Chapter IX

Revolution and Law (1789 – 1856)

The Collapse of the European States System

The French Revolution of 1789 did not initialise the process leading to the collapse of the European states system but accelerated it. In the course of the revolution, demands became articulate that the ruled were not to be classed as subjects to rulers but ought to be recognised as citizens of states and members of nations and that, more fundamentally, the continuity of states was not a value in its own right but ought to be measured in terms of their usefulness for the making and the welfare of nations. The transformations of groups of subjects into nations of citizens took off in the political theory of the 1760s. Whereas Justus Lipsius and Thomas Hobbes[1] had described the "state of nature" as a condition of human existence that might occur close to or even within their present time, during the later eighteenth century, theorists of politics and international relations started to position that condition further back in the past, thereby assuming that a long period of time had elapsed between the end of the "state of nature" and the making of states and societies, at least in some parts of the world. Moreover, these theorists regularly fused the theory of the hypothetical contract for the establishment of government, which had been assumed since the fourteenth century, with the theory of the social contract, which had only rarely been postulated before.[2] In the view of later eighteenth-century theorists, the combination of both types of contract was to establish the nation as a society of citizens.[3] Supporters of this novel theory of the combined government and social contract not merely considered human beings as capable of moving out from the "state of nature" into states, but also gave to humans the discretional mandate to first form their own nations as what came to be termed "civil societies", before states could come into existence.[4] Within states perceived in accordance with these theoretical suppositions, nationals remained bearers of sovereignty.

The entire nineteenth century witnessed controversies about the question which rights nations arising from voluntary contracts should be entitled to claim for their members. On the one side, theorists argued that rule could be placed under the law only within states, so that nationals as citizens ought to have rights and obligations. For that reason, the nationals had to remain bearers of sovereignty.[5] On the other side, a school of theorists formed itself, specifically in German-speaking areas, which was determined to equip nations with long histories leading back into the remote past and, therefore, were unwilling to derive the existence of nations from the past conclusion of contracts. Theorists opting for this doctrine argued that a nation determined the collective identity of its members[6] and that, without belonging to a nation, persons would not even "have a name".[7]

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[1] Justus Lipsius, *De constancia libri duo* (Antwerp, 1584) [English version, edited by John Stradling (London, 1595); new edn of the English version, edited by Rudolf Kirk and Clayton Morris Hall (New Brunswick, 1939), pp. 95-96; reprint of the edn by Stradling, edited by John Sellars (Exeter, 2006)]. Thomas Hobbes, *Leviathan*, chap. XXX [London 1651], edited by Richard Tuck (Cambridge, 1991), p. 244.

[2] Johannes Althusius, *Politica*, chap. I/2, I/7, IX/12, XIX/12, edited by Carl Joachim Friedrich (Cambridge, 1932), pp. 15, 16, 90, 161 [first published (Herborn, 1603); further edn (Herborn, 1614); reprint of the original edn (Aalen, 1981); reprint of the edn by Friedrich (New York, 1979)].

[3] Jean-Jacques Rousseau, *Du contrat social*, chap. I/6 [printed version], edited by Simone Goyard-Fabre (Paris, 2010), pp. 129-132.

[4] Adam Ferguson, *An Essay on the History of the Civil Society* (Edinburgh, 1966), pp. 81-96 [reprint, edited by Louis Schneider (New Brunswick, NJ, 1890); first published (London, 1773); reprint of the original edn (London, 1969)].

[5] John Austin, *The Province of Jurisprudence* Determined (London, 1832) [edited by Herbert Lionel Adolphus Hart (London, 1954), S. 306-308, 315; second 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)].

[6] *Johann Gottlieb Fichte*, 'Reden an die Deutsche Nation. Erste Rede' [Berlin, 1807], in: Fichte, *Werke*, edited by Immanuel Hermann Fichte, vol. 7 (Berlin, 1846), pp. 264-279 [reprint (Berlin, 1971)].

[7] Giuseppe Mazzini, *The Duties of Man*, edited by Thomas Jones (London and New York, 1955), S. 53 [first

However, both schools of theorists agreed on the assumption that nations did not everywhere and always have to exist in states. By consequence, nations could be older than states and might even continue to exist after their states had been destroyed.[8] Furthermore, according to the same doctrine, if states had external borders that did not overlap with the areas of settlement of nations and were composed of groups of subjects not appearing to be nations, demands to adapt states to the nations could arise. Hence, the theory of the priority of nations over states placed states at the disposal of national sentiments. Specifically, this was the case within the Holy Roman Empire of the German Nation, in the Italian Peninsula and in the Balkans. Although the Empire had the word "nation" in its then official name, it had once been the holder of claims to world rule and could therefore not be derived from a government or social contract, but seemed to owe its existence to divine will. Consequently, at the turn towards the nineteenth century, theorists, rejecting as purely speculative the derivation of the Empire from divine will in the tradition of Pufendorf's thought, were then unable to recognise the Empire as a state.[9] Moreover, theorists then not merely denied sovereignty to the Imperial Estates but even doubted their statehood, thereby reducing them to executive agencies of the Empire.[10]

By contrast, there was widespread consensus throughout the nineteenth century about the criteria determining a nation as the population of a state. Already during the 1760s, language obtained priority as the dominant criterion allowing national identification, ahead of other criteria such as religious faith and the existence of a long-term community of communication.[11] The French revolutionaries politicised the concept of nation in June 1789, when they renamed the third chamber of the legislative body traditionally called "Estates General" (États Généraux) into "National Assembly" (Assemblée Nationale) and positioned it as the representation of the French nation as a whole. This new, political concept of the nation as the group of ruled bearing sovereignty and holding inalienable legal titles rapidly spread beyond the boundaries of the Kingdom of France. Already in 1791, Edmund Burke who was then looking favourably at the revolutionary activities in France warned of the dangerous impacts that these activities might have of the entire 'system of balanced power in Europe': "It is in these [ecclesiastical] electorates [inside the Holy Roman Empire] that the first impressions of France are likely to be made, and if they succeed, it is over with the Germanic body[12] 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 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 balance 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."[13] When taking into consideration the activities of Jacobins in the ecclesiastical Electorates west of the Rhine[14] and

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published (Biblioteca democratica settimanale, 13-16) (Genua, 1851)].

[8] Arnold Hermann Ludwig Heeren, 'Ueber Mittel zur Erhaltung der Nationalität besiegter Völker [1810] ', in: Heeren, *Historische Werke*, vol. 2 (Göttingen, 1821), pp. 3-32 [reprint (Frankfurt, 1987)].

[9] Georg Wilhelm Friedrich Hegel, '[Die Verfassung Deutschlands, c. 1802**]** ', in: Hegel, *Frühe Schriften* (Hegel, Werke, vol. 1) (Frankfurt, 1971), pp. 461-581., at p. 461.

[10] Adam Christian Gaspari, *Der Deputations-Receß mit historischen, geographischen und statistischen Erläuterungen und einer Vergleichstafel*, vol. 1 (Hamburg, 1803), pp. 62, 64 [reprint, edited by Hans-Jürgen Becker (Hildesheim, Zurich and New York, 2003)].]

[11] Friedrich Carl von Moser, *Von dem Deutschen National-Geist* (Frankfurt, 1765) , p. 5 [reprint (Selb, 1976)].

[12] Kurt von Raumer, 'Absoluter Staat, korporative Libertät, persönliche Freiheit', in: *Historische Zeitschrift* 183 (1957), pp. 55-96, at p. 76, has called attention to the fact that the phrase 'Corps Germanique' was part of eighteenth-century diplomatic jargon denoting the Holy Roman Empire.

[13] Edmund Burke, 'Thoughts on French Affairs [1791]', in: Burke, *The Works*, vol. 3 (London, 1903), pp. 347-393, at p. 358 [partly printed in: Paul Seabury, ed., *Balance of Power* (San Francisco, 1965), pp. 98-123].

[14] See: Jörn Garber, ed., *Revolutionäre Vernunft* (Kronberg, 1974). Lucien Jaumes, *Les discourse Jacobins et la démocratie* (Paris, 1989). Axel Kuhn, *Jakobiner im Rheinland* (Stuttgart, 1976). Kuhn, ed., *Linksrheinische deutsche Jakobiner* (Stuttgart, 1978).

elsewhere in the Empire[15] as well as the then conventional perception of the Empire as the core factor of stability in Europe, Burke's skepticism does not appear to have been unfounded.

The new concept identifying the nation as the population of a state with a common collective identity and as the bearer of sovereignty quickly disseminated beyond the boundaries of the French state. Already in 1810, the Prussian reformer Wilhelm von Humboldt (1767 – 1835) could demand the establishment of a university in Berlin with the argument that the new institution of higher education should promote "formation and education of the nation" (Bildung der Nation). With that phrase, Humboldt referred to both, the education of persons and the formation of national consciousness, and he insisted that both processes should take place contemporaneously, complement and advance each other.[16] In 1814, Humboldt expected that it could be the purpose of a newly to be established "German Confederation" to provide a "guarantee of all rights for the various classes and individuals within the nation" (Garantie aller Rechte der verschiedenen Klassen und Individuen der Nation), thereby perceiving the nation as an integrated group endowed with rights.[17] At the same time however, Karl Theodor von Hacke (1775 – 1834), statesman from Baden in Southwestern Germany, doubted that the "German Confederation" could ever fulfill "any nation-building demand or desire" (Bedürfniß oder Wunsch der Nation). Hacke was skeptical that this could be so because, in his view, the Confederation would divide the nation onto several states rather than pulling it together into a single state.[18] Deciding about the procedure how to "form" nations and how to establish states was difficult, laden with potential conflicts and not necessarily compatible with theories of the social and government contract.

