann, Andreas Dietl and Wolfgang Wippermann, eds, *Blut oder Boden. Doppelpass, Staatsbürgerrecht und Nationsverständnis* (Berlin, 1999). Werner Bertelsmann, *Das Passwesen*. LLD thesis (University of Würzburg, 1914). Alain Bideau and Maurice Garden, 'Les registres de passeports à Trévoux pendant la Révolution', in: *Etudes sur la presse au XVIIIe siècle. Les Mémoires de Trévoux* (Lyons, 1975), pp. 167-202. Andreas K. Fahrmeir, *Citizens and Aliens. Foreigners and the Law in Britain and the German States. 1789 – 1870* (Monographs in German History, 5) (New York and Oxford, 2000), pp. 100-151.

received specific passports for periods they were serving outside garrisons, in order to protect them against suspicions that they deserters.[154] Passports for civilians came into regular use only from the beginning of the nineteenth century, when they testified to the health political safety of travellers moving from one state to another.[155] Therefore, the idea that population groups subject to control by a territorial rulers should have been tied to the soil,[156] has been drawn on a perception that arose from bourgeois criticism of absolutism, coupled with the demand for the freedom of crafts and trade, during the nineteenth century,[157] but not from contemporary records prior to that century. Along these lines, the exponential increase in urban populations during the twelth, thirteenth and early fourteenth centuries documented high mobility within Europe, which can still be gleaned in some cities from registers of residence and other sorts of record.[158] Franconian Gerolzhofen, for one, had

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Fahrmeir, 'Passwesen und Staatsbildung im Deutschland des 19. Jahrhunderts', in: *Historische Zeitschrift* 271 (2000), pp. 57-91. Fahrmeir, *Citizenship* (New Haven and London, 2007), pp. 72-75, 96-101. Fahrmeir, 'Passports and the Status of Aliens', in: Martin H. Geyer and Johannes Paulmann, eds, The Mechanics of Internationalism in the Nineteenth Century (Oxford, 2001), pp. 93-119 [further edn (Oxford, 2008)]. Fahrmeir, 'Staatliche Abgrenzung durch Passwesen und Visumzwang', in: Jochen Oltmer, ed., *Handbuch Staat und Migration in Deutschland seit dem 17. Jahrhundert* (Berlin and Boston, 2015), pp. 221-243. Ders., 'Verbriefte Identität, regulierte Mobilität. Pässe als kosmopolitische Dokumente', in: Bernhard Gißibl and Isabella Löhr, eds, Bessere Welten. *Kosmopolitismus in den Geschichtswissenschaften* (Frankfurt, 2017), pp. 225-252. Waltraud Heindl-Langer and Edith Saurer, eds, *Grenze und Staat. Paßwesen, Staatsburgerschaft, Heimatrecht und Fremdengesetzgebung in der österreichischen Monarchie. 1750 – 1867* (Vienna, 2000). Leo Lucassen, 'Het passpoort als edelste deel van een mens', in: *Holland* 27 (1995), pp. 265-285. Mervy Matthews, *The Passport Society. Controlling Movement in Russia and the USSR* (Boulder, 1993). Gérard Noiriel, *Die Tyrannei des Nationalen* (Lüneburg, 1994) [first published (Paris, 1991)]. Daniel Nordman, 'Sauf-conduits et passeports en France à la Renaissance', in: Jean Céard and Jean-Claude Margolin, eds, *Voyager à la Renaissance. Actes du Colloque de Tours. 30 juin – 13 juillet 1983* (Paris, 1987), pp. 145-158. Karl Friedrich Rauer, *Die preussische Pass-Polizei-Verwaltung* (Nordhausen, 1844). Egidio Reale, *Le régime des passeports et la Société des Nations* (Paris, 1930). Adrien Sée, *Le passeport en France* (Chartres, 1907). John Torpey, 'Le contrôle des passeports et la liberté de circulation. Le cas de l'Allemagne au XIXe siècle', in: *Genèses* 30 (1998), pp. 53-76. Torpey, *The Invention of the Passport. Surveillance, Citizenship and the Passport* (Cambridge, 2000), pp. 21-56, 75-111. Paul Vallotton, *Le passeport*. LLD. thesis (University of Lausanne, 1923). Jean Vidalenc, 'Une source d'histoire économique et sociale. Les passeports', in: *Bulletin de la Section d'histoire moderne et contemporaine* 8 (1971), pp. 187-202. Sara Warneke, *A Coastal ‚Hedge of Laws'. Passport Control in Early Modern England* (Studies in Western Tradition. Occasional Papers, 4) (Bendigo, AUS: School of Arts, La Trobe University, 1996). Hans Wehberg, *Das Paßwesen* (Staatsbürger-Bibliothek, 63) (Mönchengladbach, 1915).

[154] Mylius, *Corpus* (note 92), pp. 341-348. Hans-Michael Möller, *Das Regiment der Landsknechte* (Frankfurter Historische Abhandlungen, 12) (Wiesbaden, 1976), p. 48. Karl Rübel, 'Kriegs- und Werbewesen in Dortmund in der ersten Hälfte des 18. Jahrhunderts', in: *Beiträge zur Geschichte Dortmunds und der Grafschaft Mark* 7 (1896), pp. 106-158, at p. 113. Elmar Schmitt, ed., *Leben im 18. Jahrhundert* (Constance, 1987), pp. 13-40.

[155] Passport of the Canton of Zurich, dated 15 June 1818, Ms. Zurich: Staatsarchiv des Kantons Zürich; printed in: Harald Kleinschmidt, *People on the Move. Attitudes toward and Perceptions of Migration in Medieval and Modern Europe* (Westport, CT, and London, 2003), p. 211. Torpey, *Invention* (note 153), pp. 32-36, esp. p. 35.

[156] For a critical comment on this perception see: Gerhard Jaritz and Albert Müller, eds, *Migration in der Feudalgesellschaft* (Frankfurt and New York, 1988).

[157] Recently, as yet another academic praise song on the freedom of enterprise has been offered by Klaus-Jürgen Bade, who, while sketching the apparent constraints of guild practices, linked these practices causally with the decline of the guild economy, before, eventually, the freedom of artisan migration was accomplished. Bade thus misused migration history for his belated critique of absolutism, thereby carrying on nineteenth-century perceptions in an academic context. See: Bade, 'Altes Handwerk, Wanderzwang und Gute Policey. Gesellenwanderung zwischen Zunftökonomie und Gewerbereform', in: Bade, *Sozialhistorische Migrationsforschung*, edited by Michael Bommes and Joachim Oltmer (Göttingen, 2004), pp. 49-87 [first published in: *Vierteljahrschrift für Sozial und Wirtschaftsgeschichte* 69 (1982), pp. 1-37].

[158] Dietrich Andernacht and Otto Stamm, eds, *Die Bürgerbücher der Reichsstadt Frankfurt. 1311 – 1400 und das*

become so crowded by 1445 that the town council gave in to the residents' demand that the local bathhouses should open during four instead of three days per week.[159] Around the same time, travelling from Europe to South and East Asia increased in frequency.[160] Mobility as a whole remained high to the eighteenth century, as the recruitment possibilities of the larger European long-distance trading companies reveal.[161]

Einwohnerverzeichnis von 1387 (Veröffentlichungen der Historischen Kommission für Frankfurt, 12) (Frankfurt, 1955). James Laurence Bolton, ed., *The Alien Communities of London in the Fifteenth Century. The Subsidy Rolls of 1440 and 1483–4* (Stamford, 1998). Francis Collins, ed., *Register of the Freemen of the City of York. 1272 – 1759*, 2 vols (Surtees Society, 96, 102) (Durham, 1896-1897). Anne-Laure van Bruaene, *De Gentse memorieboeken als spiegel van stedelijke historische bewustzijn (14de tot 15de eeuw)* (Verhandelingen der Maatschappij voor Geschiedenis en Oudheidkunde te Gent, 22) (Ghent, 1998). *Bronnen en methodes van de historische demografie voor 1850* (Archives et bibliothèques de Belgique, 24) (Brussels, 1984). Helge Steenweg, ed., *Göttingen um 1400* (Veröffentlichungen des Instituts für Historische Landesforschung, 33) (Bielefeld, 1994), pp. 311-333. Franz Bastian, ed., *Das Runtingerbuch* (Regensburg, 1943). Helmut Wolff, 'Regensburgs Häuserbestand im späten Mittelalter', in: *Studien und Quellen zur Geschichte Regensburgs* 3 (1985), pp. 91-198. Egmont Lee, *Descriptio urbis. The Roman Census of 1527* (Rome, 1985).

159 Ludwig Heffner, *Ueber die Baderzunft im Mittel-Alter und später, besonders in Franken* (Archiv des Historischen Vereins für Unterfranken und Aschaffenburg, vol. 6, part 1) (Würzburg, 1864), pp. 175-176.

160 Charles F. Beckingham, *Between Islam and Christendom. Travellers, Facts and Legends in the Middle Ages and the Renaissance* (London, 1983). Anna Dorothee von den Brincken, 'Die universalhistorischen Vorstellungen des Johann von Marignola OFM. Der einzige mittelalterliche Weltchronist mit Fernostkenntnis', in: *Archiv für Kulturgeschichte* 49 (1967), pp. 297-339. Mary B. Campbell, *The Witness and the Other World. Exotic European Travel Writing. 400 – 1600* (Ithaca and London, 1988). Irene Erfen and Karl-Heinz Spieß, eds, *Fremdheit und Reisen im Mittelalter* (Stuttgart, 1997). Xenja von Ertzdorff, ed., Bes*chreibung der Welt. Zur Poetik der Reise- und Länderberichte* (Chloë, 31) (Amsterdam, 2000). Greville Stewart Parker Freeman-Grenville, *The Swahili Coast. Second to Nineteenth Centuries. Islam, Christianity and Commerce in Eastern Africa* (Aldershot, 1988). John Block Friedman and Kristen Mossler Figg, *Trade, Travel and Exploration in the Middle Ages* (New York, 2000). Michèle Guéret-Laferté, *Sur les routes de l'Empire mongol. Ordre et rhétorique des relations de voyage au XIIIe et XIVe siècles* (Paris, 1994). Folker E. Reichert, *Begegnungen mit China. Die Entdeckung Ostasiens im Mittelalter* (Beiträge zur Geschichte und Quellenkunde des Mittelalters, 15) (Sigmaringen, 1992). Reichert, *Erfahrung der Welt. Reisen und Kulturbegegnung im späten Mittelalter* (Stuttgart, Berlin and Cologne, 2001). Jean Richard, 'European Voyages in the Indian Ocean and Caspian Sea', in: *Iran* 6 (1968), pp. 45-52. Richard, *Les récits de voyage et de pélerinages* (Typologie des sources du Moyen Age occidental, 38) (Turnhout, 1981). Scott D. Westrem, ed., *Discovering New Worlds. Essays on Medieval Exploration and Imagination* (New York and London, 1991).

161 Best recorded for the Dutch East India Company (VOC): Leonard Blussé, *Strange Company. Chinese Settlers, Mestizo Women and the Dutch in VOC Batavia* (Dordrecht, 1986). Blussé, 'The VOC Records and the Study of Early Modern Asia', in: *International Institute for Asian Studies Newsletter* 18 (1999), pp. 10-11. Jacobus Ruurd Bruin, 'De personeelsbehoefte van de VOC overzee en aan boord, bezien in Aziatisch en Nederlands perspectief', in: *Bijdragen en mededelingen betreffende de geschiedenis der Nederlanden* 91 (1976), pp. 218-248. Richard H. Elphink and Hermann Buhr Giliomee, eds, *The Shaping of South African Society. 1652 – 1820* (London, 1979). Pieter C. Emmer and Femme S. Gaastra, eds, *The Organization of Interoceanic Trade in European Expansion. 1450 – 1800* (Aldershot, 1996). Femme S. Gaastra, 'De Verenigde Oost-Indische Compagnie in de zeventiende en achttiende eeuw', in: *Bijdragen en mededelingen betreffende de geschiedenis der Nederlanden* 91 (1976), pp. 249-272. Kristof Glamann, *Dutch-Asiatic Trade. 1620 – 1740* (Copenhagen, 1958) [seconed edn (The Hague and Copenhagen, 1981)]. Simon Hart, 'Historisch-demographische notities betreffende huwelijken en migratie te Amsterdam in de 17e en 18e eeuw', in: *Amstelodanum* 55 (1968), pp. 63-69. Johannes de Hullu, 'De matrozen en soldaten op de schepen der O. I. C.', in: *Bijdragen tot de taal-, land- en volkenkunde van Nederlands Indie* 69 (1914), pp. 318-365. Frank Lequin, 'A New Approach to the History of the Dutch Expansion in Asia. The Personnel of the VOC in the 18th Century', in: *Journal of European Economic History* 8 (1979), pp. 151-157. Lequin, *Het personeel van de Vereenigde Oost-Indische Compagnie in Azië in de achttiende eeuw*. Ph. D. thesis (University of Leiden, 1982). J. Thomas Lindblad, 'Computer Applications in Expansion History', in: *International Journal of Maritime History* 2 (1990), pp. 207-214. Marie Antoinette Petronella Meilink-Roelofsz, *De VOC in Azië* (Bussum, 1976). Gunter Schilder, *Australia Unveiled. The Share of Dutch Navigators in the Discovery of Australia* (Amsterdam, 1976). Joannes Petrus Sigmond and Louis H. de Vries-Zuiderbaan, *Dutch*

2. Urban Law as a Regulative for Immigration and the Law of Hospitality

Accordingly, in many towns and cities, a simple and strightforward immigration rule found application that, however, extended far beyond the Biblical mandate (Mt 25, 35) to receive Christ in the persons of guests: Come, register, stay for a while, observe the rules, and you have the option of becoming accepted into the group of residents. Following hints towards respect for the law of hospitality in ninth- and tenth-century historiography, Magister Adam of Bremen, already in the eleventh century, described this procedure in his *History of the Bishops of the Church of Hamburg* for the trading and manufacturing port of Iumne (= Víneta, Wollin) on the shores of Pomerania, in operation from the ninth century at the latest. Iumne, Adam said, was truly the largest of all cities in Europe, whereby he obviously meant emporia. In this city, inhabited by Slavic and other groups, people from everywhere gathered: Greeks, probably also Jews and Muslims as well as Saxons. Within the city, they were allowed to pursue their business, even settle, provided they observed the rules. Adam explicitly described these rules as strict: every public confession of a faith not in line with the local religion, was prohibited. And he added: Even the Saxons refrained from practising their Christian faith in public.[162] A little later, the Mainz Imperial Peace Convention of 1235

Discoveries of Australia (Adelaide, 1979). Sanjay Subrahmanyan, ed., *Merchant Networks in the Early Modern World. 1450 – 1800* (Aldershot, 1996). Heert Terpstra, *De opkomst der westerkwartieren van de Oost-Indische Compagnie. Suratte, Arabië en Perzië* (The Hague, 1918). James D. Tracy, ed., *The Rise of Merchant Empires* (Cambridge, 1990). Tracy, ed., *The Political Economy of Merchant Empires* (Cambridge, 1991).

[162] On the practice of hosting guests in ancient Christendom see: Hiltbrunner, 'Gastfreundschaft' (note 6). J. Marty, 'Sur le devoir chrétien de l'hospitalité aux trois premiers siècles', in: *Revue d'histoire et de philosophie religieuses* 19 (1939), pp. 288-295. Michaela Puzicha, *Christus peregrinus. Die Fremdenaufnahme (Mt 25,35) als Werk der privaten Wohltätigkeit im Urteil der Alten Kirche* (Münsterische Beiträge zur Theologie, 47) (Munster, 1980). On the practice of hosting guests in the early Middle Ages see above, note 6. For ninth- and tenth-century sources about the law of hospitality see: Adolf Schück, Studier rörande det svenske stadsväsendets upkomst och äldsta utveckling. Ph. D. thesis (University of Stockholm, 1926), p. 57, who derived from Rimbert's *Vita Anskarii* [chap. 26, edited by Georg Waitz (Monumenta Germaniae historica, Scriptores rerum Germanicarum in usum scholarum separatim editi, 55) (Hanover, 1884), p. 55] the distinction between resident inhabitants and guests in the emporium of Birka. Dudo of Saint-Quentin, *De moribus et actis primorum Normanniae ducum*, book I, chap. 7, newly edited by Jules Lair (Mémoires de la Société des Antiquaires de Normandie. Series III, vol. 3, part 3) (Caen, 1865), p. 147. Widukind of Corvey, *Die Sachsengeschichte des Widukind von Korvei*, book I, chap. 4, edited by Hans-Eberhard Lohrmann and Paul Hirsch (Monumenta Germaniae historica, Scriptores rerum Germanicarum in usum scholarum separatim editi, 60) (Hanover, 1935), pp. 5-6. Charter in the name of Emperor Ottos I relating to the establishment of a market at Bremen, 10 August 965, in: *Die Urkunden Konrad I., Heinrich I. und Otto I.*, nr 307 (Monumenta Germaniae historica, Diplomatvm regvm et imperatorvm Germaniae, 1) (Hanover, 1879-1884), pp. 422-423 [the dispositive part is also in: Friedrich Keutgen, ed., *Urkunden zur städtischen Verfassungsgeschichte*, nr 7 (Ausgewählte Urkunden zur deutschen Verfassungsgeschichte, 1) (Berlin, 1901), p. 4; reprint (Aalen, 1965)]. On this text see: William Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge, 1904), pp. 25-26 [reprint (Clark, NJ, 2006)]. On Vineta see: Widukind (as above), book III, chap. 69, pp. 143-144, s. a. 967: "Vuloini" (a group of "Sclavis" fighting against Mieszko of Poland). Adam of Bremen, *Gesta Hammaburgensis ecclesiae pontificum / Hamburgische Kirchengeschichte*, book II, chap. 22, edited by Bernhard Schmeidler (Monumenta Germaniae historica, Scriptores rerum Germanicarum in usum scholarum separatim editi, 2), third edn (Berlin, 1917), p. 79. The presence of West Asian merchants at Vineta is on record in the report by Jewish, Arab-writing traveller Ibrāhīm ibn Ya'qūb al-Israeli at-Tartushi [Georg Jacob, *Arabische Berichte von Gesandten an germanische Fürstenhöfe aus dem 9. und 10. Jahrhundert* (Quellen zur deutschen

Volkskunde, 1) (Berlin and Leipzig, 1927), p. 14: “They [the Ubaba or Unana] have a large city on the shores of the ocean, which has twelve gates and a port.”; reprint (Berlin and Leipzig, 2010)]. On the text see: Fuat Sezgin, ed., *Studies on Ibrāhīm ibn Ya'qūb (2nd Half 10th Century) and on His Account of Eastern Europe* (Publications of the Institute for the History of Arabic-Islamic Science, Islamic Geography 159) (Frankfurt, 1994). Dimitrij Mishin, ‘Ibrahim Ibn Ya'qub At-Tartulu's Account of the Slavs from the Middle of the Tenth Century’, in: *Annual of Medieval Studies at Central European University* 2 (1994/95), pp. 184-199. On Iumne-Vineta and its localisation at Wollin see: Vedel Simonsen, *Geschichtliche Untersuchung über Jomsburg im Wendenlande* (Szczecin, 1872) [first published (Copenhagen, 1813); reprint of the German version in: Günter Wermusch, *Das Vineta Rätsel* (Boddin, 2011), pp. 137-170]. Robert Klempin, ‘Die Lage der Jomsburg’, in: *Baltische Studien*, vol. 13, part 1 (1847), pp. 1-107. Adolf Stubenrauch, ‘Untersuchungen auf den Inseln Usedom und Wollin im Anschluß an die Vinetafrage’, in: *Baltische Studien.* N. F., vol. 2 (1898), pp. 65-134, at pp. 82-84. Adolf Hofmeister, *Der Kampf um die Ostsee vom 9. bis 12. Jahrhundert* (Lübeck and Hamburg, 1960), pp. 64-67 [first published (Greifswalder Universitätsreden, 29) (Greifswald and Bamberg, 1931), pp. 15-18; second edn (Greifswald and Bamberg, 1942)]. Hofmeister, ‘Die Vineta-Frage’, in: *Monatsblätter der Gesellschaft für pommersche Geschichte und Altertums*, vol. 46, issue 6 (1932), pp. 81-89. Karl August Wilde, *Die Bedeutung der Grabung Wollin 1934*. Ph. D. thesis (University of Greifswald, 1939), pp. 2-3 [second edn (Atlas der Urgeschichte, Beiheft 1) (Hamburg, 1953), pp. 8-9]. Oswald Kunkel and Karl August Wilde, *Jumne, “Vineta”, Jomsburg, Julin, Wollin. 5 Jahre Grabungen auf dem Boden der wikingerzeitlichen Großsiedlung am Divenowstrom. 1934 – 1939/40* (Szczecin, 1941). Władysław Filipowiak and Heinz Gundlach, *Wollin Vineta. Die tatsächliche Legende vom Untergang und Aufstieg der Stadt* (Rostock, 1992). Filipowiak, *Die Häfen von Wollin im 9. – 14. Jahrhundert* (Lübeck, 1993). Filipowiak, ‘Wollin. Ein frühmittelalterliches Zentrum an der Ostsee’, in: Alfried Wieczorek and Hans-Martin Hinz, eds, *Europas Mitte um 1000. Handbuch zur Ausstellung*, vol. 1 (Beiträge zur Geschichte, Kunst und Archäologie, 1) (Stuttgart, 2000), pp. 152-155. Similarly willhave been the case for the less well recorded emporia at Dorestad [Wijk bij Duurstede], Hamwih [Southampton], Quentovic and York, which appear to have been in operation since the end of the seventh century and are mainly known from archaeological finds; on these emporia see: Annemarieke Willemsen, *Dorestad. Een wereldstad in de middeleeuwen* (Zutphen, 2009). Willemsen, ed., *Dorestad in an International Framework* (Turnhout, 2010). Stéphane Lebecq, *Marchands et navigateurs frisons du haut Moyen Age*, vol. 1 (Lille, 1983). Lebecq, ed., *Quentovic. Environnement, archéologie, histoire* (Lille, 2010). Peter V. Addyman and David H. Hill, ‘Saxon Southampton. A Review of the Evidence’, in: *Proceedings of the Hampshire Field Club and Archaeological Society*, vol. 25 (1968), pp. 61-93, vol. 26 (1969), pp. 61-96. Philip Andrews, ed., *Excavations at Hamwih*, vol. 2: Excavations at Six Dials (Council for British Archaeology, Research Report 109) (London, 1997). Richard Hodges, ‘Trade and Urban Origins in Dark Age England. An Archaeological Critique of the Evidence’, in: *Berichten van de Rijksdienst vor het Oudheidkundig Bodemonderzoek* 27 (1977), pp. 191-215. Hodges, *The Hamwih Pottery. The Local and Imported Wares from 30 Years' Excavations at Middle Saxon Southampton and Their European Context* (Southampton Archaeological Research Committee Report. 2 = Council for British Archaeology, Research Report 37) (London, 1981). Hodges, ‘The Evolution of Gateway Communities. Their Socio-Economic Implications’, in: Colin Renfrew and Stephen Shennan, eds, *Ranking, Resource and Exchange* (Cambridge, 1982), pp. 117-123. Hodges and Brian Hobley, eds, *The Rebirth of Towns in the West. AD 700 – 1050* (Council for British Archaeology, Research Report 68) (London, 1988). Hodges, ‘Emporia, Monasteries and the Economic Foundation of Medieval Europe’, in: Charles L. Redman, ed., *Medieval Archaeology* (Binghamton, 1989), pp. 51-72. The anonymous Bavarian geographer (working probably in the second half of the ninth century) named “Velunzani” with apparently seventy *civitates*, but positioned them “iuxta istorum fines” [scil. “isti qui propinquiores resident finibus Danaorum”], that seems to indicate a location further east than what may have been Vineta; in: Munich: Bayerische Staatsbibliothek, clm 560, fol. 149^{v}-150^{r}, at fol. 150^{r}; edited by Erwin Herrmann, *Slawisch-germanische Beziehungen im südostdeutschen Raum von der Spätantike bis zum Ungarnsturm. Ein Quellenbuch mit Erläuterungen* (Munich, 1965), pp. 220-221; also in: Bohuslav Horák and Dusan Trávnicek, eds, *Descriptio civitatum ad septentrionem plagam* (Rozprávy Československé Akademie Nauk Ved, vol. 66, nr 2) (Prague, 1956); also in: Sébastien Rossignol, ‘Überlegungen zur Datierung des Traktats des sog. Bayerischen Geographen’, in: Felix Biermann, Thomas Kersting and Anne Klammt, eds, *Der Wandel um 1000* (Langenweissbach, 2011), pp. 306-316, at p. 313. Alheydis Plassmann, *Origo gentis. Identitäts- und Legitimationsstiftung in früh- und hoch mittelalterlichen Herkunftserzählungen* (Orbis mediaevalis, 7) (Berlin, 2006), p. 271, detects in the purported Saxon invasion according to Widukind's res gestae what she classes as some “right of conquest” (Eroberungsrecht) and equates this alleged right with the “ius belli”, even though Widukind used the concept of the law of hospitality and reported infringements upon that law. For the postulate of some not explicitly recorded early medieval “right of conquest” see also: Robert Bartlett, *The Making of Europe* (London, 1994), pp. 94-95. Recent literature on the history of business law (*lex mercatoria*) sometimes refers to what it ranks as the medieval practice of providing safety to traders and places this practice into the context of the Roman *ius gentium*. Thus: Harold Joseph Berman, *Recht und Revolution. Die Bildung des westlichen Rechtstradition*

specified the rights and duties of urban inhabitants termed "phalburgi", who did not belong to the group of registered residents in a city and, therefore, were to be treated as guests. The urban code of Lübeck of 1294 was precise in prescribing a period of three months of stay, after which immigrants and their families could apply for inclusion among citizens.[163] Later urban codes might vary in

(Frankfurt, 1991), pp. 536-537 [further edn (Frankfurt, 1995); first published (Cambridge, MA, 1983); further English edns (Cambridge, MA, 1996. 2003. 2006)]. Filip de Ly, *International Business Law and Lex Mercatoria* (Amsterdam, 1992), pp. 9-15. This argument is tenable in so far as certain rights of contract and further rights of protection are on record in Roman law; however, the argument does not apply to the *ius gentium* as applicable in Rome, which the *Corpus iuris* did not specify the *ius gentium* to the degree required for traders. By the ninth century, grants of trading and settlement privileges flew from rulers' discretion on the basis natural law, not from statutory law according to Roman tradition. This principled derivation did not preclude the possibility that some of these freedoms, from the twelfth century, could be enshrined in specific bi- or even multilateral treaties as well as in municipal statutory law, such as the Magna Carta of 1215, Art. 41, or the so-called Carta mercatoria in the name of King Edward I of England dated 1 February 1303 [in: Henry Thomas Riley, ed., *Munimenta Gildhallae Londoniensis; Liber Custumarum* (Rerum Britannicarum medii aevi scriptores, vol. 12, part 1) (London, 1860), pp. 205-211]. On the numerous treaties relatng to trading issues see: Federico Odorici, 'Dello spirito di associazione di alcune città lombarde nel medioevo', in: *Archivio storico Italiano*. Nuova Serie, vol. 11, part 1 (1860), pp. 73-108, who discusses 302 such agreements only for Cremona during the twelfth and thirteenth centuries. Girolamo Serra, 'Discorso II contenente un bistretto delle conventioni fatte da Genovesi per cagion di commercio e navigazione fino al secolo XV', in: Serra, La storia dell'antica Liguria e di Genova, vol. 4 (Turin, 1834), pp. 115-169. Georg Martin Thomas, 'Beiträge aus dem Ulmer Archiv zur Geschichte des Handelsverkehrs zwischen Venedig und der deutschen Nation', in: *Sitzungsberichte der Bayerischen Akademie der Wissenschaften*, Philos.-Hist. Kl. Series I, issue 14, München 1869, 281-318, on the correspondence between the council of Ulm and the Senate of Venice on the avoidance of reprisals, 1432/33. The derivation of rulers' competence of the regulation of trade from natural law is already on record in the fifteenth century [1473, 3 Edward IV, 9], printed in: Colin Baron Blackburn, *A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares and Merchandise*, second edn, edited by John Cameron Graham (London, 1885), p. 318 [further edn (Philadelphia, 1887); first published (London, 1845); further edn (London, 1847); third edn (London, 1910)]. See: Levin Goldschmidt, *Universalgeschichte des Handelsrechts*, third edn, vol. 1 (Handbuch des Handelsrechts, vol. 1, part 1) (Stuttgart, 1891), pp. 180-182 [reprint (Aalen, 1957)]. Wyndham Anstis Bewes, *The Romance of the Law Merchant* (London, 1923), pp. 12-19, 17 on the *Lex mercatoria*. Francis Marion Burdick, 'Contributions of the Law Merchant to the Common Law', in: *Select Essays in Anglo-American Legal History*, vol. 3 (Boston, 1909), pp. 34-50, at p. 50 [reprint (Frankfurt, 1968)]. Clive Macmillan Schmitthoff, 'International Busieness Law. A New Law Merchant', in: *Current Law and Social Problems* 2 (1961), pp. 129-152 [reprinted in: Schmitthoff, *Select Essays on International Trade Law*, edited by Chia-Jui Cheng Dordrecht, Boston and London, 1988], pp. 20-37]. Schmitthoff, 'The Unification of the Law of International Trade', in: *Journal of Business Law* (1968), pp. 105-119 [separately published (Gothenburg, 1964); reprinted in: Schmitthoff, *Essays* (as above), pp. 170-187, at pp. 171-173]. Schmitthoff, ed., *The Sources of the Law of International Trade* (London, 1964), pp. 3-38. Leon E. Trakman, 'The Evolution of the Law Merchant', in: *Journal of Maritime Law and Commerce* 12 (1980/81), pp. 1-24, 153-182, at pp. 3-5, 156f. Trakman, *The Law Merchant* (Littleton, CO, 1983), pp. 23-26. Andreas Kappas, *'Lex Mercatoria' in Europa und Wiener UN-Kaufrechtskonvention 1980* (Frankfurt, Berne, New York and Paris, 1990), pp. 31-36. Ursula Stein, *Lex Mercatoria. Realität und Theorie* (Juristische Abhandlungen, 28) (Frankfurt, 1995), pp. 4-5. Armin von Bodandy and Sergio Dellavalle, 'Die Lex Mercatoria der Systemtheorie', in: Gralf-Peter Calliess, Andreas Fischer-Lescano, Dan Wielich and Peer Zumbonsen, eds, *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag* (Berlin 2009, pp. 695-716, at pp. 700-701 [English version in: *Transnational Legal Theory* 4 (2013), pp. 59-82]. James Gordley, 'Extra-Territorial Legal Problems in a World Without Nations. What Medieval Jurists Could Teach Us', in: Günther Handl, Joachim Zekoll and Zumbonsen, eds, *Beyond Territoriality. Transnational Legal Authority in an Age of Globalization* (Queen Mary Studies in International Law, 11) (Leiden, 2012), pp. 35-52.

[163] Mainz Territorial Peace for the Empire (Reichslandfrieden, 1235), chap. 13, in: Ludwig Weiland, ed., *Monumenta Germaniae historica, Constitutiones et acta publica imperatorum et regum*, nr 196, vol. 2 (Hanover, 1896), pp. 243-244. Johann Friedrich Hach, ed., *Das alte Lübische Recht*, § CLXXX (Lübeck, 1839), p. 339 [reprint (Aalen, 1969)]. Brunnemann, *Dissertatio* (note 7), fol. A 3^{r}. Friedlieb, *Diascepsis* (note 7), fol. a 3^{r}. David Mevius, *Commentarii in Jus Lubecense*, book I, title II, art 2 (Frankfurt, 1744), p. 93: "Welcher Mann mit seinem Weib und Kinder in die Stadt kommt oder sich allda befreyet, so wol auch ein ledig Geselle oder andere Person wes Standes die seyn möge, so Rauch und Feuer haben will, der oder die mögen wol drey Monat darinnen wohnen, nach der

stipulating specific procedures for the registration of newly incoming residents, pending whether they wanted to settle in the core part of the city on in the suburbs.[164] Thus, a Brunswick ordinance of 1401 differentiated between guests ("gheystliken lude"), living in town, and outsiders ("uthlude") as short-term visitors. At Brno, the principle was in force during the second half of the fourteenth century that anyone living in the city without at the same time being a subject to rulers of Moravia, Boheima and Luxembourg, was to be treated as a guest. At Nuremberg, special rules were enacted in cases of marriages that "guests might conclude with citizens and their children and, likewise between the same and guests as well as foreigners" (so die geste mit burger, burgerin und iren kynden, und desgleichen dieselben mit den gesten und außwertigen personen ye ze zeyten fürnemen und beschließen). And the so-called Magdeburg Verdicts (Magdeburger Fragen) from the middle of the fourteenth century defined as a "guest" (gast) anyone having lived in the city for approximately 24 years without having obtained citizenship.[165] Hence, various groups of citizens, guests and foerigners were given different statuses. Therefore, not everyone wishing to stay in a city was bound to obtain citizenship and, here and there, someone who wanted to get citizenship would not be admitted. Consequently, the basic immigration rule proves to have been rather complex upon close examination. As it left the provision of licence for settlement in a town or city to the discretion of citizens, city law constituted settlement immigration as the legal act of admission into the community of residents and sharply distinguished between, on the one side, rules of stay or the law of hospitality and, on the other, the law of settlement. Immigration might but did not have to result in settlement. The legal act of admission into the community of settlers opened just an option for admission into the citizenry as the group of registered residents with full right of participation in political affairs of the town or city, whereby the acquisition of citizenship required the payment of a

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Zeit, wollen sie länger bleiben, so sollen sie die Bürgerschafft gewinnen, doch stehet es bey dem Rathe, ob sie ihnen die Bürgerschafft gönnen wollen oder nicht." Ahasver Georg Ostermeyer [praes.] and Michael Treschow [resp.], *Dissertatio inauguralis juridica de judicio in favorem peregrinorum constitutio. Vom Gast-Recht occasione juris Lubecensis* (Copenhagen, 1760), fol. E 1^{r}-E 2^{r}. On the history of Rostock law of hospitality see the early study by Johann Georg Berg, *De jure peregrinorum quod Rostochii viget* (Rostock, 1833). Already Schulte, 'Gästerecht' (note 6), p. 476, recognised that all persons residing outside the territory of a town could be classed as guests; however, he did not take into consideration the point that even guests could live in the town for a long time without obtaining citizenship.

[164] Joseph Baader, ed., *Nürnberger Polizeiordnungen aus dem XIII. bis XV. Jahrhundert* (Bibliothek des Litterarischen Vereins in Stuttgart, 63) (Tübingen, 1861), pp. 25-26 [reprint (Amsterdam and Atlanta, GA, 1966)].

[165] Ludwig Hänselmann, *Urkundenbuch der Stadt Braunschweig*, vol. 1 (Brunswick, 1873), p. 125. Emil Franz Rößler, *Deutsche Rechtsdenkmäler aus Böhmen und Mähren*, vol. 2: Die Stadtrechte von Brünn aus dem XII. und XIII. Jahrhundert (Prague, 1845), pp. 1-339: The Brünn *Schöffenbuch* of the fourteenth century; pp. 3-28: "Capitulum de actionibus"; nr 18, p. 11-12: "Quis actor sit hospes in iudicio quando sibi sit justicia facienda"; p. 12: "omnem hominem in judicio civitatis Brunnensis esse hospitem, qui extra Moraviam residentiam vel mansionem habet, quamvis etiam sit sub dominio regis Bohemiae. Unde homo de Bohemia, Polonia vel Luczelburga hospes est censendus in judicio civitatis, Hospitem enim non facit dominii, sed potius terrae Moraviae distinctio ab aliis terris, et per hoc, quod multum est ponderandum, in judiciis lites breviantur et expensae partium cum laboribus minorantur." [reprint (Aalen, 1963)]. Baader, *Polizeiordnungen* (note 164), p. 26. Jakob Friedrich Behrend, ed., *Die Magdeburger Fragen*, book II, chap. 5, distinction 3 (Berlin, 1865), p. 173. On these texts see: Rudorff, *Rechtsstellung* (note 7), pp. 15-20.

fee.[166] Certain groups, such as aristocrats, but also groups whose members faced legal discrimination, such as "Jews, Gypsies, beggars and idle people" (Juden, Zigeuner, Bettler und Müßiggänger), might be excluded from admission on principle;[167] but all guests, to whom citizenship had been extended, were under the protection of the council even against external authorities, which, at pervious times, had held control over the new citizens.[168] By consequence, the number of inhabitanhts of a town or city usually was much larger than the number of citizens enjoying participation rights.[169] Next to their citizens, towns and cities were homes to servants, migrant apprentices,[170] members of religious orders, beghins and beghards, and also fencers, musicians and artists,[171] scholars as well as

[166] Baader, *Polizeiordnungen* (note 164), pp. 25-26.

[167] The case of a prohibition of the acceptance of knightly born persons into the citizenry of Hamburg according to Hamburg city code of 1270, revised 1292, 1497 and 1603, in conjunction with the Hansa recess of 1529 (Art. 1) u dem Fall eines Verbots der Aufnahme ritterbürtiger Personen in die Bürgerschaft Hamburgs nach dem Stadtrecht von 1270, revidiert 1292, 1497 und 1603 sowie nach Art. 1 des Rezesses von 1529: "Id ne scal nen ridder wonen beginnen dessene wicbilde, dat hebben de wittigheiten ghelovet unn gewillkort by erenne ede.", in: Nikolaus Adolf Westphalen, *Hamburgs Verfassung und Verwaltung*, vol. 1 (Hamburg, 1841), pp. 336-337. On discrimations and ostracisations targeted at specific groups see: Friedlieb, *Diascepsis* (note 7), fol. a [4]^{r}.

[168] Mevius, *Ius* (note 163), book I, title III, art 3, pp. 135-139, at pp. 135-136: "Wann aber ein Burger in einer Stadt, da Lübisch Recht gebraucht wird, Jahr und Tag gesessen hat und alsdann von einem andern als sein eigen Mann angesprochen wird und solches mit Zeugen, daß er sein eigen wäre, beweiset würde, kan dagegen der Burger wahr machen, daß er über Jahr und Tag an Bürgerrecht und Bürger gewesen und in der Zeit unbesprochen blieben, so bleibt er der Aspruch ledig und frey."

[169] See, among many: Gerhard Dilcher, 'Zum Bürgerbegriff im späteren Mittelalter. Versuch einer Typologie am Beispiel von Frankfurt am Main', in: Dilcher, Bürgerrecht und Stadtverfassung im europäischen Mittelalter (Cologne, Weimar and Vienna, 1996), pp. 115-182, at p.p 116, 138-141, 144-146 [first published in: Josef Fleckenstein and Karl Stackmann, eds, *Über Bürger, Stadt und städtische Literatur im Spätmittelalter* (Abhandlungen der Akademie der Wissenschaften in Göttingen, Philol.-Hist. Kl. 3. F., vol. 121) (Göttingen, 1980), pp. 59-105]. Dilcher, 'Bürgerrecht und Bürgereid als städtische Verfassungsstruktur', in: Rainer Christoph Schwinges, ed., *Neubürger im späten Mittelalter. Migration und Austausch in der Städtelandschaft des alten Reiches (1250 – 1550)* (Zeitschrift für historische Forschung, Beiheft 30) (Berlin, 2002), pp. 83-97.

[170] On artisan migration see: Helmut Bräuer, Probleme der Migration von Handwerkern und Gesellen während des Spätmittelalters und der frühen Neuzeit, in: *Beiträge zur Historischen Sozialkunde*, vol. 19, issue 3 (1989), pp. 77-84. Rainer S. Elkar, 'Umrisse einer Geschichte der Gesellenwanderung im Übergang von der frühen Neuzeit zur Neuzeit', in: *Deutsches Handwerk in Spätmittelalter und Früher Neuzeit* (Göttingen, 1983), pp. 85-116. Elkar, 'Wandernde Gesellen in und aus Oberdeutschland', in: Ulrich Engelhardt, ed., *Handwerker in der Industrialisierung* (Industrielle Welt, 37) (Stuttgart, 1984), pp. 262-293. Elkar, 'Schola migrationis. Überlegungen und Thesen zur neuzeitlichen Geschichte der Gesellenwanderungen aus der Perspektive quantitativer Untersuchungen', in: Klaus Roth, ed., *Handwerk in Mittel- und Südosteuropa. Mobilität, Vermittlung und Wandel im Handwerk des 18. bis 20. Jahrhunderts* (Munich, 1987), pp. 87-108. Ulrich-Christian Pallach, 'Fonctions de la mobilité artisane et ouvrière', in: *Francia* 11 (1983), pp. 365-406. Wilfried Reininghaus, 'Die Migration der Handwerksgesellen in der Zeit der Entstehung ihrer Gilden', in: *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* 68 (1981), pp. 1-21. Reininghaus, 'Wanderungen von Handwerkern zwischen hohem Mittelalter und Industrialisierung', in: Gerhard Jaritz and Albert Müller, eds, *Migration in der Feudalgesellschaft* (Frankfurt and New York, 1988), pp. 179-215. Georg Schanz, 'Zur Geschichte der Gesellenwanderungen im Mittelalter', in: *Jahrbücher für Nationalökonomie und Statistik* 28 (1877), pp. 313-343. Rudolf Wissell, *Des alten Handwerks Recht und Gewohnheit*, vol. 1, second edn, edited by Ernst Schraepler (Einzelveröffentlichungen der Historischen Kommission zu Berlin, vol. 7, part 1) (Berlin, 1971), pp. 301-357 [first published (Berlin, 1929)].

[171] Hans-Peter Hils, '"Kempen unde ir kinder ... de sin alle rechtelos". Zur sozialen und rechtlichen Stellung der Fechtmeister im späten Mittelalter', in: Jörg O. Fichte, ed., *Zusammenhänge, Einflüsse, Wirkungen. Kongreßakten zum ersten Symposium des Mediävistenverbandes in Tübingen 1984* (Berlin, 1986), pp. 255-271. Walter Salmen, *Der fahrende Musiker im europäischen Mittelalter* (Kassel, 1960). Alfred Schaer, *Die altdeutschen Fechter und Spielleute* (Strasbourg, 1901). Wolfgang Schmid, 'Kunst und Migration. Wanderungen Kölner Maler im 15. und 16. Jahrhundert', in: Gerhard Jaritz and Albert Müller, eds, *Migration in der Feudalgesellschaft* (Frankfurt and New York, 1988), pp. 315-350. Georg Tröscher, *Kunst und Künstlerwanderungen in Mitteleuropa. 800 – 1800* (Baden-Baden, 1953).

students.[172] Moreover, there might be short-term visitors of markets and trade fairs.[173] They all united in being subject to town or city authorities legislating their statuses and subjecting them to speficic norms pending their statuses, while some urban codes could feature special norms only for guests, namely rules relaing to the law of property and to court procedures.[174] An early fifteenth-century Constance minting order, for one, stated that the currency that had just been newly introduced in the town, was to be accepted as a medium of exchange for all business transactions, "which everyone here at Constance is to accept from everyone else, be they citizens or guests, men or women, for wine or for bread, for grain or for sweets, among merchants for anything and also for the payment of debts." (das yederman hier zu Costenz von dem andern neman sol, es sigen burger oder gest, man oder wip, umb win und brot, umb korn und umb spetzery, umb koufmanschaft und umb allerlay und ouch schulden damit zu bezahlen).[175] The principle that guests were to be accommodated and taken care of in towns and cities, that they ought to be given opportunity of participating in production and trade within the law,[176] remained unlegislated and thus derived from

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[172] For the explicit inclusion of students into the legal concept of guests see: Brunnemann, *Dissertatio* (note 7), § 4, fol. A 2^{v}: "qvi amore scientiae exules fiunt, hoc est peregre*nt* tanqvam in exilio voluntario agunt, ut Studiosi, id qvod praetet alias causas." On the migration of students see: Alexander Budinsky, *Die Universität Paris und die Fremden an derselben im Mittelalter* (Berlin, 1876) [reprint (Aalen, 1970)]. Astrik L. Gabriel, 'Les étudiants étrangers à l'Université de Paris au XVe siècle', in: *Annales de l'Université de Paris* 29 (1959), pp. 377-400. Gabriel, '"Via Antiqua" and "Via moderna" and the Migration of Paris Students and Masters to the German Universities in the Fifteenth Century', in: Albert Zimmermann, ed., *Antiqui und Moderni* (Miscellanea mediaevalia, 9) (Berlin and New York, 1974), pp. 439-473. Léon Moulin, *La vie des étudiants au Moyen Age* (Paris, 1991). Jacques Verger, 'Le récrutement géographique des universités françaises au début du XVe siècle d'après les "suppliques" de 1403', in: *Mélanges d'archéologie et l'histoire*, vol. 82, issue 2 (1970), pp. 855-902. Verger, 'Géographie universitaire et mobilité étudiante au Moyen Age', in: *Ecoles et vie intellectuelle à Lausanne au Moyen Age* (Lausanne, 1987), pp. 9-23.

[173] Ostermeyer, *Dissertatio* (note 163), fol. C 3^{r-v}, traced the origin of the law of hospitality in general back to the activities of traders. Schulte, 'Gästerecht' (note 6), 473, pp. 498-525, assumed that the law of hospitality in medieval towns had been shaped to meet the interests of traders. On markets and fairs see: Peter Johanek and Heinz Stoob, eds, *Europäische Messen und Märktesysteme in Mittelalter und Neuzeit* (Städteforschung, Reihe A, Bd 39) (Cologne, Weimar and Vienna, 1996). Erich Maschke, 'Das Berufsbewusstsein des mittelalterlichen Fernkaufmannes, ' in: Maschke, *Städte und Menschen. Beiträge zur Geschichte der Stadt, der Wirtschaft und Gesellschaft. 1959 – 1977* (Wiesbaden, 1980), pp. 380-419. Michael Mitterauer, *Markt und Stadt im Mittelalter. Beiträge zur historischen Zentralitätsforschung* (Monographien zur Geschichte des Mittelalters, 21) (Stuttgart, 1980). Gerhard Rösch, *Kaufmannsbildung und Kaufmannsethik im Mittelalter (1200 – 1350)* (Städteforschung, Reihe A, Bd 63) (Cologne, Weimar and Vienna, 2004). Henry Simonsfeld, *Der Fondaco dei Tedeschi in Venedig und die deutsch-venetianischen Handelsbeziehungen*, 2 vols (Stuttgart, 1887). August Wolkenhauer, 'Eine kaufmännische Itinerarrolle aus dem Anfange des 16. Jahrhunderts', in: *Hansische Geschichtsblätter* 14 (1908), pp. 151-195.

[174] *Jus Culmense ex ultima revisione. Oder das vollständige culmische Recht*, book II, title XIV, chap. 4 (Gdansk, 1767), pp. 77-78: "Klaget jemand zu Gastrecht, dem soll man Rechts verhelfen über qveere Nacht" [= within 24 hours]. *Das alte Cölmische Recht*, book III, chap. 57 (Torun, 1584): "Arme Gäste sol man N[ächsten]tages richten ab her is begert. Clagit eyn wegertog Gast obir eynen andern Gast, adir obir eynen Bürger, deme sal der Richter odir fyne Boten an ayme Tage dry stund zu rechtir antworte gebyten etc." Likewise the Rostocker town law, quoted by Möller, *Dissertatio* (note 6), p. 24, and the Bamberg town law, edited by Zöpfl, *Recht* (note 7), Urkundenbuch, pp. 3-123,§ 36, at p. 13. On these texts see: Rudorff, *Rechtsstellung* (note 7), pp. 153-154. Zöpfl, *Recht* (note 7), p. 70. As a rule, guests were not entitled to obtain landed property in towns: Schulte, 'Gästerecht' (note 6),pp. 487-494.

[175] Friedrich Keutgen, ed., *Urkunden zur städtischen Verfassungsgeschichte*, nr 224 (Ausgewählte Urkunden zur deutschen Verfassungsgeschichte, 1) (Berlin, 1901), pp. 314-317, at p. 315 [reprint (Aalen, 1965)].

[176] Baader, *Polzeiordnungen* (note 164), pp. 128-131.

natural law. Therefore, Georg Simmel's placative view is not applicable everywhere and for all times, who defined the foreigner as "the wanderer who comes today and stays tomorrow".[177] Simmel's definition is not applicable for medieval and early modern towns and cities, as at these places, wanderers who stayed were guests without being foreigners. Within the perspective of that period, guests then were persons remaining at places for a while without coming under local general jurisdiction and, as the *Sachsenspiegel* as well as subsequently the sixteenth-century theory of the law of hospitality maintained, were subject to the norms enforced upon them at these places, while being capable of also claiming validity for the law of the places of their origin.[178] Guests then retained their established personal and collective identities, as long as they lived in towns and cities under guest status. In cases of conflict among these norms, local authorities were given competence to pass final verdict. Thus, in university cities, students could simultaneously request the personality of the law of the places of their origin within universities, while they had to accept the territorial law of the city outside the confines of the university.[179] According to Magdeburg law, for example,

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[177] Georg Simmel, 'Exkurs über den Fremden', in: Simmel, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung* (Berlin, 1908), 685-691, at p. 685: "Es ist hier also der Fremde nicht in dem bisher vielfach berührten Sinn gemeint als der Wandernde, der heute kommt und morgen geht, sondern als der, der heute kommt und morgen bleibt – sozusagen der potentiell Wandernde, der, obgleich er nicht weitergezogen ist, die Gelöstheit des Kommens und Gehens nicht ganz überwunden hat" [third edn (Berlin, 1923); fourth edn (Berlin, 1958); fifth edn (Berlin, 1968); seventh edn (Berlin, 2013); also in: Simmel, *Gesamtausgabe*, vol. 11, edited by Otthein Rammstedt (Frankfurt, 1995); first publicaion of this edn (Frankfurt, 1992), pp. 764-771, at p. 764]. Likewise: Margaret Mary Wood, *The Stranger. A Study in Social Relationships* (Studies in History, Economics and Public Law. Columbia University, 399) (New York, 1934), pp. 43-44; against Simmel, Wood preferred the definition of the stranger "as one, who has come into face-to-face contact with the group for the first time. This concept is broader than that of Simmel. ... For us, the stranger may be, as with Simmel, a potential wanderer, but he may also be a wanderer, who comes today and goes tomorrow, or he may come today and remain with us permanently. The condition of being a stranger is not, for the present study, dependent upon the future duration of the contact, but it is determined by the fact that it is the first face-to-face meeting of individuals, who have not known one another before." Wood excluided from her definition of the stranger any person,"who is socially isolated from the members of the group" (44), but would not distinguish between guests and foreigners. Likewise: Nikos Papastergiadis, *The Turbulence of Migration. Globalization, Deterritorialization and Hybridity* (Cambridge, 2000), pp. 13, 64-66. The essayistic notes by Bernhard Waldenfels, 'Fremderfahrung und Fremdanspruch', in: Waldenfels, *Topographie des Fremden* (Waldenfels, Studien zur Phänomenologie des Fremden, vol. 1) (Frankfurt, 1997), pp. 16-53 [first published in: Herfried Münkler, ed., *Furcht und Faszination* (Berlin, 1997)], do not reach up to the level of abstraction of Simmel's categorisation.

[178] *Sachsenspiegel*, Landrecht, book III, § 79, nr 2, edited by Karl August Eckhardt (Germanenrechte, N. F., Bd 1), second edn (Göttingen, Berlin and Frankfurt, 1955), p. 262. On this paragraph see: Winfried Schich, 'Braunschweig und die Ausbildung des Wendenparagraphen', in: *Jahrbücher für Geschichte Mittel- und Ostdeutschlands* 35 (1986), pp. 221-233. On the personality of the law: *Sachsenspiegel*, Landrecht, book III, § 78, nr 9 (as above), p. 262. Likewise: Giacomo Filippo Tomasini, *De tesseris hospitalitatis liber singularis in quo ius hospitiii universum apud veteres potissimum expenditur* (Amsterdam, 1670) [first published (Udine, 1647)], p. 2: "hospitalitas est ea liberalitate qua quis peregrinus et extraneus solet hospitio recipere." ; pp. 32-37: "Hospitalitatis usus et finis praecipitus humanae vitae conservatis". Mevius, *Ius* (note 163), book I, title II, art 2, p. 93; ibid., p. 393, nr 6: "Peregrini quamdiu hospites in loco sunt, nec statutis loci obnoxii sunt, nec forum sibi sortiuntur, nis si forte ratione contractus vel quasi seu ob delictum. Domicilio ergo opus est ad effectus, ut advena vel peregrinus foro jurique locali subjectus sit."

[179] For studies on the personality of the law see: Simon Leonhard Guterman, 'The Principle of the Personality of Law in the Early Middle Ages', in: *University of Miami Law Review* 21 (1966), pp. 259-348. Guterman, *The Principle of the Personality of Law in the Germanic Kingdoms of Western Europe from the Fifth to the Eleventh Century* (Bern, Frankfurt and New York, 1990). On the *nationes* in medieval universities see: Sabine Schumann, *Die 'nationes' an den Universitäten Prag, Leipzig und Wien.* Ph. D. thesis, typescript (Free University of Berlin, 1974).

guests could claim to be entitled to use their own native language to defend themselves in court trials against other foreigners.[180] Next to the general legal norms, in force for all inhabitants, there was a legal pluralism in medieval and early modern towns and cities and even in the indigenes of territorial states that left untouched the ultimate legislative capability of urban and territorial authorities as derived from natural law. The Latin appellatives *peregrini*, *advenae* and *albanii* together with their parallels denoted wanderers as guests retaining their personal and collective identities, as long as they remained guests. Up to the end of the eighteenth century, wanderers were foreigners solely under the condition that they did not have a legal status of their own, that means, outsiders and ostracised people.[181]

The juxtaposition of the personality and the terrioriality is already on record in: Brunnemann, *Dissertatio* (note 7), § 13, fol. B [1]^{r}-B [1]^{v}.

[180] Paul Laband, ed, *Magdeburger Rechtquellen* (Berlin, 1863), p. 21: "Ob sich zwene under ein ander wunden binnen wichbilde, die beide von windischer art sin, here komen unde doch nine winede sin, die eine kome vore unde klage nach windischer site, die andere ne darf ime zu rechte nicht antwarten, ob her wol beklaget in an der sprache, diu ime angeboren ist, nach wichbildes rechte." For further stipulation relating to the law of hospitality see: Balthasar, *Dissertatio* (note 6). Behrend, *Fragen* (note 165), book II, chap. 2, distinction 8, p. 139; book II, chap. 5, distinction 1, pp. 172-173. Berg, *De jure* (note 7). Brunnemann, *Dissertatio* (note 7), § 3, fol. A2^{r-v}: "Nobis hic peregrini iidem sunt, qvi forenses, advenae, hospites, Gr[aece] ἀπόλιδες, non tantum eo in significatu, qvo plerumq*ue* a C[ivita]tis accipi solent, nempe ii, qvi in loco non habent originem, seu non sunt cives originarii, etsi ibi habitent aut domicilium constituerint."; ibid., § 25, fol. [B 4]^{r} [B 4]^{v}. Fichtner, *De jure* (note 7). Ahasver Fritsch [praes.] and Johann Georg Pertsch [resp.], *Tractatus de jure hospitalitatis. Oder Gast-Recht*, second edn (Jena, 1673). Gralath, *Exercitatio* (note 7). Jean Nicholas Sébastien Allamand [praes.] and Jan Nanning van der Hoop [resp.], *Specimen juridicum inaugurale de jure peregrinorum*. LLD. Thesis (University of Leiden, 1759), pp. 18-38. Möller, *Dissertatio* (note 6), pp. 21-22. Ostermeyer, *Dissertatio* (note 163), fol. [B 3]^{v}: "*Gast* autem, lato non numquam sensu indigitans hospitem quemcinque, peregrinum vel advenam, haud secus ac vox patria *Fremder*, stricte significat civem quacunque de causa ad tempus commorantem in civitate vel territorio alieno, cujus ditioni non est subjectus." Johann Bergius [praes.] and Johann Philipp Pareus [resp.], *Orationes duae politicae de jure peregrinorum habita in ... Gymnasio Neuhusiano* (s. l., 1605). Gregor Andreas Schmid, *Dissertatio de modo procedendi circa peregrinos. Vom Gast- und Kauff-Recht et inprimis Von deroselben Gastrecht*. LLD. Thesis (University of Altdorf, 1681). Daniel Solander [praes.] and Erich Wilhelm Söderhjelm [resp.], *Dissertatio juridica de jure peregrinorum in patria*. LLD. Thesis (University of Uppsala, 1773), pp. 5-6, 11-17, here with explicit confinement to the territory of the Kingdom of Sweden. Samuel Friedrich Willenberg [resp.] and Johann Konstantin Ferber [resp.], 'De jurisdictione in extraneos competente exercitatio', in: Willenberg, *Selecta jurisprudentiae civilis*, second edn (Gdansk, 1728), nr XXXV, pp. 279-284. Willenberg, *De judicio* (note 7), 831-842. On these stipulations see: Rinaldo Comba, 'Emigrare nel medioevo. Aspetti economico-sociali della mobilità geografica nei secoli XI-XVI', in: Comba, Gabriella Piccinni and Giuliano Pinto, eds, *Strutture familiari, epidemie, migrazioni nell' Italia medievale* (Naples, 1984), pp. 45-74. Josef Joachim Menzel, 'Die Akzeptanz des Fremden in der mittelalterlichen deutschen Ostsiedlung', in: Alexander Patschovsky and Harald Zimmermann, eds, *Toleranz im Mittelalter* (Sigmaringen, 1988), pp. 207-219. David M. Palliser, 'A Regional Capital as Magnet, Immigrants to York. 1477 – 1566', in: *Yorkshire Archaeological Journal* 47 (1985), pp. 111-123; see also below, notes 293-298.

[181] Allamand, *Specimen* (note 180), pp. 5-9. On the position of strangers see: Geoffrey Alderman and Colin Holmes , eds, *Outsiders and Outcasts. Essays in Honour of William J. Fishman* (London, 1993). Claudine Billot and Arlette Higounet-Nadal, 'Les migrants limousines à la fin du Moyen Age', in: *Bulletin de la Société archéologique et historique du Limousin* 112 (1985), pp. 70-85. Maurice Hugh Keen, *The Outlaws of Medieval Legend*, second edn (London, 1977) [new edn (London, 2000); first published (London, 1961)]. Ruth Mellinkoff, *Outcasts. Signs of Otherness in Northern European Art*, 2 vols (Berkeley and Los Angeles, 1994). Wolfgang Seidenspinner, 'Angst und Mobilität. Die Ausgrenzung der Gauner im späten Mittelalter und der frühen Neuzeit und die Wirkung von Stereotypen', in: Anette Gerok-Reiter and Sabine Obermaier, eds, *Angst und Schrecken im Mittelalter* (Das Mittelalter, vol. 12, issue 1) (Berlin, 2007), pp. 72-84. Horst Wernicke, 'Der Hansekaufmann als Gast in fremden Lande', in: Irene Erfen and Karl-Heinz Spieß, eds, *Fremdheit und Reisen im Mittelalter* (Stuttgart, 1997), pp. 177-192. Wetzel, 'Anmerkungen' (note 6), pp. 7-16. Anthropologist Julian Pitt-Rivers, 'Das Gastrecht', in: Almut Loycke, ed., *Der Gast, der bleibt. Dimensionen von Georg Simmels Analyse des Fremdseins* (Edition Pandora, 9)

3. The Law of Hospitality and the Law of Settlement

The differentiation between the law of hospitality and the law of settlement also formed the basis for general migration law as Francisco de Vitoria formulated it in terms of legal theory during the earlier sixteenth century. Theologian at the University of Salamanca, the Dominican referred to that law as *ius peregrinationis* and, perhaps for the first time, applied it for the purpose of proposing regulations for trans-Atlantic migration. During the 1530s, he delivered special lectures, so-called "*relectiones*", about what he termed the "newly-found Indian islands" and discussed the problem of whether the Spanish war of conquest against Native Americans was just.[182] Vitoria argued that the war was unjust, when judged on the basis of the law of war as derived from the law of nature. In the version that St Thomas Aquinas had given to the principles of the law of war, wars could only be just if they were being conducted defensively and with the goal of restituting previously inflicted injustice. As Native Americans had never attacked Spaniards on any previous occasion before Columbus's voyages, Vitoria ranked the Spanish war of conquest as a series of aggressive campaigns and deemed it to be unjust.[183] Then he turned to the *ius peregrinationis* and, in application of the universalism enshrined in natural law, argued that Native Americans, like all other human beings, had a right of settlement sanctioned by natural law, with the consequence that conquest under the goal of expelling Native Americans from their habitual areas of settlement could not be legal.[184] Merchants, Vitoria

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(Frankfurt, 1992), pp. 17-42 [first published in: Pitt-Rivers, 'The Law of Hospitality', in: Pitt-Rivers, *The Fate of Shechem. Or The Politics of Sex. Essays in the Anthropology of the Mediterranean* (Cambridge, 1977), pp. 94-112], does not take notice of the conceptual distinction between the status of guests and the status of strangers. Sociologist Rudolf Stichweh, 'Die Semantik des Fremden in der Genese der europäischen Welt', in: Stichweh, *Der Fremde* (Berlin, 2010), pp. 75-83, at pp. 76-79, occasionally distinguishes between guests and strangers but, without any evidence, marks guests principally as persons, who do not come for the purpose of staying (76), and considers strangers as persons who "have been included at a given place" (an einem gegebenen Ort inkludiert) sind, without sharing the expectation that their potential "return to the place of origin may play any role in their inclusion" (Rückkehr an einen Herkunftsort bei der Regelung der Inklusion eine Rolle spielt) (79). However, this type of distinction between guests and strangers rests of general applicability of integration as the procedure of the inclusion of migrants according to a concept of large nations as a geno groups and thus differs from medieval urban practice. The legal pluralism practised in medieval towns and cities has remained unnotices in recent work on the issue. See: Lauren A. Benton, 'Historical Perspectives on Legal Pluralism', in: Brian Z. Tamanaka, Caroline Sage and Michael Woolcock, eds, *Legal Pluralism and Development. Scholars and Practitioners in Dialogue* (Cambridge, 2012), pp. 21-33. Benton and Richard J. Ross, eds, *Legal Pluralism and Empires. 1500 – 1850* (New York, 2013). Ralf Seinecke, *Das Recht des Rechtspluralismus* (Grundlagen der Rechtswissenschaft, 29) (Tübingen, 2015). Peer Zumbonsen, 'Law and Legal Pluralism. Hybridity in Transnational Governance', in: Paulius Jurčys, Poul F. Kjaer and Ren Yurakami, eds, Regulatory *Hybridization in the Transnational Sphere* (Leiden, 2013), pp. 49-71.

[182] Vitoria, 'De Indis' (note 86), book I, chap. 24, p. 232 (edn by Nys).

[183] Francisco de Vitoria, *Relectiones theologicae XII*, book V, chap. 10, edited by Luciano Pereña Vicente, José Manuel Peres Prendes and Vicente Beltrán de Heredia (Corpus Hispanorum de pace, 5) (Madrid, 1967) [first published (Lyons, 1557); further edn (Salamanca, 1565); (Lyons, 1580; 1586); also edited by Luis G. Getino, 3 vols (Madrid, 1933-1935)]. Thomas Aquinas, *Summa* (note 4), book I, q 95 a 4, p. 326; book II, chap. 2, q 57 a 3, p. 599.

[184] Vitoria, 'De Indis' (note 86), book III, chap. 2, pp. 257-258 (edn by Nys). For recent studies see: Norbert Brieskorn, 'Francisco de Vitoria. Theologie und Naturrecht im Völkerrecht. Auch ein Kampf um Differenzen', in: Kirstin Bunge, Anselm Spindler and Andreas Wagner, eds, *Die Normativität des Rechts bei Francisco de Vitoria*

admitted, should be given possibility to do their business, to that end could act under the *ius peregrinationis*, but, as in medieval urban law of hospitality, were not entitled to derive from that law any entitlement for settlement on Native American lands. Moreover, Vitoria could not find any supportive evidence for the contention that Native Americans should have tried to impede the activities of Spanish traders. At last, however, he withdrew to an argument that he did not take from legal theory from edicts in the name of Pope Alexander VI and direcly from the *Book of Genesis*, in order to be able to justify the Spanish conquest: Wherever military conflicts might arise between Spanish settlers, who were coming to America seeking to ply the soil as faithful believers in divine commands, and Native Americans, whom Vitoria chasticed as nomadic infidels unwilling to act in accordance with the same divine command, then these wars were just, because they were conducted to the end of implementing divine commands.[185] During the second half of the seventeenth century, Samuel von Pufendorf explicitly confirmed Vitoria's explication of the *ius peregrinationis* with the addition that the same natural law principles were valid also in East Asia. In a slight variation, Vitoria's approach to the justification of the Spanish conquest of America found its way into the widely read eighteenth-century handbook of the law among states by diplomat Emerich de Vattel.[186] *Ius peregrinationis* as part of natural law thus comprehensively tied migration to abidance by the law of hospitality and rendered unlawful forced settlements, occupation and conquest. Moreover, it established migration an integral process of movements that left emigration and immigration unseparated as a natural, that is inalienable legal entitlement for all human beings, restricted only in terms of the law of hospitality. When Immanuel Kant referred to the law of hospitality as one general condition for world peace, he did not more than cast into terms of philosophical theory the ancient *ius peregrinations*.

The same law still formed the platform, on which nineteenth-century mass emigrations occurred, which governments of states in Europe and East Asia did not oppose with administrative restrictions[187] and which governments of post-colonial states in the Americas did not obstruct.[188]

(Politische Philosophie und Rechtstheorie des Mittelalters und der Neuzeit. Reihe II, Bd 2) (Stuttgart, 2011), pp. 323-350. Stefan Kadelbach, 'Mission und Eroberung bei Vitoria. Über die Entstehung des Völkerrechts aus der Theologie', in: Bunge (as above), pp. 289-322. Andreas Wagner, 'Zum Verhältnis von Völkerrecht und Rechtsbegriff bei Francisco de Vitoria', in: Bunge (as above), pp. 235-287.

[185] Ibid., book III, chap. 3, pp. 258-259. Likewise: Alonso de la Veracruz, *De iusto bello contra Indos*, nr 1-2, edited by Carlos Baciero, Luis Baciero, F. Maseda and Luciano Pereña Vicente (Corpus Hispanorum de pace. Series 2, vol. 4) (Madrid, 1997), p. 322 [English version, edited by Ernest J. Burrus, 2 vol. (Sources and Studies for the History of the Americas, 4) (Rome, 1968)].

[186] Samuel von Pufendorf, *De jure naturae et gentium* (Amsterdam, 1688) [reprint (Oxford and London, 1934); first published (London, 1672); newly edited by Frank Böhling (Pufendorf, Gesammelte Werke, vol. 4, parts 1. 2) (Berlin, 1998)]; edn of 1998, vol. 1, book III, chap. 3, pp. 235-254; § 9, pp. 246-248, at pp. 246, 247. Vattel, *Droit* (note 18), book IV, chap. 3, nr 124, 126, pp. 615-616.

[187] For contemporary social-science studies of emigration regulations see: Eugen von Philippovich, 'Die Auswanderung als Gegenstand der Reichspolitik', in: Philippovich, ed., *Auswanderung und Auswanderungspolitik in Deutschland* (Schriften des Vereins für Socialpolitik, 52) (Leipzig, 1892), pp. III-XXIX. Hans-Wilhelm Rockstroh, *Die Entwicklung der Freizügigkeit in Deutschland, unter besonderer Würdigung der preußischen*

However, in the course of the same century, nationality legislation did raise the thresholds against the use of the *ius peregrinationis* through the conceptual separation of emigration from immigration in legal terms,[189] and in the course of the twentieth century, the *ius peregrinationis* became watered

Verhältnisse (Halle, 1910). For retrospective studies see: Ladon Boroumand, 'Emigration and the Rights of Man. French Revolutionary Legislators Equivocate', in: *Journal of Modern History* 72 (2000), pp. 67-108. Rudolf Möhlenbruch, *Freier Zug, Ius emigrandi, Auswanderungsfreiheit. Eine verfassungasgeschichtliche Studie*. LLD. Thesis, typescript (University of Bonn, 1977). Ulrich P. Scheuner, 'Die Auswanderungsfreiheit in der Verfassungsgeschichte und im Verfassungsrecht Deutschlands', in: *Festschrift für Richard Thoma* (Tübingen, 1950), pp. 199-214. Harald Schinkel, 'Freizügigkeit in der preußischen Gesetzgebung vom Jahre 1842', in: *Vierteljahrsschrift für Sozial- und Wirtschaftsgeschichte* 50 (1963), pp. 459-479. Frederick G. Whelan, 'Citizenship and the Right to Leave', in: *American Political Science Review* 75 (1981), pp. 636-653.

[188] For evidence regarding the freedom of immigration, with regard to the USA, see: Edward Young, *Special Report on Immigration* (Washington, DC: U.S. Government Printing Office, 1872), p. VII [German version s. t.: *Spezieller Bericht über Einwanderung in die Vereinigten Staaten* (Washington: U.S. Government Printing Office, 1872)]; Congressman Young believed that the econmic benefit from immigration to the USA might be expressed in numerical figures and equated the monetary value of every immigrant to the USA with 800 US$.

[189] On the history of nationality legislation in the German Empire see: John Breuilly, 'Sovereignty, Citizenship and Nationality. Reflections on the Case of Germany', in: Malcolm Anderson and Eberhart Bort, eds, *The Frontiers of Europe* (London, 1998), pp. 36-67. William Rogers Brubaker, ed., *Immigration and the Politics of Citizenship in Europe and America* (Lanham, MD, New York and London, 1989). Brubaker, 'Einwanderung und Nationalstaat in Frankreich und Deutschland', in: *Der Staat* 28 (1989), pp. 1-30. Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, MA, and London, 1992) [German version s. t.: *Staats-Bürger. Deutschland und Frankreich im historischen Vergleich* (Hamburg, 1994)]. F. El-Tayeb, '"Blood is a very special juice". Racialized Bodies and Citizenship in Twentieth-Century Germany', in: Eileen Boris and Angélique Janssens, eds, *Complicating Categories. Gender, Class, Race and Ethnicity* (International Review of Social History, Supplement to vol. 44) (Cambridge, 1999), pp. 149-169. Andreas K. Fahrmeir, 'Nineteenth-Century German Citizenships', in: *Historical Journal* 40 (1997), pp. 721-752. Fritz Franz, 'Das Prinzip der Abstammung im deutschen Staatsangehörigkeitsrecht', in: Annita Kalpaka and Nora Räthzel, eds, *Rassismus und Migration in Europa* (Das Argument, Special Issue 201) (Hamburg, 1992), pp. 237-245. Dieter Gosewinkel, 'Die Staatsangehörigkeit als Institution des Nationalstaats. Zur Entstehung des Reichs- und Staatsangehörigkeitsgesetzes von 1913', in: Rolf Grawert, Bernhard Schlink, Rainer Wahl and Joachim Wieland, ed., *Offene Staatlichkeit. Festschrift für Ernst-Wolfgang Böckenförde zum 65. Geburtstag* (Berlin, 1995), pp. 359-378. Gosewinkel, 'Staatsbürgerschaft und Staatsangehörigeit', in: *Geschichte und Gesellschaft* 21 (1995), pp. 533-556. Gosewinkel, 'Untertanenschaft, Staatsbürgerschaft, Nationalität. Konzepte der Zugehörigkeit im Zeitalter des Nationalstaats', in: *Berliner Journal fur Soziologie* 8 (1998), pp. 507-522. Gosewinkel, *Einbürgern und Ausschliessen* (Kritische Studien zur Geschichtswissenschaft, 150) (Göttingen, 2001). Gosewinkel, 'Staatsangehörigkeit in Deutschland und Frankreich im 19. und 20. Jahrhundert', in: Christoph Conrad and Jürgen Kocka, eds, Staatsbürgerschaft in Europa (Hamburg, 2001), pp. 48-62. Rolf Grawert, *Staat und Staatsangehörigkeit* (Schriften zur Verfassungsgeschichte, 17) (Berlin, 1973). Grawert, 'Staatsangehörigkeit und Staatsbürgerschaft', in: *Der Staat* 23 (1984), pp. 198-204. Grawert, 'Staatsvolk und Staatsangehörigkeit', in: Josef Isensee and Paul Kirchhof, eds, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 1 (Heidelberg, 1987), pp. 663-690. Hellmuth Hecker, *Die Staatsangehörigkeitsregelungen in Deutschland* (Institut für Internationale Angelegenheiten der Universität Hamburg, Werkhefte 30) (Hamburg and Frankfurt, 1976). Hecker, *Staatsangehörigkeit im Code Napoléon als europäisches Recht* (Institut für Internationale Angelegenheiten der Universität Hamburg, Werkhefte 34) (Hamburg and Frankfurt, 1980). Christian Joppke, *Immigration and the Nation-State. The United States, Germany, and Great Britain* (Oxford, 1999). Diethard Krombach, *Erstabgrenzungen im Staatsangehörigkeitsrecht im 19. Jahrhundert und am Anfang des 20. Jahrhunderts*. LLD. Thesis, typescript (University of Bonn, 1967). Franz Massfelder, *Deutsches Staatsangehörigkeitsrecht von 1870 bis zur Gegenwart* (Frankfurt, 1955). Wolfgang Justin Mommsen, 'Nationalität im Zeichen offensiver Weltpolitik. Das Reichs- und Staatsangehörigkeitsgesetz vom 22. Juni 1913', in: Manfred Hettling and Paul Nolte, eds, *Nation und Gesellschaft in Deutschland. Historische Essays [Hans-Ulrich Wehler zm 65. Geburtstag]* (Munich, 1996), pp. 128-141. Hermann Rehm, 'Der Erwerb von Staats- und Gemeinde-Angehörigkeit in geschichtlicher Entwicklung nach römischem und deutschem Staatsrecht', in: *Annalen des Deutschen Reichs* (1892), pp. 137-281. Maurice Ruby, *L'évolution de la nationalité allemande d'après les textes. 1842 à 1953* (Baden-Baden, 1955). Walter Schätzel, 'Geschichte der Staatsangehörigkeit', in: Schaetzel, *Internationales Recht. Gesammelte Schriften und Vorlesungen*, vol. 3 (Bonn, 1962), pp. 255-264. Heinrich Triepel, 'Internationale Regelung der Staatsangehörigkeit', in: *Zeitschrift für ausländisches öffentliches*

down through ever more severe immigration restrictions,[190] until finally the Universal Declaration of Human Rights deleted it from its canon.

Until the beginning of the nineteenth century,there were few conflicts about the use of the *ius peregrinationis*, as long as it remained checked by the recognition of the law of hospitality. Occasionally, foreigners might be expelled for political reasons, such as from France already in the fourteenth century,[191] and progromes did take place.[192] The practice of shovelling out beggars, who were not tolerated as guests, was a common feature, even though poor relief was acknowledged as a general duty.[193] But although a seventeenth-century English social reformer noted that ten per cent of the English population were not residential,[194] few administrative measures against permanent migrants are on record from the same period.[195] Lack of residence could support suspicions of

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Recht und Völkerrecht 2 (1929), pp. 15-199. Henry Ashby Turner, Jr, 'Deutsches Staatsbürgerrecht und der Mythos der ethnischen Nation', in: Hettling (as above), pp. 142-150. Lora Wildenthal, 'Race, Gender and Citizenship in the German Colonial Empire', in: Frederick Cooper and Ann Laura Stoler, eds, *Tensions of Empire. Colonial Cultures in a Bourgeois World* (Berkeley and Los Angeles, 1997), pp. 263-283. Wolfgang Wippermann, 'Das Blutrecht der Blutsnation. Zur Ideologie- und Politikgeschichte des ius sanguinis in Deutschland', in: Jochen Baumann, Andreas Dietl and Wolfgang Wippermann, eds, *Blut oder Boden. Doppel-Pass, Staatsbürgerrecht und Nationsverständnis* (Berlin, 1999), pp. 10-48. Wippermann, 'Das "ius sanguinis" und die Minderheiten im Deutschen Kaiserreich', in: Hans H. Hahn and Peter Kunze, eds, *Nationale Minderheiten und staatliche Minderheitenpolitik in Deutschland im 19. Jahrhundert* (Berlin, 1999), pp. 133-143.

[190] Henry Pratt Fairchild, *The Melting Pot Mistake* (Boston, 1926), p. 56 [reprint (New York, 1977)]: "Race and nationality, then, are the two universal foundations of group unity. Upon their character and the relations between them depend the great problems which, for a time, we the American people, were ready to dismiss from our minds by a light-hearted appeal to the figure of the melting pot."

[191] Billot, 'Migrants' (note 177).

[192] František Graus, *Pest, Geißler, Judenmorde. Das 14. Jahrhundert als Krisenzeit* (Veröffentlichungen des Max-Planck-Instituts für Geschichte, 86) (Göttingen, 1987) [second edn (Göttingen, 1988); third edn (Göttingen, 1994)].

[193] See above, note 92, and: Franz Irsigler and Arnold Lassotta, *Bettler und Gaukler, Dirnen und Henker. Randgruppen und Außenseiter in Köln. 1300 – 1600* (Munich, 1989) [first published (Cologne, 1984)]. Robert Jütte, *Abbild und soziale Wirklichkeit des Bettler- und Gaunertums zu Beginn der Neuzeit. Sozial-, mentalitäts- und sprachgeschichtliche Studien zum Liber vagatorum (1510)* (Beihefte zum Archiv für Kulturgeschichte, 27) (Cologne and Vienna, 1988). Arthur Richel, 'Armen- und Bettlerordnungen', in: *Archiv für Kulturgeschichte* 2 (1904), pp. 393-403. Norbert Schindler, 'Die Entstehung der Unbarmherzigkeit. Zur Kultur und Lebensweise der Salzburger Bettler am Ende des 17. Jahrhunderts', in: *Bayerisches Jahrbuch für Volkskunde* (1988), pp. 61-130. Ernst Schubert, 'Der "starke Bettler". Das erste Opfer sozialer Typisierung um 1500', in: *Zeitschrift für Geschichtswissenschaft* 48 (2000), 869-893. Seiring, *Fremde* (note 6), pp. 300-312. Ingeborg Titz-Matuszak, 'Mobilität der Armut. Das Almosenwesen im 17. und 18. Jahrhundert im südniedersächsischen Raum', in: *Plesse-Archiv* 24 (1988), pp. 9-338. Otto Ulbricht, 'Die Welt eines Bettlers um 1775. Johann Gottfried Kästner', in: *Historische Anthropologie* 2 (1994), pp. 371-388.

[194] *Stanleyes Remedy. Ot The Way How to Reform Wandering Beggars, Theeves. High-Way Robbers and Pick-Pockets* (London, 1646), p. 2.

[195] For studies see: Thomas McStay Adams, *Bureaucrats and Beggars. French Social Policy in the Age of Enlightenment* (New York and Oxford, 1990). Friedrich Christian Benedict Avé-Lallemant, *Das deutsche Gaunertum*, 3 vols (Leipzig, 1858-1862) [second edn (Munich and Berlin, 1914); reprint of the second edn (Wiesbaden, 1998)]. K. L. Ay, 'Unehrlichkeit, Vagantentum und Bettelwesen in der vorindustriellen Gesellschaft', in: *Jahrbuch des Instituts für deutsche Geschichte* 8 (1979), pp. 13-38. Frank Aydelotte, *Elizabethan Rogues and Vagabonds* (Oxford, 1913). A. L. Beier, 'Vagrants and the Social Order in Elizabethan England', in: *Past and Present* 64 (1974), pp. 3-29. Beier, *Masterless Men. The Vagrancy Problem in England. 1560 – 1640* (London and New York, 1986). Beier and Paul Ocobock, eds, *Cast out. Vagrancy and Homelessness in Global and Historical Perspective* (Columbus, OH, 2008). Tim Cook, ed., *Vagrancy. Some New Perspectives* (London, New York and

criminal actions,[196] but settlers convicted for crimes often had to face more severe punishments than guests or foreigners, who were immediately expelled.[197] Even migrants and travellers, when moving across long distances, except to America, could expect to be treated as guests at their destinations. Willingness to abide by local territorial law was in practice even vis-à-vis states, whose governments, like the Japanese, had enforced immigration restrictions.[198] This practice confirms that the law of hospitality as derived from natural law was widely seen as valid, even though it was nowhere legislated in terms of positive law. The nineteenth-century positivist contention that natural law was a peculiar outflow of European or, for that matter, Christian traditions, and did not lend itself to universalisation,[199] is unfounded, even if certain specific and explicit statements of natural legal norms was European in origin.

4. The Law Relating to Diplomacy

San Francisco, 1979). Paul Frauenstädt, 'Bettel- und Vagabundenwesen in Schlesien vom 16. bis 18. Jahrhundert', in: *Zeitschrift für die gesamte Strafrechtswissenschaft* 16 (1897), pp. 712-736. Bronislaw Geremek, 'Criminalité, vagabondage, pauperisme. La marginalité à l'aube des temps modernes', in: *Revue d'histoire moderne et contemporaine* 21 (1974), pp. 337-375. František Graus, 'Randgruppen der städtischen Gesellschaft im Spätmittelalter', in: *Zeitschrift für historische Forschung* 8 (1981), pp. 385-437. Theodor Hampe, *Die fahrenden Leute in der deutschen Vergangenheit* (Monographien zur deutschen Kulturgeschichte, 10) (Jena, 1902) [second edn (Die Deutschen Stände in Einzeldarstellungen, 10) (Jena, 1924)]. Bernd-Ulrich Hergemöller, ed., *Randgruppen der spätmittelalterlichen Gesellschaft* (Warendorf, 1990). Hergemöller, '"Randgruppen" im späten Mittelalter. Konstruktion – Dekonstruktion – Rekonstruktion', in: Hans-Werner Goetz, ed., Die Aktualität des Mittelalters (Bochum, 2000), pp. 165-190. Angelika Kopečny, *Fahrende und Vagabunden* (Berlin, 1980). Carsten Küther, *Räuber und Gauner in Deutschland. Das organisierte Bandenwesen im 18. und frühen 19. Jahrhundert* (Kritische Studien zur Geschichtswissenschaft, 20) (Göttingen, 1976) [second edn (Göttingen, 1987)]. Küther, *Menschen auf der Straße. Vagierende Unterschichten in Bayern, Franken und Schwaben in der zweiten Hälfte des 18. Jahrhunderts* (Kritische Studien zur Geschichtswissenschaftm 56) (Göttingen, 1983). Robert Liris, 'Mendicité et vagabondage en Basse-Auvergne à la fin du XVIII siècle', in: *Revue d'Auvergne* 79 (1965), pp. 65-78. John Pound, *Poverty and Vagrancy in Tudor England* (London, 1971). Martin Rheinheimer, *Arme, Bettler und Vaganten. Überleben in der Not. 1450 – 1850* (Frankfurt, 2000). Christoph Sachsse and Florian Tennstedt, *Bettler, Gauner und Proleten* (Reinbek, 1983). Ernst Schubert, *Fahrendes Volk im Mittelalter* (Bielefeld, 1995). Alexandre Vexliard, *Introduction à la sociologie du vagabondage* (Paris, 1956) [reprint (Paris, 1997)].

[196] At the end of the sixteenth century, the deputy town scribe of Warwick noted the increase in the numbers of persons, who had been suspected of having committed crimes solely on the grounds that they had no permanent residence: Thomas Kemp, ed., *The Book of John Fisher, Town Clerk and Deputy Recorder of Wawick (1580–88)* (Warwick, 1900), p. 106. Likewise: John Taylor, 'The Praise, Antiquity and Commoditie of Beggarie, Beggars and Begging', in: Taylor, *All the Works of John Taylor, the Water Poet* (London, 1630), p. 99 [reprint (London, 1972); first published (London, 1621)].

[197] Richard-Heinrich Schmidt, 'Pazifizierung des Dorfes. Struktur und Wandel von Nachbarschaftskonflikten vor Berner Sittengerichten 1570 – 1800', in: Heinz Schilling, ed., *Kirchenzucht und Sozialdisziplinierung im frühneuzeitlichen Europa* (Berlin, 1994), pp. 91-128.

[198] See above, note 86. Cavallar, *Rights* (note 18), neither discussed legal records nor did he venture into the juristic theory of the law of hospitality.

[199] Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisierten Staten*, § 5 (Nördlingen, 1868) [Microfiche edn (Zug, 1982); second edn (Nördlingen, 1872); third edn (Nördlingen, 1878)], p. 61 (of the first edn): "Die civilisirten Nationen sind vorzugsweise berufen und befähigt, das gemeine Rechtsbewusstsein unter die Menschheit auszubilden, und die civilisirten Staten voran verpflichtet, die Forderungen desselben zu erfüllen. Deshalb sind sie vorzugsweise die Ordner und Vertreter des Völkerrechts." On Bluntschli see the critical comment by: Michael Stolleis, 'Die Allgemeine Staatslehre im 19. Jahrhundert', in: Diethelm Klippel, ed., *Naturrecht im 19. Jahrhundert* (Naturrecht und Rechtsphilosophie in der Neuzeit, Studien und Materialien 1) (Goldbach, 1997), pp. 3-18, at p. 16.

The poverty of the criticism of the significance of natural law in the international arena finds confirmation from the law relating to diplomatic envoys as a special feature of the law of hospitality. The law relating to diplomacy provides opportunities for insight into the practical handling of the law of hospitality. The issue of prime importance is not the competence of sovereigns of sending and receiving diplomatic envoys, as this competence does not fall into the province of the law of hospitality, but emerges from the unset law of war and peace and the equally unset law among states, on occasions from specific bilateral agreements as well,[200] and in combination with municipal law. By contrast, the law of hospitality takes significance, once the legal norm of the inviolability of diplomatic envoys and their property comes under review. This norm corresponds to the obligation under natural law to treat guests fairly and to refrain from subjecting them to criminal acts and procedures, precisely because guests usually appear to have exposed themselves to their hosts.[201] The same norm is on record already in Antiquity in the case of the decision by Artaxerxes, King of the Persians, to release without ransom hostages whom the government of Sparta had delivered to him to expiate the previous murder of a Persian envoy in Sparta. Herodotus, who reported the decision, noted that the king had defended his decision with the argument that he was unwilling to reciprocate injustice with injustice.[202] Further evidence can be gleaned from various records to the sixteenth century. For one, Mongol Khan Güyük informed Pope Innocent IV in 1246 that he would under no circumstances grant safe conduct to a papal emissary, as the Pope had requested, and that he knew well how to treat diplomatic envoys.[203] In the sixteenth century, the murder of Antonio

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[200] Thus already: Martinus Garatus of Lodi [Laudensis], 'Tractatus de legatis maxime principum', edited by Vladimir Emmanuilovič Grabar, *De legatis et legationibus tractatus varii* (Tartu, 1905), pp. 45-52 [first printed in: Garatus, *Tractatus universi iuris*, vol. 13 Venice, 1584], fol. 212-213]. Brunnemann, *Dissertation* (note 7), § 4, fol. A 2^{v}: "In horum classem [scilicet peregrini] referri possunt ii, qvi municipio vel tota provincia ad Principem cum mandatis publice missi." Treaty France – Ottoman Empire, February 1535 [= 25 Chaban 941], in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 71-80; also in: Gabriel Noradounghian, ed., *Recueil d'actes internationaux de l'Empire Ottoman*, vol. 1 (Paris, 1897), pp. 83-87 [reprint (Nendeln, 1978); in conjunction with the report by the Venetian emissary to the Senate; according to the report, King Francis I defended his contacts with Sultan Süleyman on the grounds that he was trying to establish a counterpoise against the power of the Emperor; in: Niccolò Tommasseo, ed., *Relations des ambassadeurs vénitiens sur les affairs de France au XVIe siècle*, vol. 1 (Collection des documents inédits sur l'histoire de France. Series 1) (Paris, 1838), p. 67]. For further bilateral treaties see above, note 88.