Collective identities of residents in a state were equivalent either of nationality within the ideologies of the French Revolution or of indigenates in the sense of the pre-revolutionary state structure. In the first case, nationals were citizens of states under their elected government. In the second case, residents were subjects to mostly monarchical rulers. Indigenates continued well into the nineteenth century. The form of a state and the form of government were to be laid down in some basic written agreement for which the term "constitution" became common. Following the independence of the United States of America and the French Revolution, "constitution" was no longer an abstract framework of norms but often a concrete written published text regulating the rights and obligations of the citizens or the subjects. Often, mandatory military service was included into the obligations of citizens and subjects. The "constitutions" even elevated mandatory military service into the hallmark for determining the collective identity of a nation. The French republican constitution of 1793, which did not go into force, even prescribed military drill for all male citizens of the state.[19] Nations became equivalent of "peoples in arms" (Völker in Waffen).[20]

Nations as political groups of warrior citizens and subjects not merely became recognisable through mandatory military service but also in the rapidly growing acceptance of the military among traders and craftspeople in towns and cities. Until the end of the eighteenth century, these groups had often been hostile towards military service which they found obtrusive and, in any

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[15] Axel Kuhn, *Revolutionsbegeisterung an der Hohen Carlsschule* (Stuttgart, 1989).

[16] Wilhelm Christian Karl Ferdinand von Humboldt, '[Antrag auf Errichtung der Universität Berlin, 14. Mai 1809] ', in: Humboldt, *Politische Denkschriften*, edited by Bruno Gebhardt, vol. 1 (Humboldt, Gesammelte Schriften, vol. 10) (Berlin, 1903), pp. 139-145, at p. 140 [reprint (Berlin, 1968)].

[17] Wilhelm Christian Karl Ferdinand von Humboldt, 'Bases qui pourraient servir de norme au Comité qui sera chargé de la rédaction de la Constitution Germanique [April 1814] ', edited by Klaus Müller, *Quellen zur Geschichte des Wiener Kongresses 1814/1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 25) **(**Darmstadt, 1986), pp. 304-311, at p. 306 [also in: Humboldt, *Politische Denkschriften*, edited by Bruno Gebhardt, vol. 2 (Humboldt, Gesammelte Schriften, vol. 11) (Berlin, 1903), pp. 211-219; reprint of this edn (Berlin, 1968)].

[18] Karl Theodor, Freiherr von Hacke, '[Report, 30 September 1814]', edited by Klaus Müller, *Quellen zur Geschichte des Wiener Kongresses 1814/1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein Gedächtnisausgabe, 25) (Darmstadt, 1986), pp. 343-350, at pp. 346-347.

[19] Jacques Léon Godechot, ed., *Les constitutions de la France* (Paris, 1970), p. 90.

[20] Carl von Clausewitz, *Vom Kriege*, chap. II/6, 26 (Frankfurt, Berlin and Vienna, 1980, p. 521) [fourth edn of this edn (Berlin, 2003); first published, edited by Marie von Clausewitz (Berlin, 1832); sixteenth edn, edited by Werner Hahlweg (Bonn, 1952); nineteenth edn (Bonn, 1980); reprint of this edn (Bonn, 1991); English version by Michael Howard and Peter Paret (Princeton, 1976)].

case, life-threatening. However, from the turn towards the nineteenth century, nationalist ideologues became busy concocting theories which elevated the state into some embodiment of morality and the main instrument for the generation and enforcement of law. These ideologues demanded from nationals declarations of willingness to defend, and even to die for, the state. In the German-speaking areas, Friedrich Ludwig Jahn (1778 – 1852) and the gymnastics movement he mainly organised, were influential in militarising sports as paramilitary training and in campaigning among young people for the acceptance of the principle that the state should be a nation-state with strong war-making capabilities.[21] Philosopher Johann Gottlieb Fichte (1762 – 1814) argued similarly in demanding that governments should educate to nationhood the populations under their control. Fichte advocated an ethics that was no longer a theory of obligations for humankind at large but the foundation for the morality of just a nation. Directly contesting eighteenth-century political theory, Fichte claimed that the personal safety of all nationals could only be maintained if the nation as a whole was secure against external military threats. Fichte identified the state as the sole legitimate provider of security and proposed the "closed trading state" as the ideal form of the state. According to Fichte, the "closed trading state" restricted relations with other states to the minimum of the exchange of goods that needed to be traded, with the trade taking place exclusively under government control.[22] The personal identity of the residents in the state could, in Fichte's view, only be derived from the state collective identity which, he insisted, had to absorb into itself all lesser collective identities, such as families, neighbourhood groups and local political communities.[23]

In 1803, the Scottish lawyer Henry Peter Lord Brougham and Vaux (1778 – 1868) ascribed to nations thus conceived a certain psychological quality, which he called "movements" emerging from "passions". Nations, he argued, acted incalculably like the individual persons from whom they were composed, and could be moved into action through the sudden excitement of passions, specifically of envy and hatred.[24] In his view, a system of relations among states had to be capable of smoothing sudden actions of nations: "The grand and distinguishing feature of the balancing theory is the systematic form to which it reduces those plain and obvious principles of national conduct; the perpetual attention to foreign affairs which it inculcates; the constant watchfulness which it prescribes over every movement in all parts of the system; the subjection in which it tends to place all national passions and antipathies to the views of remote expediency; the unceasing care which it dictates of nations most remotely situated and apparently unconnected with ourselves; the general union, which it has effected of all the European powers in one common principle; *in fine*, as a consequence, of the whole, the right of mutual inspection, now universally recognized among civilized states, in the appointment of public envoys and residents. This is the balancing theory."[25]

Brougham took for granted that "national passions" existed, that they were incalculable and could not become subject to some general ethics of self-constraint valid for all humankind. Instead, Brougham ranked the smoothing of "national passions" as the main task of the politics of the balance of power. In other words, the international system of states was to determine the limits of the range of "national passions" and could do so only if specific legal norms were available. The international system, as Brougham conceived it, was no longer an instrument for the preservation of calculable stability but a dynamic means apt to constrain suddenly arising national "movements" and to reduce tensions resulting from the pursuit of "national passions".

A few years later, Friedrich von Gentz (1764 – 1832), who was to become chief aide to Austrian Foreign Minister Klemens Wenzel Fürst von Metternich (1773 – 1859, in office 1809 – 1848) during the Congress of Vienna, cast these perceptions into political terms. In 1800, Gentz had already published a scathing critique of plans for perpetual peace, which he deemed to be

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[21] Friedrich Ludwig Jahn and Ernst Eiselen, *Die deutsche Turnkunst zur Einrichtung der Turnplätze* (Berlin, 1816) [reprint (Fellbach, 1967); newly edited as *Die deutsche Turnkunst*, edited by Wilhelm Beier (Berlin, 1960)].

[22] Johann Gottlieb Fichte, *Der geschloßne Handelsstaat* [Tübingen, 1800], in: Fichte, *Werke 1800–1801*, edited by Richard Lauth and Hans Gliwitzky (Fichte, Gesamtausgabe, Series I, vol. 7) (Stuttgart, 1968), pp. 1-141.

[23] Ibid. Fichte, 'Reden' (note 6).

[24] Henry Peter Lord Brougham and Vaux, 'Balance of Power', in: Brougham, *The Works*, vol. 8 (London and Glasgow, 1857), pp. 1-50, at pp. 2-3 [first published anonymously as a review of: Charles François de Broglie, *Politique de tous les Cabinets de l'Europe*, 3 vols (Paris, 1802), in: *Edinburgh Review* 1 (1803), pp. 345-381].

[25] Ibid., pp. 12-13.

impossible.[26] Nor did he have anything good to say about the French Revolution. It appeared scary to him. The revolutionaries were driven, he feared, by feeble maxims of political freedom and the desire for universal rule which Napoleon that had actually implemented.[27] The conventional machine model of the European states system according to eighteenth-century balance-of-power theory was incapable of dealing with the "national passions" that the revolution had released. Gentz was inspired by Burke whose work he translated into German.[28] Yet he, like Brougham, accepted the principle that nations were bearers of "passions" and that any attempt to return to eighteenth-century balance-of-power theory was futile. In 1806, he published a critique of this theory, denouncing the balance of power as a "chimera",[29] taking up queries against the theory that had become vocal late in the eighteenth century:[30] "What is usually termed a balance of power is that constitution which exists among neighbouring states more or less connected with each other, by virtue of which none of them can violate the independence or the essential rights of another without effective resistance from another quarter and consequent danger to itself."[31] Gentz took this seemingly empirical[32] type of balance of power to have been lost and presented a definition of his own, in which he abandoned the multilateral concerns for the maintenance of peace and security as the overall goal and discarded the goal of the preservation of states as part of a divinely willed world order. Like Brougham, Gentz expected that rivalries among rulers of neighbouring states had to be suppressed through constraints of the international system and not through an ethics of self-constraint positioned as universally valid. From his review of eighteenth-century balance-of-power theory, Gentz concluded that this theory could no longer be upheld because the actual balance of power among states within the system had become "deranged": "In the physical world, a system resting on the counterpoise between opposing weights can only be deranged, if one or several of them lose their original energy, from which results the overweight of the other and the ruin of the machine. A similar system, applied to human conditions, is exposed to a further menace. Since in the latter systems the forces are equipped with freedom, one part can form an alliance at the expense of the others and can thereby effect (what it could never have achieved on its own) the ruin of those selected for sacrifice and, in this way, the destruction of the machine."[33] Following previous analyses, by other authors[34] he demonstrated this general principle on the empirical example of the partitions of Poland, through which, he concluded, the balance of power had become "deranged". On this occasion, Gentz maintained, balance-of-power politics had not been conducted to the end of preserving the stability of the international system. Instead, the partitions of Poland had "deranged" the machine, because three sovereigns had formed an alliance for the sole purpose of destroying one integral part of the system. He noted correctly that the partition had been an infringement against the quest for the preservation of states and presumed that this quest was underlying balance-of-power politics: "An alliance among several rulers had always been considered as a beneficial dam against the irregular power and the lust of a single oppressor. Now it became clear, to the terror of the world that such an alliance could be formed precisely in order to bring

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[26] Friedrich von Gentz, 'Über den ewigen Frieden', in: Kurt von Raumer, ed., *Ewiger Friede* (Munster, 1948), pp. 461-497 [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].

[27] Friedrich von Gentz, *Fragmente aus der neusten Geschichte des Politischen Gleichgewichts in Europa*, second edn (St Petersburg, 1806), pp. 36, 41 [reprint (Osnabrück, 1967); also in: Gentz, *Ausgewählte Schriften*, edited by Wilderich Welck, vol. 4 (Stuttgart and Leipzig, 1838), pp. 201-252].

[28] Friedrich von Gentz, 'Versuch einer Widerlegung der Apologie des Herrn Mackintosh', edited in: Gentz, *Über die Französische Revolution*, edited by Hermann Klenner (Berlin, 1991), pp. 507-573 [first published in: Gentz, ed., *Betrachtungen über die Französische Revolution*, German version of Edmund Burke, *Reflections*, vol. 2 (Berlin, 1793), pp. 208-274; also in: Gentz, *Ausgewählte Schriften*, edited by Wilderich Welck, vol. 2 (Stuttgart and Leipzig, 1836), pp. 177-188].

[29] Gentz, *Fragmente* (note 27), p. XXIV.

[30] Johann Heinrich Gottlieb Justi, *Die Chimäre des Gleichgewichts von Europa* (Altona, 1758).

[31] Gentz, *Fragmente* (note 27), pp. XXIV, 1, 21.

[32] Ibid., p. 1.

[33] Ibid., p. 16.

[34] E. g.: Jacques Mallet du Pan, *Du péril de la balance politique de l'Europe* (London, 1789) [English version (London, 1791)].

about the evil against the defence of which alliances had been installed."[35] The dissatisfying attempts to define and preserve the balance of power were mere justifications of transfers of rulers from one state to another, without respecting the wishes and interests of state populations, Gentz declared angrily, and there was "no place for a genuine perpetual peace, compatible at least with the idea and notwithstanding the difficulties of implementing it" (keinen Plan zum ewigen Frieden, der auch nur in der Idee und ohne noch an die Schwierigkeiten der Ausführung zu denken, Stich hielte).[36] Through such kind of transfers of rulers across territories, no state could possible come into existence, Hegel seconded, probably in 1802.[37]

The dynamism which Gentz ascribed to political actors under the label of freedom set the international system apart from its eighteenth-century predecessor. Gentz noted the discrepancy and concluded that that previous international system had been destroyed. The international system of his own time struck Gentz no longer as a lasting order imposed by nature but appeared to be a human-made assembly of states under rules and procedures regulating inter-state relations. The balance of power did continue to attract the attention not mainly of Gentz but also of other diplomats, even though they were at odds about how to define it and how it should be allowed to extend. In the German-speaking areas, the demand became vocal that core elements of the eighteenth-century balance-of-power systemic framework should be restored, most notably the Holy Roman Empire and the pluralism of the states existing within its boundaries. But, for one, Karl August Freiherr von Hardenberg (1750 – 1822), Prussian delegate at the Vienna Congress, believed that the "future repose and balance of Europe" (zukünftige Ruhe und Balance Europas) should differ from previous systems with regard to its centre and demanded that in the new system power should be concentrated in Germany under the joint leadership of Austria and Prussia. In this regard, Hardenberg agreed with his Austrian counterpart Metternich.[38] Wilhelm von Humboldt even demanded a new model for the description of nations, states and the international system surrounding them. When he reflected about the new constitution for Germany in 1813, he assumed that individuals would naturally gather in nations and that nations would divide humankind. He requested that all politics should follow the dictates of nature.[39] To Humboldt, nations and states were like hugely expanded living bodies with their organs. Nations as political bodies like individuals appeared to him to be shaped according to natural laws of life and death. Nature in Humboldt's perspective was no longer the essence of a divinely willed unchangeable order of things but appeared to be subject to the laws of growth and decay. In his assertion that nations were willed by nature, Humboldt agreed with Brougham. Both theorists used the metaphoric language of biology, and this language was to become dominant throughout the nineteenth century.

Perhaps the most consequential factor not only of the politicisation of the concept of nation but also of the dissemination of this concept of nation across the borders of the French state was the "Declaration of Man and the Citizen" (Declaration de l'homme et du citoyen) that the French National Assembly approved of on 26 August 1789. In its seventeen articles, the Declaration made explicit some legal norms which appeared to be in force not merely in France but for persons in all states. Especially with regard to rights relating to the equality and the freedom of the individual, the Declaration drew on older norms pertaining to natural law and demanded validity of these norms for

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[35] Gentz, *Fragmente* (note 27), p. 21.

[36] Gentz, *Fragmente* (note 27), pp. XXIV, 1, 21; Gentz, 'Frieden' (note 26), p. 483.

[37] Hegel, 'Verfassung' (note 9), pp. 477-479.

[38] Karl August Freiherr von Hardenberg, '[Bemerkungen zur Entstehung seines Verfassungsplans, 3 September 1814, delivered to Prince Metternich]', edited by Klaus Müller, *Quellen zur Geschichte des Wiener Kongresses* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 23) (Darmstadt, 1986), pp. 337-339, at p. 338]. Klemens Wenzel Fürst von Metternich, '[Instruction to Baron Wessenberg for His Mission to London, 8 February 1813]', edited by Wilhelm Oncken, *Oesterreich und Preußen im Befreiungskriege*, vol. 1 (Berlin, 1876), pp. 416-417. Metternich, '[Instruction to Baron Lebzeltern for His Mission to the Russian Headquarters at Kalish in Poland, 8 February 1813]', edited by Oncken(as above), pp. 421-422.

[39] Wilhelm Christian Karl Ferdinand von Humboldt, 'Denkschrift über die deutsche Verfassung [December 1813]', in: Humboldt, *Politische Denkschriften*, edited by Bruno Gebhardt, vol. 2 (Humboldt, Gesammelte Schriften, vol. 11) (Berlin, 1903), pp. 95-112, at pp. 97-98 [reprint (Berlin, 1968)].

the constitutions of all states.[40] Thus, Article XVI ruled that states, in which human rights were not guaranteed, where no separation of powers was in practice and no written constitutions existed at all, should not be classed as subjected to the rule of law. Moreover, the Declaration revoked the distinction between natural and state law with respect to its demand for the recognition of equality (Art. I) and freedom (Art. II) for all human beings and, in doing so, provided the basis for the further demand that the state, and not nature, should be the agent guaranteeing these rights. The Declaration stated this request explicitly not just for France but for the world at large. In this respect, it went far beyond the previous declarations of human rights in the context of the American Revolution. According to the French declaration, all nations and states as well as all individuals were permanently holding the same natural rights and rules of justice, although no institution of rule was there to enforce these rights and rules everywhere in the world. According to this argument, states and nations, with regard to the relations among themselves, existed in the permanent state of nature.[41] By consequence, the law among states could, strictly speaking, be no more than "external state law" on the basis of the French declaration of human rights.[42]

States as instruments for the establishment and enforcement of legitimate rule together with nations, as long as they were considered to be and remain bearers of sovereignty, turned into corporate bodies. This was a metaphor borrowed from biology. It came into use early in the nineteenth century not merely for states and nations but also for confederations and even the international system as a whole.[43] When political theorists, jointly with activists and political decision-makers in government, began to articulate the demand during the French Revolution that every nation should exist within as state of its own, they kicked off a hectic process of change in the world of states, hitherto unknown not only in Europe but in the world at large. In the course of this process, the majority of states disappeared as sovereigns in Europe between 1789 and 1820 and became mediatised to fewer, mostly large-sized states as non-sovereign secondary units. On the territory of the Holy Roman Empire, the German Confederation, in operation since 1820, had no more than 26 members, including Austria and Luxemburg. In 1833, the members of the German Confederation, except Austria, formed the German Customs Union. Likewise in the Italian Peninsula, many states ceased to exist and were replaced by new institutions, usually of short duration in the early years of the nineteenth century.