[201] Thus explicitly: Johann Eberhard Rösler [praes.] and Carl Franz von Palm [resp.], *Dissertatio de juribus legationum ex jurisprudentia naturali demonstratis*. LLD thesis (University of Tübingen, 1723), p. 3: "Theses I": "Iura legationum … ex solidaribus iuris naturae principiis deducenda *et* demonstranda sunt." For summaries on the law of diplomatic envoys see above, note 88.

[202] Herodotus, *Historiai* [various edn], book VIII, chap. 133-136.

[203] Among other records, this become evident from the missions which the King of Hungary dispatched to the Bashkirs in the Urals, the Pope sent to the Mongol Khan and the Mongol Khan to the King of Hungary during the thirteenth century. See: Iulianus, Epistola de vita Tartarorum [eport on the Mission to the Mongol Khan 1230 – 1237]. Ms: Biblioteca Apostolica Vaticana, Vat. Lat. 443 [c. 1284], edited by Heinrich Dörrie, 'Drei Texte zur Geschichte der Ungarn und Mongolen. Die Missionsreisen des f[rate]r Iulianus O. P. ins Ural-Gebiet (1234/5) und nach Rußland (1237) und der Bericht des Erzbischofs Peter über die Tartaren', in: *Nachrichten der Akademie der Wissenschaften in Göttingen*, Philolog.-Hist. Kl., vol. 6 (1956), pp. 165-182, §§ 8-9, at pp. 178-179: "Unde legatos misit [the Mongol Khan] regi Ungariae [to the Bashkirs] qui venientes per terram Sudal captivati sunt a duce de

Rincon and Cesare Fregoso, two French ambassadors on their way to Istanbul, in a boat on the River Po in 1541, triggered angry responses not just in France.[204] Admittedly, statements recording the inviolability of diplomatic envoys operating under the law of hospitality need to be read with caution, because, prima facie, they are ambivalent as they often report breaches of that same law. However, records providing information about such incidents consistently refer to these acts as criminal offenses, not just as cases of murder but also as other infringements upon the law of relating to diplomatic envoys. In the case of the correspondence between Pope Innocent IV and Khan Güyük, the papal request for safe conduct was conditioned by reports featuring allegations of previous Mongolian breaches of the law of hospitality. Yet Khan Güyük not only sharply refuted these papal allegations but also told the Pope that he took the request to be dishonourable. Thus, the thirteenth-century Mongolian-Papal correspondence shows that the validity of unset natural legal norms was taken for granted also with regard to cross-cultural diplomatic exchanges, even though, given the circumstances, these norms could not have been held to be enforceable. Hence, the law of hospitality belonged to the universal complex of legal norms, formulated in inclusionistic terms. Even Grotius confirmed this point, as he raised the obligation to honour the inviolability of diplomatic envoys to the of the two only duties that warring parties should observe in the course of their military campaigns, next to the duty of ceremonially burying warriors killed in action on either side, and to fulfill these obligations in order to keep the door open for the arrangement of a future peace.[205]

Sudal, et litteras regi missas dux ille recepit ab eis; et legatos ipsos cum sociis mihi deputatis etiam vidi; predictas litteras a duce de Sudal mihi datas ad regem Ungariae deportavi. Litterae autem scripte sunt litteris paganis sed lingua tartarica. Unde rex eas qui possint legere multos invenit sed intelligentes nullos invenit. Nos autem cum transiremus Cumaniam paganum quendam invenimus qui eas nobis est interpretatis. Est autem interpretatio: 'Ego, Chayn [Ogotai or Batu], nuntius regis celestis, cui dedit potentiam super terram subicientes mihi se exaltare et deprimere adversantes, miror de te, rex Ungarie, quod commiserim ad te iam tricesima vice legatos, quare ad me nullum remittis ex eisdem; sed nec nuntios tuos vel litteras mihi remittis. Scio quod rex dives es et potens, et mjultos sub te habes, solusque gubernas magnum renum. Ideoque difficile sponte tua te mihi subicis; melius tamen tivi esset et salibrius, si te subiceres mihi! Intellexi insuper quod Cumanos servos meos sub tua protectione detineneas. Unde mando tibi quod eos de cetero apud te non teneas et me adversarium non habeas propter ipsos! Facilius est enim eis evadere quam tibi, quia illi sine domibus cum tentoriis ambulantes possunt forsitan evadere. Tu autem in domibus habitans, habens castra et civitates, qualiter effugies manus meas?'" [also in: László Bendefy, 'Fontes authentici itinera (1235 – 1238) f[ratis] Iuliani illustrantes', in: *Archivum Europae Centro-Orientalis* 3 (1937), pp. 1-32]. Frederick II, Roman Emperor, [Epistola imperatoris de adventu Tartarorum, 3 July 1241], in: Matthew Paris, *Chronica majora*, edited by Henry Richards Luard, vol. IV (Rerum Britannicarum medii aevi scriptores, 57) (London, 1877), pp. 112-119, at p. 113, reported about repeated missions sent by the Mongol Khan to King Béla IV of Hungary. Innocent IV., Pope, *Ex Innocentii IV registro. Epistolae saeculi XIII e regestis pontificum Romanorum selectae*, edited by Karl Rodenberg, vol. 3 (Monumenta Germaniae historica, Epistolae saecvli XIII, 3) (Berlin, 1894), pp. 69-81. Güyük, Great Khan of the Mongols, [Letter to Pope Innocent IV, November 1246], in: Christopher Dawson, ed., *Mission to Asia* (Medieval Academy Reprints for Teaching, 8) (Toronto, London and Buffalo, 1980), pp. 85-86. Denis Sinor, 'Un voyageur du treizième siècle. Le Dominicain Julien de Hongrie', in: *Bulletin of the School of Oriental and African Studies* (1952), pp. 588-602. Sinor, 'Les relations entre les Mongols et l'Europe jusqu'à la mort d'Arghoun et de Béla IV', in: *Cahiers d'histoire mondiale* 3 (1956), pp. 39-62.

[204] Roger Bigelow Merriman, *Suleiman the Magnificent. 1520 – 1566* (New York, 1966), pp. 126-145, 226 [first published (Cambridge, MA, 1944); reprint (Glocester, 2007)].

[205] Grotius, *De Jure* (note 19), book II, chap. 17, 18. For close contemporary studies of the issue of the inviolability

The inviolability of diplomatic envoys needs to be kept distinct from the immunity of envoys against criminal prosecution. Contrary to the ancient application of the law of hospitality, the admission of diplomatic immunity grew incrementally, and slowly at that, and obtained the status of customary law only during the nineteenth century. Still at the turn towards the eighteenth century, Abraham de Wicquefort, theorist of diplomacy and active diplomat of origin in the Low Countries, warned that envoys would have to take responsibility for any criminal offenses they may have committed, and he recommended to envoys the unconditional readiness to act in accordance with the law at their destinations, in line with the law of hospitality.[206] Wicquefort himself had been imprisoned, whence he made his observations as a practitioner for other practitioners, based on his own experience. The enforcement of diplomatic immunity remained a problem well into the nineteenth century, because it shifted unlawful acts of diplomats from the realm of personal responsibility into the arena of relations among states, thereby removing them from the law of hospitality. Perhaps the expulsion of envoys indicted for criminal offenses, was given priority over conviction in court due to its procedural simplicity.[207] However that may have been, giving priority to expulsion, once it became standing practice, was tantamount to the abandonment of the law of hospitality with regard to diplomatic envoys. This was so, because, as a rule, the law of hospitality had excluded the immunity of guests. In turn, the abandonment of the law of hospitality, as a universal and unset legal framework, demanded increasing efforts to lay the law relating to diplomats down in written treaties under international law, initially through state practice in Europe, and eventually, from the nineteenth century, at the global level by way of legislation under positive international law.[208]

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of diplomatic envoys see: Paccassi, *Einleitung* (note 88), pp. 158-179. Johann Schleußing [praes.] and Johann Christian Klügel [resp.], *Dissertatio juridica de legatorum inviolabilitate*. LLD. thesis (University of Leipzig, 1690) [another edn (Wittenberg, 1743)]. Johann Georg Simon [praes.] and Thomas Filitz [resp.], *Violationem legati*. LLD thesis (University of Jena, 1680).

[206] Wicquefort, *Ambassadeur* note 88), English version, p. 275: "The Necessity of Embassies makes the Security of Embassadors by the universal Conseil of all Nations of the Earth; and it is this general Consent that constitutes what is call'd the Law of Nations. It holds a Medium between the Law of Nature and the Civil Law, and is so much more considerable than the Last that it can neither be chang'd nor alter'd."; p. 277: "That Embassador, who violates first the Law of Nations, is in the wrong to desire its Protection. … The Law of Nations does not protect those Crimes which Nature abhors; because it is not its Intention to destroy it, nor to lend its Authority to Wretches who ought to have no share in Civil Society."; p. 279: "I said before that it is the sovereign with whom the Minister resides, who ought to secure him that safety, which the law of Nations and the publick Faith intitle him to."; p. 281: "It is moreover certain that the Embassador is not inviolable when he commits a Violence because in that Case the Law of Nature is preferable to the Law of Nations." See also: Abraham Daniel Clavel de Brenles, *Dissertatio juris gentium inauguralis de exemtione legatorum a foro criminali ad quem missi sunt* (Marburg, 1741) [first issued as LLD. thesis (University of Marburg, 1740)].

[207] See the summary by: Richard Zouche, *Solutio quaestionis veteris et novae. Sive de legati delinquentis judice competente dissertatio* (Oxford, 1657) [German version s. t.: *Eines vornehmen Englischen J[uris] C[onsul]ti Gedancken von dem Tractement eines Ministri und dessen Domestiquen, welche an dem Orte, wo selbige in Gesandtschaft sich befinden, etwas verbrochen, wegen derer Solidité anjetzo in teutscher Sprache mitgetheilet*, edited by Johann Jakob Lehmann (Jena, 1717)].

[208] Vienna Convention on Diplomatic Relations, 18 April 1961, printed in: Niklas Wagner, Holger Raasch and Thomas Pröpstl, *Wiener Übereinkommen über diplomatische Beziehungen vom 18. April 1961. Kommentar für die Praxis* (Berlin, 2007), pp. 13-28 [also in: Michael Richsteig, , ed., *Wiener Übereinkommen über diplomatische und*

The British mission that King George III commissioned to China under George Macartney (1737 – 1806) in 1793 and 1794 became the test case for the possibility to apply the principles of European international law in Asia, specially the law of treaties between states. It was the declared purpose of the mission to establish the legal basis for trade relations between China and the UK. The British government, under influence of intellectuals**,** classed China as a "closed" state and demanded its "opening" to British traders for business and the collection of information together with the grant of the privilege of dispatching a British diplomatic envoy. It was, then, Macartney's task to implement the "opening" of China for British trade. To that end, Macartney brought with him a royal letter and had instruction to deliver the letter to China's Qīng Dynasty ruler Qian Long (1735 – 1796). However, in the course of his mission, Macartney became involved in a controversy with his Chinese counterparts who were associated with the Office of the Rituals (Lǐ Bù 礼部, traditional form 禮部). This office was in charge of dealing with foreign diplomatic emissaries in Beijing and decided about the appropriate rites that these envoys were asked to perform. In Chinese perspective, the choice of rites determined the rank which the Chinese government would grant to these envoys and the rulers who had dispatched them. The Li Bu asked Macartney to enact the so-called "Kowtow" ([kòutóu, 叩頭] = prostration), a rite which positioned the Chinese ruler at the top of a hierarchy of rulers in the world.[209] The hierarchy became explicit through the prostration rite which the Li Bu requested from Macartney unconditionally. Prior to his arrival, sixteen missions reaching Beijing had implemented the rite.[210] Macartney, who understood the logic of the rite, refused to perform it unilaterally with the argument that he was the official representative of the British king and that the British king was the highest sovereign in Europe, equal in rank to the Chinese ruler.[211] He further replied that he would only perform the "Kowtow", if, in return, Qian Long would enact the same rite before a picture of King George III. As this request was anathema to the Chinese side, the negotiations did not proceed for a while, until Macartney was finally admitted to an audience,[212] in

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konsularische Praxis. Entstehungsgeschichte, Kommentierung, Praxis (Baden-Baden, 1994), pp. 7-114]., Vienna Convention on Consular Relations, 24 April 1963, printed in: Niklas Wagner, Holger Raasch and Thomas Pröpstl, *Wiener Übereinkommen über konsularische Beziehungen vom 24. April 1963. Kommentar für die Praxis* (Berlin, 2007), pp. 13-43 [also in: Michael Richsteig, ed., *Wiener Übereinkommen über diplomatische und konsularische Praxis. Entstehungsgeschichte, Kommentierung, Praxis* (Baden-Baden, 1994), pp. 115-281].

[209] Macartney, *Embassy* (note 108), nr XXVI, pp. 95, 167. Cranmer-Byng, 'Lord' (note 108), pp. 145, 156-158. Eva Susanne Kraft, *Zum Dschungarenkrieg im 18. Jahrhundert. Berichte des Generals Funingga [1715 – 1724]. Aus einer mandschurischen Handschrift [Tsing-ni-tsiang-kün-tsou-i, Mandschurische Eingaben an den kaiserlichen Hof; Privatbesitz Erich Haenisch] übersetzt und an Hand der chinesischen Akten erläutert* (Das Mongolische Weltreich, 4) (Leipzig, 1953). For intellectuals perceiving China as a "closed" state see: Georg Forster, *Geschichte der Reisen, die seit Cook ab der Nordwest- und Nordostküste von Amerika und in dem Nördlichsten Amerika selbst ... unternommen worden sind* (Berlin, 1791) [newly edited in: Forster, *Werke*, vol. 5 (Berlin, 1985), pp. 383-593, § 33, at pp. 482-484].

[210] Immanuel Chung-Yueh Hsu, *China's Entrance in to the Family of Nations. The Diplomatic Phase. 1858 – 1880* (Harvard East Asia Series, 5) (Cambridge, MA, 1960), pp. 5, 14.

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

[212] Aeneas Andersen, *A Narrative of the British Embassy to China in the Years 1792, 1793 and 1794* (London, 1795),

the course of which he inclined one knee and the upper part of his body towards the floor.[213] Thereupon, Macartney was in fact permitted to submit the royal letter containing the request to "open" the state. However, he soon received a stiff reply in the form of an edict in Qian Long's name and addressed to George III. In his reply, Qian Long informed the British king that the Chinese government was not in need of trade relations with the United Kingdom because it could provide for the needs of the population under its control. Instead of submitting requests, George III had better introduce Chinese morality in the area under his control. Until that would have happened, the differences between Chinese law and morality on the one side, British habits on the other, were too deep to allow the admission of a British diplomatic representative to Beijing. Qian Long further obliged George III to act in full support of the Chinese government in its efforts to maintain peace in the world.[214]

Qian Long's claims were by no means unfounded, as the Beijing government had, during its war against the Dzungars (1715 – 1755), undertaken what it portrayed as a civilising mission in Central Asia. It had then demonstrated its willingness to assert its position at the top of a hierarchy of governments even against military resistance, to which Qian Long had responded with the order of mass killings.[215] Moreover, at the turn towards the nineteenth century, China was the home of about 30% of the production of all goods worldwide, while the United Kingdom produced just 4%.[216] On his part, Macartney concluded that the Chinese view of the world differed from his own,[217] and returned without having accomplished his task. Another British attempt to "open" China failed in 1816. Likewise, a Dutch mission in pursuit of the same goal failed in 1794 and 1795.[218] Thus, the Qīng government succeeded in maintaining its traditional position at the top of a worldwide hierarchy of states for the time being, in denying legal equality to other sovereigns and in regulating external trade. In Europe, the image of China as the "closed", distant and incomprehensible state per se gained in acceptance, so to speak as the cultural antipode to Europe. By contrast, even in the very first years of the nineteenth century, contemporary theorists had taken for granted the legitimacy of

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pp. 145-165 [Microfilm edn (The Eighteenth Century, Reel 3870, Nr 03); abrdiegd version, second edn (Dublin, 1796); third edn (London, 1796); further edn (London, 1797); German version (Erlangen, 1795); (Hamburg, 1796)]. Staunton, *Account* (note 108), pp. 129-137, 143-144.

213 Hüttner, *Nachricht* (note 108), pp. 219-220.

214 George III, King of Great Britain, [Letter to Qian-Long, 1792; Based on a Draft Proposal by George Macartney of 4 November 1792], in: Hosea Ballou Morse, ed., *The Chronicles of the East India Company Trading to China*, vol. 2 (Oxford, 1926), pp. 244-247 [reprint (Taibei, 1966)]. Hüttner, *Nachricht* (note 108), pp. 219-220. Peyrefitte, *L'empire* (note 108), pp. 289-291.

215 Kraft, *Dschungarenkrieg* (note 205), nr I, pp. 28, 124, nr III, pp. 40, 131.

216 Paul Bairoch, 'International Industrialization Levels from 1750 to 1980', in: *Journal of European Economic History* 11 (1982), pp. 269-310, at p. 296.

217 Hüttner, *Nachricht* (note 108), pp. 219-220.

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

governments of states to regulate trade, in order "to avoid contacts with foreigners and, by consequence, collisions that these contacts will entail" (die Berührungen mit den Ausländern und damit die Collisionen, welche diese Berührungen veranlassen, zu vermeiden). The failure of the two British missions then gave voice to demands that the British government should take action to enforce the principle of the freedom of trade and the enforcement of the freedom of trade might even justify the use of military means.[219]

Further into the nineteenth century, the successive positivation of the law relating to diplomacy boosted its exclusionistic application in actions by European and the US governments. They did so in that they regularly and unilaterally demanded the privilege of dispatching diplomatic envoys to states elsewhere on the globe and valued their success in obtaining the same privilege as an indication of their big-power status. European and the US governments could manifest their claim, whenever they succeeded in entering this privilege, together with the admission of consular justice, in non-reciprocal stipulations of the dispositive portions of materially unequal treatiesWith regard to Africa, the British government proceeded in this way already in 1817, when it concluded an agreement with the government of the Kingdom of Ashanti in West Africa and obtained the right of the uinilateral dispatch of a resident diplomatic envoy from the UK to Kumasi, the capital city of Ashanti.[220] Later in the same century, it receievd grants of the same privilege from most governments of other African states.[221] In 1843, the Chinese government became obliged to admit a British resident by the treaty, again by a non-reciprocal stipulation,[222] with the governments of Japan and some states in Southeast Asia being subjected to the same duty subsequently.[223] Goverments of other European states and the US governments followed suit.[224] When, in 1864, the Swiss special

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[219] Eung-Jeun Lee [= Ŭn-jŏng Yi], *Anti-Europa. Die Geschichte der Rezeption des Konfuzianismus und der konfuzianischen Gesellschaft seit der frühen Aufklärung* (Politica et Ars, 6) (Munster and Hamburg, 2003). Heinrich Gottlieb Tzschirner, *Ueber den Krieg* (Leipzig, 1815), p. 70. Similarly already: Immanuel Kant, *Zum ewigen Frieden* [first published (Königsberg, 1795)], in: Kant, *Werke in zwölf Bänden*, edited by Wilhelm Weischedel, vol. 11 (Frankfurt, 1968), pp. 193-251, at pp. 215-216.

[220] Treaty Ashanti (note 69), pp. 6-7; also 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)].

[221] Treaty Sherbro (note 65). Treaty Bonny – UK, 25 January 1836, in: Gwilym Iwan Jones, The Trading States of the Oil Rivers. A Study of Political Development in Eastern Nigeria (London, Ibadan and Accra, 1963), pp. 221-222 [reprints (London, 1970); (Hamburg and London, 2001)]; also in: *CTS*, vol. 86, pp. 420-423. Treaty Opobo – UK, 1 July 1884, in: *CTS*, vol. 163, pp. 158-159.

[222] Treaty Hu-mun Chase (note 109), art. VII, p. 325.

[223] Treaty Japan – USA, Kanagawa, 31 March 1854 [ratified, 21 February 1855], in: *Treaties and Conventions Concluded Between Empire of Japan and Foreign Nations* (Tokyo, 1874), pp. 1-4; also in: *CTS*, vol. 111, pp. 378-387; *Dai Nihon komonjo, Bakumatsu gaikoku kankei monjo*, vol. 5 (Tokyo, 1915), Appendix, pp. 1-6; also in: William Gerald Beasley, ed., *Select Documents on Japanese Foreign Policy. 1853 – 1868* (London, New York and Toronto, 1955), pp. 119-122. Treaty Japan – UK, Nagasaki, 14 October 1854, in: *Treaties* (as above), pp. 6-8; also in: *CTS*, vol. 112, pp. 246-250; and further ten agreements between Japan and various states in Europe and the USA up to 1869. Treaty English East India Company (EIC) – Siam, Bangkok, 20 June 1826, in: *CTS*, vol. 76, pp. 303-312. Treaty France – Tonga, 9 January 1855, in: *CTS*, vol. 112, p. 388.

[224] Treaty Frankreich – Wallo (Senegal), 8 May 1819, in: *CTS*, vol. 70, pp. 127-131. Treaty Tahiti – USA, 6 September 1826, in: *CTS*, vol. 76, pp. 398-401. Treaty Siam – USA, 20 March 1833, in: *CTS*, vol. 83, pp. 211-215.

envoy Aimé Humbert had, in the second try, finalised the negotiations on a treaty of rtrade in Japan, he found, to his surprise, that Switzerland had received the same privileges – including the unilateral right to dispatch an envoy – as every government with whom the Japanese side had previously entered into a treaty, and he boasted of having accomplished recognition in Japan of big-power status for his country.[225] And when the North German Confederation concluded a new treaty of trade with Japan in 1869, and faced the need to agree to the reciprocal admission of some restricted freedom of travel, an anonymous German diplomat felt compelled to add a marginal note to the official printed version of the text of the treaty boasting that this had been "the only reciprocity" (einzige Gegenseitigkeit) in the whole agreement.[226] These discriminating stipulations had nothing in common any longer with the ancient law of hospitality, as drawn on natural law, even though some procedural technicalities in the handling of consular justice did continue from late medieval antecedents.[227]

5. The Law Relating to Trade

Treaty Muscat – USA, 21 September 1833, in: *CTS*, vol. 84, pp. 37-40. Treaty France – Tahiti, 4 September 1838, in: *CTS*, vol. 88, p. 110.

[225] Treaty Japan – Switzerland, 6 February 1864, in: *Treaties* (note 223), pp. 207-222; also in: *CTS*, vol. 129, pp. 44-49. Neuchâtel: Cantonal Archives, Aimé Humbert Papers, Dossiers 11-13, Letter to his wife, dated 30 January 1864.

[226] Treaty Japan – North German Confederation, 20 February 1869, in: *Treaties* (note 223), pp. 474-500; also in: *CTS*, vol. 139, pp. 92-105. Hand written marginal note in the copy of the edition of the *Treaties* (note 223), now in the library of the Department of Economics [Keizaigaku-bu] of the University of Tokyo, shelf mark 3-A:1111. The book was added to this collection in 1924. It seems to have been kept in a German diplomatic agency up until 1914, when, in consequence of the beginning of World War I, German diplomatic agents left Japan.

[227] On procedural aspects of the law of hospitality see above, note 180 with the reference literature quoted there. On the nineteenth-century practice of consular justice see: Pär Cassel, *Grounds of Judgment. Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford, 2012). Richard Taiwon Chang, *The Justice of the Western Consular Courts in Nineteenth Century Japan* (Contributions in Intercultural Comparative Studies, 10) (Westport, CT, 1984). James Hoare, 'Extraterritoriality in Japan', in: *Transactions of the Asiatic Society of Japan*, Third Series, vol. 18 (1983), pp. 71-97. Hoare, *The Uninvited Guests. Japan's Treaty Ports and Foreign Settlements. 1858 – 1899* (Folkestone, 1994). Yuki Allyson Honjo, *Japan's Early Experience of Contract Management in the Treaty Ports* (Meiji Japan Series, 10) (London, 2003) [further edn (Hoboken, 2013)]. Douglas R. Howland, 'The Foreign and the Sovereign. Extraterritoriality in East Asia', in: Howland and Luise White, eds, *The State of Sovereignty. Territories, Laws, Populations* (Bloomington, 2009), pp. 35-55. Francis Clifford Jones, *Extraterritoriality in Japan and the Diplomatic Relations Resulting from Its Abolition. 1853 – 1899*, edited by Jerome D. Green (New Haven and London, 1931) [reprint (New York, 1970)]. Turan Kayaoğlu, *Legal Imperialism. Sovereignty and Extraterritoriality in Japan, the Ottoman Empire and China* (Cambridge, 2010). George Williams Keeton, ed., *The Development of Extraterroriality in China*, 2 vols (London and New York, 1928) [reprint (New York, 1969)]. Keeton, 'Extraterritoriality in International and Comparative Law', in: *Recueil des cours* 72 (1948), pp. 284-391. Shih Shun Liu, *Extraterritoriality. Its Rise and Decline* (Studies in History, Economics and Public Law, vol. 118, nr 2 = Columbia University Studies in the Social Sciences, 263) (New York, 1925), pp. 201-209 [reprint (New York, 1969)]. Christopher Roberts, *British Extra-Territoriality in Japan. 1859 – 1899*. LLD. thesis, typescript (London: University of London, School of Oriental and African Studies, 2010) [book-trade edn s. t.: *The British Courts and Extra-Territoriality in Japan. 1859 – 1899* (Leiden, 2013); further edn (Folkestone, 2014)]. Payson Jackson Treat, *Japan and the United States. 1853 – 1921* (Stanford, 1928) [reprint (New York, 1970)]. Treat, *Diplomatic Relations between the United States and Japan*, 3 vols (Stanford and London, 1932-1938). In these studies, however, there is no reference to the late medieval precursors of consular justice. For close contemporary studies see below, note 236.

Next to diplomatic envoys, traders represented another group of professional actors engaged in performing interactive worldwide actions or actions with worldwide impact and falling under the law of hospitality. Already during the late Middle Ages, the councils of larger cities, hosting regular trade fairs, like territorial rulers and even the emperor, started to provide armed safe conduct to arriving and departing traders within a certain distance from the cities or territorial borders and made efforts to keep roads and bridges in good condition.[228] The practice continued into the seventeenth century and formed part of the law of hospitality, to be extended to traders doing business in cities at the time of fairs.[229] Likewise, persons active in long-distance trade enjoyed the law of hospitality at remore places and even when trade relations operated without a legal base. For example, the Württemberg surgeon Andreas Joshua Ultzheimer, in service of the Dutch West India Company towards the end of the seventeenth century, reported on the following incident:

> When they came, they brought ivory and red sandal, which they exchanged with us against copper rings and bronze bowls. Because the black gave a rather friendly impression to us, I became so careless as to ask the captain to let me go to the land of the blacks and have a look at it; and he gave permission to do so. I did then go to the land and walked away from the ship for about a mile, where the king received me in friendship and led me into his hut, had bread made from bananas – for they do not have a different kind of bread except what they make from bananas – and also gave quite a bit of palm wine. So he had the meal with me and we were in good spirits. While we were enjoying ourselves, a bunch of blacks came all the way in front of the hut, they stood there quite angrily and told me in Spanish that me people had cheated them, because my people had made them buy rings that were completely useless because they could easily break apart. That was true indeed. Yet, the wanted to oblige and even force me to repair the rings, or they would not let me back again on board and devour me. … I promised them that I would repair the copper rings, if they would let me go back to the ship, because, I said, only there did I have the necessary tools to do so. But they would not allow me to go but demanded that I did the work in their

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[228] Hermann Peter aus Andlau, 'Libellus de Cesarea monarchia [1460]', edited by Joseph Hürbin, 'Der "Libellus de Cesarea monarchia" von Hermann Peter aus Andlau', in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. Germanistische Abteilung, vol. 12 (1891), pp. 34-103, vol. 13 (1895), pp. 163-219, at pp. 212-213. Veit Ludwig von Seckendorff, *Teutscher Fürsten Stat* (Frankfurt, 1656) [new edn (Jena, 1737); reprint of the new edn (Aalen, 1972)], new edn, p. 419: "Unter dem wort geleit verstehet man in gemein alles, was die Hohe Landes-Obrigkeit zu sicherer und bequemer geleitung, forthelffung und erhaltung derer im lande reisenden, sonderlich aber der handelsleute, verordnen und schaffen muß, es geschehe nun mit beschützung der strassen vor räuberey und plackerey oder mit erhaltung der strassen selbst, der brücken, der dämme, der schifffahrten, der anlandung, ufer und porte, daß man darauf mit fahren u*nd* wandeln oder mit schiffen und flössen fortkom*m*en kan." Martin Kintzinger, 'Cum salvo conductu. Geleit im westeuropäischen Spätmittelalter', in: Rainer Christoph Schwinges and Klaus Wriedt, eds, *Gesandtschafts- und Botenwesen im spätmittelalterlichen Europa* (Vorträge und Forschungen, herausgegeben vom Konstanzer Arbeitskreis für mittelalterliche Geschichte, 60) (Ostfildern, 2003), pp. 313-363. Guido Schönberger, *Das Geleitswesen der Reichsstadt Frankfurt im 14. und 15. Jahrhundert*. Ph. D. thesis, typescript (University of Freiburg, 1922). Jochen Zorn, *Bündnisverträge der Stadt Frankfurt am Main mit dem Adel der Umgebung im 14. und 15. Jahrhundert*. LLD. thesis, typescript (University of Frankfurt, 1966).

[229] Joachim Nerger [praes.] and Benedictus Strauß [resp.], *Ope divina et a magnifico ictorum ordine facta potestate Dissertationem ad ius maritimum spectantem*. LLD. Thesis (University of Wittenberg, 1659), p. 13 = fol. B2^{r}: "Denn vormahls da die Leute miteinander kriegten, und sich das Volck nicht geregen dorffte, da satzten die Römer in dem Lande, daß man Boleten nehmen solte (daß ist Gelait-Brief) und von dem man Boleten nehme, der solte den nehmer schadloß halten binnen seinem Geleite, und daß war von des Reichs gunst zugegeben denen Fürsten, daß Sie davon Strassenreiter hielten, die das Volck beschirmeten, das gastweise in ihr Gebiete kehme. Quod et hodie nonnullis in locis observari videtur, daß die Außreuter die Strassen zur Zeit der Messe bewehren müssen." Lawrence Humphrey, *The Nobles. Or: Of Nobility* (London, 1563), book III, nr VI: the host shall keep the door open "to all good, poore and Pilgrimes: close to al vagabonds, needeless and vicious". On this text see: Felicity Heal, 'The Idea of Hospitality in Early Modern England', in: *Past and Present* 102 (1984), pp. 66-93, at p. 77.

> presence, or they would devour me. Therefore, I asked them to let me return to the king. I asked the king to send messengers to the ship and to fetch the tools from there, then I would fix the broken rings. I also said that I wanted to add a written note, which the messengers should forward to the captain, then he would deliver to them the tools with which I could fix the rings. The king agreed. But during this day, no further canoo went to the ship, and so I had to wait until the morning. ... When God let the sun rise, for which I longed desparately, the king came to me and said, he would now send messengers to the ship and asked what they should tell the captain and where I had my written note. Then I gave him a sheet of paper – as I always paper and pencil with me to the end that, when I was seeing something unusual or strange, I could take a note or draw a sketch thereof – addreessed to the captain; on the sheet I had briefly written, what my current condition was, that the rings were useless and that I had been imprisoned for that reason and that, if he would not liberate me, I would surely be devoured, because I was unable to repair the rings. The king sent several blacks with this note, among them his son, aboard the ship to my captain. He held no suspicion, because they were ignorant of script and could not read. When they had come aboard and the captain had read the note, he kept the king's son in confinement together with the other blacks, except two of them, whom he sent back to the king with the mandate that they should deliver me aboard and that he would allow his prisoners to return. When the blacks received the news, they became furious and came together and quickly decided to let me return on board. The king himself returned to me, declared his intention to me and told me that I should safely return to my fellow whites with the two people who would accompany me and see to it that his son together with the other prisoners would be released with certainty as well. Moreover, he gave me a key, whose blade or bit had broken off, and asked me to fix it on the ship and return it to him with his son. I promised that I would do so. But when I had returned to my ship, I threw the key over board and, after we had beaten up the blacks, we let them return home.[230]

The incident shows that Ultzheimer, as a guest, was subject to the territorial law of the state he was visiting and in which the trade took place. He accepted liability for imperfect products the crew of his ship had sold, while he was fearful that his hosts would not respect the law of hospitality and kill him. Exploiting the orality of his hosts, while in captivity, he sent a written message to the captain of his ship requesting help. The crew responded by taking hostages as a reprisal, and the incident ended with Ultzheimer's release in exchange for the hostages. However, while the African side did not do any harm to Ultzheimer, thereby fully honouring the law of hospitality, the ship crew beat the hostages up before allowing them to return and infringed upon the same law. Ultzheimer's fear that his hosts might kill him, derived from the heterostereotype of the lack of governmentality of African states. Yet, he did not provide any evidence whatsoever that the African side had actually had an intention of doing him any harm. On the contrary: his hosts simply insisted upon delivery of proper trading goods and intended to keep Ultzheimer in confinement until the fulfillment of their demand. The incident took place against the backdrop of the European practice of trying to barter goods of minor quality with slaves in West Africa, in order to bolster poor returns from the triangular trade.[231]

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[230] Andreas Joshua Ulsheimer [Ultzheimer], *Wahrhafftige Beschreibung ettlicher Raysen, wie dieselbigen Mr. Andreas Ultzheimer vollbracht hat*, edited by Sabine Werg (Tübingen, 1971), pp. 135-136, 136-141 [partly edited in: Adam Jones, *German Sources for West African History. 1599 – 1669* (Studien zur Kulturkunde, 66) (Wiesbaden, 1983), pp. 20-43].

[231] On the triangular trade see: Philip D. Curtin, *The Atlantic Slave Trade* (Madison, 1969) [second edn (Madison, 1975)]. Curtin, *Economic Change in Pre-colonial Africa. Senegambia in the Era of the Slave Trade*, vol. 1 (Madison, 1975). Curtin, *Migration and Mortality in Africa and the Atlantic World. 1700 – 1900* (Aldershot, 2001). K. Y. Daaku, *Trade and Politics on the Gold Coast. 1600 – 1720. A Study of the African Reaction to European Trade* (Oxford, 1970). Kenneth Gordon Davies, *The Royal African Company* (London, 1957) [second edn (London, 1970); reprint (London and New York, 1999)]. Christoph Degn, *Die Schimmelmanns im atlantischen*

Other records also yield evidence to the effect that European long-distance trading companies accepted the principle that territorial rulers and governments were in a position of legitimately legislating the rules at trading places. This becomes clear not only from major centres of the trans-Atlantic slave trade, such as Wydah on the West African coast,[232] but also from a number of

Dreieckshandel (Neumünster, 1974). David Eltis, 'Free and Coerced Transatlantic Migration. Some Comparisons', in: *American Historical Review* 88 (1983), pp. 251-280. Eltis and David Richardson, eds, *Routes to Slavery. Direction, Ethnicity and Mortality in the Transatlantic Slave Trade* (London and Portland, OR, 1997). Eltis, David Richardson, Stephen D. Behrendt and Herbert S. Klein, eds, *The Trans-Atlantic Slave Trade. A Database on CD-ROM* (Cambridge, 1999). Robert William Fogel, *Without Consent or Contract. The Rise and Fall of American Slavery* (New York and London, 1989). J. D. Graham, 'The Slave Trade, Depopulation and Human Sacrifice in Benin History', in: *Cahiers d'études africaines* 5 (1965), pp. 317-334. Joseph E. Inikori, ed., *Forced Migration. The Impact of the Export Slave Trade on African Societies* (London, 1982). Inikori and Stanley L. Engerman, eds, *The Atlantic Slave Trade. Effects on Economies, Societies and Peoples in Africa, the Americas, and Europe* (Durham and London, 1992) [third edn (London, 1998)]. Herbert S. Klein, *The Middle Passage. Comparative Studies in the Slave Trade* (Princeton, 1978). Paul E. Lovejoy, *Transformation in Slavery* (Cambridge, 1983). Patrick Manning, ed., *Slave Trades 1500 – 1800. Globalization of Forced Labour* (Aldershot, 1996). Claude Meillassoux, ed., *The Development of Indigenous Trade and Markets in West Africa* (London, 1971). Joseph Calder Miller, *Way of Death* (Madison, 1988). Werner Peukert, *Der atlantische Sklavenhandel von Dahomey (1740 – 1797)* (Studien zur Kulturkunde, 40) Stuttgart, 1978). Karl Polanyi, *Dahomey and the Slave Trade. An Analysis of an Archaic Economy* (Seattle, 1966). Johannes Menne Postma, *The Dutch Atlantic Slave Trade* (Cambridge, 1990). Walter Rodney, *West Africa and the Atlantic Slave Trade* (Nairobi, 1967). *Georges Scelle, La traite négrière aux Indes de Castille. Contrats et traits d'asiento* (Paris, 1906). Ralph Shlomowitz, *Mortality and Migration in the Modern World* (Aldershot, 1996). Barbara L. Solow and Stanley L. Engerman, ed., *British Capitalism and Caribbean Slavery. The Legacy of Eric Williams* (Cambridge, 1987). Solow, *Slavery and the Rise of the Atlantic System* (Cambridge, 1991). Robert Louis Stein, *The French Slave Trade in the Eighteenth Century* (Madison, 1979). Pierre Verger, *Bahia and the West African Trade. 1549 – 1851* (Ibadan, 1964). Verger, *Flux et reflux de la traite des nègres entre le Golfe de Bénin et Bahia de Todos os Santos du XVIIe au XIXe siècle* (Le monde d'outre-mer passé et présent, 30) (Paris, 1968). Enriqueta Vila Vilar, 'Los asientos Portugueses y el contrabando de negros', in: *Anuario de estudios Americanos* 30 (1973), pp. 557-609. Andrea Weindl, 'The Asiento de Negros and International Law', in: *Journal of the History of International Law* 10 (2008), pp. 229-257. Albert Wirz, *Sklaverei und kapitalistisches Weltsystem* (Frankfurt, 1984).

[232] The bulk of the trans-Atlantic slave trade took place offshore, despite the prevalence of some trading company fortified strongholds on West African coasts. Some of the trading spots were sutonomous sovereign states, not, as has been argued, so-called "ports of trade" as early modern equivalents of "Free Economic Zones". For theoretical arguments in support of the "ports of trade"-theory see: Karl Polányi, 'Ports of Trade in Early Societies', in: *Journal of Economic History* 23 (1963), pp. 30-45, at p. 37: "On West Africa's coast, morte than a century later [than the sixteenth century] a port of trade appeared, which attained world fame: the slave port of Whydah [= Xwéda (o-wi-dah), Benin; reference to: A. M. Chapman, 'Port of Trade Enclaves in Aztec and Maya Civilizations', in: Karl Polányi, C. M. Arensberg and H. W. Pearson, eds, *Trade and Market in the Early Empires* (Glencoe, 1958), pp. 114-153, at p. 119]. It was a politically neutral open port, which carried on passive trade with all the European powers by administrative methods. In 1727, Dahomey conquered Whydah and incorporated its territory, subjecting trade to its own administration." For a description of Wydah see: Catherine Hutton, *The Tour of Africa. Containing a Concise Account of all the Countries in That Quarter of the Globe, Hitherto Visited by Europeans, with the Manners and Customs of the Inhabitants, Selected from the Best Authors*, vol. 2 (London, 1821), pp. 322-334: "Whydah", at p. 322: "About fifty miles west of Benin lies what was formerly the kingdom of Whydah. No such kingdom now exists; but I shall give some account of it from a Dutch slave-trader, who visited this coast between the years 1692 and 1700. This part of the country is now called the Slave Coast. This gentleman begins by stating that slaves were so plentiful in the interior that two were sometimes sold for a handful of salt; and that he himself had laden three ships with this article of merchandize, at Whydah, in fourteen days. He says that the people delivered a thousand slaves a month and that from twenty-five to fifty ships were laden in a year. The territory did not extend more than ten miles along the coast; but it may be supposed to have been one of the principal marts for human beings [footnote: "Before the English attempted to abolish the slave trade, it is said that 80.000 slaves were annually exported from Africa. I wish it were possible to know how much the number is now diminished."]. These creatures came from the inland countries, where there were markets for men, as in Europe for beasts."; p. 323:

treaties that representatives of long-distance trading companies concluded with rulers and governments specifically in Southeast Asia.[233] Even the British government retained this practice until early in the nineteenth century by concluding treaties of trade with governments in West Africa confirming the subjection of British traders to the territorial law of their treaties partners.[234]

However, in contradistinction against the law relating to diplomats, the concept of the personality of law was introduced into regulations concerning trade already during the twelfth century and thereby watered down the significance of the law of hospitality. This process becomes recognisable from regulations implementing consular justice, as councils of Northern Italian cities agreed upon with respect to the exemtion of Christian traders from local adjudication at the trading spots under the control of rulers of Muslim states.[235] Long-distance trade, thus from early on, featured the competition of unset law of hospitality with positive treaty stipulations with regard to the recognition as well as limitation of the competence of sovereign rulers and governments to regulate trade and legislate rights and duties of traders doing busines in territories under their control.[236] The unset law of hospitality, however, continued in operation as a residual category in niches of unregulated trade relations.

When, a the turn towards the nineteenth century, most long-distance trading companies had gone bankrupt, governments of European states took over the role as regulators of trade and successively expanded to the entire globe the existing practice of the conclusion of treaties concerning trade. But unlike the long-distance trading companies, they inserted the formulary of trading treaties into the wider formulary of peace agreements and did so even on occasions, when no war had previously taken place. Hence, this type of peace treaties did not include war-ending treaties. The logic behind

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"There were frequently six or seven hundred slaves on board one ship. … It was to be lamented that, notwithstanding this kind treatment, the negroes were so willful as sometimes to starve or drown themselves, rather than make a voyage to Barbadoes, shackled two and two together. .. When the cargo could not otherwise be completed, the king would sell three or four hundred of his wives."

233 See above,note 32.

234 Treaty Bonny (note 221).

235 For Venice see: Michele Amari, I diplomi arabi (Florence, 1863), pp. 247-248. Treaty Egypt (Mameluk Sultanate) – Venice, 14 November 1238, in: Gottlieb Lukas Frriedrich Tafel and Georg Martin Thomas, eds, *Urkunden zur älteren Handels- und Staatsgeschichte der Republik Venedig mit besonderer Beziehung auf Byzanz und die Levante vom neunten bis zum Ausgang des fünfzehnten Jahrhunderts*, part 2 (Fontes rerum Austriacarum. Section II, vol. 13) (Vienna, 1856), pp. 336-341 [reprint (Amsterdam, 1964)]. On these treaties see: Liu, *Extraterritoriality* (note 227), pp. 35-37.