States thus no longer counted as stable institutions, but became disposable to diplomatic arrangements at peace and other congresses or have been destroyed through war. Governments of states received the task not only of maintaining the legitimacy of the states under their control, but also to permanently to testify to the usefulness of the state for the formation and the preservation of the nation seen as conveying a single collective identity upon long-term residents within the state's borders. In practice, the disposability of states meant as a rule that new states would replace previous ones. Once the demand for a new state became vocal, it was equivalent of the demand for the destruction of usually more than one existing state. The phrase "state succession" came up replacing the earlier term 'state revolution', which had been limited in scope to internal transformations of state institutions and patterns of administrative practice[44], and, drawn on the analogy of the the

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[40] Wolfgang Martens, 'Völkerrechtsvorstellungen der Französischen Revolution in den Jahren von 1789 bis 1793', in: *Der Staat* 3 (1964), pp. 295-314.

[41] Constantin François Volney, '[Address to the National assembly, 18 May 1790]', edited by Boris Mirkine-Guetzévich, *L'influence de la Révolution Française sur le développement du droit international dans l'Europe Orientale* (Paris, 1929), p. 309.

[42] Alexandre Maurice Blanc de la Nautte, Comte d'Hauterive, *De l'état de la France à la fin de l'an VIII* [1800] (Paris, 1800), pp. 38-39. Heinrich Bernhard Oppenheim, *System des Völkerrechts*, chap. I/2 (Frankfurt, 1845), p. 2.

[43] Humboldt, 'Bases' (note 17), S. 304.

[44] 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. Johann Gottlieb Steeb, *Versuch einer allgemeinen Beschreibung vn dem Zustand der ungestitteten und gesitteten Völker nach ihrer moralischen und physicalischen Beschaffenheit* (Karlsruhe, 1766), pp. 100-101, 187-190. Georg Andreas Will, 'Einleitung in die historische Gelahrtheit und die Methode, die Geschichte zu lehren und zu lernen [Ms. Nuremberg: Stadtbibliothek, Will Papers (Bibliotheca Norica Williama), V.612[a]; 1766]', edited by Horst Walter Blanke, 'Georg Andreas Wills "Einleitung in die historische Gelahrtheit" (1766) und die Anfänge

life-cycle of birth and death, fused together the concepts of state destruction as well as state creation and made its way into the language of international law.[45] Immediately after the turn towards the nineteenth century, the populations of the European settler colonies in the Caribbean and Latin America demonstrated the far-reaching effects of this new perception of states. In Haiti, which had become an integral part of France in 1794 and was subject to French law, Afro-Americans succeeded in establishing the first new state in the Western hemisphere after the USA in 1804. The French government recognised the new state only in 1820. From 1808, the formation of autonomous governing juntas took place on the American Continent as a precursor to the establishment of new states replacing the former Portuguese and Spanish colonies between 1810 and 1829. From then to the second half of the nineteenth century, European colonial rule in the Americas became confined to

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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 (Fundamenta historica, vol. 1) (Stuttgart, 1990), pp. 313-350, at p. 320]. 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, at pp. 62-63. Gatterer, *Einleitung in die synchronistische Universalhistorie zur Erläuterung seiner synchronistischen Tabellen* (Göttingen, 1771), part I, p. 1. August Ludwig von Schlözer, *Vorstellung seiner Universalhistorie* (Göttingen and Gotha, 1772), pp. 1, 107 [reprint, edited by Horst Walter Blanke (Beiträge zur Geschichtskultur, 4) (Hagen, 1990)]. Ferdinand Friedrich von Nicolai, *Betrachtungen über die vorzüglichsten Gegenstände einer zur Bildung angehender Officiers anzuordnenden Kriegsschule* [Stuttgart, Württembergische Landesibliothek, Cod. Milit. 2º 33 (1770)], edited by Daniel Hohrath, in: *Militärgeschichtliche Mitteilungen* 41 (1992), pp. 115-141. Gottlob David Hartmann, 'Ueber das Ideal einer Geschichte', in: *Der Teutsche Merkur* 6 (1774), pp. 195-213 [edited in: Hartmann, *Nachgelassene Schriften*, edited by Christian Jakob Wagenseil (Gotha, 1779), pp. 245-270; also edited in: Horst Walter Blanke and Dirk Fleischer, eds, *Theoretiker der deutschen Aufklärungshistorie*, vol. 1 (Fundamenta historica, vol. 1) (Stuttgart, 1990), pp. 688-697, at p. 689]. Claude François Xavier Millot, *Universalhistorie alter, mittlerer und neuer Zeiten*, German version, edited by Wilhelm Ernst Christiani, Part 9 (Leipzig, 1787) [first published (Paris, 1772-1773); English version (London, 1779)]. Johann Georg Wiggers, 'Versuch, die verschiedenen Pflichten eines Geschichtsschreibers aus einem Grundsatze herzuleiten', in: Wiggers, *Vermischte Aufsätze* (Leipzig, 1784), pp. 1-73 [also edited in: Horst Walter Blanke and Dirk Fleischer, eds, *Theoretiker der deutschen Aufklärungshistorie*, vol. 1 (Fundamenta historica, vol. 1) (Stuttgart, 1990), pp. 429-452, at p. 451]. 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). Woldemar Friedrich von Schmettow, *Patriotische Gedanken eines Dänen über stehende Heere, politisches Gleichgewicht und Staatsrevolution*, second edn (Altona, 1792) [first published (Altona, 1792)], at p. 111, combined the usage of the conventional concept of revolution with the new concept of a radical overthrow. Schmettow, *Erläuternder Commentar zu den Patriotischen Gedanken* (Altona, 1793). By contrast, the new concept of revolution is on record already in: 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.

[45] For early records see: Johannes von Müller, 'Darstellung des Fürstenbundes', in: Müller, *Sämmtliche Werke*, vol. 9 (Stuttgart and Tübingen, 1811), pp. 11-310, at pp. 100-101. Carl Theodor von Welcker, *Die letzten Gründe von Recht, Staat und Strafe* (Gießen, 1813), pp. 13-26. Johann Caspar Bluntschli, *Psychologische Studien über Staat und Kirche* (Zurich, 1844), p. 15. Johann Georg Sulzer, *Kurzer Begriff aller Wißenschaften und andern Theile der Gelehrsamkeit, worin jeder nach seinem Inhalt, Nutzen und Vollkommenheit kürzlich beschrieben wird*, second edn (Leipzig, 1759), pp. 24-54, §§ 29-67: 'Von der Historie' [partly 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. 286-299, at p. 286 (p. 24 of the second edn)], envisaged the description of the demise of states as the historian's task, but did not associate the coming and going of states with the life cycle. On state succesion in the perspective of late nineteenth- and early twentieth-century legal theory see: Amos Shartle Hershey, 'The Succession of States', in: *American Journal of International Law* 5 (1911), pp. 285-297. Max Huber, *Die Staatensuccession. Völkerrechtliche und staatsrechtliche Praxis im 19. Jahrhundert* (Leipzig, 1898), pp. 8, 18. Arthur Berriedale Keith, *The Theory of State Succession. With Special Reference to English and Colonial Law* (London, 1907) [microfiche edn (Zug, 1985)]. S. Kiatibian, *Conséquences juridiques des transformations territoriales des états sur les traités*. LLD Thesis (University of Paris, 1892) [reprint (Farmington Hills, 2013)]. Walter Schönborn, *Staatensukzession* (Handbuch des Völkerrechts. Part 3, vol. 2) (Berlin, 1913).

some parts of the Continent, among them the Guyanas and Canada, as well as mostly small islands in the Caribbean and off the Canadian coast. In the new states, however, European settler colonists refused to admit as citizens the Native Americans populations, where these had not fallen victim to genocide, and continued to suppress the enslaved Afro-Americans.

War and State-Making

The changes of the concept of the state and the nation occurred in the context of severe and long-lasting military conflicts which resulted from responses of rulers outside France towards the revolution taking place there. Among the rulers who voiced their opposition against the revolutionary movement in France earliest were Frederick William II, King of Prussia (1786 – 1797) and Emperor Leopold II (1790 – 1792, 1765 – 1790 Grand Duke of Tuscany), son of Maria Theresa and brother to the French queen Marie Antoinette (1755 – 1793), at whose request the two rulers took a strong stand against designs to abolish monarchy in France. In presence of the Duke Charles Philippe d'Artois, later King Charles X of France (1757 – 1836, in office 1824 – 1830), both monarchs signed a joint declaration in the Saxon town of Pillnitz on 27 August 1791. The Pillnitz Declaration proclaimed the principle that Prussia and the Holy Roman Empire as a whole would not intervene into French domestic political affairs as long the monarchy and the royal family in France would remain untouched. The monarchs intended their declaration to be a confirmation that Prussia as well as the Empire would not get involved, as long as the stated conditions remained fulfilled. But, in France, the declaration was received with the exactly opposite effect. The revolutionary government in Paris took it to be a political intervention which it deemed unlawful by the then acknowledged standards of the law among states.[46] Consequently, the government strictly opposed any external intervention into French domestic affairs, and continued to pursue its efforts at the enforcement of a new constitution imposing severe restrictions on the rights of the king. Both monarchs and their advisors in Prussia and the Empire assumed, not without reason that the French royal army was being subjected to measures of fundamental restructuration[47] and thus was hardly prepared for deployment in war. Therefore, they convinced themselves that rescuing the French monarchy through a military intervention would be a quick, easy and relatively cheap affair.