236 For older studies of extraterritoriality and consular justice see: Alessandro Paternostro, 'La révision des traités avec le Japon au point de vue du droit international', in: *Revue de droit international et de législation comparée* 23 (1891), pp. 5-29, 176-200. Leopold Marx, *Die gerichtlichen Exemtionen der Staaten, Staatshäupter und Gesandten im Ausland*. LLD. thesis (University of Tübingen, 1895). Francis Taylor Piggott, *Exterritoriality. The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (London, 1892) [second edn (London, 1907)]. Erich Schlesinger, *Exterritorialität der diplomatischen Agenten*. LLD. Thesis (University of Rostock, 1904). Wilhelm Ziemssen, *Beitrag zur Casuistik der Lehre von der Exterritorialität der gesandtschaftlichen Functionäre.* LLD. thesis (University of Greifswald, 1898). Liu, *Extraterritoriality* (note 227), pp. 201-209. For recent studies see above, note 227.

this procedure remained implicit and emerges only against the background of contemporary peace theory.[237] From the beginning of the nineteenth century, European peace theory witnessed a sharp turn against the pursuit of "perpetual peace"[238] as the imagined integral part of the divinely willed or

[237] On peace theory see: Werner Bahner, 'Die Friedensideen der französischen Aufklärung', in: Bahner, *Formen, Ideen, Prozess in den Literaturen der romanischen Völker* (Berlin [GDR], 1977), pp. 101-138. Davis Bitton and Ward A. Mortensen, 'War or Peace. A French Pamphlet Polemic. 1604 – 1606', in: Malcolm R. Thorp and Arthur J. Slavin, eds, *Politics, Religion and Diplomacy in Early Modern Europe. Essays in Honor of De Lamar Jensen* (Sixteenth Century Essays and Studies, 27) (Kirksville, 1994), pp. 127-141. Edgard Briout, *L'idée de paix perpétuelle de Jérémy Bentham* (Paris, 1905). Peter Brock, *Pacifism in Europe to 1914* (Brock, A History of Pacifism, vol. 1) (Princeton, 1972). Gilberte Derocque, *Le Projet de paix perpétuelle de l'abbé de Saint-Pierre comparé au pacte de la Société des Nations* (Paris, 1929). Heinz Duchhardt, '"Friedensvermittlung" im Völkerrecht des 17. und 18. Jahrhunderts', in: Duchhardt, ed., *Studien zur Friedensvermittlung in der Frühen Neuzeit* (Schriften der Mainzer Philosophischen Fakultätsgesellschaft, 6) (Wiesbaden, 1979), pp. 89-118. Duchhardt, 'Friedenssicherung im Jahrhundert nach dem Westfälischen Frieden', in: Manfred Spieker, ed., *Friedenssicherung*, vol. 3 (Osnabrücker Friedensgespräche, 3) (Munster, 1989), pp. 11-18. Duchhardt, 'Gewaltverhinderung als Ansatz der praktischen Politik und des politischen Denkens', in: Claudia Ulbrich, Claudia Jarzebowski and Michaela Hohkämper, eds, *Gewalt in der Frühen Neuzeit* (Historische Forschungen, 81) (Berlin, 2005), pp. 237-244. Claudius R. Fischbach, *Krieg und Frieden in der französischen Aufklärung* (Munster and New York, 1990). Volker Gerhardt, *Immanuel Kants Entwurf "Zum ewigen Frieden". Eine Theorie der Politik* (Darmstadt, 1995). Anja Victorine Hartmann, *Rêveurs de paix? Friedenspläne bei Crucé, Richelieu und Sully* (Beiträge zur deutschen und europäischen Geschichte, 12) (Hamburg, 1995). Francis Harry Hinsley, *Power and the Pursuit of Peace. Theory and Practice in the History of Relations between States* (Cambridge, 1963), pp. 62-80. James Hutton, *Themes of Peace in Renaissance Poetry* (Ithaca, 1984), pp. 60-72. Wilhelm Janssen, 'Krieg und Frieden in der Geschichte des europäischen Denkens', in: Wolfgang Huber and Johannes Schwerdtfeger, eds, *Kirche zwischen Krieg und Frieden* (Forschungen und Berichte der Evangelischen Studiengemeinschaft, 31) (Stuttgart, 1976), pp. 67-129. Janssen, 'Friede. Zur Geschichte einer Idee', in: Dieter Senghaas, ed., *Frieden Denken. Si vis pacem, para pacem* (Frankfurt, 1995), pp. 227-275 [first published in: Otto Brunner, Werner Conze and Reinhart Koselleck, eds, *Geschichtliche Grundbegriffe*, vol. 2 (Stuttgart, 1975), pp. 545-591]. Bernd Matthias Kremer, *Der Westfälische Friede in der Deutung der Aufklärung* (Ius ecclesiasticum, 37) (Tübingen, 1989), pp. 29-36. Johannes Kunisch, 'Friedensidee und Kriegshandwerk im Zeitalter der Aufklärung', in: *Der Staat* 27 (1988), pp. 547-568 [reprinted in: Kunisch, Fürst – Gesellschaft – Krieg (Cologne and Vienna, 1992), pp. 131-159]. Francis Stewart Leland Lyons, *Internationalism in Europe 1815 – 1914* (European Aspects, Series C, Bd 14) (Leiden, 1963). Henry Meyer, 'Voltaire on War and Peace', in: *Studies on Voltaire and the Eighteenth Century* 144 (1976), pp. 11-202. Ernest Nys, 'Deux irénistes au XVIIe siècle. Émeric Crucé et Ernest de Hesse-Rheinfels', in: Nys, *Etudes de droit international et droit politique*, vol. 1 (Brussels and Paris, 1896), pp. 301-317. Nys, 'Les "Bentham Papers" du British Museum', in: Nys, *Etudes de droit international et de droit politique*, vol. 2 (Brussels and Paris, 1901), pp. 291-333 [first published in: *Revue de droit international et de législation comparée* 23 (1891)]. Marcel Pekarek, *Absolutismus als Kriegsursache. Die französische Aufklärung zu Krieg und Frieden* (Theologie und Frieden,15) (Stuttgart, 1997). Heinz Schilling, 'Johannes Althusius und die Konfessionalisierung der Außenpolitik. Oder: Warum gibt es in der Politica keine Theorie der internationalen Beziehungen?', in: James P. Carney, ed., *Jurisprudenz, politische Theorie und politische Theorie* (Beiträge zur Politischen Wissenschaft, 131) (Berlin, 2004,) pp. 47-70. Sabine Schmolinsky and Klaus Arnold, 'Konfliktbewältigung. Kämpfen, Verhandeln und Frieden schließen im europäischen Mittelalter', in: Bernd Wegner, ed. Wie Kriege enden. 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Gärten und Barock', in: Ulrich Schütte, ed., *Architekt und Ingenieur. Baumeister in Krieg und Frieden* (Ausstellungskataloge der Herzog-August-Bibliothek, 42) (Wolfenbüttel, 1984), pp. 268-279. Jochen Zenz-Kaplan, *Das Naturrecht und die Idee des ewigen Friedens im 18. Jahrhundert* (Dortmunder Historische Studien, 9) (Bochum, 1995).

[238] For sources relating to eighteenth-century peace theory see: John Bellers, 'Some Reasons for an European State.

naturally given world order[239] and aimed at setting the conditions for the "foundation" (Stiftung) of peace,[240] not through the restoration of the pre-war order,[241] but through the promotion of change-provoking human action.[242] Against the background of this human-centred and action-orientated peace theory, governments of European states and the USA combined their efforts towards the regulation of long-distance trade with the pursuit of the setting of peace as the purported condition in which the enforcement of trade regimes could be expected to become achievable in the international arena, specifically with trading partners in Africa, West, South, Southeast and East Asia as well as the South Pacific. Within this perspective, peace was no longer conceived in unversalistic terms as part of a given world order, but ought to result from purposeful human action through the

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Proposed to the Powers of Europe', in: George Clarke, ed., *John Bellers. His Life, Times and Writings* (London, 1987), p. 141 [first published (London, 1710)]. Charles Irénée Castel de Saint-Pierre, *Projet pour rendre la paix perpétuelle en Europe* (Utrecht, 1713) [reprint, edited by Simone Goyard-Fabre (Paris, 1981); German version, edited by Wolfgang Michael (Klassiker der Politik, 4) (Berlin, 1922); first published s. t.: *Mémoires pour rendre la paix perpétuelle en Europe* (Cologne, 1712); abdriged version s. t.: *Abrégé du projet de paix perpétuellement inventé pa le roi Henri le Grand approprié à l'état présent des affaires générales de l'Europe* (Rotterdam, 1729)]. Johann Michael von Loën, *Entwurf einer Staats-Kunst*, third edn (Frankfurt and Leipzig, 1751), pp. 236-240: "Von einem beständigen Frieden in Europa" [first published (Frankfurt, 1747), pp. 245-248]. Ange Goudar, *La paix de l'Europe ne put s'établir qu' à la suite d'une longue trêve. Ou Projet de la pacification générale* (Amsterdam, 1757). Rousseau, 'Extrait' (note 39). Franz von Palthen, 'Projekt, einen immerwährenden Frieden von Europa zu unterhalten', in: Palthen, *Versuche zu vergnügen. Erste Sammlung* (Rostock and Wismar, 1758), pp. 71-84. Jakob Heinrich von Lilienfeld, *Neues Staats-Gebäude* (Leipzig, 1767). 'Idee von der Möglichkeit eines allgemeinen und ewigen Friedens in der Welt', in: *Niederelbisches historisch-politisch-litterarisches Magazin*, vol. 1, issue 2, part 12 (1787), pp. 935-965. Jeremy Bentham, 'Plan for an Universal and Perpetual Peace', in: *The Works of Jeremy Bentham,*edited by John Bowring, vol. 2 (London, 1838), pp. 546-560 [reprint of this edn (New York, 1962); also edited by C. John Colombos (The Grotius Society Publications, 6) (London, 1927)]. Johann August Schlettwein, *Die wichtigste Angelegenheit für Europa. Oder System eines festen Friedens unter den europäischen Staaten nebst einem Anhang über einen besonderen Frieden zwischen Rußland und der Pforte* (Leipzig, 1791).

[239] Immanuel Kant, *Gesammelte Schriften*, vol. 19, Reflexion nr 7833 (Berlin, 1934), p. 529: "Der Krieg ist ein medium necessitatis in suum persequendi."; p. 530, Reflexion nr 7837: "Ein Friede muß jederzeit als die Aufhebung alles Rechtsstreits aus Gründen, die Gegenwärtig existiren, angesehen werden." Kant, *Friede* (note 93), p. 203.

[240] Nevertheless, Kant insisted upon the conventional view that the coming "perpetual peace" was part of some unalterable "plan of nature". See: Immanuel Kant, 'Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht', in: Kant, *Werke in zwölf Bänden*, edited by Wilhelm Weischedel, vol. 11 (Frankfurt, 1968), pp. 33-50, at p. 47 [first published in: *Berlinische Monatsschrift* (November 1784), pp. 385-411].

[241] Kant's peace theory found some adaepts early in the nineteenth century, even though it featured rarely in political debates between the Congress of Vienna and the end of the century. See: Wilhelm Traugott Krug, 'Allgemeine Uebersicht und Beurtheilung der Mittel, die Völker zum ewigen Frieden zu führen', in: *Leipziger Literatur-Zeitung* (1812), ü. 33. Alexander Lips, *Der allgemeine Weltfrieden. Oder Wie heißt die Basis, über welche allein ein dauernder Weltfriede gegründet werden kan* (Erlangen, 1814). *Materialien zum bevorstehenden allgemeinen Frieden. Oder Ideen über das politische Gleichgewicht von Europa* (Leipzig, 1814). Karl Theodor Traitteur von Luzberg, *Europa im Frieden für itzt und in Zukunft. Die Völker vereint nach Natur und Sprache* (Mannheim, 1815). *Vorschläge zu einer organischen Gesetzgebung für den Europäischen Staatenverein zur Begründung eines dauerhaften Weltfriedens* (Leipzig, 1814).

[242] Thus already early on: Friedrich von Gentz, 'Über den ewigen Frieden', in: Kurt von Raumer, ed., *Ewiger Friede* (Munster, 1948), pp. 461-497, at p. 483 [first published in: *Historisches Journal*, vol. 2, issue 3 (1800); newly edited by Anita Dietze, *Ewiger Friede? Dokumente einer deutschen Diskussion um 1800* (Munich, 1989), pp. 377-391; French version, edited by Mouchir Basile Aoun, *Thesaurus de philosophie du droit* (Paris, 1997); Italian version, edited by Maria Pia Paternó (Camerino, 1992)]. Gentz, *Fragmente aus der neusten Geschichte des Politischen Gleichgewichts in Europa*, second edn (St Petersburg, 1806), pp. XXIV, 1, 21 [reprint (Osnabrück, 1967); also in: Gentz, *Ausgewählte Schriften*, edited by Wilderich Welck, vol. 4 (Stuttgart and Leipzig, 1838), pp. 201-252].

making of usually bilateral treaties. And within this novel peace theory, it was only after the particularistic as well as exclusionistic making of peace agreements that the allegedly anarchical international system, in which per se only force appeared to rule,[243] might become transformed into a network of bilateral relations among states beyond the narrow confines of the club of states termed the "Family of Nations" and placed under the rule of international law.[244] In taking this stance, some European and the US governments shared the assumption that they alone were in a position to determine how peace was to be made and how trade was to become regulated in accordance with which principles.[245]

From the 1840s, when some European and the US governments opted for the promotion of the so-called free trade as a political goal,[246] they also began to deny the competence of the governments as their partners to set the conditions for long-distance trade, with the consequence that the aims shifted under which treaties of trade came into existence. From that time, specifically the British and the US governments urged their treaty partners to grant the concession of unrestricted "free trade", wherever possible in universal terms, though at least for merchants under their direct control. They also sought to impose rules for trade non-reciprocally so that only British and US merchants became entitled to benefit from the "freedom" of trade, but not merchants under the control of their partner governments. However, the treaties, as they were enforced, did not feature an explicit statement of the lack of reciprocity of the stipulations relating to the "freedom" of trade; instead, the agreements simply namend only merchants from the European and the US sides as the benficiaries of the trading

[243] Seydel, *Grundzüge* (note 102). For a recent study see: Miloš Vec, 'From Invisible Peace to the Legitimation of War. Paradoxes of a Concept in Nineteenth Century International Law Doctrine', in: Thomas Hippler and Miloš Vec, eds, *Paradoxes of Peace in 19th Century Europe* (Oxford, 2015), pp. 19-36.

[244] Stengel, *Frieden* (note 102).

[245] For examples see Matthew Calbraith Perry, who as US emissary to Japan, insisted, in 1853, upon the setting of a general peace and the admission of the principle of the freedom of trade, in his negotiations with Hayashi Akira about the conclusion of a treaty of peace, amity and trade: Francis Lister Hawks, *Narrative of the Expedition of an American Squadron to the China Seas and Japan under the Commodore M[atthew] C[albraith] Perry, United States Navy* (Washington and New York, 1856), pp. 239-240, 244, 256-257, 259-260 [new edn (New York, 1857); reprints (New York, 1952); (New York, 1967); (Stroud, 2005)]. Roger Pineau, ed., *The Japan Expedition. 1852 – 1854. The Personal Journal of Commodore Matthew [Calbraith] Perry* (Smithsonian Institution Publication, 4743) (Washington, 1968), pp. 105, 168-169 [reprint (Richmond, SY, 2002)]. Bayard Taylor, *A Visit to India, China and Japan in the Year 1853*, edited by George Frederick Pardon (London and Edinburgh, 1859) [first published (New York and London, 1856); reprint (Japan in English. Key Nineteenth-Century Sources on Japan. 1850-59. First Series, vol. 2) (Tokyo, 2002)]. Samuel Wells Williams, *A Journal of the Perry Expedition to Japan, hrsg. von Frederick Wells Williams* (Transactions of the Asiatic Society of Japan. First Series, vol. 37, part II) (Tokyo, 1910), pp. 197, 211 [reprint, edited by William Gerald Beasley (The Perry Mission to Japan. 1853 – 1854, vol. 6) (Richmond, SY, 2002)].

[246] For studies see: Charles Poor Kindleberger, 'Foreign Trade and Economic Growth. Lessons from Britain and France. 1850 to 1913', in: *Economic History Review*, Second Series 14 (1961), pp. 289-305. Kindleberger, 'The Rise of Free Trade in Western Europe. 1820 – 1875', in: *Journal of Economic History* 35 (1975), pp. 20-55. Richard Koebner, 'The Concept of Economic Imperialism', in: *Economic History Review*, Second Series 2 (1949), pp. 1-29. Bernard Semmel, *The Rise of Free Trade Imperialism* (Cambridge, 1970). Miloš Vec, *Recht und Normierung in der Industriellen Revolution. Neue Strukturen in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung* (Studien zur europäischen Rechtsgeschichte, 200 = Recht in der Industriellen Revolution, 1) (Frankfurt, 2006), pp. 31-47.

privileges. During the 1840s and longest part of the 1850s, notably the governments of China and Japan remained in a position to resist the pressure and refused grants of "free trade" in general terms, while granting only regulated trade at specified treaty ports.[247] From the end of the 1850s, however, they yielded to diplomatic and military pressure from the european and US sides,[248] admitted "free trade" in general terms and under the Most Favoured Nation-clause[249] jointly with the privilege of consular justice.[250] Since that time, activities of European ans US merchants have been positioned outside the framework of the law of hospitality. European and the US governments used the privilege of consular justice and the concession of "free trade" as instruments of big-power politics, which they sought to manifest through threats of the use of military force and even openly reserved for themselves the option of the establishment of colonial rule.[251] During the later nineteenth and the earlier twentieth centuries, all population groups living in areas that were coming under European and US colonial control were excluded from the application of the law of trade and peace treaties; instead, these population groups came to be classed as objects of colonial rule and also of international law, although their states continued to be related with states in Europe and North America by treaties under international law.[252] The abandonment of the law of hospitality occurred during the nineteenth century, not because it was no longer applicable, but because stood against the claim of members of the club of states of the "Family of Nations" that European international law should become globalised.

6. The Law Relating to the Rescue of Shipwrecks

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[247] Nanjing Treaty (note 66). Treaty Japan – USA 1854 (note 223). Treaty Japan – UK 1854 (note 223). Treaty Japan – Russia, Shimoda, 7 February 1855, in: *Treaties* (note 223), pp. 9-12; also in: *CTS*, vol. 113, pp. 468-471.

[248] Among many, see: Michael R. *Auslin, Negotiating with Imperialism. The Unequal Treaties and the Culture of Japanese Diplomacy* (Cambridge, MA, 2004). William W. McOmie, *The Opening of Japan. 1853 – 1855. A Comparative Study of the American, British, Dutch and Russian Naval Expeditions to Compel the Tokugawa Shogunate to Conclude Treaties and Open Ports to Their Ships* (Folkestone, 2006), pp. 280-325, 440-455.

[249] Treaty Japan – USA, Edo, 29 July 1858, in: *Treaties* (note 223), pp. 52-62; also in: *CTS*, vol. 119, pp. 254-280. Treaty Japan – the Netherlands, 18 August 1858, in: *Treaties* (note 223), pp. 71-89; also in: *CTS*, vol. 119, pp. 314-332. Treaty Japan – Russia, 19 August 1858, in: *Treaties* (note 223), pp. 90-110; also in: *CTS*, vol. 119, pp. 338-347. Treaty Japan – UK, 26 August 1858, in: *Treaties* (note 223), pp. 111-129; also in: *CTS*, vol. 119, pp. 402-412. Treaty France – Japan, 9 October 1858, in: *Treaties* (note 223), pp. 130-150; also in: *CTS*, vol. 120, pp. 8-20.

[250] See above, notes 227, 236.

[251] 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)]. Sherard Osborn, *A Cruise in Japanese Waters* (Edinburgh and London, 1859), p. 47 [reprint (Japan in English. Key Nineteenth-Century Sources on Japan. 1850-59. First Series, vol. 6) (Tokyo, 2002)].

[252] For the argument that treaties on "protectorates" under international law did not provide "protection" to allegedly "culturally inferior" (kulturell tiefer stehender) population groups, but solely to Europeans residing or doing business in colonial dependencies, see: Karl Gareis, *Deutsches Kolonialrecht*, second edn (Gießen, 1902), p. 2 [first published (Gießen, 1888)]. Ferdinand Lentner, *Das internationale Colonialrecht im neunzehnten Jahrhundert* (Vienna, 1886), pp. 42-50. 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.

Shipwrecks were the third group of persons benefitting from the law of hospitality in the international arena. The law of shipwrecks is equivalent of the law of hospitality extended to persons thrown on oceanic coasts. Since trans-continental and specifically trans-oceanic communication increased in intensity during the fifteenth century, norms regulating that traffic of persons engaged in world-wide action or action with world-wide effect have extended far beyond issues of regulating insurance and compensation for losses and have turned ever more important.[253] However, despite sluggish beginnings already in the early seventeenth century, in the form of bilateral treaties, the first globally valid convention under international law came into existence only in the twentieth century.[254] Yet, at the level of international legal theory, academic debates, together with written

[253] Already the late eleventh-century rules for merchants at Amalfi featured stipulations regulating the conveyance of protection through insurances against desasters and crimes on the seas. These rules were subsequently applied in many towns in the Italian Peninsula. Similar protection clauses were also enshrined in the Skaaer for Danish guilds, which were obliged to shoulder parts of the damages of shipwreck members. See: 'Tavola e consuetudini di Amalfi, Capitula et ordinationes maritimae nobilis civitatis Amalphae, quae in vulgari sermone dicuntur: la Tabula de Amalfa [Tabula Amalphitana; The Sea Law of Amalfi, original version, c. 1095]', in: *Archivio storico italiano*, Appendice 1 (Florence, 1842-1844), pp. 259-270, at p. 261, nr 21, p. 268, nr 55. 'Skraa for St. Knudsgilde i Flensborg [c. 1200]', § 11; 'Skraa for St. Knudsgilde i Odense [c. 1245]', § 13, in: Camillus Nyrop, ed., *Danmarks gilde- og lavsskraaer*, vol. 1 (Copenhagen, 1899-1900), pp. 6-17, 18-31, at pp. 9, 24. On the skraaer see: Carsten Müller-Boysen, *Kaufmannsschutz und Handelsrecht im frühmittelalterlichen Nordeuropa* (Neumünster, 1990), pp. 77-79. Max Pappenheim, *Die altdänischen Schutzgilden* (Breslau, 1885), pp. 143-160, 407-414, 414-424. Regulations in terms of domestic state law are extant from the seventeenth century. See: Charles XI, King of Sweden, *Sveciae Regni jus maritimum* (Stockholm, 1674). Mevius, *Commentarii* (note 163). Wyndham Beawes, *Lex mercatoria rediviva* (London, 1751), pp. 138-142, esp. pp. 138-139 [further edn (London, 1752); (Dublin, 1752; 1754; 1761; 1771; 1773; 1783); (London, 1792; 1795; 1813); reprints (Ottawa, 1982; 1983)].

[254] Treaty France – Ottoman Empire, 20 May 1604 [= 20 Zilludje 1012], in: Jean Dumont, Baron von Careels-Cron, *Corps diplomatique universel*, vol. 5, part 2 (The Hague, 1728), pp. 39-43; also in: Gabriel Noradounghian, ed., *Recueil d'actes internationaux de l'Empire Ottoman*, vol. 1 (Paris, 1897), pp. 99-102 [reprint (Nendeln, 1978)]; renewed through the treaty France – Ottoman Empire, 5 June 1673 [extant as edict in the name of the Ottoman Sultan], art. VII (guarantee of safety on land and in waters, p. 468), art. XII (Protection against "les Corsaires de Barbarie", who, albeit under the Sultan's rule, did not always act in accordance the Sultan's commands, pp. 468-469), art. XXIV (rescue of shipwrecks, p. 471), in: *CTS*, vol. 12, pp. 465-476, and through the treaty France – Ottoman Empire, 28 May 1740, art. XIX, in: *CTS*, vol. 36, pp. 43-87, at pp. 52-53. Treaty Great Britain – Ottoman Empire, September 1675 = Akir 1086, art. I, V, VI [extant in the form of an edict in the name of the Ottoman Sultan], in: *CTS*, vol. 13, pp. 431-461, at pp. 433-434; also in: Dumont, Corps diplomatique(as above), vol. 7, part 1 (1726), pp. 297-305. Treaty Great Britain – Tunis, 5 October 1662, art. II, in: *CTS*, vol. 7, p. 243 (Latin version), pp. 244-246 (English version), at p. 244. Treaty Great Britain – Tripolis, 5 / 15 March 1676, art. II, in: *CTS*, vol. 14, pp. 75-81, at p. 76. Treaty Algiers – France, 11 March 1679, in: *CTS*, vol. 15, pp. 105-108. Treaty Algiers – States General of the Netherlands, 30 April 1679, in: *CTS*, vol. 15, pp. 143-151. Treaty Algiers – Denmark, 10 April 1746, art. VI, in: *CTS*, vol. 38, pp. 29-35, at p. 31. The British-Turkish treaty of 1675 was applicable to British subjects and indigenes of other states operating in the Ottoman Empire under the British flag; in art. I, it ruled: "Que ladite Nation *et* les Marchands Anglois *et* toute autre Nation, ou Marchands qui sont ou vi endront sous la Bannière et protection d'Angleterre avec leurs Navires, grands *et* petites, Marchandises, effects *et* tous leurs Biens, pourront en tout temps seurement passer en nos Mers *et* aller et venir en out seureté *et* liberté en tous endroits des Limites Impériaux de nos Etats, de telles sorte que qui que ce soit de la Nation, ni ses Biens *et* Effects ne receveront aucune molestation, ou empêchement de quelque personne que ce soit."; in art. V and art. VI, it obliged the Sultan's subjects to provide assistance to shipwrecks and sailors in emergency due to stormy weather. On treaties between Sweden on the one side, Algiers 1729, Morocco 1763, Tripolis 1741 and Tunis 1736 on the other see: Joachim Östlund, 'Swedes in Barbary Captivity. The Political Culture of Human Security', in: Cornel Zwierlein, Rüdiger Graf and Magnus Ressel, eds, *The Production of Human Security in Premodern and Contemporary History* (Historical Social Research, vol. 35, issue 3/4) (Cologne, 2010), pp. 148-163, at pp. 156--155. *Convention for the Unification of Certain Rules of Law Respecting Assiatance and Salvage at Sea, Brussels*, 23 September 1910 [in force since 1 March 1913; extended in the Protocol of 1967, entering into force on 15 August 1977], in: *CTS*, vol.

reports by rescued shipwrecks, are extant already from the seventeenth and eighteenth centuries, testifying to the awareness of the need to provide assistance to shipwrecks. Even though August Ludwig von Schlözer, in his Göttingen lecture on apodemics, delivered during the winter term 1795/96, indeed listed "long-distance voyages" (Große Seereisen), for instance to the Cape of Good Hope or to South America together with "dangerous voyages" (Schlimme Seereisen), to the East and West Indies as destinations and even included whale hunting as a purpose of voyages that might be hazardous for want of "assistance" (Hülfe) on the open seas and due to the likelihood of deadly diseases, and he called attention to the dangers of long-distance journey in instructions for unexperienced travellers.[255] But, against such skepticism, reports show that stranded shipwrecks did receive help that was necessary and were immediately accommodated as guests under the law of hospitality, as long as they were in need. This can be gleaned already from the somewhat muddled account by the Portuguese shipwreck Fernão Mendez Pinto, who arrived on the southern Japanese island of Tanegashima probably in 1542, apparently the first European ever to have visited the archipelago.[256] In his report, which is not extant in the original, Pinto described that Japanese authorities on the island treated him well.[257] The authorities showed little interest in the person of the shipwreck himself, even though they noted his bodily features, somewhat unusual to them. Instead, a load of portable firearms, found in the wreck of the Chinese junk that had carried Pinto to Tanegashima. These guns featured certain specificities compared to the firearms then known in East Asia.[258] Pinto's report, then, suggests that the accommodation of shipwrecks in accordance with the

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212, pp. 187-201 [transportrecht.de/transportrecht_content/102498920.pdf]. This convention has been devolved into municipal law and, in the case of Germany, been included into the *Handelsgesetzbuch*, §§ 574ff. On the convention see: Erwin Beckert and Gerhard Breuer, *Öffentliches Seerecht* (Berlin, 1991). Wolfgang Graf Vitzthum, ed., *Handbuch des Seerechts* (Munich, 2006). See also above, note 88.

[255] August Ludwig von Schlözer, *Vorlesungen über Land- und Seereisen. Gehalten von Herrn Professor Schlözer. Nach dem Kollegheft des stud. jur. E. F. Haupt (Wintersemester 1795/96)*, edited by Wilhelm Ebel (Göttingen, 1962), p. 15. Leopold Graf Berchthold, *An Essay to Direct and Extend the Inquiries of Patriotic Travellers. With Further Observations on the Means of Preserving the Life, Health and Property of the Unexperienced in Their Journey by Land and Sea*, 2vols (London, 1789) [German version, Brunswick, 1791]].

[256] Mendez Pinto, *Peregrinação* (note 16).

[257] However, Pinto's narration is rather imprecise with the consequence that the precise year of the landing has remained unascertainable, even though 1542 has been accepted as the most likely year. The local authorities registered the occurrence without noting the year. Lidin, *Tanegashima* (note 16).

[258] Fujimoto Masayuki, *Nobunaga no Sengoku Gunjigaku* (Tokyo, 1997). Hora Tomio, *Teppō denrai to sono eikyō* (Kyoto, 1991). Kubota Masashi, 'Nihon no jūhei no kunren to jōbi heika', in: *Gunji Shigaku*, vol. 38, issue 3 = nr 151 of the entire series (2002), pp. 4-32. Kubota, 'Nihon ni okeru teppō no fukyū to sono eikyō', in: *Gunji Shigaku* 160 (2005), pp. 49-63. Joseph Needham, *Military Technology. The Gunpowder Epic* (Needham, Science and Technology in China, vol. 5, part 7) (Cambridge, 1986). Ōwada Tetsuo, *Sengoku bushō* (Tokyo, 1990). *Sakai Teppō. The Sakai Gun. Special Exhibition. Sakai City Museum. April 28 – May 27, 1990* (Sakai, 1990). Suzuki Masaya, *Teppō to Nihonjin. "Teppō shinwa" ga kakushite kita koto* (Tokyo, 1997). Takahashi Ōsamu, 'Sengoku kassenzu byōbu no keisei to tenkai', in: *Sensō to heiwa no chūkinseishi* (Rekishigaku no genzai, 4) (Tokyo, 2001), 75-103. Taniguchi Shinkō, 'Military Evolution or Revolution? State Formation and the Early Modern Samurai', in: Rosemarie Deist and Harald Kleinschmidt, eds, *Knight and Samurai. Actions and Images of Elite Warriors in Europe and East Asia* (Göppinger Arbeiten zur Germanistik, 707) (Göppingen, 2003), pp. 169-195. Udagawa Takehisa, *Teppō denrai* (Tokyo, 1990). Udagawa, *Higashi Ajia heiki kōryūshi no kenkyū* (Tokyo, 1993). Udagawa, 'Nichō no shuryoku kaki "teppō" to "jūtō"', in: *Rekishi gunzō* 2 (1993), pp. 134-136. Udagawa, *Edo no hōjutsu. Keisho sareru bugei* (Tokyo, 2000). Udagawa, 'Hōjutsu densho wa jidao no kagami', in: *Rekihaku* 108 (2002), pp.

law of hospitality was a perfectly common procedure and caused little ado, no matter where the shipwrecks might have come from.

From the following two centuries, several further shipwreck accounts from long-distance travellers are on record.[259] They portrayed similar situations, unless they had been shaped by perceptions of the allegedly or manifestly cruel treatment by European as well as North African pirates operating in the Mediterranean Sea.[260] Pierre-Raymond de Brisson, who was thrown on the West African coast in 1788, met some "Arab" priest upon his rescue, gave him "two very fine clocks" as gifts and was then taken care of well.[261] William Mackay, whose ship *Juno* left Rangoon (Yangoon) for Madras (Chennai) on 29 May 1795 in service to the English East India Company and sank on its way, reached the western coast of South Asia in a lifeboat with some of the original 72 fellow passengers. On the coast, local inhabitants welcomed the shipwrecks as guests.[262] John Nicholson Inglefield, whose vessel *Centaur* left Jamaica in 1782, encountered distress at sea west of the island of Faial of the Azores. The British consular agent, stationed on the Azores, saw to it that the crew received the required assistance.[263]

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[259] Adam Olearius, ed., *Colligirte und viel vermehrte Reise-Beschreibung, bestehend in den nach Mußkau und Persien wie auch Johann Albrechts von Mandelslo Morgenländischer und Jürgen Andersens und Volquard Yversens Orientalischer Reise* (Hamburg, 1686), report by Andersen, book II, chap. 21, pp. 92-94: shipwreck and rescue off the Chinese coast [first published (Schleswig, 1669); reprint of this edn (Deutsche Neudrucke. Reihe Barock, 27) (Tübingen, 1980); partly printed in: Eberhard Werner Happel, *Grösste Denkwuerdigkeiten der Welt oder sogenannte Relationes curiosae* (Berlin, 1990), pp. 96-105; first printing of this version (Hamburg, 1689)]. For studies see: Michael Titlestad, 'Preservation by Shipwreck. The Memoirs of William Mackay', in: *Mariner's Mirror* 99 (2013), pp. 39-51. Cornel Zwierlein, 'Renaissance Anthropologists of Security. Shipwreck, Barbary Fear and the Meaning of "Insurance"', in: Andreas Hofele and Stephan Laquet, eds, *Humankinds. The Renaissance and Its Anthropologies* (Pluralisierung und Autorität, 25) (Berlin and New York, 2011), pp. 157-182, at pp. 174-175.

[260] For examples, see: *Thomas Saunders, A True Discription and Breefe Discourse of a Most Lamentable Voyage Made Latelie to Tripolie in Barbarie* (London, 1587). Ben Jonson, George Chapman and John Marston, 'Eastward Ho', edited by C. P. Petter, *The New Mermaids* (London, 1973), VV 2.2, pp. 86-127. John Fox, '"The worthy Enterprise of John Fox, in Delivering 266 Christians Out of the Captivity of the Turks" in Richard Hakluyt, *Principal Navigations* (1589)'; John Rawlins, 'The Famous and wonderful Recovery of a Ship of Bristol, Called the *Exchange*, from the Turkish Pirates of Argier (1622)'; both edited in: Daniel J. Vitkus, ed., *Piracy, Slavery and Redemption. Barbary Captivity Narratives from Early Modern England* (New York, 2001), pp. 55-69, 96-119. On these texts and their literary reception see: Östlund, 'Swedes' (note 254), pp. 151-153 [with reference to letters by captives in North Africa seeking help from the King of Sweden, 1680, 1707, 1724]. Kenneth Parker, 'Reading "Barbary" in Early Modern England. 1550 – 1685', in: *Seventeenth Century* 19 (2004), pp. 87-115. Anne-Julia Zwierlein, 'Shipwrecks in the City. Commercial Risk as Romance in Early Modern City Comedy', in: Dieter Mehl, Angela Stock and Zwierlein, eds, *Plotting Early Modern London. Newe Essays on Jacobean City Comedy* (Aldershot, 2004), pp. 75-94.

[261] Pierre-Raymond de Brisson, *Geschichte des Schiffbruchs und der Gefangenschaft des Herrn von Brisson; deutsche Fassung*, edited by Georg Forster (Frankfurt, 1790), pp. 12-15 [second edn (Eisenach, 1806); English version (Perth, 1789); first published s. t.: *Histoire du naufrage det de la captivité de M. de Brisson, Officier de l'administration des colonies* (Geneva, 1789)].

[262] William Mackay, *Narrative of the Shipwreck of the Juno on the Coast of Aracan* (London, 1798), pp. 24-26 [new edn (Edinburgh, 1892); German version (Hamburg, 1800; 1802)].

[263] John Nicholson Inglefield, *Cheap Repository. Wonderful Excape from Shipwreck. An Account of the Loss of His Majesty's Ship Centaur* (Bath, 1795), pp. 11-12 [first published (London, 1783), pp. 34-35].

Early in the nineteenth century, an incident occurred casting a spotlight on the transformation on the law of shiprwrecks. In 1834, after a cruise of fourteen months across the North Pacific, three Japanese sailors made landfall on the West Coast of North America. Their cargo ship, built for coastal voyages within the archipelago, without mast and steer, had carried them acorss the ocean. Their misery had started in 1832, when they had been on a routine trip along the coasts. But awkward winds had driven them out into blue waters. Now, they reached Cape Alava, the westernmost tip of Olympic Peninsula in what is Washington State today. Only three had survived from the original crew, feeding on desalted seawater and the scarce food they had had on board. Their names: Iwakichi, 29, Kyūkichi, 16, and Otokichi, 15. The other members of the original crea had died during the passage. They did not know where they were. But they did know one thing, namely that it would be hard for them to return, as, for about two hundred years, the strict prohibition of leaving the country, no matter for what reason, has been in force all over Japan. Everyone returning back to the country across the sea, faced capital punishment.[264] They wanted to return, but it was impossible for them.

How should Iwakichi, Kyūkichi and Otokichi explain their dilemma? They had no idea that there had been Japanese shipwrecks crossing the Pacific before them.[265] The inhabitants on the West Coast of North America, members of the Makah group of Native Americans, treated them well as guests and accommodated them. Communication, a problem anyway, yielded few results. The name of the land was Oregon, the three were told. But the Makah knew nothing about Japan and its laws. As the three shipwrecks had no intention of staying as guests, the Makah eventually passed them on to John McLoughlin, factor of the British Hudson Bay Company and in charge of the trading district around the Columbia River. McLoughlin knew about Japan but had no concern for the shipwrecks' anxieties. Instead, he saw a business chance. Exactly thirty yeas ago, no one less than Thomas Jefferson, then President of the USA, had promoted the fancy idea of crossing the continent east to west and to develop the trans-Pacific trade with East Asia.[266] Once the western coasts would have been reached,

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[264] Kaempfer, *Japan* (note 91).

[265] See above, note 16. Manjiro, who reached the North American West Coast in 1790 an der Westküste, is believed to have been the first recorded Japanese shipwreck. On him see: Donald R. Bernard, *The Life and Times of John Manjiro* (New York, 1992). Hisakazu Kaneko, *Manjiro. The Man Who Discovered America* (Tokyo, 1954) [further edn (Boston, 1956)]. Sakamaki Shunzô, *Japan and the United States. 1790 – 1853* (Transactions of the Asiatic Society of Japan. Second Series, vol. 18) (Tokyo, 1939), pp. 12-19. The fates of further shipwrecks reaching North America is described by: Katherine Plummer, *A Japanese Glimpse at the Outside World. 1839 – 1843. The Travels of Jirokichi in Hawaii, Siberia and Alaska*, edited by Richard A. Pierce (Alaska History, 36) (Kingston, Ont, and Fairbanks, AL, 1991). Plummer, *The Shogun's Reluctant Ambassadors. Sea Drifters* (Tokyo, 1985) [third edn (North Pacific Studies, 17) (Portland, 1991)].

[266] 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 [reprint, edited by Bernard De Voto (New York, 1969)], at p. 206: "The Indian tribes within the limits of the United States have for a considerable time been growing more and more uneasy at the constant diminuation of the territory they occupy, although effected by their own voluntary sales."; p. 207: "In leading them thus to agriculture, to manufactures and civilization, in bringing together their and our sentiments, and in preparing them ultimately to participate in the

so was the long-term plan, the lucrative trade between Europe and East Asia might be redirected across North America, allowing the then nascent USA to take profit from the exchange. McLoughlin shared this idea but acted more pragmatically. He intended to use the three shipwrecks as door-openers to Japan. To that end, he taught them a little English and told them to walk all the way to Washington, DC to report to the US government. The three did as instructed. But, in Washington, the US administration thought differently and put them on a vessel to London. They reached the UK in 1835. Now, they were farther away from Japan than ever before.

Yet, the British government also decided against McLoughlin, put the three shipwrecks on a ship to the Portuguese seaport of Macau on the Chinese coast, in order to facilitate their return to Japan from there. The three reached Macau in 1837, where they met Karl Gützlaff, an overly active German Protestant missionary, who was just preparing an expedition to Japan to preach the gospels there.[267] There were further Japanese shipwrecks sheltered at Macau. Gützlaff developed the plan of chartering a ship to repatriate them and then seek to convince the Japanese authorities to admit him to the country. Otokichi, whose knowledge of English had grown well, again tried hard to explain the dilemma that shipwrecks faced should they return. He became a kind of spokesperson for the shipwrecks but clould not accomplish anything. Gützlaff posed a God's servant and would not listen to talk about legal issues. He completely ignored the warning that Christian missionaries would not be tolerated in Japan. The *Morrison*, the ship he had chartered, was ready for departure for Japan. Grudgingly, the shipwrecks followed Gützlaff on board. The destination was Nagasaki port. Gützlaff believed that foreign vessels of any origin were welcome there. But the court police had different instructions, when the *Morrison* reached the port. Only ships under the Chinese and the Dutch flags were admitted, Gützlaff was informed, and the *Morrison* was told to leave the port immediately. The order was given strictly enough even to persuade Gützlaff to give in. Still, however, he wanted to repratriate the shipwrecks. But this desire met with staunch opposition from the port authorities. There could not have been any Japanese shipwrecks returning from America, they replied. And if he insisted on disembarking them, they would be put to death instantaneously, as they had left illegally. Hence, Otokichi and his fellow shipwrecks returned to Macau. Otokichi took residence in Shanghai and established contacts with British merchants in 1843.[268] In the USA, the *Morrison* affair turned

benefits of our Government, I trust and believe we are acting for their greatest good." Jefferson, [Instruction for Aberiwether Lewis, 20 June 1803], in: ibid., pp. 247-252, at p. 251: "On your arrival on that coast endaevour to learn if there be any port within your reach frequented by the sea-vessels of any nation, and to send two of your trusty people by sea, in sich a way as shall appear practicable, with a copy of your notes. And should you be of opinion that the return of your party by the way they went will be eminently dangerous, then ship the whole and return by sea by way of Cape Horn or the Cape of Good Hope, as you shall be able." Diary of the expedition, on 15 February 1806, in: *Journals* (as above), vol. 4, p. 74, where fur trade was the issue.

[267] On Gützlaff see: Reinhard Zöllner, 'Gützlaffs Japanreise 1837 und das Nojutsu yumemono-gatari. Zur japanischen Fremdenpolitik am Vorabend der "Öffnung"', in: Thoralf Klein and Zöllner, eds, *Karl Gützlaff (1803 – 1851) und das Christentum in Ostasien* (Nettetal, 2005), pp. 21-39.

[268] On this affair see the statement by: Philipp Franz Balthasar Siebold, in: *Le Moniteur des Indes-Orientales et*

into a massive scandal with wide coverage in the printed press and the accusation that human rights were unknown in Japan.[269]

For six further years, Otokichi earned his living in Shanghai, until the British government again became interest in his services. In the meantime, it had pressured the Chinese government in Beijing to surrender the tropical island of Hong Kong to British rule and to allow the British government to build a military stronghold there.[270] According to the British-Chinese treaty Nanjing of 1842, British rule over the island was granted for good. Using Hong Kong as a base, British vessels went on voyages of exploration into the northern Pacific, reaching, among other, Japanese waters. In 1849, the crew of HMS *Mariner* took Otokichi on board, dressed him up as a Chinese, allegedly born in Nagasaki,and employd him as a translator in negotiations with the Japanese authorities at Uraga port about the "opening" of Japanese ports for British ships. But the Japanese authorities turned down all British approaches,[271] as they also rejected similar attempts by the US government.[272] While the number of shipwrecks washed on Japanese coasts from the USA increased together with the number of foreign ships cruising in or near Japanese waters,[273] the government put into force an edict on 24 July 1842, regulating the provision of assistance to people stranded in Japan. But King William II of the Netherlands, sending a message to the "Emperor" of Japan in 1844, warned that this edict might not satisfy the British quest for the "opening" of the entire country for trade. Tacitly seeking to retain the trading privileges that the Kingdom of the Netherlands had taken over from the defunct Dutch East India Company in 1815, the King informed the Japanese government of his view that the edict might not succeed in hedging British naval power.[274]

Meanwhile, the US government in Washingto, DC, again pondered plans to boost the trans-Pacific

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occidentales 1 (1846), p. 85.

[269] Charles W. King, *The Claims of Japan and Malaysia upon Christendom* (New York, 1839).

[270] Nanjing Treaty (note 66), art. III, p. 467.