Against these expectations, the National Legislative Assembly (Assemblée Nationale Législative) that had been elected in lieu of the National Assembly between 29 August and 15 September 1791, declared war on Austria for the Holy Roman Empire on 20 April 1792. The imperial administration in Vienna and the government of Prussia with their alliance partners Hesse-Kassel and Spain marched an invasion army into France with the declared aim of defending the office and the person of the French king. The revolutionary government responded by declaring "the fatherland in danger" and had masses mobilised against the invasion army. At Valmy on 20 September 1792, that army suffered a defeat that stopped its advance. King Louis XVI and Marie Antoinette were put on trial which led to death sentences. The king was executed on 21 January 1793, his wife on 10 October 1793. The Peace of Basle of 5 April 1795 between France on the one side, Prussia, Hessen-Kassel and Spain on the other as well as the Peace of Campoformio of 17 October 1793 between Austria and France concluded the intervention with a complete Austrian and Prussian withdrawal and the cession to France of areas west of the Rhine.

Backed by its military success, the revolutionary government in France turned the concept of intervention against its former enemies and formulated a new doctrine saying that the French revolutionary army would have to intervene in states without written constitutions, because according to French revolutionary convictions, the rule of law could only be guaranteed in

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[46] 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*, chap. II/4, Nr 54 (London [recte Neuchâtel], 1758), p. 297 [second edn (Paris, 1773); third edn (Amsterdam, 1775); new edn, 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)].

[47] Richard Cobden, 'The Balance of Power [1836]', in: Cobden, *The Political Writings*, vol. 1 (London and New York, 1867), pp. 253-283 [also in: Paul Seabury, ed., *Balance of Power* (San Francisco, 1965), pp. 128-136].

constitutionally governed states. The revolutionary army thereby received mandate from the Republic, declared on 21 September 1792, to impose the rule of law in states without written constitutions. The first target of the intervention was the Southern Netherlands where revolutionary groups were already working and which had stood under the control of the government in Vienna since 1714. Yet the French revolutionary army did not confine its invasion to the Southern Netherlands but extended its advance into the Northern Netherlands where it proclaimed the 'Batavian Republic'. William V (1748 – 1806), the Stadhouder for the Northern Netherlands fled, first into the United Kingdom and from there into the Empire, while he surrendered control over the Dutch overseas positions to the British government.[48] The ensuing wars between France and a variety of European states produced further thorough changes of the European states system, as numerous states ceased to exist around 1800 and were replaced by new ones. It was Napoleon Bonaparte (1769 – 1821), first and foremost, who promoted the processes of state succession through the deployment of military force since 1797. In the Italian Peninsula he dissolved the ancient republics of Genua and Venice in the course of an invasion by the French revolutionary army under his command and sacked the Papal States that had been formed in the sixteenth century. Napoleon set up here as in other parts of the peninsula new states at his discretion.

Napoleon's more far-reaching attempt failed through which he sought to conquer Egypt and use it as a base to attack British positions in India without having to circumnavigate Africa. The French revolutionary army that Napoleon led into Egypt in 1797 withdrew in 1801. Napoleon who had returned early from Egypt, participated in the coup d'état of 9 November 1799 and strengthened his grip on the government. Although his conquest of Egypt failed, it resulted in sharpening the British-French antagonism that had been growing since the decapitation of King Louis XVI. The United Kingdom turned into France's main and most formidable enemy. The British government enforced a trade boycott against France and all areas under French control on the European Continent. One consequence of the boycott was that the French government could not act against the uprising in Haiti of 1804; a further consequence was the sale to the USA in 1803 of vaguely defined French titles of control over areas in the South and the Midwest of North America then collectively called "Louisiana". Napoleon hoped to circumvent the boycott first by expanding French control over the German-speaking areas in 1805, then by invading the Iberian Peninsula in 1808 and eventually by attacking Russia in 1811. On the other side, the British government felt compelled to ally itself with the Spanish government against Napoleon and to support Spanish interests in the Caribbean and Latin America. By consequence, the British government could not intervene in favour of the Latin American independence movements as long as Napoleon's rule continued.

During the years 1805 and 1806, the French revolutionary army defeated several states within the Holy Roman Empire, whose rulers had not by that time voluntarily opted for cooperation with Napoleon. French control over states within the German-speaking areas was cast into legal terms through the peace treaties of Bratislava on 26 December 1805 with Austria and Hungary[49] and by way of the establishment of the Confederation of the Rhine under French leadership on 12 July 1806,[50] to which altogether 37 states and rulers acceded. Napoleon posed as if he was emperor, playing with ranks and titles. Thus he upgraded the Electorate of Bavaria and the Duchy of Württemberg to kingdoms on 1 January 1806, whereby he had given the rank of a duchy to Württemberg only in 1803. Also in 1803, he gave the rank of Electors to the Landgrave of Hessen-Kassel and the Duke of Baden. The Elector of Baden was raised to the rank of a Grand Duke, also in 1806, jointly with the Duke of Berg and Cleves and the Landgrave of Hessen-Darmstadt. However, the latter was merged into the newly formed Kingdom of Westphalia already in 1807 with Kassel as its capital city under the rule of Napoleon's younger brother Jérôme. The imperial administration in Vienna recognised the sovereignty of Bavaria and Württemberg through the treaty

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[48] William V, Stadhouder General of the Netherlands: 'Foreign Office, Draft Order [1. Februar 1795]', in: Hermann Theodor Colenbrander, ed., *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840*, vol. 2 (The Hague, 1906), pp. 819-820 [also in: George McCall Theal, ed., *Records of the Cape Colony* (London, 1897), p. 26].

[49] Treaty Austria – France, Bratislava, 26 December 1805, in: *CTS*, vol. 58, pp. 341-349.

[50] Act of the Confederation of the Rhine, 12 July 1806, in: *CTS*, vol. 58, pp. 461-492.

of Bratislava.[51] Some of the states within the Empire that, like Bavaria, had been effected by the transfer of control of territories west of the Rhine under French control by the stipulations of the treaty of Lunéville of 9 February 1801, received compensation in the form of the transfer of control over small states which became mediatised to secondary administrative units in 1803.[52] The compensation act turned Baden, Bavaria and Württemberg to large territorial states. Napoleon crowned himself Emperor of the French on 18 May 1804, whereupon the reigning Roman Emperor Francis II / I (1795/1804 – 1835) took the additional title of Emperor of Austria on 11 August 1804 and continued to hold the title of King of Hungary. As Francis bore two imperial titles, the imperial status of Habsburg rule in Vienna was no longer necessarily tied to the institution of the Holy Roman Empire. By consequence, the Empire became subject to diplomatic dispositions in accordance with the principle of state succession. As the Vienna imperial administration feared that Napoleon would aspire to the crown of the Holy Roman Empire together with his French imperial crown, it provided Francis II with legal opinions advising him to lay down the Roman imperial crown.[53] Francis implemented the advice and released all imperial estates from their duties towards the Emperor and the Empire on 6 August 1806. The act did not dissolve the Holy Roman Empire but prevented Napoleon from grabbing the Roman imperial crown. The resulting Habsburg Imperial-Royal Monarchy on the Danube continued until 1918. Meanwhile, Prussia came under French occupation through the peace of Tilsit of 9 July 1807.[54]

However, Napoleon neither succeeded in breaking up the British continental boycott nor was he able to conquer British overseas positions. His attempts to lift the boycott through invasions of the Iberian Peninsula (1808 – 1814) and Russia (1811 – 1812) were thwarted by the guerrilla tactics that Spanish resistance forces practiced against the French invasion army and through the tactical withdrawal of the Russian government into areas east of Moscow, which were beyond reach for Napoleon. Although he reached Moscow and took the city, he could not maintain himself in control of the place and had to withdraw under heavy losses. Moreover, the failure of Napoleon's invasion of Russia gave leverage to anti-French opposition specifically in the German-speaking areas. In 1813, the opposition militarised and the resulting wars of liberation led to the dissolution of the Confederation of the Rhine. The first peace of Paris of 31 May 1814 confirmed Napoleon's defeat, forced him to withdraw from all offices and to accept exile on the Italian island of Elba, while obliging the winners to convene a general peace conference in Vienna later in the year.[55] Napoleon's attempt to regain power based on his continuing popularity among soldiers failed in spring 1815, while the congress was already meeting in Vienna. The second Peace of Paris of 20 November 1815 concluded the wars in the aftermath of the French Revolution of 1789.[56]

The Congress of Vienna, meeting between 18 September 1814 and 9 June 1815 with more than 200 delegates, thus, did not constitute a peace but provided a new order of states in large parts of Europe. Moreover, it approved of international legal agreements on the termination of slavery and slave trade[57] and the freedom of riverine traffic on the Maas, the Main, the Moselle, the Neckar, the

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[51] Bratislava Treaty (note 49), Art. XIV, p. 347.

[52] Treaty France – Roman Emperor and Roman Empire, Lunéville, 9 February 1801, Art. VI, in: *CTS*, vol. 55, pp. 476-495, at p. 479. Gaspari, *Deputations-Receß* (note 10).

[53] Alois Freiherr von Hügel, 'Gutachten über die Frage: ob das Österreichische Kaiserhaus nach den eingetretenen Folgen des Pressburger Friedens die römisch-deutsche Kaiserkrone noch forttragen solle? [17 May 1806]', nr 11, 12, edited by Kurt von Raumer, 'Hügels Gutachten zur Frage der Niederlegung der deutschen Kaiserkrone', in: *Zeitschrift für bayerische Landesgeschichte* 27 (1964), pp. 399-408, at p. 405. Friedrich Graf von Stadion, '[Memorandum on the Usefulness of Retaining or Deposition of the Roman-German Imperial Crown, 24 May 1806]', edited by Karl Otmar Freiherr von Aretin, *Heiliges Römisches Reich 1779 – 1806*, nr 63, vol. 2 (Veröffentlichungen des Instituts für Europäische Geschichte Mainz, 38) (Wiesbaden, 1967), pp. 334-344., at pp. 338-341.

[54] Treaty France – Prussia, Tilsit, 9 July 1807, in: *CTS*, vol. 59, pp. 257-263.

[55] Treaty of Paris, 30 May 1814, in: *CTS*, vol. 63, pp. 172-202 [Secret Separate Articles, partly edited by Klaus Müller, *Quellen zur Geschichte des Wiener Kongresses 1814/1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr vom Stein Gedächtnisausgabe, 25) (Darmstadt, 1986), pp. 62-63].

[56] Treaty Austria – Prussia – Russia – UK, 20 November 1815, in: *CTS*, vol. 65, pp. 253-257; also in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 3, part 1 (Berlin and New York, 1992), pp. 100-106.

[57] Thierry Lentz, *1815. Der Wiener Kongress und die Neugründung Europas* (Munich, 2014) [first published (Paris,

Rhine and the Scheldt.[58] Most of the delegates approached the reordering of the European states system in accordance with the conventions; thus, they established a Statistical Commission[59] which received the task of counting "souls" in the manner of eighteenth-century statistics,[60] seemingly as if it was the task of the congress to piece together the states of Europe into some equilibrium. In doing so, the delegates gave expression to the view that the new order among states in Europe was to be laid out for the long term, as the pre-revolutionary order had claimed to be. They also agreed to dissolve most of the states that had owed their existence to Napoleon's discretion. But they did not return to the European states system that had been in existence up until 1789. Instead, the delegates, like Napoleon, implemented state succession on a large scale. For the German-speaking areas, they left untouched the compensation decision of 1803, for the North of the Italian Peninsula, they turned down requests for the restoration of the ancient republics of Genua and Venice.[61] Genua became integrated into the Kingdom of Sardinia Piedmont, Venice came under Austrian rule. The plan to restore the Holy Roman Empire received no support at the congress, once the Empire of the French had ceased to exist with Napoleon's abdication.[62] On the contrary, the congress approved of the establishment of the German Confederation, including Austria,[63] recognised Switzerland as a sovereign federation under permanent military and political neutrality[64] and, on the basis of the first Treaty of Paris also recognised the newly founded Kingdom of the Netherlands, now comprising the old States General of the Northern and the former Habsburg Southern Netherlands into one state under the rule of King William I (1815 – 1840).[65]

However, the delegates rejected the plea to acknowledge nations as bearers of sovereignty and to support the formation of national states, most notoriously in the German-speaking areas and the Italian Peninsula. Also Poland that had been carved up completely in 1795 remained divided under Austrian, Prussian and Russian rule. The congress even strengthened the power of the Russian

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2013)]. Déclaration des Puissances sur l'abolition de la traite des Nègres, Vienna, 8. Februar 1815, in: *CTS*, vol. 63, pp. 474-475.

[58] Règlement pour la libre navigation des rivières, Vienna, 24 March 1815, in: *CTS*, vol. 64, pp. 14-26.

[59] Hans Mauersberg, 'Rekonstruktionsprojekte deutscher Staaten auf dem Wiener Kongreß und die ihr dienlichen bevölkerungsstatistischen und sonstigen Unterlagen nach den Gesandtschaftsberichten des k[öni]g[lich] britischen und hannöverschen Bevollmächtigen, des Grafen Münster', in: Wilhelm Abel, Knut Borchardt and Hermann Kellenbenz, eds, *Wirtschaft, Geschichte und Wirtschaftsgeschichte. Festschrift für Friedrich Lütge* (Stuttgart, 1966), pp. 266-283.

[60] Karl August Freiherr von Hardenberg, 'Plan für die künftige Gestaltung Europas [29. April 1814]', edited by Klaus Müller, *Quellen zur Geschichte des Wiener Kongresses 1814/1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 23) (Darmstadt, 1986), pp. 33-59, at pp. 35-59.

[61] James MacKintosh, '[Address to the House of Commons, 27 April 1815]', in: James Joll, ed., *Britain and Europe* (London, 1961), pp. 66-67.

[62] Johannes Anton Graf Kapodistrias, 'Considérations sur l'Empire Germanique [28. Januar / 9. Februar 1815]', in: Georg Heinrich Pertz, *Das Leben des Ministers Freiherrn vom Stein*, vol. 4 (Berlin, 1851), pp. 735-739. Heinrich Friedrich Karl, Freiherr vom Stein, 'Über die Wiederherstellung der Kaiserwürde in Deutschland [Memorandum for Czar Alexander I, 17 February 1815]', edited by Klaus Müller, *Quellen zur Geschichte des Wiener Kongresses 1814/1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit, 25) (Darmstadt, 1986), pp. 398-401. On the project see: Gero Walter, *Der Zusammenbruch des Heiligen Römischen Reichs Deutscher Nation und die Problematik seiner Restauration in den Jahren 1814/15* (Karlsruhe, 1980).

[63] German Federal Act [8 June 1815], in: Günter Dürig and Walter Rudolf, eds, *Texte zur deutschen Verfassungsgeschichte* (Munich and Berlin, 1967), pp. 11-20 [first published in: Philipp Anton Guido von Meyer, ed., *Corpus iuris Confoederationis Germanicae*, vol. 2 (Frankfurt, 1822); second edn (Frankfurt, 1833); third edn (Frankfurt, 1859); reprint of the third edn (Aalen, 1978)]. The Vienna Final Act [Schluß-Acte der über Ausbildung und Befestigung des deutschen Bundes zu Wien gehaltenen Ministerial-Conferenzen, 15 May 1820] , in: Dürig (as above), pp. 21-33 [first published in: Meyer (as above)].

[64] Treaty on Swiss Neutrality, Vienna, 20 March 1815, in: *CTS*, vol. 64, pp. 6-12.

[65] Treaty of Paris, 30 May 1814, in: *CTS*, vol. 63, pp. 172-202 [Secret Separate Articles, edited by Klaus Müller, *Quellen zur Geschichte des Wiener Kongresses 1814/1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit, 25) (Darmstadt, 1986), pp. 62-63]. William I, King of the Netherlands, '[Note on Territorial Claims by the Netherlands, 10 August 1814], edited by Müller, Quellen (as above), pp. 102-103 [also in: Hermann Theodor Colenbrander, ed., *Gedenkstukken der Algemeene Geschiedenis van Nederland van 1795 tot 1840*, vol. 7 (The Hague,1906), pp.160-162].

Czar through the creation of some Duchy of Warsaw, with the Czar being in personal union also the Duke. The drive to obstruct the formation of nations as bearers of sovereignty found its most dramatic expression the making of the so-called Holy Alliance among Czar Alexander I of Russia (1801 – 1825), Emperor Francis I of Austria and King Frederick William III of Prussia (1797 – 1840).[66] The Alliance pursued the goal of preserving monarchies wherever possible and to install new ones where opportunities appeared. The Alliance thus stood explicitly against any attempts to fuse nations with states. However, the effects of the Alliance remained limited, even though it succeeded in imposing a monarchical constitution upon Greece, once the state had obtained its independence from Turkish rule in 1827.[67] The Alliance also had some unintendedly supportive influence on the creation of new states in Latin America. When, after the end of Napoleon's rule, the British government started to support the revolutionaries in Latin America and the Caribbean,[68] the Alliance took the side of Portugal and Spain as the colonial powers and, in 1822, prepared an intervention with the goal of suppressing the independence movements. In the USA, President James Monroe (1758 – 1831, in office 1817 – 1825) responded promptly and proclaimed the doctrine in his address to Congress of 2 December 1823 that the US government would actively resist any attempt to intervene against the independence of any state in America. Monroe underpinned his doctrine with the statement that the populations of American settler colonists had accomplished an increase of the birthrate and neither required political support from European governments any longer nor immigration from Europe in order to sustain themselves.[69] The Holy Alliance remained without success in its effort to retain colonial rle in Latin America. Moreover, it failed to accomplish agreement about a common policy towards nationalist independence movements on the Balkans, which the Russian Czar sought to support and the Austrian Emperor sought to quench. In 1853, the Alliance broke apart.

The demise of the Holy Alliance was accelerated by the fact that the monarchs of Austria and Prussia were members of the German Confederation, which started its operations in 1820. The Confederation once again put a problem on the agenda to which theorists had responded controversially since the sixteenth century. This was the issue of whether or not sovereignty could be divided and allocated to several rulers and governments. Late in the eighteenth century, the Göttingen jurist Johann Stephan Pütter had pleaded for the argument that sovereignty was divisible, so that within the Holy Roman Empire, a federal entity as Pütter believed, both the Emperor and the heads of Imperial Estates could be recognised as bearers of sovereignty.[70] Once the Empire had ceased to exist as a manifest institution of rule, so that there was no valid imperial law any more, the problem of the divisibility of sovereignty shifted from the focus on the Empire, first to the Confederation of the Rhine, then to the German Confederation. The same problem appeared to exist for the USA and for the Swiss Confederacy. While the Confederation of the Rhine opted unequivocally for the undivided sovereignty of its members through its constitutive charter,[71] theorists diagnosed both for the USA and for the German Confederation that sovereignty had been divided in these cases.[72] Against these empirical observations, jurist John Austin (1790 – 1859)

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[66] Treaty on the Foundation of the Holy Alliance, Vienna, 14 / 25 September 1815, in: *CTS*, vol. 65, pp. 200-202; auch in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 3, part 1 (Berlin and New York, 1992), pp. 107-108. For studies see: William Penn Cresson, *The Holy Alliance* (New York, 1922) [reprint (New York, 1966)]. Werner Näf, *Zur Geschichte der Heiligen Allianz* (Berner Untersuchungen zur Allgemeinen Geschichte, 1) (Berne, 1928). Hans W. Schmalz, *Versuche eines gesamteuropäischen Organisation 1815-20*. Ph.D. Diss. (University of Berne, 1940) [printed version (Berner Untersuchungen zur Allgemeinen Geschichte, 10) (Aarau, 1940)].