[271] On the British-Japanese clashes: William Gerald Beasley, *Great Britain and the Opening of Japan. 1834 – 1858* (London, 1951), p. 116 [reprint (Folkestone, 1995)]. Ernest Wilson Chapman, 'British Seamen and Mito Samurai in 1824', in: *Transactions of the Asiatic Society of Japan*. First Series, vol. 33 (1906), pp. 86-132. Mitani Hiroshi, *Escape from Impasse. The Decision to Open Japan* (LTCB International Library Selection, 20) (Tokyo, 2006), pp. 223-226 [expanded edn (Tokyo, 2008);first published s. t.: *Perī raikō* (Tokyo, 2003)].

[272] Richard A. Doenhoff, 'Biddle, Perry and Japan', in: *US Naval Institute Proceedings* 42 (1966), pp. 79-87. Forster Rhea Dulles, *Yankees and Samurai. America's Role in the Emergence of Modern Japan. 1791 – 1900* (New York, 1965). Stpehen Bleeker Luce, 'Commodore Biddle's Visit to Japan in 1846', in: *US Naval Institute Proceedings* 31 (1905), pp. 555-563. McOwie, *Opening* (note 248), pp. 39-42.

[273] On foreign ships cruising in Japanese waters: Joseph Henrij Levyssohn, *Bladen over Japan* (The Hague, 1852), pp. 40-42, 46-58, 60-63. A US citizen had himself dropped off the coast, in order to test responses by Japanese authorities: Ranald Macdonald, *The Narrative of His Life. 1824 – 1894*, edited by William S. Lewis and Naojirō Murakami (Spokane, 1923) [reprint (Portland, OR, 1990)].

[274] William II., King of the Netherlands, [Letter to Tokugawa Ieyoshi, Shōgun of Japan, 1844], edited by Daniel Crosby Greene, 'Correspondence between William II of Holland and the Shogun of Japan, A. D. 1844', in: *Transactions of the Asiatic Society of Japan*. First Series, vol. 34 (1907), pp. 106-122, at p. 107 [also in: *The Meiji Japan through Contemporary Sources*, vol. 2 (Tokyo, 1970), pp. 1-8; also in: John Zimmermann Bowers, *Western Medical Pioneers in Feudal Japan* (Baltimore and London, 1970), pp. 203-207].

trade with East Asia.[275] Since Jefferson's time, much of the West Coast had come under government control, and numerous settlers had reached coastal lands via the Oregon Trail. California had attracted a lot of people during the gold rush. Hence, there was sufficient reason to support the view that time had come to implement designs for trans-Pacific seaborne traffic, particularly as the novel steamship technology appeared to ease the passage.[276] The government used the *Morrison* affair as a pretext for preparing an expedition to Japan arguing the the Japanese government was unwilling to allow shipwrecks to return, even threatening them with capital punishment, and that this was a blatant breach of essential human rights. The US government claimed for itself the duty of enforcing human rights all across the globe and insisted that the expedition was mandated to these ends.[277] Consequently, when Commodore Matthew Calbraith Perry[278] reached Japan with a fleet of four vessels, arriving outside Edo Bay in 1853, he threatened the use of military force, unless the Japanese side agreed to enter into negotiations about the conclusion of a treaty of peace and trade. The Japanese government eventually complied and, during the negotiations, Perry demanded explicit assurances, to be included into the text of the treaty, that shipwreck US citizens would receive the

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[275] Caleb Atwater, 'Remarks Made on a Tour to Prairie du Chien, Thence to Washington City, in 1829', in: Atwater, *The Writings of Caleb Atwater* (Columbus, OH, 1833), p. 202.

[276] Daniel Webster, [Instruction for Caleb Cushing for his Mission to China, 8 May 1843], in: Webster, *The Writings and Speeches*, vol. 12 (Boston and New York, 1903), pp. 141-146, at p. 142: "A leading object of the mission in which you are now to be engaged is, to secure the entry of American ships and cargoes into these ports on terms as favorable as those which are enjoyed by English merchants."; p. 143: "You will … assert and maintain, on all occasions, the equality and independence of your own country. The Chinese are apt to speak of persons coming into the empire from other nations as tribute-bearers to the emperor. This idea has been fostered, perhaps, by the costly parade of embassies from England. All ideas of this kind respecting your mission must, should they arise, be immediately met by a declaration, not made ostentatiously or in a manner reproachful toward others, that you are no tribute-bearer; that your government pays tribute to none and expects tribute from none; and that, even as to presents, your government neither makes nor accepts presents."; p. 144: "The purpose of seeing the Emperor in person must be persisted in as long as may be becoming and proper. You will inform the officers of the government, that you have a letter of friendship from the President's own hand which you cannot deliver except to the Emperor himself, or some high officer of the court in his presence. You will say also that you have a commission conferring on you the highest rank among representatives of your government and that this also can only be exhibited to the Emperor or his chief officer. You may expect to encounter, of course, if you get into Pekin, the old question of the Ko-tou. In regard to the mode of managing this matter, much must be left to your discretion, as circumstances may occur. All pains should be taken to avoid the giving of offence or the wounding of national pride; but, at the same time, you will be careful to do nothing, which may seem, even to the Chinese themselves, to imply any inferiority on the part of your gobernment or any thing less than perfect independence of all nations."

[277] Daniel Webster, [Letter to John H. Aulick, dated 10 June 1851], in: Webster, *The Papers of Daniel Webster*, edited by Kenneth E. Shewmaker and Kenneth R. Stevens Series 3: Diplomatic Papers, vol. 2 (Hanover, NH, and London, 1983), pp. 290-291. Webster, [Letter to William Alexander Graham, dated 9 May 1851], in: ibid., pp. 288-289. On these communications see: Walter LaFeber, *The Clash. U.S.-Japanese Relations Throughout History* (New York and London, 1997), pp. 9-17. Hideo Ibe, *Japan Thrice Opened. An Analysis of Relations between Japan and the United States* (New York, 1992), pp. 19-42.

[278] On Perry see: Edward Morley Barrows, Great Commodore (Indianapolis and New York, 1935) [reprint (Freeport, 1972)]. William Elliot Griffis, *Matthew Calbraith Perry* (Boston, 1887) [second edn (Boston, 1890); reprint of the first edn (Richmond, SY, 2002)]. Griffis, *Townsend Harris* (Boston and London, 1895) [reprint (Freeport, 1971)]. Griffis, *Millard Fillmore and His Part in the Opening of Japan* (Buffalo, 1906). Samuel Eliot Morison, *"Old Bruin"* (Boston, 1967). John H. Schroeder, *Matthew Calbraith Perry. Antebellum Sailor and Diplomat* (Annapolis, 2001). Oliver Statler, *The Black Ship Scroll* (San Francisco and New York, 1963) [second edn (Rutland, 1964)]. Arthur Clarence Walworth, *Black Ships off Japan. The Story of Commodore Perry's Expedition* (New York, 1946) [second edn (Hamden, CT, 1966)].

necessary assistance.[279] Although the State Council (Rōjū) conceded that, at some time in the future, the possibility of changing Japanese laws might arise due to the intensification of international trade,[280] it did not comprehend the logic behind the insistence of the US side that the care of shipwrecks should be included into an agreement under international law. Hence, the Japanese side initially responded that it did not see any need to include a specific article relating to the law of shipwrecks into the treaty. Instead, it took the view that what had always been enshrined into the universal law of nature, had no place in a specific bilateral treaty, that shipwrecks had always been treated as guests, and that human rights had always been respected in Japan anyway.[281] However, Perry would not accept the position, which Akira Hayashi, the Japanese plenipotentiary, took during the negotiations.[282] The agreement, finally signed at Kanagawa on 31 March 1854, did feature a reciprocal article obliging both parties to provide aid to shipwrecks.[283] That meant that not only US citizens shipwrecked in Japan, but also Japanese subjects shipwrecked in the USA, could benefit from the treaty, which was the first ever to transfer the law of shipwrecks from natural into positive international law.

While the Japanese –US treaty negotiations were going on, the Crimean War had begun in 1853, which France and the UK fought against Russia. In the course of the eighteenth century, Russia had expanded into a Pacific power, in addition to its rank as a European power, and appeared to be able to influence or even restrict British expansion into the northern Pacific. The Russian, like the British government had heard about the US plans to "open" Japan for trade, and frowned on them, as it had pursued its own strategy of expanding into the northern Pacific from the end of the eighteenth century. It had made several attempts to "open" Japan but had always failed.[284] By the middle of the

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[279] Hawks, *Narrative* (note 245), p. 361. Pineau, *Expedition* (note 245), p. 105. J. W. Spalding, *The Japan Expedition* (New York and London, 1856), p. 9 [reprint, edited by William Gerald Beasley (The Perry Mission in Japan. 1853 – 1954, vol. 3) (Richmond, SY, 2002); further reprint (Japan in English. Key Nineteenth-Century Sources on Japan, 1850-59. Second Series, vol. 42) (Tokyo, 2007)].

[280] Voin Andreevič Rimskij-Korsakov, 'Iz Dnevnika', edited by F. Rimskij-Korsakov, in: *Morskoj Sbornik* 6 (1896), pp. 193-194. On him see: Conrad D. Totman, 'Political Reconciliation in the Tokugawa Bakufu. Abe Masahiro and Tokugawa Nariaki. 1844 – 1852', in: Albert M. Craig and Donald Howard Shively, eds, *Personality in Japanese History* (Berkeley and Los Angeles, 1970), pp. 180-208.

[281] Hayashi Akira [Fukusai], Ido Satohiro, Izawa Masayoshi and Udono Chōei, for Amerika ōsetsu gakai, [Letter to the Rōjū, 2 April 1854], in: *Bakumatsu Gaikoku Kankei Monjo*, vol. 5 (Tokyo, 1927), pp. 478-485 [the version edited by the Rōju, printed in: ibid., pp. 460-470; reprint (Tokyo, 1972)].

[282] Hayashi Akira [Fukusai], 'Diary of an Official of the Bakufu', in: *Transactions of the Asiatic Society of Japan.* Second Series, vol. 7 (1930), pp. 98-119, at pp. 104-105.

[283] Kanagawa Treaty (note 223), art. III, p. 2.

[284] On Japanese-Russian relations see: Norbert R. Adami, *Eine schwierige Nachbarschaft. Die Geschichte der russisch-japanischen Beziehungen*, vol. 1 (Munich, 1990). William George Aston, 'Russan Desent in Saghalien and Itorup in the Years 1806–7', in: *Transactions of the Asiatic Society of Japan.* First Series, vol. 1 (1874), pp. 86-95 [reprinted in: Aston, Collected Works, edited by Peter Francis Kornicki, vol. 1 (Bristol and Tokyo, 1997), pp. 19-29]. Glynn Barratt, *Russia in Pacific Waters. 1715 – 1825* (Vancouver, 1981). Edgar Franz, 'Siebold's Endeavors in the Year 1852 to Induce the Russian Government to Initiate Activities for the Opening of Japan', in: *Bunka* (Tōhoku Universität), vol. 66, issue 1-2 (2002), pp. 167-186. Franz and Yoshida Tadashi, 'Philipp Franz von Siebold's Correspondence with Leading Russian Diplomats 1852 – 1853 in the Context of the Endeavors to Open

nineteenth century, the Russian government pursued the same goal as its US counterpart, yet with an eye on war theatres in Europe as well. While the Crimean War was raging in the Black Sea, the Russian government dispatched a fleet from St Petersburg to Nagasaki.[285]

In 1854, Otokichi once again was suddenly caught up in global politics. While the British government would not stand behind the Russian pressures towards the "opening" of Japan, it was fearful that open conflict with Russia in Pacific waters might jeopardise its still unstable position in Hong Kong. Therefore, it took a cautious stance towards Russian military and trade expansion, for the time being. But Rear Admiral James Stirling, British emissary at Hong Kong, thought differently. Against explicit instructions by his government, he started to prepare his own expedition to Japan in 1854, in order to reach an agreement with the Japanese side before the arrival of the Russian fleet.[286]

Japan for Trade and Navigation', in: *Tōhoku Ajia Kenkyû* 7 (2003), pp. 125-46. Franz, 'Siebold's Influence on the Instructions of the Russian Government to Admiral Putiatin, Commander of the Russian Expedition to Japan in 1852', in: *Bunka* (Tōhoku-Universität), vol. 66, issue 3-4 (2003), pp. 137-56. Franz, *Philipp Franz von Siebold and Russian Policy and Action on Opening Japan to the West in the Middle of the Nineteenth Century* (Munich, 2005). Michael Henker, ed., *Philipp Franz von Siebold (1796 – 1866). Ein Bayer als Mittler zwischen Japan und Europa* (Veröffentlichungen zur bayerischen Geschichte und Kultur, 25/93) (Munich, 1993). Hans Körner, *Die Würzburger Siebold* (Deutsches Familienarchiv, 34/35) (Neustadt/Aisch, 1967) [also published (Lebensdarstellungen deutscher Naturforscher, 13) (Leipzig, 1967)]. Arlette Kouwenhoven and Matthis Farrer, *Siebold and Japan* (Leiden, 2000). Kure Shūzō, *Philipp Franz von Siebold. Leben und Werk*, 2 vols, edited by Hartmut Walravens (Monographien aus dem Deutschen Institut für Japanstudien, 17) (Munich, 1997). Kutsuzawa Nobutaka, 'The Activities of Philipp Franz von Siebold During His Second Stay in Japan, Particularly His Diplomatic Activities in Nagasaki, Yokohama and Edo', in: Arnulf Thiele, Yoshiki Hiki and Gundolf Keil Philipp, eds, *Franz von Siebold and His Era* (Berlin and Tokyo, 2000), pp. 101-103. George Alexander Lensen, 'The Historicity of Frigate Pallada', in: *Monumenta Nipponica* 8 (1953), pp. 462-466. Lensen, 'Russians in Japan. 1858 – 1859', in: *Journal of Modern History* 26 (1954), pp. 162-173. Lensen, 'The Russo-Japanese Frontier', in: *Florida State University Studies* 14 (1954), pp. 23-40. Lensen, *Russia's Japan Expedition of 1852 to 1855* (Gainesville, 1955) [reprint (Westport, CT, 1982)]. Lensen, 'The Importance of Tsarist Russia to Japan', in: *Contemporary Japan* 24 (1957), pp. 626-639. Lensen, *The Russian Push Toward Japan. Russo-Japanese Relations. 1697 – 1875* (Princeton, 1959) [reprint (New York, 1971)]. John Mac Lean, 'Philipp Franz von Siebold and the Opening of Japan (1843 – 1860)', in: Pieter Hendrik Pott, ed., *Philip Franz von Siebold. A Contribution to the Study of Historical Relations between Japan and the Netherlands* (Leiden, 1978), pp. 53-95. William W. McOmie, 'The Russians in Nagasaki. 1853–54', in: *Acta Slavica Japonica* 13 (1995), pp. 42-60. McOmie, *Opening* (note 248), pp. 326-372. Herbert Plutschow, *Philipp Franz von Siebold and the Opening of Japan. A Re-Evaluation* (Folkestone, 2007), pp. 47-101, 149-164. Martin Ramming, 'Über den Anteil der Russen an der Eröffnung Japans für den Verkehr mit den westlichen Mächten', in: *Mitteilungen der Deutschen Gesellschaft für Natur- und Völkerkunde Ostasiens*, vol. 31, part B (1926), pp. 1-34. Ramming, 'Geschichtlicher Rückblick auf die deutsch-japanischen Beziehungen der älteren Zeit', in: *Zeitschrift für Politik* 32 (1942), pp. 610-612. Ramming, 'Einige Mitteilungen über die Mission Putiatin's aufgrund japanischer Quellen', in: *Bochumer Jahrbuch zur Ostasienforschung* 5 (1982), pp. 323-351. Yasuda Kōichi, 'Siebold and the Russian Government. Introduction from a Newly Discovered Collection of Letters', in: Yōjirō Kimura and Valerii Ivanonič Grubov, eds, *Siebold's Florilegium of Japanese Plants*, vol. 2: Articles and Catalog (Tokyo, 1994), pp. 35-40.

[285] Paul Edward Eckel, 'The Crimean War and Japan', in: *Far Eastern Quarterly* 3 (1944), pp. 109-118. John J. Stephan, 'The Crimean War in the Far East', in: *Modern Asian Studies* 3 (1969), pp. 257-277.

[286] The main sources are: Miyako Vos [-Kobayashi], ed., *Bakumatsu Dejima mikōkai monjo. Donkeru Kuruchiusu oboegaki* (Tokyo, 1992), pp. 90-100. UK, *Correspondence Respecting the Late Negotiations with Japan* (Parliamentary Papers 1856, vol. 61. = Command Paper, 2077) (London, 1856), pp. 220-221, 225. Japan, *Dai Nihon Komonjo. Bakumatsu Gaikoku Kankei Monjo*, nr 18, 55, 79, 85, 133, 137, 141, 142, 148, 151, vol. 7 (Tokyo, 1915), pp. 39-63, 147-150, 214-217, 247-253, 374-383, 385-390, 408-410, 410-418, 425-427, 439-441. On the mission see: Hugh Cortazzi, *Victorians in Japan* (London, 1987). Cortazzi and Gordon Daniels, eds, *Britain and Japan* (London and New York, 1991). Cortazzi, 'Sir Rutherford Alcock, the First British Minister to Japan. 1859 – 1864', in: *Transactions of the Asiatic Society of Japan*. Fourth Series, vol. 8 (1994), pp. 1-42. Cortazzi, Ian Nish,

Stirling heard about Otokichi, again employed him as translator and went to Nagasaki at his own risk.[287] In Stirling's entourage, Otokichi actually returned to Japan in 1854, even if for a short while only. The Japanese government agreed on a treaty with the UK, conceding essentially the same privileges to the UK that it had previously granted to the USA.[288] Upon his return to Hong Kong, Stirling allowed Otokichi to return to Shanghai. In 1866, the Japanese government finally lifted the ban on emigration[289] and rehabilitated Otokichi. But he had moved to Singapore in the meantime, the home of his wife, where he died in 1867, without having had a chance to take notice of the change of government policy in Japan.

Otokichi's story leads directly into the centre of the conflict between the security concerns of individual persons and the security interests of governments of states. Around the middle of the nineteenth century, no one wanted that conflict. The Japanese government had enforced the ban on emigration in 1633 with the intention of putting an end to clashes between Japanese sailors and the Spanish colonial admnistration in the Philippines.[290] Otokichi and his fellow shipwrecks had not had any intention of leaving their country. The US government had spoken for norms and values that had been written into formal declarations of human rights, first during the American and then during the French Revolution. And yet, Otokichi and his fellow shipwrecks were punished several times, by the awkwardness of nature, by the rigidity of municipal laws and by the lack of policy-making flexibility of governments, which would not acknowledge legal or moral institutions above themselves.

Since the middle of the nineteenth century, a series of bilateral agreements, together with municipal laws, have regulated the provision of assistance to shipwrecks in international waters. In addition, the Brussels conference approved the Convention on the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea on 23 September 1910, thereby transferring the law of shipwrecks into positive international law.[291] This convention, which has continued in force and has been transferred into municipal law, still reflects the pluralism of the set of bilateral and municipal legal norms and has the task of determining the principles upon which these norms should be applied in emergencies. In its main dispositive part, it features stipulations relating to the regulating of costs for the salvage and excludes reimbursements of expenditures for the rescue of persons (Art. 9), while obliging every captain to provide assistance to all persons, including enemies, who are in danger at

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Peter Lowe and James E. Hoare, eds, *British Envoys in Japan. 1859 – 1972* (Embassies of Asia Series, 1) (Folkestone, 2004). Grace Fox, 'The Anglo-Japanese Convention of 1854', in: *Pacific Historical Review* 10 (1941), pp. 411-434.

[287] William Gerald Beasley, 'Japanese Castaway and British Interpreter', in: *Monumenta Nipponica* 46 (1991), pp. 91-103.

[288] Nagasaki Treaty (note 223).

[289] Amino, 'Japonais' (note 152).

[290] For the context see: Kleinschmidt, *Legitimität* (note 17), pp. 149-172.

[291] *Convention* (note 253).

sea, as far as this is possible without danger for drew and ship (Art. 11). The Convention does, however, limit these obligations to vessels under flags of signatory states (Art. 16). In imposing this restriction, the Convention separated the law of shipwrecks from the law of hospitality and broke with the natural law principle of universality. Moreover, the Convention focused the international legislation on the rescue of ships trather than of shipwrecked persons and transferred the regulation of the admission of shipwrecks to state territory from the unset law of hospitality into the competence of legislators of sovereign states. This latter principle remained unchanged until the present day.

By contrast, the older academic literature on shipwrecks of the seventeenth and the eighteenth centuries had mainly been concerned with shipwrecked persons, had treated the law of shipwrecks as a branch of the law of hospitality,[292] which it had taken for granted as a given.[293] The provision of assistance to ship crews, who had been driven off from their routes by awkward winds, ranked as an obligation under natural law everywhere on the globe.[294] Authors tirelessly referred to the penal code

[292] Johann Gottlieb Heineccius [Heinecke], ed., *Scriptorum de iure nautico et maritimo* (Halle, 1740). Reinhold Curicke [Kuricke], *Ius maritimum Hanseaticum* (Hamburg, 1667), pp. 205-219: "De naufragio et inventis in mari" [also in: Heineccius (as above), pp. 637-902]. Johann Karl Friedrich Gildemeister, *Dissertationis qua disquiritur sitne aliquod fueritve ius maritimum universale partem priorem* (Göttingen, 1803). Charles XI., King of Sweden, *Jus* (note 253), title I, chap. 9, pp. 15-16: "De nautarum immunitate inaere alieno: Nullus potestatem habeat arrestandi vel detinendi illum ministrum nauticum, superiorem vel inferiorem, ex parata velis faciendis navi, propter aes alienum, sed bona ejus , intra vel extra na-//vim, apprehendere licebit, qvando debitum liqvidum est."; title V, chap. 1, pp. 71-72: "Si qva navis oneraria vel aliud navigium in locis jurisdictioni Svericae subjectis illideretur scopulis aut in littus expelleretur, ita ut periret, vel naufrasgium faceret, vel deperdita aut navi ejecta bona ad Svecicum littus fluitarent, vel qvidam Sveticus subditus talia reperirert in mari vel bona pertinenerent ad Svecum, vel ejus subdotum, qvi in amicitia esset cum // Corona Sveciae, *et* idem proprietarius repeteret navim vel bona intra annum *et* diem, ex qvo damnum accidit, ille expensas et praemium servationis illius qvibus debetur solvet, *et* suum recuperabit, qvod jure est. Sed si navis vel bona ad regni inimicum *et* hostem vel piratam pertineant, vel qvae proprietarius intra annum et noctem non veniat repertitum, Regi competet illa bona sibi vendicare *et* retinere, salva servatoribus mercede vel praemio."; chap. 10, pp. 80-81: "Si viri in maris periculum incidant *et* velint salvare navim, vitam *et* bona *et* necesse habeant amputare malum vel funes vel anchoram vel alia armamenta vel jacere qvasdam merces ex navi; atqve in eo nauclerus cum mercatoribus conveniat, qvod ex necessitate fieri opporteat, qvodcunqve damnum in hoc casu navi vel bonis servatis, provirilibus portionibus, qvas quisque in illis possidet. ... Omnia qvae intra navim reperiuntur *et* per jactum servantur, sive sint aurum, sive argentum sive pecunia sive margaritae, ornamenta, annuli vel adamantes, sive corpore gestentur sive non, exceptis vestimentis qvae qvis gestat una cum cibariis aut viaticis, haec omnia qvaliacunqve sint, una cum ipsa navi ejusqve vectura, pro illo itinere conducta, contributioni sibjecta erunt pro qvota, et nauclerus potestatem habebit retinere bona, donec proprietarius pro illis satisfaciat vel plenam cautionem praestat." Mevius, *Ius* (note 163). Johann Franz Stypmann, *Ius maritimum et nauticum* (Halle, 1740) [also in: Heineccius (as above), pp. 3-636; 431-487: part IV, chap. 7: "De adsecuratione, vsitatissimo hodie inter mercatores contractv, Germ[anice] Adsecvrantzen"; pp. 571-579: part IV, chap. 18: "De vi bonor. Raptorvm, sev rapina maritima et piratica et remediis pro ea coercenda ex edictis praeiorvm et constitvtionibvs imp. Competentibvs"]. On Mevius see: David Alvermann, 'David Mevius in Greifswald', in: Jörn Nils, ed., *David Mevius (1609 – 1670). Leben und Werk eines pommerschen Juristen von europäischem Rang* (Schriftenreihe der David-Mevius-Gesellschaft, 1) (Hamburg, 2007), pp. 11-30.

[293] Henning Wedderkop, *Introductio in ius nauticum* (Flensburg, 1757), book IV, title I, art. 9: "De Havaria", pp. 153-178 [further edn (Flensburg, 1759)].

[294] Adam of Bremen, *Kirchengeschichte* (note 162), "Descriptio insularum Aquilonis", chap. 3, p. 231; quoted in: Curicke, *Ius* (note 292), p. 208. Nerger, *Ope* (note 229), p. 15 = fol. B3^{r}: "Sicque res sese habet cum navibus ipsis, jactatae enim et expulsae errore itineris, vi aut tempestate in alienum portum, velut ad alienum praesidium confugientes, ex communi gentium jure fidam stationem habere libereque recedere solent, / Sive errore viae seu tempestatibus acti / (qualia multa mari natuae patiuntur in alto) / Fluminis intrastis ripas portuque sedetis / Ne fugite hospitium."

that had been put into effect in the name of Emperor Charles V in 1530. In an appendix to that code, the emperor had outlawed the practice of some territorial rulers, who had treated stranded shipwrecks as serfs and confiscated their property.[295]

7. From Unset Law of Hospitality to Positive International Law

The survey of the transformations of the law of hospitality displays deep impacts resulting from the abandonment of natural law and its partial replacement by positive international law. Historiographers of the Middle Ages had positioned the law of hospitality as a law of humankind ("ius humanitatis"), as seventeenth-and eighteenth-century authors of juristic literature took a stance against the positivist theory that the law of hospitality could be derived from Roman civil law. Instead, they argued that the law of hospitality consisted of unset "privileges" for guests derived from natural law.[296] They held these "privileges" to be benefitial for persons moving across long distances through space with reduced law-enforcement capacity and recognisable as performers of world-wide actions and actions with world-wide significance.[297] Reference was often made to the work of Tacitus, but also to the Ancient Roman *ius gentium*,[298] as evidence for the high age of the law of hospitality and interpreted the *ius gentium* as a complex of legal norms, which treated citizens different from guests and excluded the latter type of inhabiants from political participation rights.[299] Guest status was to be available only for persons not registered as resident citizens, not or not thoroghly knowledgeable in local territorial law while remaining at the place for a significant span of

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[295] Charles V., Roman Emperor, *Die peinliche Gerichtsordnung Kaiser Karls V. Constitutio criminalis Carolina*, § 218, edited by Joesef Kohler and Willy Scheel (Halle, 1900) [reprint (Aalen, 1968)], pp. 112-113: "Von myssprеuchen vnd pösen vnvernunfftigen gewonheiten, so an etlichen orthen vnd enden gehalten werden"; pp. 112-113: "Desgleichen an villen enden der myssprauch, So ein Schiffman mit seinem schif verferet, schiffbruchig wurde, das er alsdan der obrikeit desselben orts mit schiff, leib vnd guderen Verfallen sein soll." Curicke, *Ius* (note 287), p. 209. Nerger, *Ope* (note 229), p. 19 = fol. C^{r}, with the quote from Charles's order of criminal procedure.

[296] Adam of Bremen, *Kirchengeschichte* (note 162), "Descriptio insularum", chap. 21, p. 252: "studium vel certamen habeant inter illos, quis dignus sit recipere hospitem. Cui exhibens omnia iura humanitatis, quot diebus illic commemorari voluerit." Balthasar, *Dissertatio* (note 6), p. 7. Brunnemann, *Dissertatio* (note 7), § 7, fol. A 3^{r}. Gralath, *Exercitatio* (note 7). Solander, *Dissertatio* (note 180), p. 13, in this passage quoting from Adam's text. Tomassini, *Tesseris* (note 178), chap. 10, pp. 56-59: "Ius Hospitalitatis"; p. 58: "Iuris autem hospitalis caput erat Hospites ab aliena vi atque injuria defendere, praeuntibus etiam animamtibus iis quibus vis nulle rationis." Willenberg, *De judicio* (note 7), pp. 832-833. By contrast, Möller, *Dissertatio* (wie Anm. 6), traced the law of hospitality simultaneously back to Roman civil law and to Germanic law. Benedict Kingsbury and Benjamin Straumann, eds, *The Roman Foundations of the Law of Nations* (Oxford, 2010), do not consider these authors.

[297] Balthasar, *Dissertatio* (note 6), pp. 16-17, quoting from the Stralsund urban law of 1693: "Sie gebieten einem jeden, der mit Fremden oder Gästen Kauff-Handel treibet, daß er bezahle, damit keine Klage komme, dann einem jeden soll förderlichst zu Gastrecht verholfen werden." Fritsch, *Tractatus* (note 180). Gralath, *Exercitatio* (note 7). Ostermeyer, *Dissertatio* (note 163), fol. C 3^{r-v}. Schmid, *Dissertatio* (note 180). Tomasini, *Tesseris* (note 178), p. 41.

[298] Curicke, *Ius* (note 292), pp. 208-209; for the concept of *ius gentium* in Roman Antiquity see: Max Kaser, *Ius gentium* (Forschungen zum Römischen Recht, 40) (Cologne, Weimar and Vienna, 1993). On Tacitus see above, note 6.

[299] Gralath, *Exercitatio* (note 7), p. 19: "ipsae etiam leges Romanae, quae discrimina jurium inter cives et extraneos docent, decus fere et ornamentum civitatis in eo possum fuisse ostendunt, ut peregrini ab honoribus et muneribus non solum exclusi, verum etiam unoquoque jurium favore orbati censerentur."

time. Following the partial exemtion of traders and diplomats from the law of hospitality during the twelfth and the seventeenth centuries respectively, the impact of territory-bound legislation on the regulation of the status on migrants and travellers turned stronger from the later eighteenth century, gradually removing rules concerning the special status of guests and eventually subjecting them fully to territorial law.[300]

The weakening of the law of hospitality as regulator for global action and action with global significance contributed, in the context of the expansion of positivist international law, to answers to the question whether and, if so, under which circumstances, international legal norms could be considered to be valid all across the globe. Already Friedrich Schiller, in 1789, took the view that the inclusionistic applicability of the law of emergency rescue at sea was not to be expected; instead, he portrayed the world as an unsafe place und placatively described the dangers of shipwreck in remote waters; he accused non-European population groups, whom he denounced as "savages", of a lack of governmentality: "Always ready for attack and defense, frightened by every small noise, the savage stretches his shy ear towards the desert; everything new is enemy to him, and poor stranger, whom awkward weather throws upon his coast! There will be no accommodating hearth steaming for him, and no sweet law of hospitality will enjoy him. " (Immer zum Angriff und zur Vertheidigung gerüstet, von jedem Geräusch aufgeschreckt, reckt der Wilde sein scheues Ohr in die Wüste; Feind heißt ihm alles, was neu ist, und wehe dem Fremdling, den das Ungewitter an seine Küste schleudert! Kein wirthlicher Herd wird ihm rauchen, kein süßes Gastrecht ihn erfreuen.)[301] As long as the law of hospitality had been acknowledged as being capable of regulating migration and travel in spaces with reduced law-enforcement capacity, the world as a whole appeared to be perceivable as an integrated and ordered whole, wherein, as Wolff had postulated with his construct of the *civitas maxima*, universal legal norms were recognisable as valid even when and where they had been legislated through human activity, although they might not be enforceable. Hence, it had been possible and even common to expect that some legal norms, irrespective of their specific formulation

[300] Balthasar, *Dissertatio* (note 6), pp. 22-23. Gralath, *Exercitatio* (note 7), p. 21: "in sensu forensi unumquemqve eum designet, qui neque domicilium neque forum in eo loco habet, quo lis judicialis ipsi discutienda occurrit." Christoph Besold, *Thesaurus practicus*, new edn, edited by Christoph Ludwig Dietherr von Anwanden and Ahasver Fritsch, vol. 1 (Regensburg, 1740), pp. 328-330: "Gast, Gastgeber, Wirth, Tavern, Hospes, Caupo"; p. 330: "Gastrecht, Gastgericht oder erkaufft Gericht, judicium peregrinorum" [first edn, edited by Johann Jacob Speidel (Tübingen, 1628)]. Mevius, *Commentarii* (note 163),book I., title II, art. 2, pp. 93-100, at pp. 93, 95; book I, title III, art. 3, pp. 135-139, at pp. 135-136; book II, title II, art 12, pp. 391-395, at p. 393. On the rise of territial law see: Gralath, *Exercitatio* (note 7), pp. 24-25, referring to the territorial law of the Prussian provinces.

[301] Friedrich Schiller, 'Was heisst und zu welchem Ende studiert man Universalgeschichte? Eine akademische Antrittsrede [Mai 1789]', in: Schiller, *Werke. Nationalausgabe*, vol. 17: Historische Schriften, Teil 1, edited by Karl-Heinz Hahn (Weimar, 1970), pp. 359-376 [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].

in technical terms in various parts of the globe, were valid everywhere, with the implication that any person claiming the law of hospitality could act under the assumption that norms relating to that law existed everywhere. The total number of these legal norms was limited at that and mainly concerned with the concession of the possiblity of visiting places and, at the same time, recognising the right of residence together with the competence of hosts to subject guests to norms valid at places they were visiting. Should a guest desire the transformation of guest status into resident status by admission into the citizenry, regular procedures came into use with the end of establishing agreement about the conditions of the transfer.

When, however, the law of hospitality became overarched by positive international law during the nineteenth century, the world could only be considered to be ordered under the condition that positive international law came to be agreed upon as valid and enforced for global action and action of global effects everywhere. From then on, migrants and travellers moving across international borders of states appeared not just to operate in spaces with reduced law-enforcement capacity but in spaces bereft of any enforcement capacity, except where treaties had been concluded and were being honoured. But because most treaties among states were bilateral in kind, the particular stipulations that had been written into these agreements, had to be transferred into general legal norms through specific acts of legislation in the form of a distinct type of agreement of a higher order. When it came to decide about the validifcation of procedures, governments of sovereign states engaged in the making of these treaties of a higher order, mainly in Europe and North America, insisted on the application of European public law of treaties among states, which were the main engines of the globalisation of European international law at the time of the expansion of European and US colonial rule.[302] This process took place, first, in the form of the unilateral imposition of the European law of diplomatic intercourse together with the European law of trade and on the basis of usually bilateral treaties and reached the level of a multilateral treaties with the approval of the internation convention on salvage at sea. Within the perception of nineteenth-century European and US globalisers, there was, then, some form of legal pluralism,[303] which appeared to obstruct the validification of international legal norms on the globe at large and was to be overcome through the legislative activity of the club of states of the "Family of Nations". In short: positivists looked at the apparently anarchical international system as an arena that seemed to lend itself to global legal regulation only by way of the use of diplomatic pressure and military force. Legal theorists advocated their exclusion of the majority of the world's population, living in dependencies under

[302] For details see: Kleinschmidt, *Geschichte* (note 63), pp. 361-368.

[303] See above, note 181. And: Andreas Fischer-Lescano and Gunther Teubner, 'Fragmentierung des Weltrechts. Vernetzung globaler Regimes statt etatistischer Rechtseinheit', in: Mathias Albert and Rudolf Stichweh, eds, *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung* (Wiesbaden, 2007), pp. 37-61, at pp. 39-40.

European and US colonial control, from the application of international law with the concocted argument that population groups living in these dependencies purportedly did not have any "legal consciousness" or some consciousness that was incompatible with that of Europe. In this apparently anarchical international system, recourse to the law of hospitality had no place. Put differently: Only in this seemingly anarchical world was the expectation becoming naive that legal norms might be valid even without formal legislation. This expectation turned naive due to the firm belief of legal positivits that the enforcement of legal norms in the international arena was possible only by the use of the power of those governments into whose interests fell the globalisation of the house law of the "Family of Nations". Only after the world had come to be perceived as anarchical, could migration have become a political problem. Migration, thus, can only be regarded as controllable in the international arena on the basis of a type of international legal norms that do not just flow from state legislation, and thereby reveals the poverty of theories claiming exclusive validity for positive sources of international law.[304]

V. The Transformation of the Perception of Migration

1. Internal Attitudes of Migrating Persons vis-à-vis External Perspectives of Legislative and Administrative Institutions toward Migration

I define migrants as person who relocate their residence across a border of recognised significance, whereby migrants themselves determine the signifcance of that border, and residence shall be the place to which the movements of the day return. In what follows, I examine only the migration of persons who relocate their residence across long distances from their place of departure, no matter for what reasons and to what ends. Consequently, I do not distinguish conceptually between migrants and "refugees". At their destinations, migrants are guests for the time being, whereby their guest status may continue for a while and can even be inherited to subsequent generations. As non-citizens, migrants differ from registered settlers in legal terms. From the nineteenth century, the differences have usually been shaped through municipal immigration and nationality law.[305] Like many other

[304] Similarly: Samantha Besson, 'Die Autorität des Völkerrechts. Ein Blick unter die Schleier über den Staaten', in: Rainer Forst and Klaus Günther, eds, *Die Herausbildung normativer Ordnungen* (Normative Orders, 1) (Frankfurt and New York, 2011), pp. 167-225, at pp. 169, 219. Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions. The Vain Search for Legal Unity in the Fragmentation of Global Law', in: *Michigan Journal of International Law* 25 (2004), pp. 999-1046, at p. 1010: demand the abandoning of "the assumption that global law exclusively derives its validity from processes of State law-making and from state sanctions, where these derive from State internal sources of from officially sanctioned international sources of law.", and request recognition for a "concept of law to encompass norms lying beyond the legal sources of Nation-State and international law and, at the same time, to reformulate our concept of the regime." For the notion of legal pluralism see above, notes 181 and 303.

[305] In Germany: *Das Reichs- und Staatsangehörigkeitsgesetz vom 22. Juli 1913* [*Reichsgesetzblatt* (1913), p. 583].

people, migrants in this sense holders of personal and collective identities.[306] Overlaps between both types of identity promote the formation of various degrees of preference allocated to the one of the other type, both within migrants' perspectives of themselves and within external perspectives on migrants. Although not all moving persons must perceive of themselves as migrants, I assume, for the sake of simplicity, that, in cases of long-distance migrations, migrants do categorise themselves as such within their own perspectives and are simultaneously also being perceived as such. Whle on the move, migrants do not merely carry their personal and collective identities with them, are rather reluctant to change them under pressure, but also form multiple identities at their destinations.[307]

According to their own perspectives, migrants are likely to undertake the movements as integrated continuous processes of movements from their previous to their envisaged new places of residence. Border crossings themselves, albeit a necessary condition of migrations, do not effect transformations of the mix of personal and collective identities of migrants within their own perspectives. Within these perspectives, migrations end at the destinations, perhaps temporarily, but not at borders. Migrants do not have to perceive, let alone to accept, borders as demarcation lines, even when they are manifest in buildings, perhaps even fortified and make visible the limitations of spaces as semiospheres, and, hence, do not have to expect that borders can seriously obstruct their movements. Migration in these perspectives is not a movement from state to state, but from place to place, even when migrants before or in the course of their movements indicate a state as their destination. Migrants must eventually take up residence at a place somewhere and, most commonly, persons intending to migrate across long distances, have gathered information about possible destinations well ahead of the beginning of their movements. The establish networks or enter into them and, by doing so, acquire a high degree of autonomy, especially in the course of their movements. These networks also promote independence of decision-making, preparation and implementation of migration designs. Migrants thus imagine their doings in accordance with the

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Book-trade edn s. t.: *Reichs- und Staatsangehörigkeitsgesetz mit Nebenbestimmungen* (Berlin, 1913) [second edn (Munich and Berlin, 1960)], revised, 15 July 1999, latest revision, 28 October 2015. [http.//www.documentArchiv.de/ksr/reichs-staatsangehoerigkeitsgesetz.html]; *Ausländergesetz* [*Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet*], 28 April 1965, in: *Bundesgesetzblatt* (1965), I, p. 353; no longer in force since 1 January 2005.

306 However, from the 1930s, historical migration research has continued to postulate the primacy of collective identities over personal identities for migrants and to categorise specifically long-distance migrations as movements of collectives. See: Alexander Kulischer and Eugen Kulischer, *Kriegs- und Wanderzüge. Weltgeschichte als Völkerbewegung* (Berlin and Leipzig, 1932). Patrick Manning, *Migration in World History* (New York and London, 2005). Massimo Livi Bacci, *Kurze Geschichte der Migration* (Berlin, 2015), pp. 13-24 [first published (Bologna, 2010)].

307 See, among many: Nina Glick Schiller, Linda Basch and Cristina Blanc-Szanton, 'Transnationalismus. Ein neuer analytischer Rahmen zum Verständnis von Migration', in: Heinz Kleger, ed., *Transnationale Staatsbürgerschaft* (Frankfurt and New York, 1997), pp. 81-108 [first published in: *Annals of the New York Academy of Sciences* 645 (2006), pp. 1-24]. Nikos Papastergiadis, *The Turbulence of Migration. Globalization, Deterritorialization and Hybridity* (Cambridge, 2000).

concept of the guest in the sense of natutal law theory.[308]

Within perspectives of institutions in charge of administrating, legislating on and accompanying or even facilitating cross-border movements in their capacities as state and civil society organisations or as migration industries, migration takes a completely different shape. Within these perspectives, borders, which often have come to be established in consequence of military as well as political decisions, have been regulated authoritatively through legal norms, for instance treaties under international law, have taken a crucial role as merely apparently fixed demarcation lines that alter all significant coordinates of migration and have imposed upon resident populations what has been termed "cartographic anxiety".[309] Within these external perspectives, migration processes fall apart

[308] This supposition is supported for migrations to America from approximately 300 million emigrants' letters, which were exchanged between Europe and North America only during the nineteenth century, even though only a few have remained extant and even less are accessible in editions. For collections see: Arnold Barton, ed., *Letters from the Promised Land. Swedes in America. 1840 – 1914* (Minneapolis, 1975). Walter Kamphoefner, Wolfgang Helbich and Ulrike Sommer, eds, *News from the Land of Freedom* (Ithaca and London, 1991) [first published (Munich, 1988)], at p. 27 on the estimate of the numbers of emigrants' letters exhcanged. Witold Kula, Nina Assorodobraj-Kula and Marcus Kula, eds, *Writing Home. Immigrants in Brazil and the United States. 1890 – 1891* (East European Monographs, 210) (New York, 1986). Hedwig Rappolt, ed., *"Alles ist ganz anders hier". Auswandererschicksale in Briefen im 19. Jahrhundert* (Olten and Freiburg, 1977). Hansmartin Schwarzmaier, 'Auswandererbriefe aus Nordamerika', in: *Zeitschrift für die Geschichte des Oberrheins*. N. F., vol. 26 (1978), pp. 303-369. Marie-Louis Seidenfaden, ed., *"Wir ziehen nach Amerika". Briefe Odenwälder Auswanderer aus den Jahren 1830-1833* (Schriftenreihe des Museums Schloss Lichtenberg, 8) (Renheim, 1987). George E. Hargest, *History of Letter Communication between the United States and Europe. 1845 – 1875* (Smithsonian Studies in History and Technology, 6) (Washington, 1971). Wolfgang Helbich and Ulrike Sommer, 'Immigrant Letters as Sources', in: Christiane Harzig and Dirk Hoerder, eds, *The Press of Labor Migrants in Europe and North America* (Bremen, 1985), pp. 39-59. On the concept of semiospheres and of the perspectivity of boundaries see: Jurij Michailovič Lotman, 'The Semiophere', in: Lotman, *Universe of the Mind* (London and New York, 1990), pp. 121-214, esp. pp. 131-142: "The Notion of the Boundary"; at p. 133: "The outside world, in which a human being is immersed in order to become culturally signifcant, is subject to semioticization, i. e. it is divided into the domain of objects which signify, symbolise, indicate something (have meaning), and objects which simply are themselves."; pp. 136-137: "But the hottest spots for semioticizing processes are the boundaries of the semiosphere. The notion of boundary is an ambivalent one: it both separates and unites. It is always the boundary of somethiong and belongs to both frontier cultures, to both contiguous semiospheres. The boundary is bilingual and polylingual. The boundary is a mechanism for translating texts of an alien semiotics into ‚our' language, it is the place // where what is ‚external' is transformed into what is 'internal', it is a filtering membran which so transforms foreign texts that they becomne part of the semiosphere's internal semiotics while still retaining their own characteristics." Lotman, 'On the Semiosphere', in: *Sign Systems Studies* 33 (2005), pp. 215-239; [first published (1984); German version in: *Zeitschrift für Semiotik*, vol. 12, nr 4 (1990), pp. 287-305]. Kilian Heck, *Genealogie als Monument und Argument. Der Beitrag dynastischer Wappen zur politischen Raumbildung* (Kunstwissenschaftliche Studien, 98) (Munich, 2002), pp. 81-82. Heck, 'Die Ahnen formen den Raum. Dispositive in der Architektur um 1500', in: Dieter Boschung and Julian Jachmann, eds, *Diagrammatik der Architektur* (Cologne, 2013), pp. 286-306.