[67] Treaty France – Russia – UK, 6 July 1827, in: *CTS*, vol. 77, pp. 308-315.

[68] James MacKintosh, '[Address to the House of Commons, 15 June 1824], in: MacKintosh, *The Miscellaneous Works*, vol. 3 (London, 1846), pp. 437-479.

[69] James Monroe, '[Address to Congress, 2 December 1823]', in: *Annals of Congress* (1823), p. 23.

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

[71] Act of the Confederation of the Rhine [12 July 1806], in: Günter Dürig and Walter Rudolf, eds, *Texte zur deutschen Verfassungsgeschichte* (Munich and Berlin, 1967), pp. 1-10.

[72] Robert von Mohl, *Das Bundes-Staatsrecht der Vereinigten Staaten von Nordamerika* (Stuttgart, 1824). Paul Achatz Pfizer, *Über die Entwicklung des öffentlichen Rechts in Deutschland durch die Verfassung des Bundes* (Stuttgart,

returned to Jean Bodin's initial position arguing that the division of sovereignty was a logical absurdity.[73] But Austin's query had little effect. The debate over the divisibility of sovereignty in federations and confederations continued throughout the nineteenth century.[74] These debates severely undermined the legitimacy of monarchical rule, which rested on the assumption that sovereignty was indivisible.

The delegates at the Congress of Vienna used the slogan of restoration to carry out state succession. Since then, the stability of states could no longer result from some natural condition of the world, but had to come about as a consequence of political determination and the use of military force. Nevertheless, the perseverance of the order of European states established at the congress was considerable and withstood the pressure emerging from nationalist movements to the middle of the nineteenth century. One factor of duration was the long terms of office of the key policy-makers at the congress, first and foremost of Metternich, student of Niklas Vogt (1765 – 1836), the Mainz historian of and advocate for the balance of power,[75] of Charles Maurice de Talleyrand-Périgord, the French Minister of Foreign Affairs (1754 – 1838, in office 1797 – 1807, 1814 – 1830) and of the Russian Foreign Minister Count Karl Robert Nesselrode (1780 – 1862, in office 1816 – 1856). Together with more rapidly changing representatives of the United Kingdom and Prussia, they formed a club of privileged actors among legally equal sovereigns.[76] For this group the technical term 'European Concert came into use'. The word concert had belonged to the diplomatic jargon of the eighteenth century, but had then connotated mainly bilateral cooperation among treaty partners, without implying a privileged position. Starting with the various agreements for anti-French coalitions early in the nineteenth century, the meaning of the word shifted towards multilateral cooperation among governments of a few states in pursuit of the goal of bringing about a new order of states in Europe.[77] This newly defined concert was to have access restrictions, in practice being limited to the so-called "great powers".[78] The new "European Concert" already determined the course of events during the Congress of Vienna and continued to have a major impact of European international relations to the middle of the nineteenth century. It was understood to consist mainly of the representatives of Austria, France, Prussia, Russia and the United Kingdom, which dispatched altogether fifteenth delegates to the congress. The remaining state parties to the coalition against Napoleon were represented by no more than five delegates together.[79] By consequence, the term

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1835).; Wilhelm Adolf Schmidt, *Geschichte der preußisch-deutschen Unionsbestrebungen seit der Zeit Friedrichs des Großen*, 2 vols (Berlin, 1851). Alexis de Tocqueville, *Democracy in America* [1835]. The Henry Reeve Text as Revised by Francis Brown, edited by Phillips Bradley, vol. 1 (New York, 1954), pp. 118, 124, 162-164, 168. Carl Friedrich Vollgraff, *Wodurch unterscheiden sich Staaten-Bund, Bundes-Staat und Einheits-Staat von einander* (Marburg, 1859). Georg Waitz, 'Das Wesen des Bundesstaats', in: Waitz, *Grundzüge der Politik nebst einzelnen Ausführungen* (Kiel, 1862), pp. 153-218 [reprint (New York, 1979); first published in: *Allgemeine Monatsschrift für Wissenschaft und Literatur* (1853)]. Carl Theodor von Welcker, *Die Vervollkommung der organischen Entwicklung des deutschen Bundes zur bestmöglichen Förderung deutscher Nationaleinheit und deutscher staatsbürgerlicher Freiheit* (Karlsruhe, 1831).

[73] Austin, *Province* (note 5), pp. 239, 241, 245-246, 251-252.

[74] Constantin Bake, *Beschouweningen over den statenbond*. LLD Thesis (University of Amsterdam, 1881). Eugène Borel, *Sur la souveraineté et l'état fédératif*. LLD Thesis (University of Geneva, 1886). Siegfried Brie, *Der Bundesstaat*, vol. 1 (Leipzig, 1874). Brie, *Theorie der Staatenverbindungen. Festschrift zur Fünfhundertjahrfeier der Universität Heidelberg im Namen und Auftrage der Universität Breslau* (Stuttgart, 1886). Attilio Brunialti, *Unioni e combinazioni fra gli stati* (Biblioteca di scienze politiche, vol. 6, part 1) (Turin, 1891). Louis Erasme Le Fur, *État fédéral et confédération d'états* (Paris, 1896). Max von Seydel, 'Der Bundesstaatsbegriff', in: *Zeitschrift für die gesamte Staatswissenschaft* 28 (1872), pp. 185-256 [reprinted in: Seydel, *Staatsrechtliche und politische Abhandlungen* (Freiburg, 1893), pp. 1-89].]

[75] Nicolaus [Niklas] Vogt, *System des Gleichgewichts und der Gerechtigkeit*, vol. 1 (Mainz, 1785), pp. 41-42, 45-46 [further edn (Frankfurt, 1802)].

[76] Ernest Nys, 'Le Concert Européen et la notion du droit international', in: *Revue de droit international et de législation comparée* 31 (1899), pp. 273-313.

[77] Treaty Russia – UK, Sankt Petersburg, 30 March / 11 April 1805, Art. I, in: *CTS*, vol. 58, pp. 83-126, at p. 84.

[78] Matthias Schulz, *Normen und Praxis. Das Europäische Konzert der Grossmächte als Sicherheitsrat 1815-60* (Studien zur internationalen Geschichte, 21) (Munich, 2009), pp. 36-46.

[79] Robert Stuart Viscount Castlereagh, '[Report, dated 21 November 1814]', in: Klaus Müller (Hrsg.), *Quellen zur*

"European Concert" distinguished the "great powers" in the European states system against the rest of the states, even though all states represented at the congress were legally equal sovereigns. In practice, the nineteenth-century European system comprised not only legal equals but also a hierarchy of privileged states. In political theory, the capability of a state to resist the combined forces of all other states in the system ranked as the characteristic feature of a "great power".[80] The Congress of Vienna petrified the position of the five states of Austria, France, Prussia, Russia and the United Kingdom as "great powers", for which, counted in Greek, the rival term "European Pentarchy" also came in use.[81]

While the foreign-policy guidelines agreed upon in Vienna remained unaffected by the revolutions of 1830, the unrest spreading across the Continent from France to Central Europe in 1848 did usher in intensified demands for the establishment of national states in the German-speaking areas, Hungary and Poland. Yet, despite these pressures, the plan of the Prussian General Field Marshal Carl Friedrich von dem Knesebeck (1768 – 1848), proposed for the creation of an apparently stable balance of power in Europe in 1815, could appear to be valid still in 1854, when it was edited in print. Knesebeck's plan had been arranged on the basis of the old-fashioned model of the scales, with Prussia, one federal state each for Germany, Austria and Italy assembled around a central unit comprising the United Kingdom. For his scheme, Knesebeck drew on the assumption that states could be pieced together according to the laws of mechanics and, in this respect, followed military theorist Adam Heinrich Dietrich von Bülow (1757 – 1807) as well as historian Niklas Vogt. Both had continued to adhere to the belief that the maintenance of the balance of power among states was divinely willed. In 1799 and 1806 respectively, they had solicited plans for preserving the military balance of Europe by designing fourteen states, equal with regard to population size, economic achievement and military strength, and by assembling these states into two seemingly equally powerful blocks.[82] The plan had of course become outdated by the decisions of the Vienna Congress but could still serve as a propaganda instrument against the establishment of new national states as well as against the much feared rise in Russian political influence in the Balkans.[83]

These fears incrementally built up to from the beginning of the Russian-Turkish war in 1853. The Ottoman Sultan had declared the war in order to strike against Russian efforts to enforce a kind of protective control over the principalities along the lower course of the Danube as well as over Christians living elsewhere under Turkish rule. France and the United Kingdom jointly with Sardinia-Piedmont entered into the war on the Turkish side in 1854 and 1855, used newly developed firearms with higher targeting capability and heavy iron warships and inflicted a humiliating defeat upon the Russian forces. In the Peace of Paris of 30 March 1856, the Russian side withdrew its demands and, under pressure from the British and the French governments, agreed upon the internationalisation of the Danube and the Black Sea for riverine and maritime traffic.[84] In the course of this war, now known as the Crimean War, the Holy Alliance broke apart.