[309] However, even though research in the conceptual history of borders has for a long time, and against the positivism prevailing from the early twentieth century, pointed to the constructivity of borders as devices of connection as well as separation, the evidence presented has hardly entered political discourse. Among the more powerful positivist positions, see: Georg Simmel, *Soziologie* (Leipzig, 1908) [newly edited in: Simmel, *Gesamtausgabe*, vol. 11, edited by Otthein Rammstedt (Frankfurt, 1992); pp. 687-790: "Der Raum und die räumlichen Ordnungen der Gesellschaft", at p. 697: "Die Grenze ist nicht eine räumliche Tatsache mit soziologischen Wirkngen, sondern eine soziologische Tatsache, die sich räumlich formt." Robert Hartshorne, 'Suggestions on the Terminology of Political Boundaries', in: *Annals of the Association of American Geographers* 26 (1936), pp. 56-57 [who proposed to distinguish among "antecedent", "subsequent", "superimposed" und "natural boundaries" and used the type of border-setting group or institution as the distinguishing criterion, but completely excluded aspects of perception]. Samuel Whittemore Boggs, *International Boundaries. A Study of Functions and Problems* (New York, 1940). E.

Wendl, ‘Völker, Staaten und Grenzen. Eine Skizze über die kulturelle und rechtliche Bedeutung von Souveränität und Territorium’, in: Malcolm Anderson and Eberhard Bort, eds, *Boundaries and Identities. The Eastern Frontier of the European Union* (Edinburgh, 1996), pp. 92-101, at p. 92 with the archaically determinist and, at the same time, exclusionist definition of borders as those “territorial determinations, within which rule is given, but beyond which either nor rule at all or a different rule exists” (territorialen Bestimmungen, innerhalb deren Herrschaft gegeben ist, außerhalb derer entweder keine oder eine andere Herrschaft existiert). Likewise: Peter Schmitt-Egner, *Handbuch zur europäischen Regionalismusforschung. Theoretisch-methodische Grundlagen, empirische Erscheinungsformen und strategische Optionen des Transnationalen Regionalismus im 21. Jahrhundert* (Wiesbaden, 2005), p. 77, who defined border as “a constructed barrier encompassing and separating alike spaces and systems and can only be overcome under certain conditions” (eine konstruierte Barriere, die Raumeinheiten sowie Systeme ebenso umfasst wie trennt und nur unter bestimmten Bedingungen überwunden werden kann.) [also in: Schmitt-Egner, ‘Die grenzüberschreitende Zusammenarbeit von Regionen in Europa’, in: *Revue des études d’Allemagne* 22 (2001), pp. 339-361, at p. 343]. With his definintion, Schmitt-Egner linked border crossing with procedures of authorising trespass through state institutions, in accordance with Jellinek’s concept of the state and would not grant any influence of perceptions by border-crossing persons upon the definition of borders. From the 1990s, the same close link with Jellinek’s concept of the state has featured in arguments about some “cartographic anxiety”, emerging from linearly demarcated state territories and population groups residing on them and preventing the rise of one single recognised collective identity within each populaton group in each state territory. On the concept of “cartographic anxiety” see: Derek Gregory, *Geographical Imaginations* (Oxford and Cambridge, MA, 1994), pp. 34-51, 70-201 [reprints (Oxcford and Cambridge, MA, 1996; 1998)]. Sankaran Krishna, ‘Cartographic Anxiety. Mapping the Body Politic of India’, in: *Alternatives* 19 (1994), pp. 507-521, at p. 508: cartography = “the social and political product of nationality. ... In a postcolonial society such as India, the anxiety surrounding questions of national identity and survival is particularly acute.” Mezzadra (see below), pp. IX, 4, 6. For the history of borders and border regimes see: Jacques Ancel, ‘L’évolution de la notion de frontière’, in: *VIIe congrès international des sciences historiques* (Warsaw, 1933), pp. 538-554. Malcolm Anderson, *Frontiers. Territory and State Formation in the Modern World* (Cambridge, 1996), pp. 12-36: “The International Frontier in Historical and Theoretical Perspective”. Karl Siegfried Bader, ed., *Grenzrecht und Grenzzeichen* (Freiburg, 1940). Markus Bauer and Thomas Rahn, eds, *Die Grenze. Begriff und Inszenierung* (Berlin, 1997). Etienne Balibar, ‘What is a Border?’, in: Balibar, *Politics and the Other Scene* (London, 2002) [first published in: Balibar, *La crainte des masses* (Paris, 1997)], p. 76: “Every discussion of borders relates, precisely, to the establishment of definite identities, national or otherwise. Now, it is certain that there *are* identities – or, rather, identifications – which are, to varying degrees, active and passive, voluntary and imposed, individual and collective. Their multiplicity, their hypothetical and fictive nature does not make them any less real.”; pp. 78-79: “I shall briefly touch on three major aspects of the equivocal character of borders in history. The first I shall term their *overdetermination*. The second // is their *polysemic character* – that is to say, the fact that borders never exist in the same way for individuals belonging to different social groups. The third aspect is their *heterogeneity* – in other words, the fact that, in reality, several functions of demarcation and territorialization – between distinct social exchanges or flows between distinct rights, and so forth – are always fulfilled simultaneously by borders.”; p. 79: “It is less often known that no political border is ever the mere boundary between two states, but is always *over*determined and, in that sense, sanctioned, reduplicated and relativized by other geopolitical divisions.” Balibar, ‘World Borders, Political Borders [Lecture delivered in Aristotle-University Thessaloniki, 4 October 1999]’, in: *Publications of the Modern Language Association of America* 111 (2002), pp. 71-78 [first published in: *Transeuropéennes* 17 (1999/2000)]. André Bazzana, ‘El concepto de frontera en el Mediterráneo occidental en la Edad Media’, in: Pedro Segura Artero, ed., *Actas del Congreso ‘La Frontera Oriental Nazarí como sujeto histórico’ (s. XIII – XVI). 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Jean Daniel Chaussier, ‘La frontière devant ses limites. Transgressions et recomposition’, in: Maïté Lafourcade, ed., *La frontière des origines à nos jours. Actes des journées de la Société internationale d’histoire du droit* (Talence, 1998), pp. 5-25. Giles Constable, ‘Frontiers in the Middle Ages’, in: Outi Merisalo and Päivi Pahta, eds, *Frontiers in the Middle Ages* (Louvain-la-Neuve, 2006), pp. 3-28. Anthony Cooper and Chris Perkins, ‘Borders and Status-Functions. An Institutional Approach to the Study of Borders’, in: *European Journal of Social Theory* 15 (2012), pp. 55-71. Cooper and Perkins, ‘Mobile

Borders / Bordering Mobility. Status-Functions, Contemporary State Bordering Practices and Implications for Resistance and Intervention', in: Catarina Kinnvall and Ted Svensson, eds, *Governing Borders and Security. The Politics of Connectivity and Dispersal* (London and New York, 2013), pp. 14-32. Hastings Donnan and Thomas M. Wilson, eds, *Border Approaches. Anthropological Perspectives on Frontiers* (Lanham, MD, 1994). Jean Baptiste Duroselle, 'Les frontières. Vision historique. Colloque 1990', in: *Relations internationales* 63 (1990), pp. 225-328. Lucien Fèbvre, *La terre et l'évolution humaine* (Paris, 1949) [zuersfirst published (Paris, 1922)]. Fèbvre, 'Frontière. The Word and the Concept', in: Fèbvre, *A New Kind of History. From the Writings of Fèbvre*, edited by Peter Burke (London, 1973), pp. 208-218. 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Zu den Begriffen "Mark" und "Gemarkung" in den Leges barbarorum', in: Heinrich Beck, Dietrich Denecke and Herbert Jankuhn, eds, *Untersuchungen zur eisenzeitlichen und frühmittelalterlichen Flur in Mitteleuropa und ihrer Nutzung* (Abhandlungen der Akademie der Wissenschaften zu

into two classes of movements, that of the emigration from the territory of a state and that of the immigration onto the territory of another state.[310] When crossing international borders of states, migrants, according to these external perspectives, change their legal status from that of emigrants to that of immigrants. State and non-state institutions in charge of migration differ, pending on which side of a borders migrants just happen to be, whereby, again for the sake of simplicity, I pass over the special problematique of third-country transit. As a rule, legislative and administrative institutions of the statte of emigration and the state of immigration do not cooperate with regard to ordinary international migrants. As elements of municipal law, legal norms relating to migration are often not compatible with legal norms regulating immigration again in terms of municipal law. Moreover, within the external perspectives, migrants' collective identities take priority over migrants' personal identity, whereby commonly the collective identity that has been entered into a migrant's passport is deemed to hold legal significance alone and pluralist conceptions of collective identities are ignored except in cases of the admission of dual nationality. Even recent research transcending positivist limitations, some "national idea", introduced under the postulate of the applicability of the concept of the nation-state, is serving as the dominant formative factor of collective identity.[311] Moreover,

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Göttingen, Philol.-Hist. Kl. 3. F., vol. 115) (Göttingen, 1979), pp. 74-91 [reprinted in: Schmidt-Wiegand, *Stammesrecht und Volkssprache*, edited by Dagmar Hüpper and Clausdieter Schott (Weinheim, 1991), pp. 335-352]. Reinhard Schneider, 'Grenzen und Grenzziehung im Mittelalter', in: Wolfgang Brücher and Peter Robert Franke, eds, *Probleme von Grenzregionen* (Saarbrücken, 1987), pp. 9-27. Antonio Truyol y Serra, 'Las fronteras y las marcas', in: *Revista española de derecho internacional* 10 (1957), pp. 105-123. Frank Vanderweghe, *Marques typographiques employées aux XVe et XVIe siècles dans les limites géographiques de la Belgique actuelle* (Nieuwkoop, 1993). The contention David Newman's (as above, 2006) that the perspectivity of borders should have become recognised in academic discourse only during the past fifteen to twenty years is difficult to accept in view of the massive body of research in the history of the concept of the border. Cooper and Perkins (as above, 2012), using speeach act theory, do point into the right direction, when they seek to explain border-setting activities. However, in defining border as a "form of sorting through the imposition of status-functions on people and things", they expand their concept of border to such an extent that it becomes unclear what cannot be a border. Moreover, in adhering to a functionalist terminology, they remain on beaten tracks and do not expect that border can not just be perceived in various ways, but can also be set through manifest action by migrants.

[310] On the questionability of the juxtaposition of emigration against immigration see: Anthony Fielding, 'Migration and Culture', in: Tony Champion and Fielding, eds, *Migration Processes and Patterns*, vol. 1 (London, 1992), pp. 201-214. Fielding, 'Migrations, Institutions and Politics. The Evolution of European Migration Policies', in: Russell King, ed., *Mass Migrations in Europe. The Legacy and the Future* (London, 1993), pp. 40-62. Aristide R. Zolberg, 'International Migration in Political Perspective', in: Mary M. Kritz, Charles B. Keely and Silvano M. Tomasi, eds, *Global Trends in Migration* (Staten Island, 1981), pp. 3-27.

[311] On the "national idea" see Paasi, *Territories* (note 309), pp. 39-61. On problems ofthe so-called "transnational citizenship" and the "transnational social spaces" see: Rainer Bauböck, ed., *Transnational Citizenship. Membership and Rights in International Migration* (Aldershot, 1994). Juan M. Delgado-Moreira, *Multicultural Citizenship of the European Union* (Aldershot, 2000). Jost Halfmann, 'Citizenship Universalism, Migration and the Risks of Exclusion', in: *British Journal of Sociology* 49 (1998), pp. 513-533. David Jacobson, *Rights across Borders. Immigration and the Decline of Citizenship* (Baltimore, 1996). Heinz Kleger, *Transnationale Staatsbürgerschaft* (Frankfurt, 1997). Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford, 1995) [new edn (Oxford, 1996)]. Ludger Pries, 'Transnationale soziale Räume. Theoretisch-empirische Skizze am Beispiel der Arbeitswanderungen Mexiko – USA', in: Ulrich Beck, ed., *Perspektiven der Weltgesellschaft* (Frankfurt, 1998), pp. 55-86. Peter H. Schuck, *Citizens, Strangers and In-Betweens. Essays on Immigration and Citizenship* (Boulder, 1998). Yasemin Nuhoğlu Soysal, 'Citizenship and Identity. Living in Diasporas in Post-War Europe', in: *Ethnic and Racial Studies* 23 (1999), pp. 1-15. Charles Westin, 'Temporal and Spatial Aspects of Multiculturality. Reflections on the Meaning of Time and Space in Relation to the Blurred Boundaries of Multicultural Societies', in: Rainer Bauböck and John Rundell, ed., Blurred

collective identities credited with legal relevance have been categorised as state nationality from the nineteenth century, with the capability of authoritatively determining the criteria for the acquisition of nationaliy has been recognised as one of the hallmarks of state sovereignty.[312] This capability has been postulated even when and where individual migrants, for themselves, reject the nationality imposed upon them or at least do not regard it as the only type of collective identity relevant for them.[313] Moreover, legal norms set to regulate migration, have often been shaped by the residentialist assumption that sedentary behaviour is the "normal" and migration the deviating pattern, the latter seemingly demanding the provision of specific motives on the side of migrants. This assumption comes along together with the widespread biologistic idea that migrating persons, after departing from their state of origin, should cut all ties with their previous communities and should take new "roots" at their destinations, and this idea has persisted against the long-known migrant practice of keeping more or less close ties with relatives and friends left behind at their original homes.[314] Last but not least, external perspectives on migration have continued to embrace a

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Boundaries. Migration, Ethnicity, Citizenship (Aldershot, 1998), pp. 53-84.

[312] For the distinction between "nationality" and "citizenship" in the USA and some other states see: T. Alexander Aleinikoff, *Between Principles and Politics. The Direction of U.S. Citizenship Policy* (Washington, 1998). Ders. and Douglas B. Klusmeyer, eds, *From Migrants to Citizens* (Washington, 2000). Aleinikoff and Klusmeyer , eds, *Citizenship Today* (Washington, 2001). Jack M. Barbalet, *Citizenship* (Milton Keynes, 1988). William A. Barbieri, Jr, *Ethics of Citizenship* (Durham, NC, 1998). Ronald Beiner, ed., *Theorizing Citizenship* (Albany, 1993). George J. Borjas, *Heaven's Door. Immigration Policy and the American Economy* (Princeton, 1999). Stephen Castles and Alastair Davidson, Citizenship and Migration (London, 2000). Paul Barry Clarke, ed., *Citizenship* (London, 1994). Thomas Faist, 'Transnationalization in International Migration. Implications for the Study of Citizenship and Culture', in: *Ethnic and Racial Studies* 23 (2000), pp. 189-222. Herman R. van Gunsteren, *A Theory of Citizenship* (Oxford, 1998). Tomas Hammar, *Democracy and the Nation-State. Aliens, Denizens and Citizens in a World of International Migration* (Aldershot, 1990). Derek Heater, *Citizenship. The Civic Ideal in World History, Politics and Education* (London and New York, 1990). Atsushi Kondo, ed., Citizenship in a Global World (Basingstoke, 2001). David Miller, *Citizenship and National Identity* (Cambridge, 2000). Tharrileth K. Oommen, *Citizenship and National Identity from Colonialism to Globalism* (New Delhi, 1997). Aihwa Ong, 'Splintering Cosmoplitanism. Asian Immigrants and Zones of Autonomy in the American West', in: Thomas Blom and Finn Stepputat, eds, *Sovereign Bodies. Citizens, Migrants and States in the Postcolonial World* (Princeton and Oxford, 2005), pp. 257-275. Noah Pickus, ed., *Immigration and Citizenship in the 21st Century* (Lanham, 1998). Peter H. Schuck and Rainer Münz, eds, *Paths to Inclusion. The Integration of Migrants in the United States and Germany* (Migration and Refugees, 5) (New York and Oxford, 1998). Judith N. Shklar, *American Citizenship. The Quest for Inclusion* (Cambridge, MA, and London, 1991) new edn (Cambridge, MA, and London, 1995)]. Jeff Spinner, *The Boundaries of Citizenship. Race, Ethnicity and Nationality in the Liberal State* (Baltimore and London, 1994) [new edn (Baltimore and London, 1996)]. Bryan S. Turner, 'Outline of a Theory of Citizenship', in: *Sociology* 24 (1990), pp. 189-217.

[313] On the case of Kurds with Turkish nationality, residing outside the state territory of Turley, see: Andreas Blätte, 'The Kurdish Movement. Ethnic Mobilization and Europeanization', in: Harald Kleinschmidt, ed., *Migration, Regional Integration and Human Security. The Formation and Maintenance of Transnational Spaces* (Aldershot, 2006), pp. 181-202.

[314] On the continuity of this theory well into the twentieth century and the criticism of it see: Oscar Handlin, *The Uprooted. The Epic Story of the Great Migrations That Made the American People* (Boston, 1951) [second edn (Boston, 1973); reprint (Boston, 1990)]. Michael Marrus, 'The Uprooted. An Historical Perspective', in: Göran Rystad, ed., *The Uprooted. Forced Migration as an International Problem in the Postwar Era* (Lund, 1990), pp. 47-57. Khalid Koser, 'Refugees, Transnationalism and the State', in: *Journal of Ethnic and Migration Studies* 12 (2007), pp. 233-254. Maja Zwick, 'Transnationale Migration. Eine dauerhafte Perspektive. Saharauische Flüchtlinge zwischen agency und vulnerability', in: *Peripherie* 138/139 (2015), pp. 260-280, at p. 280. Surveys on migration theory are in: Caroline B. Brettell and James F. Hollifield, eds, *Migration Theory. Talking Across Disciplines* (New York and London, 2000). Tomas Hammar, 'Why Do People Go or Stay?', in: Hammar, Grete

number of conventional postulates about migration motives, mainly the so-called "push and pull"-factors, extending back to nineteenth century traditions of migration theory.[315] These ascribed motives are often incompatible with those stated by migrants, when asked about their motives before the beginning of their movements.[316] Thus from the turn towards the nineteenth century, state authorities have made efforts to grasp migration by means of statistical data they created, without however correlating these data with the internal perspectives of migrants themselves. Consequently, the sheer mass of data assembled through statistical calculations has, from the late nineteenth century at the latest, boosted the government perception that immigration frequency was dramatically increasing, that immigration, in its own right, contributed to some "interweaving among states", that meant, a reduction of state sovereignty, as well as to some "mass influx" and intensified the anxiety that immigration might neither be controllable nor even stoppable. Migrants then were no longer perceived as guests but als foreigners, who were either to be turned away or become integrated.[317]

Brochmann, Kristof Tamas and Thomas Faist, eds, *International Migration, Immobility and Development* (Oxford and New York, 1997), pp. 1-19. Timothy J. Hatton and Jeffrey G. Williams, *The Age of Mass Migration. Causes and Economic Impact* (New York and Oxford, 1998). Russell King, 'Why do People Migrate? The Geography of Departure', in: King, ed., *The New Geography of European Migration* (London and New York, 1993), pp. 17-46. P. Neal Ritchey, 'Explanations of Migration', in: *Annual Review of Sociology* 2 (1976), pp. 363-404.

[315] On "push and pull"-factors, mainly the categorisation of migrants as paupers, see: Charlotte Erickson, 'Depression Emigrants. Who Went Where from the British Isles in 1841', in: Erickson, *Leaving England. Essays on British Emigration in the Nineteenth Century* (Ithaca and London, 1994), pp. 167-208. Robin Haines, 'Shovelling out Paupers? Parish-Assisted Emigration from England to Australia. 1834 – 1847', in: Eric Richards, ed., *Poor Australian Immigrants in the Nineteenth Century* (Visible Immigrants, 2) (Canberra, 1991), pp. 33-67. Christiane Hansen, 'Die deutsche Auswanderung im 19. Jahrhundert. Ein Mittel zur Lösung sozialer und sozialpolitischer Probleme', in: Günter Moltmann, ed., *Deutsche Auswanderung im 19. Jahrhundert* (Stuttgart, 1976), pp. 8-61. Eric Richards, 'How did Poor People Emigrate from the British Isles to Australia in the Nineteenth Century?', in: *Journal of British Studies* 32 (1993), pp. 250-279. Richards, 'Emigration to the New Worlds. Emigration Systems in the Early Nineteenth Century', in: *Australian Journal of Politics and History* 44 (1995), pp. 391-407. Currently, the theory is commonly referred to as "theory of economic migration": Roger Zetter, 'More Labels, Fewer Refugees. Remaking the Refugee Label in the Era of Globalization', in: *Journal of Refugee Sudies* 20 (2007), pp. 172-192.

[316] This has happened rather rarely. Yet see for an early example: Friedrich List, [Protocols of Interviews of Potential Emigrants; Ms. City of Reutlingen: List-Archiv, Faszikel 2,4], in: Günter Moltmann, ed., *Aufbruch nach Amerika. Die Auswanderungswelle von 1816/17*, second edn (Stuttgart, 1989), Document 15, pp. 128-166 [first published (Tübingen, 1979)].

[317] Albert Eberhard Friedrich Schäffle, *Bau und Leben des socialen Körpers*, vol. 4, part 2 (Tübingen, 1881), pp. 221-222: "Die Einwohnerschaft zerfällt staatsrechtlich in zwei Theile, die Staatsangehörigen (Staatsbürger oder Einheimische) und Fremde. Die Staatsangehörigkeit beruht entweder auf der Abstamung von Staatsangehörigen, was die Eingeborenen (Indigenat i[m] e[ngeren] S[inn]) ergiebt, oder auf der Ertheilung des Staatsbürgerrechtes an Ausländer, d. h. durch Naturalisation. ... Auch die Fremden sind als Einwohner der Staatshoheit des ihnen fremden Staates für ihr Thun und Lassen auf fremdem Gebiet unterworfen und werden, da sie an den Wohlthaten des fremden Staates Antheil haben, auch seinen Lasten und Steuern mehr und mehr unterworfen. Allem Anscheine nach wird, gegenüber dem wachsenden Procentsaz der staatsfremden Bevölkerung das öffentliche Recht der Zukunft schwierige Aufgaben bezüglich der Behandlung der Fremden zu bewältigen haben. Vielleicht kommt es bald zur Verabredung einer völkerrechtlichen Institution, die der zwingenden Ersizung des Wohngemeindebürgerrechtes in unserem neueren Gemeinderecht ähnlich ist (Naturalisationszwang). Dann würde die Fremdenfluctuation erst recht als einer der stärksten Kettenfäden für die steigende internationale Verwebung der Staaten wirken." In even more dramatic terms, the following sociologist lent expression to his fears of negative consequences of migration: Herman Schmalenbach, 'Die soziologische Kategorie des Bundes', in: *Die Dioskuren* 1 (1922), pp. 35-105, at p. 100: "'Altertum': Das ist die Zeit, da die Völker noch wandern; schweifend über die

The survey shows that there has been a wide gap between migrants' own perspectives of their doings and the external perspectives of institutions regulating, observing, supporting and facilitating migration. Cast into rough categorical terms, migrants' own perspectives on their doings have featured essential elements of the law of hospitality as part of natural law and strenghtened inclusionistic as well as multiple identity-preserving goals migrants seek to accomplish. By contrast, within the external, institutional perspectives, elements have taken charge, pertaining mainly to positive municipal and aimed at imposing legal distinctions between migrants and residents together with the exclusion of as many immigrants from the group of potential new residents. These categorical differences have further increased in intensity by the attitudes of adherents to external perspectives, who have commonly refused to take notice of the differences between their and the pesprctives of the migrants themselves. The differences of perspectives may entail conflicts that can turn violent.

2. Changes of Types of Conflict about Migration

Conflics about migration are nothing new. However, the causes and types of occurrences have changed, which have entailed conflicts of migration. Prior to the nineteenth century, the lack of compatibility between migrants' own perspectives and external perspectives led to conflicts; instead, infringements upon the law of hospitality in the form of the denial of the right of residence of settlers

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Erde ziehen. Wo auch während der kurzen Rasten Kriegsfahrt und Beutezug der allsommerliche Inhalt des Lebens sind, wenigstens für die Jugend. Wo 'Gemeinschafts'-Verbände von auch nur einiger Dauer sich nicht bilden können. Wo Gefolgschaftswesen die bestimmende soziale Erscheinung ist. Wo das gesamte Dasein sich be alledem, obwohl die 'Bräuche' noch flackern und leicht wechseln, durchaus als religiöses, mit Religion geladenes Geschehenes vollzieht [following the example of some "äolischen Ur-Homer"]."; p. 102: "Auf die 'Neuzeit' folgt schliesslich die 'Spätzeit'. Sehr allmählich (obwohl wieder: nicht 'kontinuierlich') wandelt sich in sie die 'Neuzeit' um. Nur erst die frühesten Zeichen bezeugen ihre Heraufkunft auch bei uns. Doch die Antike belehrt."; S. 104: „Söldnerscharen, die, aus allen Völkern der Erde zusammengelaufen, von den einen Grenzen des Reiches zu den andren ziehen, hart gestraffte Legionen, wenn es 'gilt', sonst zügellos raufende Banden, die bald ihre Feldherrn ermorden, bald sie zu Kaisern ausrufen."; p. 105: "Am Ende sind auch die äusseren Gefüge mehr und mehr zerrüttet. Die Barbaren brechen in geschlossenen Massen herein. 'Bund'-hafte 'Spätzeit' und 'bund'haftes 'Altertum' mischen sich in nun noch letztem 'Synkretismus', worin dann das Blut sich für die einen erneut, für die andren geschmeidig wird." Fears of immigration, clad into the imagery of natural desasters and consociated with massive flows of water resurfaced recently in the decision by the European Council in its "Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting the a Balance of Efforts between Member States in Receiving Such Persons annd Bearing the Consequences Thereof" (2001/55/EG), dated 20 July 2001 [eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32001L0055]. The rhetoric of "mass influx" was taken over into the Lisbon Treaty of the EU (see below, note 396). And, recently, restated emphatically in academic diction in: Bacci, *Geschichte* (note 306), p. 15, who, using examples from prehistoric archaeology, traced the dissemination of the neolithic revolution to some wave of migration. Similarly: Münkler, *Deutschen* (note 5), pp. 120-124, who, in the context of a discussion of migration, employ the phraseology of "streams" (Strömen), "waves" (Wellen), "locks" (Schleusen) and speculate about some purported "crowding-in effect" (Sogeffekt), even defend their imagery with the argument that the metaphors should make intelligible the alleged "fluidity" (Fluidität) of migration, while they unaffectedly bow to the terminology of catastrophes and allow migrants to become merged into a seemingly destructive amorphous mass.

at destinations of migration often resulted in violence. Such cases of harsh and massive infringements upon the law of hospitality have repeatedly come on record from Late Antiquity. The settlement of population groups of central and northern European origin, increasing on the territory of the Roman Empire from the fourth century, took place in the majority of cases on the auspices of the law of hospitality, according to which mainly soldiers recruited into the services of the Roman arny, such as in Britain, were given federate status and entitlement to preserve their established collective identities.[318] In the course of the fifth century, then, the number of violations of the law of hospitality came about, as soldiers, for example in Britain, revolted, claim rights of self-government for themselves and finally imposed themselves as rulers by their own law over stretches of territory of the Roman Empire.[319] The first crusade forms another case, which Occidental warriors, together

[318] The theory that migration resulted in federate settlements goes back to the nineteenth century. See: Ernst Theodor Gaupp, *Die germanischen Ansiedlungen und Landtheilungen in den Provinzen des Römischen Westreiches in ihrer völkerrechtlichen Eigenthümlichkeit und mit Rücksicht auf verwandte Erscheinungen der alten Welt und des späteren Mittelalters dargestellt* (Breslau, 1844) [reprint (Aalen, 1962)], beso. P. 540. Adolf Friedrich Heinrich Schaumann, 'Zur Geschichte der Eroberung Englands durch germanische Stämme', in: *Göttinger Studien* 1 (1845), pp. 3-49, at pp. 36-37 [also published separately]. Recently, the theory has been revisited and modified by: Jean Durliat, 'Le salaire de la paix sociale dans les royaumes barbares (Ve – Vie siècles)', in: Herwig Wolfram and Andreas Schwarcz, eds, *Anerkennung und Integration. Zu den wirtschaftlichen Grundlagen der Völkerwanderungszeit. 400 – 600. Berichte des Symposiums der Kommission für Frühmittelalterforschung, 7. – 9. Mai 1986, Stift Zwettl, Niederösterreich* (Denkschriften der Österreichischen Akademie der Wissenschaften, Philos.-Hist. Kl. 193 = Veröffentlichungen der Kommission für Frühmittelalterforschung, 11) (Wien, 1988), S. 21-72. Durliat, 'Armée et société vers 600. Le problème des soldes', in: Françoise Vallet and Michel Kazanski, eds *L'armée romaine et les barbares du IIIe au VIIe siecle* (Mémoires publiées par l'Association Française d'Archéologie Mérovingienne, 5) (Rouen, 1993), pp. 31-238. Durliat, 'Cité, impôt et integration des Barbares', in: Walter Pohl, ed., *Kingdoms and Empire. The Integration of Barbarians in Late Antiquity* (The Transformation of the Roman World, 1) (Leiden, Boston and Cologne, 1997), pp. 153-179. Walter André Goffart, *Barbarians and Romans. A. D. 418 – 584. The Techniques of Accommodation* (Princeton, 1980), pp. 206-234. Goffart, Rome, 'Constantinople and the Barbarians', in: *American Historical Review* 86 (1981), pp. 275-306. Goffart, 'After the Zwettl Conference. Comments on "The Techniques of Accommodation"', in: Wolfram (wie oben), pp. 73-85. Goffart, 'The Theme of "The Barbarian Invasions" in Late Antique and Modern Historiography', in: Evangelos Chrysos and Andreas Schwarcz, eds, *Das Reich und die Barbaren* (Veröffentlichungen des Instituts für Österreichische Geschichtsforschung, 29) (Vienna, 1989), pp. 87-107 [reprinted in: Goffart, *Rome's Fall and After* (London and Ronceverte, WV, 1989), pp. 111-132]. Rommel Krieger, *Untersuchungen und Hypothesen zur Ansiedlung der Westgoten, Burgunder und Ostgoten* (Europäische Hochschulschriften. Series 3, vol. 516) (Bern, 1992). Roland Steinacher, *Die Vandalen* (Stuttgart, 2016), pp. 103-205. Chris Wickham, *Framing the Early Middle Ages* (Oxford, 2005), pp. 80-124. Herwig Wolfram, 'Die Aufnahme germanischer Völker ins Römerreich', in: *Popoli e paesi nella cultura altomedioevale* (Settimane di studio del Centro Italiano de Studi sull' Altomedioevo, 29) (Spoleto, 1983), pp. 87-117. Wolfram, 'Die dauerhafte Ansiedlung der Goten auf römischem Boden. Eine endlose Geschichte', in: *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 112 (2004) pp. 11-35 [reprinted in: Wolfram, *Gotische Studien. Volk und Herrschaft im frühen Mittelalter* (Munich, 2005), pp. 174-206].

[319] The argument in the theory of the mercenary (or federate) revolt for Britain is drawn a remark in the so-called Gallican Chronicle, reporting, for the year 441, that the "Roman Britains" have fallen under Saxon control.. See: 'Gallikanische Chronik', edited by Theodor Mommsen, *Chronica minora saec[ulorum] IV. V. VI. VII*, vol. 1 (Monumenta Germanie Historica, Auctores antiquissimi, 9) (Berlin, 1892), pp. 646-666, at pp. 654, 660, 661 [newly edited by Richard W. Burgess, 'The Gallic Chronicle of 452. The Gallic Chronicle of 511', in: Ralph W. Mathisen and Danuta Shanzer, eds, *Society and Culture in Late Antique Gaul* (Aldershot, 2001), pp. 85-100, at pp. 79-80, 97]. Gildas, *De excidio et conquestu Britanniae*, chap. 23, edited by Michael Winterbottom (Arthurian Period Sources, 7) (Chichester, 1978), p. 97. On the theory and the evidence see: Krystyna Bilikowska, 'The Anglo-Saxon Settlement of Bedfordshire', in: *Bedfordshire Archaeological Journal* 14 (1980), pp. 25-38. Horst Wolfgang Böhme, 'Das Ende der Römerherrschaft in Britannien und die angelsächsische Besiedlung Englands im 5. Jahrhundert', in: *Jahrbuch des Römisch-Germanischen Zentralmuseums Mainz* 33 (1986), pp. 469-574. Vera Ivy Evison, 'Quoit Brooch Style Buckles', in: *Antiquaries* Journal 48 (1968), pp. 231-246. Charles Francis Christopher

with accompanying grups of non-combattants, conducted under the goal of conquering, occupying and settling Palestine, which, in Occidental perspective, appeared to be located at the centre of the world.[320] Muslim rulers in Palestine legitimised their defense against invading Occidental intruders

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Hawkes, 'Britons, Romans and Saxons', in: *Archaeological Journal* 104 (1948), pp. 27-81. Hawkes, 'The Jutes of Kent, in: Donald Benjamin Harden, ed., *Dark Age Britain. Studies Presented to Edward Thurlow Leeds* (Oxford, 1956), pp. 91-111. Sonia Chadwick Hawkes and Gerald Clough Dunning, 'Soldiers and Settlers in Britain. Fourth to Fifth Century', in: *Medieval Archaeology* 5 (1961), pp. 1-70 [German version s. t.: 'Krieger und Söldner in Britannien während des 4. und 5. Jahrhunderts', in: *Bericht der Römisch-Germanischen Kommission* 43/44 (1962/63), pp. 155-231]. Hawkes, 'The Jutish Style A. A Study in Germanic Animal Art in Southern England in the Fifth Century A. D. ', in: *Archaeologia* 98 (1961), pp. 29-74. Hawkes, 'Early Anglo-Saxon Kent', in: *Archaeological Journal* 126 (1968), pp. 186-192. Hawkes and Mark Pollard, 'The Gold Bracteates from Sixth-Century Anglo-Saxon Graves in Kent, in the Light of a New Find from Finglesham', in: *Frühmittelalterliche Studien* 15 (1981), pp. 316-370. Hawkes, 'Anglo-Saxon Kent c. 425 – 725', in: Peter E. Leach, ed., *Archaeology in Kent to AD 1500. In Memory of Stuart Eborall Rigold* (Council for British Archaeology, Research Report 58) (London, 1982), pp. 64-78. Hawkes, 'The Anglo-Saxon Cemetery a Bifrons, in the Parish of Patrixbourne, East Kent', edited by E. Cameron and Helena F. Hamerow, in: *Anglo-Saxon Studies in Archaeology and History* 11 (2000), pp. 1-94. Catherine Hills, 'The Anglo-Saxon Settlement of England. The State of Research in Britain in the Late 1980s', in: Michael Müller-Wille and Reinhard Schneider, eds, *Ausgewählte Probleme europäischer Landnahmen des Früh- und Hochmittelalters* (Vorträge und Forschungen, herausgegeben vom Konstanzer Arbeitskreis für mittelalterliche Geschichte, 41) (Sigmaringen, 1993), pp. 303-315. Neil Holbrook, 'The Roman and Early Anglo-Saxon Settlement at Wantage, Oxfordshire. Excavations at Mill Street. 1993–4', in: *Oxoniensia* 61 (1996), pp. 109-179. Peter A. Inker, 'Technology as Active Material Culture. The Quoit Brooch Style', in: *Medieval Archaeology* 44 (2000), pp. 25-52. Peter Schmid, 'Die Siedlungskeramik von Mucking (Essex) und Feddersen Wierde (Kr. Wesermünde). Ein Formenvergleich', in: *Berichten van de Rijksdienst voor Oudheidkundige Bodemonderzoek* 19 (1971), pp. 135-144. Christopher J. Scull, 'Approaches to Material Culture and Social Dynamics of the Migration Period in Eastern England', in: John Bintliff and Helena F. Hamerow, eds, *Europe between Late Antiquity and the Middle Ages* (British Archaeological Reports, International Series 617) (Oxford, 1995), pp. 71-83 Seiichi Suzuki, *The Quoit Brooch Style and Anglo-Saxon Settlement. A Casting and Recasting of Cultural Identity Symbols* (Woodbridge, 2000), pp. 103-121. Carolyn Wingfield, 'The Anglo-Saxon Settlement of Bedfordshire and Hertfordshire. The Archaeological View', Robin Holgate, ed., *Chiltern Archaeology* (Dunstable, 1995), pp. 31-43. For a later reported alleged case of the violation of the law of hospitality in the contetx of rule formation see: Widukind of Corvey, *Res gestae Saxonicae / Die Sachsengeschichte des Widukind von Korvei*, book I, chap. 3-7, edited by Hans-Eberhard Lohmann and Paul Hirsch (Scriptores rerum Germanicarum in usum scholarum separatim editi, 60) (Hanover ,1935), pp. 5-7.

[320] For details see above, note 10, and: Ingrid Baumgärtner, 'Völker und Reiche in Raum und Zeit. Zur Vorstellungswelt mittelalterlicher Universalkarten', in: Matthias Becher and Stefanie Dick, eds, *Völker, Reiche und Namen im frühen mittelalter* (Mittelalter-Studien, 22) (Munich, 2010), pp. 359-394. Anna-Dorothee von den Brincken, 'Mundus figura rotunda', in: *Ornamenta Ecclesiae. Kunst und Künstler der Romanik*, vol. 1 (Cologne, 1985), pp. 103-106. Brincken, 'Das geographische Weltbild um 1300', in: Peter Moraw, ed., *Das geograhische Weltbild um 1300* (Zeitschrift für historische Forschung, Beiheft 6) (Berlin, 1989), pp. 9-37. Karl Clausberg, 'Scheibe, Rad, Zifferblatt. Grenzübergänge zwischen Weltkarte und Weltbildern', in: Hartmut Kugler and Eckhard Michael, eds, *Ein Weltbild vor Columbus. Die Ebstorfer Weltkarte. Interdisziplinäres Colloquium 1988* (Weinheim, 1991), pp. 260-313. Evelyn Edson, *Mapping Time and Space. How Medieval Mapmakers Viewed Their World* (London, 1997), pp. 52-96 [reprint (London, 1999)]. Brigitte Englisch, *Ordo orbis terrae. Die Weltsicht in den Mappae mundi des frühen und hohen Mittelalters* (Ordo mediaevalis, 4) (Berlin, 2002). Patrick Gautier Dalché, *Géographie et culture. La representation de l'espace du VIe au XIIe siècle* (Aldershot, 1997). Gautier Dalché, 'Décrire le monde et situer les lieux au XIIe. L'Expositio mappe mundi et la généalogie de la mappemonde de Hereford', in: *Mélanges de l'École française de Rome. Antiquité – Moyen Age*, vol. 112 (Rome, 2001), pp. 343-409. Margriet Hoogvliet, *Pictura et scriptura. Textes, images et hermeneutique des mappemondes du Moyen Age long (XIIIe – XVIe siècles)*. Ph. D. thesis, typescript (Groningen, 1999) [printed (Orbis terrarum, 7) (Turnhout, 2007)]. Herma Kliege, *Weltbild und Darstellungspraxis hochmittelalterlicher Weltkarten* (Munster, 1991). Naomi Reed Kline, *Maps of Medieval Thought. The Hereford Paradigm* (Woodbridge, 2001). Marcia Kupfer, 'Medieval World Maps. Embedded Images, Interpretative Frames', in: *Word and Image* 10 (1994), pp. 262-288. Danielle Lecoq, 'La "mappemonde" du De arca noe mystica de Hugues de Saint-Victor (1128 – 1129)', in: Monique Pelletier, ed., *Géographie du monde au moyen âge et à la Renaissance* (Paris, 1989), pp. 9-29. Bruno Reudenbach, 'Die Londoner Psalterkarte und ihre Rückseite', in: *Frühmittelalterliche Studien* 32 (1998), pp. 164-181. Rudolf Simek,

with the principle, derived from the law of hospitality, that there was "no place" (la maqām) for further settlers in Palestine, thereby demanding that the incoming crusaders should respect the right of residence of the settlers. The collective identities of the crusaders and the civilians accompanying them as well as whatever migration motives may have existed among them, remained irrelevant in Muslim perspective. Where crusaders showed readiness for compromise and willingness to integrate into the established system of rule, they were, at least temporarily, accommodated in line with the law of hospitality.[321] The harshness of the military conflicts between Muslims and crusaders increased, once the latter started to ignore the law of hospitality extended to them, and were eventually defeated.

After the crusades and, partly overlapping with them, the so-called "German settlement in the East"[322] and the legal and military controversies between the Teutonic Order and the Kingdom of Poland resulting from the movement,[323] the intensity of conflicts about the application of the law of hospitality in the context of long-distance migration increased and reached its peak with the conquest of America and the establishment of settler colonies on land that stood in property of Native Americans and that, as a rule, was alienated from them through the use of force by settlers immigrating from Europe. Settler colonists responded to Native American resistance, that was enduring outside the areas forming parts of the Aztek[324] and the Inca empires, as has already been mentioned, with the enforcement of the *ius peregrinationis* without simultaneously acknowledging the law of hospitality and inflicted genocide upon Native Americans between the sixteenth and the nineteenth centuries.[325] Australian Aborigines met with the same fate during the nineteenth and twentieth centuries,[326] the Māori in Aotearoa (New Zealand) as well as African population groups

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Erde und Kosmos im Mittelalter. Das Weltbild vor Columbus (Munich, 1992). Jon R. Stone, 'The Medieval Mappaemundi. Toward an Archaeology of Sacred Cartography', in: *Religion* 23 (1993), pp. 197-216. David Woodward, 'Reality, Symbolism, Time and Space in Medieval World Maps', in: *Annals of the Association of American Geographers* 75 (1980), pp. 510-521.

321 Michael A. Köhler, *Allianzen und Verträge zwischen fränkischen und islamischen Herrschern im Vorderen Orient* (Studien zur Sprache, Geschichte und Kultur des islamischen Orients, N. F., vol. 12) (Berlin, 1991).

322 For survey see: Walter Schlesinger, ed., *Die deutsche Ostsiedlung des Mittelalters als Problem der europäischen Geschichte* (Vorträge und Forschungen, herausgegeben vom Konstanzer Arbeitskreis für mittelalterliche Geschichte, 18) (Sigmaringen, 1975).

323 For a survey on the battle of Tannenberg see: Even Ekdahl, *Die Schlacht bei Tannenberg 1410. Quellenkritische Untersuchungen*, vol. 1: Einführung und Quellenlage (Berliner Historische Studien, 8) (Berlin, 1982). For the legal context of the conflict between the Teutonic Order and the Kingdom of Poland see: Paulus Vladimiri [Pawel Włodkowic], 'Tractatus de potestate papae et imperatoris respectu [vorgetragen auf dem Konzil zu Konstanz, 5. Juli 1415]', edited by Stanislaus Franciszek Belch, *Paulus Vladmiri and His Doctrine Concerning International Law and Politics*, vol. 2 (The Hague, 1965), pp. 792-844.

324 The defeat of the Azteks cannot be explained in military terms. See: Ross Hassig, *Mexico and the Spanish Conquest* (London, 1994) [second edn (Norman, OK, 2006)].

325 David E. Stannard, *American Holocaust. Columbus and the Conquest of the New World* (New York and Oxford, 1992).

326 Anthony Dirk Moses, *Genocide and Settler Society. Frontier Violence and Stolen Indigenous Children in Australian History* (New York, 2004). Moses, ed., *Empire, Colony, Genocide. Conquest, Occupation and Subaltern Resistance in World History* (War and Genocide, 12) (New York, 2008).

from the 1830s.[327]

[327] On the victims of the Groote Trek of the Boers on the African side see the collection edited by: Isaac Schapera, *Praise Poems of Tswana Chiefs* (Oxford, 1965). Nowhere, however, did any European government proceed as ruthlessly with the enforcement of the European law of treaties between states as the British government did vis-à-vis the Māori in Aotearoa (New Zealand). The often so called "Treaty of Waitangi", which the British government imposed upon the Māori on 5 / 6 February 1840, exists in the form of an edict commanding the cession of land. The treaty exists in several versions because some Māori groups received the text only at later points of time. [Edict in the name of Queen Victoria of Great Britain and Ireland [for the Māori in New Zealand], Waitangi, 5 / 6 February 1840, in: *CTS*, vol. 89, pp. 474-475, at p. 475. J. M. Ross, 'Te Tiriti o Waitangi. Texts and Translations', in: *New Zealand Journal of History* 6 (1972), pp. 129-167]. In its dispositive part, the edict takes the form of a declaration in the name of Queen Victoria of Great Britain. Victoria makes known her decision to establish "civil government" in New Zealand so as to make the necessary laws and create administrative institutions both for the "native population" and for her subjects. The edict then reports that the Māori "chiefs" had completely and without limitations renounced their sovereign rights and competences in favour of Victoria, and declares that Victoria had, while recognising established private landed property rights, received the right of first refusal for collectively or privately owned property that had been released for sale. Victoria is then made to establish her royal protection over the "natives of New Zealand", and in the final section, the "chiefs" attach their agreement to the above edict. [Edict (as above), p. 475]. The so-called "Treaty of Waitangi" is a document of state destruction through legal nonsense. The text names only Queen Victoria as a sovereign issuing agent and is, consequently, not a treaty in accordance with the European law of treaties between states. It is a unilateral edict in legal terms, even though William Hobson, the British emissary negotiating and signing the text, himself used the word treaty for the document. The Māori appeared only as objects of British rule in the text of the edict, their group name remained unspecified. Instead, the text featured them as "aborigines or natives" in their own lands. Even though the dispositive part of the edict referred to the renunciation of sovereignty, that allegedly had happened earlier, the Māori "chiefs" stated their consent to the edict, whereas, according to the wording of the text, they had already lost their sovereignty. Noreover, there was a lack of compatibility between the wording of the English and the Māori versions. The latter version of the passage concerning the renunciation of sovereignty transferred "te Kawanatanga katoa" (control over land) to Queen Victoria, whereas according to the English version "all rights and powers of sovereignty" had been surrendered to the Queen. [Ian Wards, *The Shadow of the Island* (Wellington, 1968), p. VII]. In accordance with the expression used in the Māori language, the "chiefs" reached the conclusion that only the "shadow of the land" had been given away, whereas the "substance of the land" had been retained in Māori ownership. Hence, the Māori version lacked a term directly corresponding to the European concept of sovereignty. By consequence, the Māori "chiefs" were made to surrender something to Queen Victoria that was not conceivable in Māori terms. In British perspective, the Māori had been reduced to objects of international law before they were made to use their sovereignty to confirm the renunciation of their sovereignty. This strange, juristically untenable wording of the English version can, it is true, be explained historically by the fact that the British government had already in 1835 formally recognised the independence of some state of New Zealand among British settlers. Accordingly, the Waitangi edict could not serve as a legal instrument setting up a new state, but had the dual purpose of simultaneously restoring British control over the immigrant settlers and of transforming that unilaterally established state of British immigrant settlers into a political instrument for the subjection of the Māori majority population to British control. [Danderson Coates, [Address to the House of Commons, 1835], edited by William David McIntyre and W. J. Gardner, *Speeches and Documents in New Zealand History* (Oxford, 1971), col. 7]. In addition, Queen Victoria had, at the request by the colonial lobbyist Edward Gibbon Wakefield [Edward Gibbon Wakefield, *The British Colonization of New Zealand. Being an Account of the Principles, Objects and Plans of the New Zealand Association* (London, 1837)] and through her Minister of War and Colonial Affairs Constantine Henry Phipps, Marquis of Normanby, explicitly instructed Hobson in 1839 to proceed with the enforcement of British rule only under unequivocal consent from the Māori. [Victoria, Queen of Great Britain and Ireland, 'Instruction to Captain William Hobson [14. August 1839; Ms., London, Public Record Office, CO 209/4]', in: Robert McNab, ed., *Historical Records of New Zealand*, vol. 1 (Wellington, 1908), p. 731]. Yet, the text of the edict, as Hobson appears to have compiled it, does not follow the instructions. According to the text, the establishment of colonial rule over New Zealand preceded the destruction of Māori states to which the edict made references merely as an event of the past. The provision, in terms of an eschatocol, of alleged Māori consent was invalid in legal terms. The edict thus combined the formularies of a notification and a dispositive

3. Emigration Orders and Immigration Promotion

Emigration enforced, at least encouraged by government, was the prime condition for the making of Europen colonial settlements initially in the "New World", later also in South Africa and the South Pacific.[328] At the same time, mainly during the eighteenth century, however, governments implemented a policy of active immigration promotion to the effect of strengthening the legitimacy of their rule, so to speak through acts of voting by the feet. According to a political theory, widely received during the sixteenth-century, rule was legitimate, once it had become based on an often hypothetical contractual agreement between rulers and ruled.[329] Within that theory, migration could appear as the expression of the combination by migrant groups between the cancellation of an existing and the entering into a new government contract. Accordingly, immigration boosted the legitimacy of the government of a destination state, if it was in excess of emigration from the same state. Competition about the most attractive conditions for immigration among governments of destination states for migrants,[330] mainly, though not exclusively of farmers, craftspeople, scientists

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diploma and used international law to the end of legitimizing, simultaneously and in one stroke, state destruction and the imposing of British rule as well. The lack of legitimacy of this procedure was the cause for subsequent military conflicts which lasted until 1881. [James Belich, *Paradise Reforged* (Auckland and London, 2001). Keith Sinclair, *The Origins of the Maori Wars*, reprint of the second edn (Auckland and London, 1974) second edn (Wellington, 1961); first published (Wellington, 1957)].

[328] Thus, for example, the transoceanic migration from Andalusia in the early sixteenth century; see: Peter Boyd-Bowman, *Patterns of Spanish Emigration to the New World (1493 – 1580)* (Special Studies, Council of International Studies, State University of New York at Buffalo, 34) (Buffalo, 1973). Or the emigration of convicts from Britain during the seventeenth and eighteenth centuries; see: *Acts of the Privy Council of James I*, vol. 2 (London, 1925), p. 23. Peter Wilson Coldham, *Emigrants in Chains* (Stroud, 1992). A. Roger Ekirch, *Bound for America. The Transportation of British Convicts to the Colonies. 1718 – 1775* (Oxford, 1987). Alan George Lewers Shaw, *Convicts and the Colonies* (London, 1966). Last but not least, nineteenth-century emigration supported by so-called "emigration societies" (Auswanderungsvereine) with the goal of directing emigrants to overseas areas under the control of the government of the state of origin; see: Agnes Bretting and Hartmut Bickelmann, *Auswanderungsagenturen und Auswanderungsvereine in Deutschland im 19. und 20. Jahrhundert* (Von Deutschland nach Amerika, 4) (Stuttgart, 1991). See also above, note 315.

[329] Justus Lipsius, *Politicorum sive de doctrina civilis libri sex* (Leiden, 1589) [newly edited by Jan Waszink (Assen, 2004), pp. 95-96, 540; reprint of the edn of 1704, edited by Wolfgang Weber (Hildesheim, 1998)]. Juan de Mariana, *De rege et regis institutione libri III*, book I, chap. 1 (Toledo, 1599), pp. 21-22 [reprint (Aalen, 1969)]. Francisco Suárez, SJ, *De legibus (III 1-16)*, book III, chap. 2, nr 4-6, edited by Luciano Pereña Vicente and Vidal Abril (Corpus Hispanorum de pace, 15) (Madrid, 1975), pp. 24-27. Richard Hooker, *Of the Lawes of Ecclesiasticall Politie. Eyght Bookes* (London, 1594), pp. 70-73 [reprint (The English Experience, 390) (Amsterdam and New York, 1971)]. Johannes Althusius [praes.] and Hugo Pelletarius [resp.], *Disputatio politica de regno recte instituendo et administrando*, Theses 6-56 (Herborn, 1602), pp. 3-7. Althusius, *Politica*, book I, chap. 2, book I, chap. 7, book IX, chap. 12, book XIX, chap. 12, third edn (Herborn, 1614) [first published (Herborn, 1603); newly edited by Carl Joachim Friedrich (Cambridge, 1932), pp. 15, 16, 90, 161 [reprint of the original edn (Aalen, 1981); reprint of the edn by Friedrich (New York, 1979)].

[330] Thus explicitly: Johann Heinrich Gottlob Justi, *Staatswirtschaft. Oder Systematische Abhandlung aller ökonomischen und Cameral-Wissenschaften, die zur Regierung eines Landes erforderlich werden*, vol. 1, second edn (Leipzig, 1758), pp. 159-165 [reprint (Aalen, 1963); first published (Leipzig, 1755)]. Justi, *Die Grundfeste zu der Macht und Glückseligkeit der Staaten*, vol. 2 (Königsberg and Leipzig, 1761), pp. 235-246 [Nachdruck, Aalen 1965]. Ders., Grundsätze der Policeywissenschaft, Göttingen 1782, 77-84, 141 [reprint (Frankfurt, 1969)]. Catherine II, Tsarina of Russland, implemented this strategy into political practice, as has been recorded in the

copy of her immigration edict, dated 22 Juliy 1763 [printed edn of the German version in: Max Praetorius, *Galka. Eine deutsche Ansiedlung an der Wolga*. Ph. D. thesis (University of Leipzig, 1912), Appendix; partly printed in: Alexander Klaus, *Unsere Kolonien* (Odessa, 1887), pp. 22-26; reprint (Hildesheim, 2009); first published (Sankt Petersburg, 1869); reprint of this edn (Cambridge, 1972); Hermann Dalton, *Beiträge zur Geschichte der evangelisch-lutherischen Kirche in Rußland*, vol. 2: Urkundenbuch der evangelisch-reformierten Kirche in Rußland (Gotha, 1889), p. 143; reprint (Amsterdam, 1973)]. Russian agents disseminated copy at Ulm in September 1763 and one item has been preserved in the Ulm city archives [Ulm: Stadtarchiv A 3889, 3^{v}-4^{v}]. On Catherine's immigration support policy see also: Catherine II, *Katharinä der Zweyten Kaiserin und Gesetzgeberin von Rußland Instruction für die zu Verfertigung des Entwurfs zu einem Gesetzbuch verordnete Commission* [Moscow, 30 July 1767], nr 272, edited by M. Haigold [i. e. August Ludwig von Schlözer] (Riga and Mitau, 1769) [Nachdruck, Frankfurt 1970], p. 78: "Je glückseliger die Menschen in einem Reiche leben, desto leichter vermeret sich die Zahl der Einwohner." The same policy applied to Prussia under Frederic II: Frederic II, King in Prussia, [Letter to Jean Baptiste le Rond d'Alembert, 18 December 1770], in: *Œuvres de Frédéric le Grand*, vol. 24 (Berlin, 1854), pp. 519-523, at p. 523: "Vous me permettez encore de ne pas penser comme vous sur le sujet de la révocation de l'ßedit de Nantes; j'en ai vraiment unde grande obligation à Louis XIV, et à M[onsieur], son petit-fils [sic!] voulait suivre cet auguste exemple, j'en serais pénétré de reconnaissance; surtout, s'il bannissait en même temps de son royaume cette vermisse de philosophes, je recevrais charitablement ces exilés chez moi." The expectation that immigration might contribute to the increase of the legitimatcy of government in the destination state has recently been restated by: Kitty Calavita, 'US Immigration and Policy Responses. The Limits of Legislation', in: Wayne A. Cornelius, Philip L. Martin and James F. Hollifield, eds, *Controlling Immigration. A Global Perspective* (Stanford, 1994), 55-82. On Justi see: Mario Ackermann, *Wissenschaft und nationaler Gedanke im 18. und frühen 19. Jahrhundert. Eine Studie zum Nationalismus am Beispiel der deutschen Forscher Johann Beckmann und Johann Friedrich Ludwig Hausmann im Kontakt mit schwedischen Gelehrten 1763 bis 1815* (Nordische Geschichte, 9) (Berlin and Munster, 2009), pp. 125-129. Marcus Obert, *Die naturrechtliche 'politische Metaphysik' bei Johann Heinrich Gottlob von Justi (1717 – 1771)* (Europäische Hochschulschriften Series II, vol. 1202) (Frankfurt and Bern, 1992). Beatrice Rösch-Wanner, *J. H. G. von Justi als Literat* (Europäische Hochschulschriften. Series I, vol. 1386) (Frankfurt, Berlin, Bern, New York, Paris and Vienna, 1993). On Ulm as a place of emigraton see: Hektor Ammann, 'Vom geographischen Wissen einer deutschen Handelsstadt des Spätmittelalters', in: *Ulm und Oberschwaben* 34 (1955), pp. 39-65. Werner Hacker, 'Auswanderer aus dem Territorium der Reichsstadt Ulm', in: *Ulm und Oberschwaben* 42/43 (1978), pp. 161-257. Wolf-Henning Petershagen, 'Die Ulmer Donauschiffe und das Geschäft mit der Auswanderung. Mit einem besonderen Blick auf den Beginn der Auswanderung durch Ulm in die habsburgischen Länder im Jahr 1623', in: Márta Fata, ed., "*Die Schiff stehn schon bereit*". *Ulm und die Auswanderung nach Ungarn im 18. Jahrhundert* (Forschungen zur Geschichte der Stadt Ulm, 13) (Ulm, 2009), pp. 21-30. Otto Wiegandt, 'Ulm als Stadt der Auswanderer', in: *Ulm und Oberschwaben* 31 (1941), pp. 88-114. On immigration support policy in Russia, specifically under Catherine II between 1763 and 1775, see: Roger Bartlett, *Human Capital. The Settlement of Foreigners in Russia. 1762 – 1804* (Cambridge, 1979), pp. 58-65, 94-108. Heinz H. Becker, *Die Auswanderung aus Württemberg nach Südrußland 1816 – 1830*. Ph. D. thesis, typescript (University of Tübingen, 1962). Gerhard Bonwetsch, *Geschichte der deutschen Kolonien an der Wolga* (Stuttgart, 1919), pp. 11-29. Jean-François Bourret, *Les Allemands de la Volga* (Lyons, 1986), pp. 45-61. Detlef Brandes, 'Die Ansiedlung von Ausländern im Zarenreich unter Katharina II., Paul I. und Alexander I.', in: *Jahrbücher für Geschichte Osteuropas*. N. F., vol. 34 (1986), pp. 161-187. David H. Epp, 'The Emergence of German Industry in the South Russian Colonies', in *Mennonite Quarterly Review* 55 (1981), pp. 289-371. Vladimir Maksimovič Kabuzan, 'Nemeckoe naselenie v Rossii v XVIII – načale XX veka', in: *Voprosi istorii*, Nr 12 (1989), pp. 18-29. Conrad Keller, *Die deutschen Kolonien in Südrussland*, vol. 1 (Odessa, 1905) [English version (Lincoln, NE: American Historical Society of Germans from Russia, 1980)]. Georg Opitz, *Die wirtschaftlichen und kulturellen Beziehungen zwischen Anhalt und Rußland in der Zeit von 1760 bis 1871*. Ph. D. thesis, typescript (University of Halle, 1968), pp. 1-77. Claus Scharf, *Katharina II., Deutschland und die Deutschen* (Mainz, 1996), pp. 148-154. Jakob Stach, *Die deutschen Kolonien in Südrußland*, part I (Prischib, c. 1904), pp. 5-9 [third edn (Lincoln, NE: American Historical Society of Germans from Russia, 1980)]. Karl Stumpp, *Die Auswanderung aus Deutschland nach Rußland in den Jahren 1763 bis 1862* (Tübingen, 1972) [fifth edn (Tübingen, 1991), pp. 31-32]. While Justi praised the success of Catherine's immigration support policy, the Russian government itself displayed dissatisfaction with its own measures, because the capacity of transport ships, carrying immigrants from Lübeck to St Petersburg, proved insufficient, whence the program had to be shelved. Moreover, it turned out that the number of immigrants considered qualified, specifically the numbers of much wanted farmers, were smaller than anticipated, and a significant number of immigrants decided to contionue their migration or to return. Nevertheless, the total number of immigrants on Russian territory suffered little reduction, as the birthrate increased among those who stayed (see: Bonwetsch, as above, pp. 29-43, esp. at p. 40). Another factor, reducing the number of immigrants to Russia related to competition in the immigration market, mainly of

and members of discriminated religious minorities.[331] Within the established norms of the law of hospitality, immigrants could remain entitled to preserve their collective identities in the destination state, as long as they professed loyalty to the ruler and remained indigenates subject to the order constituted under the hypothetical government contract. Early modern historians could describe migrating groups with collective identities that might extend across many centuries, and could even invent migrations. In his compendium on the origin of the Franks printed in 1515, Johannes Trihemius, Abbot of Sponheim, for one, argued that the Franks had left the city of Troy immediately after its destruction, had again and again changed their name and language in the course of 400 years of ensuing migraton and eventually called themselves "Franks" after their mythical King "Francko"

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the German-speaking areas. As not only Catherine II, but also Frederick II and Emperor Joesph II pursued an active immigration support policy, tensions arose among the three rulers. Frederick II issued an edict prohibiting emigration to Russia on 1 May 1766, although only a few among his subjects left Prussia (Bonwetsch, see above, p. 23). In consequence of the Habsburg policy of supported settlement in Hungary and Siebenbürgen, Joseph II made efforts to stop emigration from Habsburg territories into other parts of Europe and, on 11 August 1768, issed an edict prohibiting emigration "in frembde mit dem Heil[igen] Röm[ischen] Reich in keiner Verbindung stehende Länder" (in: Stumpp, as above, p. 31). In doing so, he supplemented a mandate by Emperor Leopold I, [Mandate on the settlement of Hungary, print (August 1689); Ulm: Donauschwäbisches Zentralmuseum]. On imperial population policy respecting the Balkans see: Mathias Beer and Dittmar Dahlhausen, eds, *Migration nach Ost- und Südosteuropa vom 18. bis zum Beginn des 19. Jahrhunderts* (Sigmaringen, 1999). Similar prohibitions were issued repeatedly for Hesse-Kassel (Stumpp, as above, p. 32), the Palatinate and Bavaria: Daniel Häberle, *Auswanderung und Koloniegründungen der Pfälzer im 18. Jahrhundert* (Kaiserslautern, 1909), pp. 6, 8. However, these prohibitions affected only migrations from a few German-speaking territories and left other parts of Europe unconsidered, specifically France, from where more than a few migrants went to Russia. See: Alexander Schunka, 'Migranten und kulturelle Transfers', in: Bernd Sösemann and Gregor Vogt-Spira, eds, *Friedrich der Große in Europa*, vol. 2, second edn (Stuttgart, 2013), pp. 80-96, at pp. 83-89 [first published (Stuttgart, 2012)].

[331] For example, the Huguenots; see: Claudia Bandholz, Beatrix Siering, Christine Stuff and Sandra Thürmann, '1685. Die Erfindung der Greencard. Die Hugenotten kommen', in: Birgit Kletzin, ed., *Fremde in Brandenburg* (Region – Nation – Europa, 17) (Munster, Hamburg and London, 2003), pp. 20-47. Johannes E. Bischoff, 'Hugenotten und Hugenotten-Nachkommen als städtische Minderheiten', in: Bernhard Kirchgässner and Fritz Reuter, eds, *Städtische Randgruppen und Minderheiten* (Stadt in der Geschichte, 13) (Sigmaringen, 1986), pp. 115-128. Jon Butler, *The Huguenots in America. A Refugee People in New World Society* (Cambridge, MA, 1982). Richard M. Golden, ed., *The Huguenot Connection. The Edict of Nantes, Its Revocation, and Early French Migration to South Carolina* (Dordrecht and Boston, 1988). Susanne Lachenicht, 'Migration, Migrationspolitik und Integration. Hugenotten in Brandenburg-Preußen, Irland und Großbritannien', in: Manuela Böhm, Jens Häseler and Robert Violet, eds, *Hugenotten zwischen Migration und Integration. Neue Forschungen zum* Refuge *in Berlin und Brandenburg* (Berlin, 2005), pp. 37-58. Lachenicht, 'Die Freiheitskonzession des Landgrafen von Hessen-Kassel, das Edikt von Potsdam und die Ansiedlung von Hugenotten in Brandenburg-Preußen und Hessen-Kassel', in: Lachenicht and Guido Braun, eds, *Hugenotten in den deutschen Territorialstaaten. Immigrationspolitik und Integrationsprozesse / Les états allemands e les huguenots. Politique d'immigration et processus d'intégration* (Pariser Historische Studien, 82) (Munich, 2007), pp. 71-83. Lachenicht, 'Huguenot Immigrants and the Formation of National Identities', in: *Historical Journal* 50 (2007), pp. 309-331. Lachenicht, 'Huguenots in Ireland, Britain and Brandenburg-Prussia (1660 – 1750)', in: Lachenicht, ed., *Religious Refugees in Europe, Asia and North America (6th – 21st Century)* (Atlantic Cultural Studies, 4) (Munster, 2007), pp. 107-120. Lachenicht, *Hugenotten in Europa und Nordamerika. Migration und Integration in der Frühen Neuzeit* (Frankfurt and New York, 2010), pp. 168-199: on Brandenburg-Prussia. Margret Zumstroll, 'Die Gründung von "Hugenottenstädten" als wirtschaftspolitische Maßnahme eines merkantilistischen Landesherren. Am Beispiel Kassel und Karlshafen', in: Volker Press, ed., *Städtewesen und Merkantilismus in Mitteleuropa* (Städteforschung. Series A, vol. 14) (Cologne and Vienna, 1983), pp. 156-221. On other religious minorities see: Andreas Gestrich, 'Pietistische Rußlandwanderung im 19. Jahrhundert. Die Walddorfer Harmonie', in: Gestrich, Harald Kleinschmidt and Holger Sonnabend, eds, *Historische Wanderungsbewegungen* (Munster and Hamburg, 1991), pp. 109-125. Fred C. Koch, *The Volga Germans in Russia and the Americas from 1763 to the Present* (University Park, PA, 1977). Gabriele Emrich, *Die Emigration der Salzburger Protestanten. 1731 – 1732* (Historia profana et ecclesiastica, 7) (Munster and Hamburg, 2002).

and, he insisted, they always had remained Trojans.[332]

Although, as has been mentioned above, emigration restrictions did exist,[333] several governments even accepted desertion as long as it remained below figures known from other armies.[334] The Dutch East India Company alone faced little difficulty in recruiting new "servants" (*dienaars*) from wide areas in Europe, among whom a number of deserters and people who had otherwise violated migration laws have been.[335] Migrations usually did not occur only in one direction, but migrants did return for visits[336] or even for good[337] and kept close contacts with people at home through letters.[338] Migrants thus were capable of experiencing their doings as integrated movements from place to place and remained in touch with people at their place of departure. There was no need for general

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[332] Johannes Trithemius [Tritheim, Abbot of Sponheim], *De origine gentis Francorum compendium* (Mainz, 1515) [further edn (Spyres, 1522); reprinted in: Trithemius, *Primae partis opera historica*, edited by Marquard Freher (Frankfurt, 1601); reprint (Frankfurt, 1966)], p. VII: "so lang aber sie bey den Troianern iren ersten voralten bliben, waren sie genent Troianer. Aber darnach bey den Armeniern wonende Armenier. Bey den von Scythia Scythier. Bey den Teutschen Teutsch. Bey den Galliern Gallier und also wie sie ... andere land bewonet ander namen gehegt. Haben zum dicker mal ire setze, zung oder sprach vnd namen der gegene nach darin sie sich zur zeit nidergethan, geandert vnd verwechselt." However, there were also vehement objections against the use of the mythology of Trojan descent in descriptions of the history of the Franks. On Tritheim see: Markus Völkl, 'Paradigmen der Geschichtsschreibung im Übergang vom Mittelalter zur Frühen Neuzeit. Oder: Das ‚mittlere Alter' als der Ursprung der Historiographiegeschichte', in: Ludger Grenzmann, Burkhard Hasebrink and Frank Rexroth, eds, *Geschichtsentwürfe und Identitätsbildungen am Übergang zur Neuzeit* (Abhandlungen der Akademie der Wissenschaften zu Göttingen, N. F., vol. 41) (Berlin, 2016), pp. 3-53, at pp. 11-13. For one, Beatus Rhenanus [Rheinauer] took the view that the Franks had migrated across the ocean from the North and had used a "germanica lingva"; hence, he insisted, Trojan descent could not apply to the Franks: Rhenanus, *Rervm Germanicarvm libri tres* (Basle, 1531), pp. 29-40, 106-108 [further edns (Baske, 1551); Strasbourg, 1610; 1670]; another edn s. t. *Libri tres institutionum rerum Germanicarum Nov-Antiquarum, Historico-Geographicarum* (Ulm, 1693); newly edited by Felix Mundt (Frühe Neuzeit, 127) (Tübingen, 2008), pp. 152-158, 256-260]. On the use of migration as a motif in early modern historiography see: Stefan Donecker, 'Migration und ihre Folgen als Motiv frühneuzeitlicher Historiographie und Ethnographie. Anmerkungen zur Vorgeschichte der aktuellen Migrationsdebatte', in: Elena Taddei, Michael Müller and Robert Rebitsch, eds, *Migration und Reisen* (Innsbrucker Historische Studien, 28) (Innsbruck, Vienna and Bolzano, 2012), pp. 19-28. On Rhenanus's criticism of Tritheim's arguments see: George Huppert, 'The Trojan Franks and Their Critics', in: *Studies in the Renaissance* 12 (1965), pp. 227-241, at pp. 231-232. Paul Joachimsen, *Geschichtsauffassung und Geschichtsschreibung in Deutschland unter dem Einfluss des Humanismus* (Beiträge zur Kulturgeschichte des Mittelalters und der Renaissance, 6) (Leipzig, 1910), pp. 125-146, esp. pp. 142-143 [reprint (Aalen, 1968)].

[333] See above, note 91.

[334] Frederick II, King in Prussia, [Political Testament, 7 November 1768], edited by Richard Dietrich, *Die politischen Testamente der Hohenzollern* (Munich, 1981), pp. 256-397, at p. 301.

[335] Harald Kleinschmidt, 'Bemerkungen zur Historischen Migrationsforschung am Beispiel der Auswertung der Schiffslisten der Niederländischen Ostindischen Kompagnie (VOC)', in: Andreas Gestrich, Kleinschmidt and Holger Sonnabend, eds, *Historische Wanderungsbewegungen* (Munster and Hamburg, 1991), pp. 9-17. See also above, note 161.

[336] On visits see: David Cressy, *Coming Over. Migration and Communication between England and New England in the Seventeenth Century* (Cambridge, 1987), pp. 178-212 [another edn (Cambridge, 1989)]. Daniel Statt, *Foreigners and Englishmen. The Controversy over Immigration and Population. 1660 – 1760* (Newark, DE, 1995), pp. 121-165.

[337] On remigration see: Cressy, *Coming* (note 336), pp. 191-212. Eric Richards, 'Return Migration and Migrant Strategies in Colonial Australia', in: David Fitzpatrick, ed., *Home or Away? Immigrants in Colonial Australia* (Canberra, 1992), pp. 64-104.

[338] Among others, see: Gottfried Wilhelm Leibniz, *Leibniz korrespondiert mit China. Der Briefwechsel mit den Jesuitenmissionaren*, edited by Rita Widmaier (Veröffentlichungen des Leibniz-Archivs, 11) (Frankfurt, 1990).

legislation of positive migration law beyond restrictions against beggars.

4. Creating Positive Immigration Law and the Rise of the Politics of Immigration Restriction

The legal and political context of long-distance migration changed fundamentally in the course of the nineteenth century. Differences against the natural-law attitudes towards migration can best be described on the case of the following incident happening on the British West Coast in 1906. The incident was the unintended consequence of a chain of reactions followng from the results of the population census that had taken place in the UK in 1901, as it had been done once in a decade since 1801.[339] The 1901 census, however, yielded surprising results, compared to the previous one of 1891: the number of foreigners in the UK, counted in 1901, had dramatically risen against the number counted for 1891. The search for the causes of the increase had quickly revealed that, in fact, no increase taken place at all, that, instead, the change of the mode of enumeration had produced the extraordinarily high figures for foreigners. In 1901, for the first time, visitors had been listed after their registration in hotels on the day of the enumeration. However, their departure from the UK soon thereafter had not been taken into account. This difference was significant, as many of the hotel guests were short-term visitors, waiting for the beginning of their trans-Atlantic cruise. Even though the mistake in the enumeration procedure had become known and admitted quickly, disclosing the allegaed increase in the number of foreigners as purely fictive, it dominated public debate. Fears of the "inundation" of the British Isles with "waves" of immigrants grew,[340] promoted demands for immigration control[341], but soon led to the finding that the British government neither had a legal basis for effective immigration control[342] nor even had the staff stationed in seaports to implement controls. Therefore, public opinion requested that an immigration bill should be enacted immediately. The House of Commons launched the legislation process and passed the so-called "Aliens Act" on

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[339] On population censuses see: Phillip Aslett, *Victorians on the Move. Research on the Census Enumerators' Books. 1851 – 1881* (Thornborough, 1984). Dudley E. Baines, 'The Use of Published Census Data in Migration Studies', in: Edward Anthony Wrigley, ed., *Nineteenth Century Society. Essays in the Use of Quantitative Methods for the Study of Social Data* (Cambridge, 1972), pp. 311-335. Norman Henry Carrier and James R. Jeffery, *External Migration. A Study of the Available Statistics. 1815 – 1950* (General Register Office. Studies on Medical and Population Subjects, 6) (London, 1953). Colin R. Chapman, *Pre-1841 Censuses & Population Listings*, fifth edn (Dursley, 2002) [first published (Dursley, 1990)]. Michael Drake, 'The Census. 1801 – 1891', in: Wrigley (as above), pp. 7-46. John Thomas Krause, 'The Changing Adequacy of English Registration', in: David Victor Glass and David Edward Charles Eversley, eds, *Population in History* (London, 1965), pp. 329-393. Richard Lawton, ed., *The Census and Social Structure. An Interpretative Guide to Nineteenth-Century Censuses for England and Wales* (London, 1978). C. Glenn Pearce and Dennis R. Mills, *Census Enumerators' Books. An Annotated Bibliography of Published Work Based Substantially on the Nineteenth-Century Census Enumerators' Books* (Milton Keynes, 1982).

[340] Landa, *Aliens* (note 83), pp. 40-42.

[341] Bernard Gainer, *The Alien Invasion. The Origin of the Aliens Act of 1905* (London 1972. John A. Garrard, *The English and Immigration. 1880 – 1910* (London, 1971).

[342] From 1836, the Registration of Aliens Act was in force, mandating the official registration of foreigners in the UK. However, the act did not provide for rules relating to immigration. See: Landa, *Aliens* (note 83), p. 14.

11 August 1905.[343] It went into force on 1 January 1906.[344] Its main stipulations restricted immigration to a few designated sea ports, where government immigration control was to be in place, barred persons from entering the UK who were not able to support themselves and would thus become beneficiaries of social welfare services, and also banned "lunatics" and "idiots", criminals and persons who had previously been deported, from access.

On 3 January 1906, the crew of USS *Edward L. Mayberry* arrived in the UK. Their vessel had sunk not far from the coast, nearby British steamer *Ella* had taken them on board and dropped them off at the nearest port. However, that port was not on the list of designated seaports according to the "Aliens Act". Moreover, the sailors had failed to rescue their papers which had sunk into the sea, with the consequence that the sailors could neither identify themselves nor prove that they were not in need of social welfare benefits or any other help from the British state. Therefore, the port authorities arrested the sailors for violation of the "Aliens Act".[345] The shipwrecked US sailors were denied not only the law of hospitality but even the law of shipwrecks. An intervention by the US ambassador to the UK was necessary to persuade the authorities to release the sailors in an act of mercy and without punishment.[346]

The incident casts a spotlight on the changes of the perception of migration and the administrative handling of it. In the first place, it reveals that the ancient law of hospitality, specifically the law of shipwrecks had ceased to be of effect, once positive migration law had been enforced. The sailors were no longer categorised as guests, but, in accordance with the "Aliens Act", as foreigners and infringers upon the law. Second, the most important criterion determining legal procedures in their case was nationality, not their obvious need for help. Whereas, in the 1830s, Native Americans had accommodated Otokichi and his fellow countrymen as guests under the unset shipwreck law without any ado, British authorities criminalised the US sailors on the basis of the "Aliens Act". Whereas the Japanese shipwrecks had turned victims of international politics only after a diplomatically unexperienced conceited missionary started to promote their return to Japan, the early twentieth-century US sailors became the objects of a conflict between two governments immediately upon their arrival in the UK, precisely because the "Aliens Act" as part of British domestic legislation and like all contemporary immigration laws, remained out of touch with international law.

The UK was not the only state setting immigration law at this time. The North German Federation enacted a nationality law in 1870 that stipulated norms for the naturalisation of foreigners and

[343] *Aliens Act* (note 83).
[344] Ibid.
[345] *Daily News* (3 January 1906).
[346] Landa, *Aliens* (note 83), p. 82.

thereby also set norms for immigration.[347] The French Republic supplemented its already existing nationality laws with an "Act against Nomades" in 1912, which was designed to restrict immigration and to downgrade immigrants to deviants and potential criminals.[348] The German Empire, into which the naturalisation law of 1870 had been devolved, legislated an "Emigration Act" in 1897, the purpose of which it was to prevent impoverished German emigrants from returning to the empire.[349] In 1913, the Reichstag passed a new nationality law.[350] What is striking in the first place, is the lack of explicit reference to migration in the official titles of several of these acts, even though focused on migration. The reason for this stylistic feature is easy to detect from contemporary perceptions on migration. During the nineteenth and most of the twentieth centuries, European states counted as "states of emigration", while the European settler colonies in America, South Africa and the South Pacific ranked as so-called "states of immigration".[351] Laws making explicit reference to immigration in their official titles would have undermined the interests of many European governments which were determined to portray immigration as non-existent,[352] and, worse even, would have cast immigration into a norm granting certain rights under municipal law. The evolution of migration legislation thus further displays the increasing trend of restricting only immigration and leaving emigration unmentioned. While the nationality act of the North German Federation had still

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[347] North German Confederation, 'Gesetz über die Erwerbung und den Verlust der Bundes- und Staatsangehörigkeit. Vom 1. Juni 1870', §§ 13, 21, in: Matthias Lichter and Werner Hoffmann, *Staatsangehörigkeitsrecht*, third edn (Cologne, Berlin and Munich, 1966), pp. 689, 691. For a contemporary commentary see: Wilhelm Cahn, *Das Reichsgesetz über den Erwerb und den Verlust der Reichs- und Staatsangehörigkeit vom 1. Juni 1870* (Berlin, 1888) [reprint (Berlin, 1889); second edn (Berlin, 1896); third edn (Berlin, 1908)]. For research literature on the act see above, notes 187, 189.

[348] See above, note 84. For contemporary analyses see: Lucide Agel, *De la nationalité d'origine* (Paris, 1889). Alphonse Andréani, *La condition des étrangers en France et la législation sur la nationalité française* (Paris, 1896) [second edn (Paris, 1907)]. Emmanuel Bes de Berc, *De l'expulsion des étrangers en France* (Paris, 1888). Louis André Daniel de Folleville, *Traité théorique et pratique de la naturalisation* (Paris, 1880). Jules Ingouf, *De la naturalisation des étrangers en France, ses règles, ses formalités, qui est et qui devient français* (Paris, 1881). Louis Eugène LeSueur and E. Dreyfus, *La nationlité. Commentaire de la loi du 26 juin 1889* (Paris, 1890). Charles Sapey, *Les étrangers en France sous l'ancien et le nouveau droit* (Paris, 1843).

[349] *Stenographische Berichte über Verhandlungen des Reichstages*, 9. Legislaturperiode, IV. Session (1896/96), Anlagenband 6 (Berlin, 1897), pp. 3728-3747. M. Hans Klössel, *Das deutsche Auswanderungsgesetz vom 9. Juni 1897* (Leipzig, 1898). On the emigration act see: Ernst Francke, 'Das deutsche Auswanderungsgesetz', in: *Archiv für soziale Gesetzgebung und Statistik* 11 (1897), pp. 181-214. For the context see: Andreas K. Fahrmeir, *Citizens and Aliens. Foreigners and the Law in Britain and the German States. c. 1789 – 1870* (Monographs in German History, 5) (Oxford and New York, 2000). Fahrmeir, *Citizenship* (New Haven and London, 2007).

[350] *Staatsangehörigkeitsgesetz* 1913 (note 305).

[351] In contemporary terminology, "states of immigration" meant territories, into which "undesired" poor people from Europe were to be shipped; for example, see the article on emigration in the London *Times* of 1870, printed in: Charles Manning Hope, ed., *Select Documents in Australian History. 1851 – 1900* (Sydney, 1955), p. 247. Conversely, "states of emigration" were territories, into which immigration was to be obstructed through border control regimes; on this notion see: Wilhelm, Rüstow, *Die Grenzen der Staaten* (Zurich, 1868), pp. 1-5.

[352] On government intention of proclaiming states under their control as unaffected by immigration see: Klaus Jürgen Bade, *Vom Auswandererland zum Einwanderungsland? Deutschland 1880 – 1980* (Berlin, 1983). Bade, 'German Emigration to the United States and Continental Immigration to Germany in the Late Nineteenth and Early Twentieth Centuries', in: *Central European History* 13 (1980), pp. 248-177 [reprinted in: Colin Holmes, ed., *Migration in European History*, vol. 1 (Cheltenham and Brookfield, VT, 1996), pp. 134-163]. Agnes Bretting, 'Organizing German Immigration', in: Frank Trommler, ed., *America and the Germans*, vol. 1 (Philadelphia, 1985), pp. 25-38.

featured an article, obliging emigrants to register with a German consular agency abroad should they want to retain their German nationality, the new nationality law of 1913, like contemporary acts in other European states, did without any norm relating to emigration.[353] The reason for the lack of reference to emigration in these laws is obvious and became explicit in the German parliamentary debate about the nationality bill of 1913: The renunciation of emigration norms was to underline the recognition of the human right of emigration and was to avoid acts of government discrimination against emigrés through restrictive procedures for the keeping of the nationality of the state of departure.[354] In the German case, this stance was motivated by demographic statistics showing that most emigrants from the German Empire were moving to the European settler colonies in America, South Africa and the South Pacific, thereby departing from areas under the direct control of the German government. For the German Empire, other than for France and the UK,[355] emigration was equivalent of the loss of population. Therefore, the German government, in backing the renunciation of the regulation of emigration, tried to acomplish the dual aim of using "Germans Abroad" as promoters of the import of German industrial products in the new home states, and to allow as many emigrés as possible to keep their German nationality and thereby blow up the demographic statistics of the German Empire.[356] The government even pondered the idea of sponsoring genealogical and local history research as instruments for strengthening social ties between emigrés and their places of origin.[357] Even socialist Karl Kautsky saw the "high task of nation-building" (hohe nationale Aufgabe) accomplished, if overseas emigration could be directed at areas under the German government control.[358]

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[353] See above, note 189.

[354] *Stenographische Berichte über Verhandlungen des Reichstages*, 137. Sitzung (28. Mai 1913) (Berlin, 1913), pp. 5304-5305, 155. Sitzung (29. Mai 1913), p. 5334.

[355] For British government attempts to direct emigrants from the UK into British overseas dependencies even early in the twentieth century see: L. S. Amery, 'Migration within the Empire', in: *United Empire* 12 (1922), pp. 206-218. William Booth, 'Our Emigration Plans', in: *Proceedings of the Royal Colonial Institute* 37 (1905/06), pp. 137-154. William Alexander Carrothers, *Emigration from the British Isles* (London, 1929). On great-power competition about population censuses and population statistics see: Ulrike von Hirschhausen and Jörn Leonhard, *Empires und Nationalstaaten im 19. Jahrhundert* (FRIAS Rote Reihe, 1) (Göttingen, 2009), pp. 53-78 [second edn (Göttingen, 2010)].

[356] Thus: C. Herzog, 'Was fließt den Vereinigten Staaten durch die Einwanderung zu und was verliert Deutschland durch die überseeische Auswanderung?', in: *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft* 9 (1885), pp. 31-74, at p. 37. Friedrich Kapp, *Über Auswanderung. Ein Vortrag gehalten am 2. Februar 1871 im Berliner Handwerker-Verein* (Berlin, 1871). Kapp, 'Entwurf eines Gesetzes betreffend die Beförderung von Auswanderern nach außerdeutschen Ländern vom 25. Februar 1878', in: *Sammlung sämtlicher Drucksachen des Deutschen Reichstages*, 3. Legislaturperiode, II. Session 1878, vol. 2 (Berlin, 1878), nr 44. Franz H. Moldenhauer, *Erörterungen über das Colonial- und Auswanderungswesen. Vortrag gehalten in der wissenschaftlichen Sitzung des Geographischen Vereins zu Frankfurt am Main am 16. Januar 1878* (Frankfurt, 1878). Ernst von Weber, *Die Erweiterung des deutschen Wirtschaftsgebietes und die Grundlegung zu überseeischen Staaten. Ein dringendes Gebot unserer wirtschaftlichen Nothlage* (Leipzig, 1879). Albert Zweck, *In welche Länder ist der deutsche Auswandererstrom zu lenken, um ihn dem Reiche nutzbar zu machen?* (Jahresbericht über das Königliche Luisen-Gymnasium zu Memel, 34, 1784/95) (Memel, 1895).

[357] On the promotopn of genealogical research see: Fritz Wertheimer, 'Das Deutsche Auslandsinstitut Stuttgart', in: *Der Auslandsdeutsche* 3 (1920), pp. 770-789.

[358] Karl Kautsky [Pseud. Ewald Paul], 'Auswanderung und Kolonisation', in: *Die neue Zeit* 1 (1883), pp. 287-290, at

European governments took the exactly opposite stance towards immigration. It was their common conviction that immigration should be restricted through legislation and the enforcement of administrative hurdles.[359] In this respect as well, the public debate leading to the British "Aliens Act" of 1905 revealed the key motivation for the demanded legislation: Immigration restriction was to protect the UK against the apparent rise in the number of incoming "foreigners", even after it had become clear that no such increase had actually taken place. Immigration restriction thus went together with the waiver of the guest status for immigrants and their categorisation as "foreigners". Migration researchers were given the task of analysing the consequences of a labour market split between nationals and foreigners,[360] as if immigrants as foreigners would jeopardise the unity of the state population[361] and thence were to be excluded, at least, as the British "Aliens Act" would have it, if they were "lunatics" or "idiots", carried with them infectious diseases or looked like being in need of social security assistance.[362] Governments, legislative bodies and administrations thus perceived as difficult the integration of immigrants into the state population, which they construed as a nation, and, even in the USA,[363] Australia,[364] New Zealand[365] and Natal[366] sought to fortify international

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p. 290.

[359] For details see: Gordon F. De Jong and James T. Fawcett, 'Motivations for Migration. An Assessment and a Value-Expectancy Research Model', in: De Jong and Robert W. Gardner, eds, *Migration Decision Making. Multidisciplinary Approaches to Microlevel Studies in Developed and Developing Countries* (New York, 1981), pp. 13-58. José Havet, ed., *Staying on Retention and Migration in Peasant Societies* (Ottawa, 1988). Samuel A. Stouffer, 'Intervening Opportunities', in: *American Sociological Review* 5 (1940), pp. 845-867. Stouffer, 'Intervening Opportunities and Competing Migrants', in: *Journal of Regional Science* 2 (1960), pp. 1-26.

[360] Among others, see: Maurice Barrès, *Contre les étrangers. Etude pour la protection des ouvriers français* (Paris, 1893). R. Bernard de Jandin, *Des professions que les étrangers peuvent exercer en France* (Paris, 1899).

[361] *Stenographische Berichte* (note 349), 5303. See also above, note 83.

[362] Ibid. Robert von Mohl, *Staatsrecht, Völkerrecht und Politik*, vol. 1 (Tübingen, 1860), pp. 579-636: 'Die Pflege der internationalen Gemeinschaft als Aufgabe des Völkerrechtes'; at p. 615, Mohl argued that it was the task of the "international community" (internationalen Gemeinschaft), to take precautionary measures against „bringing in contagious diseases" (Einschleppung ansteckender Krankheiten). Similarly: *Aliens Act* (note 83).

[363] In the USA increasingly so from the 1880s: Fairchild, *Melting Pot* (note 190), pp. 29, 56, 247-261, here the claim that the "melting pot" was no longer melting. On the making of this metaphor see: Hector St John Crèvecoeur, *Letters from an American Farmer* [1782], in: Edith Abbott, ed., *Historical Aspects of the Immigration Problem* (Chicago, 1926), p. 418 [reprint (New York, 1969)]. More radically nativist demands as those coming from Harvard sociologist Fairchild were brought forth by industrialist Samuel Rea, who demanded the Americanisation of all immigrants in 1918; quoted in: Howard C. Hill, 'The Americanization Movement', in: Richard J. Meiser , ed., *Race and Ethnicity in Modern America* (Lexington, MA, 1974), p. 33. Also from: Henry Cabot Lodge, 'The Restriction of Immigration', in: *North American Review* 62 (1891), pp. 32-34 [reprinted in: Abbott, as above, pp. 192-193]. Roy Lawrence Garis, *Immigration Restriction* (New York, 1927) [further edn (New York, 1928)]. President Woodrow Wilson repeatedly vetoed Congress legislation aimed at enforcing more rigorou immigration control through administrative measures, such as the literarcy test; see: Wilson, 'The Literacy Test Condemned [1915]', edited by Oscar Handlin, *Immigration as a Factor in American History* (Englewood Cliffs, 1959), pp. 187-188. However, the "Immigration Act of 1924" (also: "National Origins Act" or "Johnson-Reed Act") of 26 May 1924 [library.uwb.edu/static/usimmigration/43%20stat%20153.pdf], which was revised only in 1952, turned "nationality" into the core instrument of exclusionist immigration policy. It did so by enforcing certain "quotas", which were to ensure that annual immigration would become reduced to two per cent of the US population with the same original nationality according to the 1890 census (Section 11(a)). In consequence of the act , "nationality" as recognised by state authorities, came to dominate all other personal and collective identities that immigrants might share. On the history of nativism in the USA see: John Higham, *Strangers in the Land. Patterns of American Nativism. 1860 – 1925* (New Brunswick, 1955), pp. 300-330 [reprints (New York, 1963; 1971); second edn (New

borders of states into administrative bulwarks against immigration. In the UK and the USA, that was accomplishable relatively easily through immigration control at seaports. Yet land borders left available many options to sneak across border and into territories on the other side by sidetracking immigration control. Hence, from the very beginning, the feasibility and efficiency of immigration control were called into question.

5. Postulates about Migration Motives

Contemporary theorists of migration, mainly social scientists, provided a further, seemingly core argument in favour of restrictive migration legislation. They started from the assumption that members of a state population, styled nationals in the sense of the nineteenth-century theory of the state, were and were bound to be residents, that is, sendentary, then postulated some metaphysical process of successive sedentarisation in the course of human history, believed that that process had ccurred at different speeds in various parts of the world and claimed that it had fully advanced to a completely sedentary form of life only in Europe and European settler colonies in America, South Africa and the South Pacific. Consequently, the positioned all those states, apparently presenting their populations as groups of residents, at the highest echelon in the hierarchy of states and contended that these states were "civilised".[367] What followed from this argument was not only, as

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Brunswick, 1988)]. Gerald L. Neumann, *Strangers to the Constitution. Immigrants, Borders and Fundamental Law* (Princeton, 1996), pp. 19-94. Already the Chinese Immigration Acts of 1 October 1888, 5 May 1892 and 27 April 1904 prohibited legal immigration from China to the USA. On these acts see: Mary Elizabeth Burroughs Roberts Coolidge, *Chinese Immigration* (New York, 1909), pp. 168-233 [reprint (New York, 1969)]. Sucheng Chan, 'European and Asian Immigration into the United States in Comparative Perspective', in: Virginia Yans-McLaughlin, ed., *Immigration Reconsidered* (New York and Oxford, 1990), pp. 37-75. Chan, ed., *Entry Denied. Exclusion and the Chinese Community in America. 1882 – 1943* (Philadelphia, 1991). Oger Daniels, *Asian America. Chinese and Japanese in the United States since 1850* (Seattle, 1988). Philip S. Foner and Daniel Rosenberg , eds, *Racism, Dissent and Asian Americans from 1850 to the Present* (Westport, CT, 1993). Claudia Goldin, *The Political Economy of Immigration Restriction in the United States. 1890 – 1921* (National Bureau of Economic Research. Working Paper 4345) (Cambridge, MA, 1993). Edward Prince Hutchinson, *Legislative History of American Immigration Policy. 1789 – 1965* (Philadelphia, 1981). Charles J. McClain, *In Search of Equality. The Chinese Struggle against Discrimination in Nineteenth-Century America* (Berkeley and Los Angeles, 1994). Lucy Salyer, 'Law as Harsh as Tigers. Enforcement of the Chinese Exclusion Law. 1891 – 1924', in: Chan, *Entry* (as above), pp. 57-93. Salyer, *Law Harsch as Tigers. Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill and London, 1995). Elmer Sandmeyer, *The Anti-Chinese Moveent in California* (Urbana and Chicago, 1973). Torpey, *Invention* (note 153), pp. 96-101.

[364] *Sydney Morning Herald* (7 August 1901); (11 September 1901). On immigration policy in Australia see: James Jupp and Marie Kabala, eds, *The Politics of Australian Immigration* (Canberra, 1994). Jürgen Matthäus, '"Für alle Zeiten weiß". Einwanderungspolitik und nationales Selbstbewußtsein Australiens im 19. und frühen 20. Jahrhundert', in: *Zeitschrift für Geschichtswissenschaft* 50 (2002), pp. 294-315.

[365] UK, *Natal Act* (1897).

[366] New Zealand, *Immigration Restriction Act* (1899). On immigration policy in New Zealand see: John Leonard Elliott, 'New Zealand. The Coming of Age of Multiracial Islands', in: Daniel Kubat, ed., *The Politics of Migration Policies* (New York, 1993), pp. 45-59.

[367] Schäffle, *Bau* (note 317), pp. 216-219. Herbert Spencer, *The Principles of Sociology*, vol. 1 (New York and London, 1910), pp. 449-453 [first published (London, 1876); further edns (London, 1877; 1882; 1893); (New York, 1897; 1901; 1906; 1912); reprints (Osnabrück, 1966); edited by Stanislav Andreski (London and Hamden, CT, 1969); (Spencer, The Works of Herbert Spencer, vol. 7) (Westport, CT, 1975); edited by Jonathan H. Turner (New

has been noted above, the devaluation of all other state to purported polities with non-resident population groups and the resulting request that these populations groups should be subjected to European colonial rule, but also the classification of migrants as a group with allegedly deviant behaviour who appeared to be thorougly dangerous for resident populations. This perception even shaped the attitudes of retrospective historians. For one, Georg von Below, advocate of radically conservative positions at the turn towards the twentieth century, took the view that medieval urban law of hospotality had served the sole purpose of providing legitimacy to the discrimination of foreigners and thus keeping them at bay. Alfred Schulte, historian of norms, believed that what he called Germanic law of hospitality had to be distinguished from its medieval successor, because Tacitus had appeared to record "Germanic" hospitality and that the councils of medieval cities had not been hospitable at all.[368] Within this perception, migration seemed to demand specific motives on the side of migrants. In search for migration motives, theorists were quick to destill, from statistical tables, poverty as the main factor pushing people out from their homes, and identified escape from poverty as the prime migration motive.[369] Usually, they did not do so on the basis of empirical evidence but through the combination of statistical data. Whenever these data featured the gaps between income levelsbetween two states and simultaneously migration from the state with a lower into that with a higher income level, theorists concluded that migrants were turning from the state with lower to that with higher income level for reasons of avoiding poverty.[370] This, of course, was a mere theoretical postulate, but it quickly assumed the status of an ascertained fact in public discourse. In this respect, the public debate in the German Reichstag on the revision of the nationality in 1912 not only recorded the use of anti-semitic rhetoric as means to restrict the naturalisation of Jews, but an equally harsh rhetoric against the immigration of persons of Polish origin, who were classed as poor and accused of desiring to abuse German social security benefits. This argument came up, even though migration from German occupied parts of Poland ranked as internal migration within Prussia and thereby remained outside the scope of imperial nationality legislation.[371]

Brunswick, 2002)]. See also above, note 85.

[368] Georg von Below, 'Über Theorien der wirthschaftlichen Entwicklung der Völker mit besonderer Rücksicht auf die Stadtwirthschaft des deutschen Mittelalters', in: *Historische Zeitschrift* 86 (1901), pp. 1-77, at p. 69. Schulte, 'Gästerecht' (note 6), p. 526. Against this argument already: Rudorff, *Rechtsstellung* (note 7), pp. 153-154. See also above, notes 6, 357, 358.

[369] Ernst Georg Ravenstein, *The Laws of Migration* (New York, 1976).

[370] Wilhelm Mönckmeier, *Die deutsche überseeische Auswanderung. Ein Beitrag zur deutschen Wirtschaftsgeschichte* (Jena, 1912), pp. 6-7.

[371] On migration from Poland into the German Empire see: Klaus Jürgen Bade, 'Politik und Ökonomie der Ausländerbeschäftigung im preussischen Osten', in: Hans-Jürgen Puhle and Hans-Ulrich Wehler, eds, *Preussen im Rückblick* (Göttingen, 1980), pp. 273-299. Bade, '"Preussengänger" und "Abwehrpolitik". Ausländerbeschäftigung, Ausländerpolitik und Ausländerkontrolle auf dem Arbeitsmarkt in Preussen vor dem Ersten Weltkrieg', in: *Archiv für Sozialgeschichte* 24 (1984), pp. 91-162. Knuth Dohse, *Ausländische Arbeiter und bürgerlicher Staat. Genese und Funktion von staatlicher Ausländerpolitik und Ausländerrecht. Vom Kaiserreich bis zur Bundesrepublik Deutschland* (Königstein, 1981). Lothar Elsner, *Die ausländischen Arbeiter in der Landwirtschaft der östlichen und mittleren Gebiete des Deutschen Reiches während des ersten Weltkrieges. Ein Beitrag zur Geschichte der*

6. Empirical Reseach in Migration Motives

Moreover, the assumption that migration was generally motived by the search for escape from poverty, did not just rest on dubious empirical foundations, but also stood in stark opposition to empirical findings. Already at the beginning of the nineteenth century, young Friedrich List, whom the Württemberg government had dispatched into the area around the city of Heilbronn, was in search for migration motives among the local population there. After the end of the Napoleonic Wars, a hunger epidemia was spreading in the Kingdom in 1816, and the government was worried about the consequences of starvation, one of these consequences appearing to be the increase in readiness to emigrate to America.[372] After having established an atmosphere of trust with people in the area, List, indeed, received information that quite a number of people were considering to leave the Kingdom, apparently under influence by increasing numbers of people who had already gone. When

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preussisch-deutschen Politik. Ph. D. thesis, typescript (University of Rostock, 1961). William W. Hagen, *Germans, Poles, Jews. The Nationality Conflict in the Prussian East. 1772 – 1914* (Chicago and London, 1980). Ulrich Herbert, *Geschichte der Ausländerbeschäftigung in Deutschland. 1880 – 1980* (Berlin and Bonn, 1986). Herbert, *Geschichte der Ausländerpolitik in Deutschland. Saisonarbeiter, Zwangsarbeiter, Gastarbeiter* (Munich, 2001). Christoph Klessmann, *Polnische Bergarbeiter im Ruhrgebiet. 1870 – 1945* (Göttingen, 1978). Klessmann, 'Polnische Bergarbeiter im Ruhrgebiet. Das Beispiel Bottrop', in: Hans Mommsen and Ulrich Borsdorff, eds, *Glückauf, Kameraden! Die Bergarbeiter und ihre Organisationen in Deutschland* (Cologne, 1979), pp. 89-108. Klessmann, 'Polish Miners in the Ruhr District. Their Social Situation and Trade Union Activity', in: Dirk Hoerder, ed., *Labor Migration in the Atlantic Economies* (Westport, CT, and London, 1985), pp. 253-275 [first published s. t.: 'Polnische Bergarbeiter im Ruhrgebiet. Soziale Lage und gewerkschaftliche Organisation', in: Mommsen (as above), pp. 109-130]. Klessmann, 'Comparative Immigrant History. Polish Workers in the Ruhr Area and the North of France', in: *Journal of Social History* 20 (1986), pp. 335-353 [reprinted in: Colin Holmes, ed., *Migration in European History*, vol. 2 (Cheltenham and Brookfield, VT, 1996), pp. 244-262]. Klessmann, *The Foreign Worker and the German Labor Movement. Xenophobia and Solidarity in the Coal Fields of the Ruhr. 1881 – 1914* (Oxford, 1994). John J. Kulczycki, 'Scapegoating the Foreign Worker. Job Turnover, Accidents, and Diseases among Polish Coal Miners in the German Ruhr. 1871 – 1914', in: Camille Guerin Gonzales and Carl Strickwerda, eds, *The Policies of Immigrant Workers* (New York and London, 1993), pp. 133-152. Hans Linde, 'Die soziale Problematik der masurischen Agrargesellschaft und die masurische Einwanderung in das Emscherrevier', in: Hans-Urich Wehler, ed., *Moderne deutsche Sozialgeschichte* (Cologne, 1968), pp. 456-470. Ewa Morawska, 'Labor Migrations of Poles in the Atlantic Economy. 1880 – 1914', in: *Comparative Studies in Society and History* 31 (1989), pp. 237-272 [reprinted in: Holmes (as above), vol. 1, pp. 240-275; also in: Dirk Hoerder and Leslie Page Moch, eds, *European Migrants* (Evanston, 1996), pp. 170-208]. Richard C. Murphy, *Polish Immigrants in Bottrop. 1891 – 1933*. Ph. D. thesis, typescript (University Park: University of Iowa, 1977). Krystyna Murzynowska, *Polskie wychodzstwo zarotkow w zagłebin Ruhry. 1880 – 1914* (Wrocław, 1972) German version (Dortmund, 1979)]. Christoph Palaschke, ed., *Die Migration von Polen nach Deutschland. Zu Geschichte und Gegenwart eines europäischen Migrationssystems* (Schriftenreihe des Instituts für Europäische Regionalforschungen, 7) (Baden-Baden, 2001). Robert Earl Rhoades, 'Foreign Labour in German Industrial Capitalism. 1871 – 1978', in: *American Ethnology* 5 (1978), pp. 553-573. Stanislas I. Ruziewicz, *Le problème de l'immigration polonaise en Allemagne* (Paris, 1930). Adelheid von Saldern, 'Polnische Arbeitsmigration im Deutschen Kaiserreich – Menschen zweiter und dritter Klasse', in: Hans-Heinrich Nolte, ed., *Deutsche Migrationen* (Munster and Hamburg, 1996), pp. 102-113. Hans-Ulrich Wehler, 'Die Polenpolitik im Deutschen Kaiserreich', in: Wehler, *Krisenherde des Kaiserreiches. 1871/1918* (Göttingen, 1970), pp. 181-200 [reprinted in: Ernst-Wolfgang Böckenförde, ed., *Moderne deutsche Verfassungsgeschichte* (Neue Wissenschaftliche Bibliothek, 51) (Cologne, 1972), pp. 106-124; second edn (Königstein, 1981)]. Arthur Young, *Bismarck's Policy towards the Poles. 1870 – 1890*. Ph. D. thesis, typescript (University of Chicago, 1970).

[372] List, 'Protokolle' (note 316), pp. 133-134.

List asked them about their motives, those who responded, told him, against his expectation, that hunger and poverty were not the problem; for they had long lived with these burdens hoping for better times in the future. But the situation, in their view, was different at that time, because the local authorities seemed to act arbitrarily, unjustly and unbearably. Under these circumstances, they could not continue to stay.[373] List also found out that the Treaty of Tübingen of 1514 was unknown to them, that was still in force and guaranteed the freedom of emigration. Many people among those showing willingness to emigrate, declared themselves only after List had given them assurance that they would not be punished for their preparations for departure.[374]

The results of List's investigations shows that networks[375] existed among people planning to emigrate from Württemberg early in the nineteenth century, that they discussed their plans and coordinated their activities. List's findings also make it clear that political motives ranked higher than economic ones, at minumum that poverty was not the only motive. Already since the 1970s, migration hump theory has independently re-established these findings and produced evidence to the effect that poverty and extreme want can be excluded as factors promoting emigration. This, proponents of the theory argue, has been so, because people in extreme poverty and want must struggle for short-term survival and have neither the time nor the opportunity of making long-term plans focused on migration. By contrast, once people have been lifted out of extreme poverty, they can, and often do, develop plans for the further improvement of their situation and then formulate livelihood strategies including preparations for long-distance migration.[376] However, even if bits of migration hump theory have meanwhile reached the office of the Chancellour of the Federal Republic of Germany, government migration policy has remained largely unaffected by the main elements of that theory, as the policy continues to rely on statistical data blieb and results of academic research all of which tend to ignore the migrants' own perspectives of their doings. Government migration policy has, therefore, tended to further widen the gap between these perspectives and those of adminitrative agencies, decision-making political institutions and

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373 Ibid., pp. 138-139, 145, 153.

374 Ibid., pp. 132-133. See also above, note 90.

375 On networks see: James F. Fawcett, 'Networks, Linkages and Migration Systems', in: *International Migration Review* 23 (1989), pp. 671-680. Mary M. Kritz, Lean Lin and Hania Zlotnik, eds, *International Migration Systems. A Global Approach* (Oxford, 1992). John S. MacDonald and Leatrice MacDonald, 'Chain Migration, Ethnic Neighborhood Formation and Social Networks', in: *Millbank Memorial Fund Quarterly* 42 (1964), pp. 82-97, all without concerns for early nineteenth-century migration processes.

376 Wilbur Zelinsky, 'The Hypothesis of the Mobility Transition', in: *Geographical Review* 61 (1971), pp. 219-249, at p. 233. Philip L. Martin and J. Edward Taylor, 'The Anatomy of Migration Hump', in: Taylor, ed., *Development Strategy, Employment and Migration* (Paris: OECD, 1996), pp. 43-62, at p. 45. Commission on Human Security, *Human Security Now* (New York, 2003), p. 44: "The movement of people is also a development issue. The growing inequality between and within countries affects displacement patterns. … Poverty is often cited as one of the main causes of irregular migration. … The largest movements originate from middle-income countries, not from the poorest countries. Only after years of development is a gradual decline in migration noticeable." Peter Stalker, *International Migration* (London, 2001), p. 129.

legislative bodies.[377]

Systematic polls among people showing willingness to emigrate, as List conducted them, namely before the departure, do not belong to repertory of social-science migration research and are not requested by governments and legislatures. Instead, social-science migration theories categorising residentialism as the standard of appropriate, migration, however, as deviant collective behaviour and propagating poverty as the main migration motive have continued in place from the nineteenth century; so have administrative agencies interacting with migrants on the basis not of their personal but on their collective identities and, as rule, simply implement what appears to them as givens of nineteenth-century migration theory; legislative bodies perceiving of migrants as statistical data, not as acting individuals, seeking to regulate migration with domestic political instruments, envisioning cooperation in between states about migration issues not as a regular procedure but, as in the EU, solely in response to some perceived "massive inflow",[378] and take notice of migrants only once they have trespassed the international border of the state or the region, and consider international law as relevant only to the extent mandated by the state constitution; all these attitudes and practices further widen the gap between the internal perspectives of migrants and the external perspectives of those in charge of regulating migration. The change of paradigm from the foundation of the law of hospitality in natural law to the formulation and enactment of positive migration law was part of the wider process of the installing positive law as the standard type of law in Europe during the nineteenth century and conditioned both, the recognition of a general human right of emigration and the progressively advanced restriction of immigration. The contradictoriness of the general human right of emigration and the widening implementation of immigration restriction has continued in practice. The Universal Declaration of Human Rights has only cast it into the form of international law. The contradictoriness of the general freedom of emigration and particular immigration restrictions has further widened the discrepancy between political demands to the end of increasing the efficiency of immigration restriction by means of domestic legislation, public administration and police surveillance on the one side and, on the other, the insight that immigration restriction is often difficult to implement. As international law allocates migration regulation to the competence of sovereign states, as long as the general freedom of emigration remains untouched, migrants are still in a position to use for their own purposes the legally underregulated space in between states.

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[377] Angela Merkel, '"Mitleid ist nicht mein Motiv"', in: *Die Zeit*, nr 42 (6 October 2016), pp. 2-3, p. 3: "Übrigens sind die Migranten aus Afrika nicht notwendigerweise die Ärmsten ihrer Länder. Aus Niger etwa, einem Transitland für Flüchtlinge, kommen fast keine Menschen zu uns, weil der Kampf um das tägliche Leben dort so hart ist, dass nur wenige sich eine Flucht oder auch nur den Gedanken daran leisten können." On the gap between perspectives on migration see Christiane Harzig, Dirk Hoerder and Donna R. Gabaccia, *What is Migration History?* (New York, 2009), pp. 115-131: 'Migrant Practices as a Challenge to Scholarship'.

[378] Münkler, *Deutschen* (note 317). The phrase "mass influx" is on record in: European Union, *Treaty on the Functioning of the European Union*, Lisbon (signed 13 December 2007, in force since 1 December 2009), art. 78.

Through virtually autonomous networks[379] and the services of the so-called "migration industry", can develop strategies, which, within their own perspectives on migration, appear to be conducive to the accomplishment of set goals, even when state institutions have erected hurdles against immigration. The history of state-controlled migration restriction policy is the history of its long-term failure, even if short-term measures may have meet with some degree of success. In this respect, the theoretical perception of migration as well as the political, legistative and administrative handling of migration have, since the nineteenth-century paradigm change, followed what has already been established for the acceptance of positive international law, namely the finding that the international system as a whole has come to appear as anarchical and the belief in the implementability of global legal norms has turned into an illusion. The theoretical, legal and political juxtaposition of the freedom of emigration against the restriction of immigration, in turn, has advanced both dangers encountered by migrants and anxieties current among residents. In many states, there is, by consequence, no longer a lack of fair adjustment between the demand of residents for protection and the demand of migrants for security. The gap between has the potential of raising the level of conflict, thereby increasing insecurity for migrants and residents alike.

VI. Migration, Positive International Law and Unset Law of Hospitality

Which conclusions may follow from this description of the processes of the abandonment of natural law in its effects on relations among states, the upgrading of positive international law, the overarching of the law of hospitality by international law, and the change of the perception of migration and its handling? It becomes immediately clear that the largest number of international legal norms, as they have been put into force for about two hundred years, have hardly been helpful with regard to the regulation of global actions or actions with global impact as well as concerning the perception of the international system as an anarchical entity. That is to say that legal positivists have not lived up to the promise they have repeatedly given since the abandonment of natural law in the nineteeth century, namely that the legislation of positive legal norms as such could guarantee the rule of law. But this is not to say that international law should be rejected as redundant and as a chimera. Quite on the contrary: the deniers of international law[380] try to ignore what is a simply

[379] See above, note 375, and: Diana E. Ascott and Fiona Lewis, 'Motives to Move. Reconstructing Individual Migration Histories in Early Eighteenth-Century Liverpool', in: David Siddle, ed., *Migration, Mobility and Modernization* (Liverpool Studies in European Population, 7) (Liverpool, 2000), pp. 90-118. Jacques Post, *Information, Communication and Networks in International Migration Systems* (Tsukuba, 1995). Gungwu Wang, *China and the Chinese Overseas* (Singapore, 1991), pp. 3-21.

[380] For the twentieth century see: Walter Burckhardt, *Über die Unvollkommenheit des Völkerrechts* (Berne, 1923). Burckhardt, *Die Organisation der Rechtsgemeinschaft* (Basle, 1927) [reprint (Zurich, 1971)], p. 329: "Die Personen des Völkerrechts sind die Staaten. Jeder Staat ist Person des Völkerrechts, sofern er nur dem Begriffe des Staates entspricht (Vorhandensein einer Verfassung, eines Volks, eines Gebiets)."; p. 350: "Die Völkergemeinschaft

matter of virtually daily practice in the international arena, namely that most governments in most states of the world under most circumstances and almost at all times have honoured treaties under international law, although the "basic norm" *pacta sunt servanda* can not be legislated. Hence, there is no need of proving either the existence or the effectiveness of international law, as practice confirms both. But it is appropriate to ask, whether the international system may be perceived less frequently as an anarchical entity and can appear to suffer less harm, if positive international laws get legislated ever more frequently. The task is not confined to the minimisation of infringements upon international legal norms and the reduction of violent conflicts, but equally important is the discussion of the deeper theoretical problem of why the progressive frequency of the enactment of positive international legal norms has so far contributed so little to the regulation of global actions and actions with global impact in the international arena between states. Understanding the change of the perception of migration und its handling may suggest solutions to the latter problem.

A closer look at international legal norms enforced for the purpose of regulating some aspects of migration quickly reveals that conventions setting these legal norms have been designed to intervene only marginally into migration processes. The case in point is the Geneva Convention on refugees of 1951. As is well known, this convention does not stipulate any duty of states to admit migrants, but only sets the conditions under which persons should be treated, who have already been accepted as refugees. And even these conditions have had rather limited effects and have been under the proviso that the acceptance of refugees does not "place unduly heavy burdens on certain countries".[381] In its original version, the Convention contains even a time limit, until which it covers migratory movements, and sets this boundary on 1 January 1951.[382] Moreover, it obliges every signatory government to make the decision whether if wishes to apply refugee law only in Europe or "in europe and elsewhere". And, last but not least, it sets an unusually narrow concept of refugees, which focuses only on persons having crossed international borders of states for fear of persecution due to their race, religion, nationality or their political convictions,[383] thereby excluding war as a legal reason for seeking refuge.[384] The temporal boundary was waived in the 1967 protocol with its

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hat keine Verfassung und keine (von Rechts wegen bestehende) Organisation, sie hat folglich auch kein Organ, das von Rechts wegen zuständig wäre, zu bestimmen, welches Recht verbindlich sein und gelten soll."; p. 351: "Deshalb gibt es auch kein positives Völkerrecht, d. h. durch die Erklärung einer Autorität inhaltlich festgelegtes Recht." Fritz Sander, 'Das Wesen der "Völkerrecht" genannten gesellschaftlichen Gebilde', in: *Zeitschrift für die gesamte Staatswissenschaft* 81 (1926), pp. 80-127.

381 Geneva Convention (note 78), Preamble.

382 Ibid., art. 1, A2.

383 Ibid., art 1, A2.

384 There have been two reasons for the exclusion of war from the legal causes of seeking refuge, first the insight, drawn on empirical evidence, that escape from carnage of war does not necessarily and immediately result in migration across international borders of states, but rather to seeking shelter in what appear to be safe places; furthermore the politically motivated anxiety that the inclusion of war into the legal entitlements for support under international law may be abused among warring parties, purposefully expelling certain groups of people from their homes.

unusually harsh declaration as null and void from the very beginning.[385] The narrow concept of refugees has been under attack for a long time, not just among theorists but also within UNHCR praticitioners. Among others, criticisms have become vocal that the Convention was drafted under the impression of occurrences during and immediately after World War II, but not under a global perspective, and proposals have been made to the effect to list as refugees any persons, who may not claim basic human rights and neither can nor want to avail themselves of the protection of the state in which they happened to be.[386] Even the UNHCR has acknowledged the Eurocentric perspective informing the Convention and has suggested the pragmatic strategy of recognising as refugees persons fleeing from the carnage of war[387] and also those who do not cross international borders of states.[388] But these are either recommendations or non-binding proposals by an international organisation, of academic migration research, and the UNHCR has consistently refused to amend the Convention.

The Geneva Convention on refugees has thus been written to the effect of intervening into sovereign state competences solely under restrictively formulated conditions, has thus been shaped by the anxiety that any further intervention into state sovereigny might have reduced government willingness to accept the Convention. Even though it has set positive international law, the Convention avoids every impression that it could regulate migration as a type of global action or action with global effect. Consequently, long-distance migration across international borders of

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[385] Protocol (note 78). This expression was deemed a requirement for, otherwise, the original version of the Convention would have been valid for the time span between 1951 and 1967.

[386] Dana Schmalz, 'Der Flüchtlingsbegriff zwischen kosmopolitischer Brisanz und nationalstaatlicher Ordnung', in: *Kritische Justiz* 48 (2015), pp. 390-404. Andrew E. Shacknove, 'Who is a Refugee?', in: *Ethics* 95 (1985), pp. 274-284.

[387] In making this proposal, the UNHCR responded to well recorded claim by persons seeking recognition as refugees on the grounds that they had had to escape from the use of military force against them, and, in taking this stance, gave expression of their lack of knowledge of the wording of the Convention. UNHCR, *Handbuch über Verfahren und Kriterien zur Feststellung der Flüchtlingseigenschaft*, new edn (UNHCR, 2003), pp. 47-48 [first published (Geneva, 1979); unhcr.ch/fileadmin/user_upload/dokumente/03_profil_begriffe/fluechtlinge/Handbuch.pdf]; the handbook referred to the Geneva Convention on the Protection of Civilians during War of 12 August 1949 mit supplementary protocol of 8 June 1977 (which expanded, in art. 1, nr 4, the term "military conflict" to cover conflicts in which nations fight against colonial rule and foreign occupation as well as against racist regimes in execultion of their right of self-determination. However, in the media. The refugee status is often claimed for persons having escaped from military violence, even when there has not been an ascertained link between the conduct of war and the emigration of people. For example, on 31 May 2016, a ZDF reporter commented, on the occasion of the death of journalist Rupert Neudeck,founder of the aid organisation Kap Anamur, that Neudeck had established this organisation in 1979 in order to rescue Vietnamese "boat people" from the carnage of war. However, the Vietnam War had ended already in 1975, and the "boat people" of 1979 had escaped perceived hardships of postwar civilian life.

[388] UNHCR *Handbuch* (note 387), p. 24: "Die Furcht vor Verfolgung muss sich nicht immer auf das gesamte Territorium des Landes erstrecken, dessen Staatsangehörigkeit der Flüchtling besitzt. Bei Konflikten zwischen verschiedenen Volksgruppen oder schweren, bürgerkriegsähnliche Zustände mit sich bringenden Unruhen kann es vorkommen, dass sich die Verfolgung einer bestimmten ethnischen oder nationalen Gruppe nur auf einen Teil des Landes beschränkt. In einem solchen Fall wird einer Person die Flüchtlingseigenschaft nicht vorenthalten, nur weil sie Zuflucht in einem anderen Teil des Landes hätte sch können, wenn, nach den Umständen zu urteilen, ein solches Verhalten vernünftigerweise von ihr nicht erwartet werden konnte."

states has been left unchecked in legal respects and in the long run, and has thus provoked fear. Migration policy as the complex of domestic legislation, public administration and police surveillance of migration has, in words of the Commission on Human Security of 2003,[389] the difficult task of maintaining some balance between the legitimate demand for protection among residents and the equally legitimate demand for security among migrants under the law of hospitality[390] and thus excludes a general right of immigration.[391] Keeping this balance is difficult for the main reason that state migration policy, as primarily an instrument of domestic policy, has global actions or actions with global impacts as its target. Yet, migration policy, in this capacity, can only target migration, once migrants have crossed the borders of the state in which it is to be of effect. Amidst this conflict between the domestic range of legislative and exccutive institutions and the international arena in which migrants operate without practical possibilities of claiming security under international law,[392] migration policy, as a rule, is confined to what can be regulated under municipal legislation,[393] and is structured in accordance with the principle of ranking the demand of residents for protection under positive state law above the demand of migrants for security under the unset law of hospitality.[394] When based on that strategy, migration can at best be restrained in the

[389] Commission (note 376), p. 42: "Massive population movements affect the security of receiving states, often compelling them to close their borders and forcibly prevent people from reaching safety and protection. Armed elements among civilian refugee populations may spread conflict into neighbouring countries."

[390] For the theoretical discussion see: Mark Gibney, 'Citizenship and Freedom of Movement. An Open Admission Policy?', in: Gibney, ed., *Open Borders? Closed Societies? The Ethical and Political Issues* (Westport, CT, 1988), pp. 3-40, at p. 34. James F. Hollifield, *Immigrants, Markets and States. The Political Economy of Postwar Europe* (Cambridge and London, 1992), p. 41: "Immigration represents a critical dilemma for the governments of liberal states. The expansion of civil and social rights since 1945 (for citizens as well as noncitizens) has contributed to increases inmigration. Governments, especially in Europe, have struggled to cope with immigration and the challenge to state autonomy and sovereignty that it represents. Nothing short of a major political-economic upheaval that would roll back the liberal gains of the past forty years or eliminate current international inequalities is likely to arrest the movement of individuals across national boundaries." Albert Scherr, 'Offene Grenzen? Migrationsregime und die Schwierigkeiten einer Kritik am Nationalismus', in: *Prokla. Zeitschrift für kritische Sozialwissenschaft* 171 (2013), pp. 335-349. Michael Walzer, *Spheres of Justice* (Oxford, 1984), pp. 31-63.

[391] Among others, sociologist Urry proposed this demand: John Richard Urry, 'Mediating Global Citizenship', in: *Iichiko* 11 (1999), pp. 3-26, at pp. 8-9: "With regard to the rights to participate within a putative global community, these increasingly include the rights: to migrate from one society to another and to stay at least temporarily with comparable rights as the indigenous population; to be able to return not as stateless and with no significant loss of rights."

[392] Postulates of some "cosmopolitan law", when drawing on Kant, are encountering the difficulty during the twenty-first century that Kant, in accordance with Wolff's *civitas maxima*, derived his notion of cosmopolitan law from natural law, whereas, from the nineteenth century, natural law has been rejected as a source of most international law. This difficulty is overlooked in: David Held, 'Principles of Cosmopolitan Order", in: Gilllian Brock and Harry Brighowe, eds, *The Political Philosophy of Cosmopolitanism* (Cambridge, 2005), pp. 10-27, at pp. 25-27.

[393] Thus explicitly for Germany Udo di Fabio in his legal opinion for the Bavarian state government on the perceived "migration crisis" of 2015/16: Udi di Fabio, 'Migrationskrise als föderales Verfassungsproblem' [Typoscript, undated, apparelty early January 2016], p. 120, accessible in: [welt.de/politik/deutschland/article150982804/Rechtssystem-in-schwerwiegender-Weise-deformiert. html], who argued in favour of rigorous border controll implementation with reference to §§ 3 (obligation to carry passports), 14 (exemtion from the obligation to carry passports in cases of desasters and catastrophes), 15 (mandate to deny undocumented immigration) of the Residence Act (Aufenthaltsgesetz) and to § 18 (mandate to deny undocumented immigration) of the Asylum (Procedure) Act (Asyl(verfahrens)gesetz).

[394] The protection of residents against the prohibution of discrimination under the UN Charter presents a different

short term, but cannot be regulated in the long term. This is so, because the lack of efficiency of migration policy aimed at immigration restriction, must be compensated by ever intensified measures of border control, and these measures only boost the incentive to sidetrack them, specifically among migrants, who are determined to accomplish their goals.[395]

The formulation and implementation of migration policy must, therefore, take into consideration these effects and, by consequence, must not take place under the expectation that the protection of residents can be guaranteed with legislative and administrative means alone in the long run. Nevertheless, migration policy can, in short- and mid-term perspectives, contribute to hedging conflicts between demands for the provision of security for migrants under the law of hospitality and the demand for the protection of residents under state law. This can, however, take place solely under the condition that migration policy flows from coherent legislation and consistent implementation. That means that migration policy, simply responding unilaterally and hectically to apparently suddenly emerging crises, has few chances of leading to satisfactory outcomes. This implication has been envisaged already in the Lisbon Treaty on the "Functioning of the European Union", "amending the Treaty on European Union and the Treaty Establishing the European Community" of 1 December 2009, one of the psssages of which, relating to migration, reads: "(1) The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties. "; "(2) For the purpose of paragraph 1, the European Parliament and the Council, acting in accorance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: ... c) a common system of temporary protection for displaced persons in the event of a massive inflow."[396] Through these stipulations, the Lisbon Treaty obliges all governments of EU member states to establish a joint response to apparently acute occurrences of migration, which the text of the agreement, in line with nineteenth-century migration

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case. Providing protection to victims of discrimination is possible, even necessary, whenever groups of residents are being denied equal treatment by the law, for example nationality laws. In these cases, which do not affect migration directly, may abidance by the prohibition of discrimination be demanded under international law. On such a case see: Hans-Joachim Heintze, 'Integration von Bevölkerungsgruppen als Regelungsbereich des Völkerrechts', in: Christiane Lembke, ed., *Migration und Menschenrechte in Europa* (Lembke, Europa als politischer Raum, vol. 2) (Munster, 2009), pp. 189-202, at p. 195 (with reference to special regulations under Estonian nationality law, seen as discriminating residents with Russian collective identity in Estonia), pp. 199-200 (seen as incompatibel with the obligation to protect minorities under international law).

[395] Papastergiadis, *Turbulence* (note 307), p. 61: "In the context of global migration, the concept of the border needs to be radically re-examined. Borders are the most racialized and militarized zones on the political map. The so-called defence of the nation-state against the 'invasion' of migrants is happening in the USA and in Europe, at precisely the same time as the signing of new free-trade agreements and the encouragement of greater flexibility and mobility of the workforce within these regions."

[396] Lisbon Treaty (note 378); the phrase occurred in the EU recommenation of 2001 on asylum-seeking (note 317).

discourse,[397] describes in the metaphorics of uncontrollable natural disturbances. In the eventuality of some imminent threat against the demands of residents for protection, the treaty indeed gives priority to consultation among, over unilateral decisions of, member state governments, while categorising migration as uncontrollable. However, the unilateral, hectically enforced government decisions relating to migration policy, enforced within the EU in 2015, cast doubt on the implementability of even the minimal consultation efforts that the Lisbon Treaty envisages.

Moreover, unilaterally fomulated and hectically implemented migration policy is not only disadvantageous for relations among states, it runs contrary to the underlying goal of regulating migration. This is so, because many migrants, and most long-distance migrants at that, are used to plan their movements in the long-term, with long-distance migration often extending across long spans of time. Decisions that migrants may have made, are often not alterable once the migration has started.[398] Migration policy, which is supposed to be coherent in its planning and consistent in its implementation, thus, has to be based on perspectives that are not fundamentally at odds with internal migrants' perspectives, must therefore take into account motives and goals, which, as much as possible, have been ascertained among migrants prior to the beginning of their migrations. But still, robust empirical data are lacking, although proof of the possiblity of their generation has existed since the early nineteenth century. The generation of data on migration goals prior to the onset of migrations is a requirement for the simple reason that, as has long been known, usually more people declare their willingness to move than people actually carry out their intentions.[399] Hence, there is a principal possibility of influencing migration decision-making before the movement has begun, provided those seeking to influence migration decision-making have reasonably appropriate idea about what motivates migrants. However strategies devised to change what has come to be termed "causes of migration", should not rely on obsolete theories such as those encapsulated in the formula of "push and pull",[400] drawn on imperfect data bases, but should,

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[397] For the use of metaphors derived from natural desasters in descriptions of migration see, among others: Andreas Brinck, *Die deutsche Auswanderungswelle in die britischen Kolonien Nordamerikas um die Mitte des 18. Jahrhunderts* (Stuttgart, 1993). Hans-Jürgen Grabbe, *Vor der grossen Flut. Die europäische Migration in die Vereinigten Staaten von Amerika* (USA-Studien, 10) (Stuttgart, 2001). Münkler, *Deutschen* (note 5).

[398] See above, notes 375, 379.

[399] Thus already: Kingsley Davis, 'The Migration of Human Populations', in: *Scientific American* 231 (1974), pp. 92-105.

[400] Thus again employed recently by: Marcus ter Steeg, *Das Einwanderungskonzept der EU. Zwischen politischem Anspruch, faktischem Regeluingsbedürfnis und den primärrechtlichen Grenzen im Titel IV des EG-Vertrages* (Schriftenreihe Europäisches Recht, Politik und Wirtschaft, 321) (Baden-Baden, 2006), p. 36. Anne White, *Polish Families and Migration since EU Accession* (Bristol, 2011), p. 2. Di Fabio, 'Migrationskrise' (note 393), p. 17, and Münkler, *Deutschen* (note 5), pp. 124-127, despite long-standing criticism of the "push and pull": Klaus Jürgen Bade, *Auswanderer – Wanderarbeiter – Gastarbeiter. Bevölkerung, Arbeitsmarkt und Wanderung in Deutschland seit der Mitte des 19. Jahrhunderts*, 2 vol. (Ostfildern, 1984), vol. 1, pp. 57-58 [second edn (Ostfildern, 1985)]. Bade, 'Sozialhistorische Migrationsforschung', in: Ernst Hinrichs and Henk van Zon, eds, *Bevölkerungsgeschichte im Vergleich* (Aurich, 1988), pp. 63-74. Nicholas Canny, ed., *Europeans on the Move. Studies on European Migration. 1500 – 1800* (Oxford, 1994), pp. 263-283. Stephen Castles, 'The Australian Model of Immigration and

vis-à-vis identifiable groups of potential migrants, raise the threshold against the implementation of their migration plans and should do so on the basis of the well-ascertained perspectives migrants themselves have of their doings. Finally, migration policy should tirelessly remind both migrants and residents of their unset duties. Cases of the past, featuring serious violations of the law of hospitality by migrants out from Europe, do confirm the warning that complete freedom of immigration is neither possible nor appropriate. But that only means that complete freedom of emigration is also impossible. Article 13 of the Universal Declaration of Human Rights should, therefore, be understood as stipulating that no government can legally prevent nationals from emigrating, whereas it should not be read as giving the legal entitlement to everyone to pursue any migration plan under any circumstance.

The conclusion, then, is: Despite repeated contentions not just of the factuality but also the necessity of global mobility, institutions of state governance remain the only legitmate regulators for migration in short- and mid-term periods. Hoping for the possibility of returning to the world of seventeenth- and eighteenth-century natural law is an illusion. Such return is out of place in view of the dominant position of the international system as an anarchical entity and a dynamic one at that, which excludes the option of the restitution of static unset natural law. Instead, institutions of state governance can act in accordance with their competence for the regulation of migration, if and as long as they respect not only attitudes and perceptions of residents but also perspectives of migrants of their own doings and honour the unset law of hospitality. For the law of hospitality remains that distinct complex of legal norms that, in its simplicity and the balance of its rights and duties, provides more chances of the avoidance of conflict about migration than does positive international law. Even the Geneva Convention on refugees, so to speak the prototype of all international migration legislation, takes up, in its Article 2, the old unset law of hospitality with the stipulation that every “refugee” should comply with the duty of honouring the law of the host country, as if the principle of the territoriality of the law, already valid in terms of domestic legislation, should again be confirmed from out of the superior position of international law.

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