The Congress of Vienna mollified the law among states from a tool for the maintenance of the stability of states into a flexible device for the promotion of state succession. Already in 1789,

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Geschichte des Wiener Kongresses 1814/1815 (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 25) (Darmstadt,1986), pp. 198-200., at p. 199.

[80] Leopold von Ranke, 'Die Grossen Mächte', in: Ranke, *Die Grossen Mächte. Politisches Gespräch,* edited by Theodor Schieder (Göttingen, 1963), pp. 3-43, at p. 25 [first published in: *Historisch-Politische Zeitschrift* (1832); English version in: Theodore Herman von Laue, *Leopold Ranke. The Formative Years* (Princeton Studies in History, 4) (Princeton, 1950); reprint (New York, 1970), pp. 181-218].

[81] K. E. von Goldmann, *Die europäische Pentarchie* (Leipzig, 1839).

[82] Adam Dietrich Heinrich von Bülow, *Geist des neuern Kriegssystems*, second edn (Hamburg, 1805), pp. 321-333 [first published (Hamburg, 1799); newly edited in: Bülow, *Militärische und vermischte Schriften*, edited by Eduard Bülow and Wilhelm Rüstow (Leipzig, 1853), pp. 151-338]. Nicolaus [Niklas] Vogt, 'Das neue politische Gleichgewicht', in: Vogt, ed., *Europäische Staatsrelationen*, vol. 6 (Frankfurt, 1806), pp. 44-53.

[83] Karl Friedrich von dem Knesebeck, *Denkschrift betreffend die Gleichgewichts-Lage Europa's* (Berlin, 1854) [written in 1814].

[84] Treaty of Paris, 30 March 1856, in: *CTS*, vol. 114, pp. 410-420.

philosopher Jeremy Bentham (1748 – 1832)[85] had proposed the formula "international law" for the set of legal norms that could regulate the relations among states but followed exclusively from human action. The word "international" quickly rose in popularity in the early nineteenth century and became a ubiquitous term for various patterns of public cultural, economic, military and political activities conducted both by incumbents to office of rule as well as ordinary nationals extending across borders of states. The delegates at the Congress of Vienna did no longer feel obliged to honour an order of states seemingly endowed with permanence by nature or divine will. Instead, they posed as designers and creators of states. The congress itself had set law. The newly formulated legal norms had flown from the wills of the states which had been represented at the congress. The new "international law" would, as a consequence, be in force above states, if and as long as the governments of states had accepted its norms as binding and were willing to continue to do so. The binding effect of "international law" was thus derived, not from natural reason as in the case of the former law among states, but from the wills of states. Since the Congress of Vienna, the concept of set international law replaced the concept of the law among states as connected with natural law. The works by authors like Pufendorf, Gundling, Darjes, Heinecke, Wolff, Achenwall, Nettelbladt and Höpfner, who had combined the law among states with natural law during the seventeenth and eighteenth centuries, disappeared from the reading lists of teachers and students of international law.[86]

The Reformulation of the Model for the Balance of Power

Burke's analysis of the French Revolution excelled among the close contemporary judgments of occurrences in France between 1789 and 1792.[87] Burke's treatise of 1791 formed part of a series of statements whose authors had expressed concerns about the prospects of preserving the system of the balance of power in Europe.[88] Burke already employed the new concept of independence in application to the Holy Roman Empire, whose role as a factor of stability he took to be in danger.[89] With the Empire in a shaky position, Burke expected that the French Revolution would bring about the collapse of the entire European states system. He thereby brought to the fore the then current demand for change which indeed had taken hold of Europe as a whole, not just of France. In view of the reform industry that spread in many parts of Europe from the 1770s,[90] Burke's expectation was not unfounded. But Burke did not confine himself to prophecy but also gave sage advice to his government. He predicted that the British government alone would be capable neither of resisting the winds of change nor of preventing the collapse of the Empire: "France, the author of the treaty [sic!] of Westphalia, is the natural guardian of the independence and balance of Germany. Great Britain (to say nothing of the king's concern as one of that august body) has a serious interest in preserving it; but, except through the power of France, acting upon the common old principles of state policy, in the case we have supposed, she has no sort of means supporting that interest. It is

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[85] Jeremy Bentham, 'Introduction to the Principles of Morals and Legislation [1789]', chap. XIX/2, nr 25, in: *The Works of Jeremy Bentham*, edited by John Bowring, vol. 1 (London, 1838), pp. 1-154, at p. 149 [reprint of this edn (New York, 1962)].

[86] 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.

[87] Johann Adam Bergk, *Untersuchungen aus dem Natur-, Staats- und Völkerrechte. Mit einer Kritik der neuesten Konstitution der französischen Republik* (Leipzig, 1796). For further texts see: Alfred B. C. Cobban, ed., *The Debate on the French Revolution* (London, 1963), pp. 39-69.

[88] James MacKintosh, *Vindiciae Galliae* (Dublin, 1791) [also in: MacKintosh, *Miscellaneous Works*, vol. 3 (London, 1846)].

[89] Burke, 'Thoughts' (note 13), p. 358.

[90] Diethelm Klippel, ed., *Naturrecht und Staat* (Schriften des Historischen Kolleges, Kolloquien 57) (Munich, 2006). Paul Nolte, *Staatsbildung als Gesellschaftsreform. Politische Reformen in Preußen und den süddeutschen Staaten. 1800 – 1820* (Historische Studien, 2) (Frankfurt, 1990). Nolte, 'Republikanismus, Revolten und Reformen. Reaktionen auf die Französische Revolution in Deutschland. 1789 – 1820', in: Manfred Hettling, ed., *Revolution in Deutschland. 1789 – 1989* (Göttingen, 1991), pp. 8-26.

always the interest of Great Britain that the power of France should be kept within the bounds of moderation. It is not her interest that power should be wholly annihilated in the system of Europe. Though at one time through France the independence of Europe was endangered, it is, and ever was, through the balance of power alone that the common liberty of Germany can be secured against a single or combined ambition of any other power. In truth, within this century the aggrandizement of other sovereign houses has been such that there has been a great change in the whole state of Europe; and other nations as well as France may become objects of jealousy and apprehension. In this state of things, a new principle of alliances and wars is opened. The treaty of Westphalia is, without France, an antiquated faible."[91] By means of what appears to be an allusion to the partition of Poland in 1772, as Prussia had been the only State within the European international system that had significantly increased its territory during the eighteenth century, Burke invoked the dangers of the departure from the conventional machine model of the balance of power. According to that model, any severe reduction of power in any member of the European system could be perceived as entailing serious consequences for the system as a whole, and Burke expressed unequivocal concerns for the repercussions that the then current political instability in and military weakness of France might have on Europe as a whole.[92] Because Burke sought to adhere to the conventional machine model of the balance of power, his critique had little impact on political thought and theory, but he did influence the young British Prime Minister William Pitt (1759 – 1806, in office 1783 – 1801, 1804 – 1806) and thereby provided the ideological background for the British government adopting an anti-French stance in the early 1790s.[93]

In a pamphlet through which he tried to defend the results of the French Revolution, Johann Gottlieb Fichte in 1793 subjected the machine model of the balance of power to sarcastic criticism. Old-style balance of power theory appeared, in Fichte's making, not only as chimeric but even as sinister: "A minister must laugh if he hears someone else talking seriously about the equilibrium, naively respond to their important investigations; and both of them must laugh, if others have to gain neither the smallest strip of land nor a pension."[94] Fichte censured as ignorant those theorists who continued to assume that conventional balance-of-power politics had been conducted under the control of reason; instead, he insisted that rulers' claims for the maintenance of the balance of power were merely rhetorical and threadbare covers to disguise preparations for war. He therefore urged theorists to deconstruct the machine model of the balance of power, denounce it as clandestine and a serious fallacy: "The friction of the complicated wheelwork of that artificial political machine of Europe has always kept humankind moving. There was a perpetual struggle among conflicting internal and external powers. From within, the sovereign, by way of the wonderful masterpiece of the subordination of the estates, suppressed what was next to him in rank, these, in turn, pressuring what was inferior to them, and thence continuously down to the slave working in the fields. Each of these powers resisted the pressure and pressed upwards, and this confusing play together with the elasticity of the human mind, preserved and inspired the machine, an artful masterpiece, offending nature with its composition, although operating upon a single principle, yielded the most heterogeneous results: in Germany a confederation combining monarchies and republics, in France an unlimited monarchy. From without, where there was no subordination, poise and counterpoise were determined and kept in a stable position by the steady tendency towards universal monarchy, the ultimate goal of all military campaigns though it was not always made explicit. It destroyed a Sweden, weakened an Austria and a Spain, in a single political row, and raised a Russia and a

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[91] Burke, 'Thoughts' (note 13), p. 360.

[92] Edmund Burke, 'Three Letters Addressed to a Member of the Present Parliament on the Proposals for Peace with the Regicide Directory of France [1796]', in: Burke, *The Works*, vol. 5 (London, 1903), pp. 152-433.

[93] William Pitt, the Younger, '[Speech on the French Declaration of War, 12 February 1793]', in: James Joll, ed., *Britain and Europe* (London, 1961), pp. 33-39 [also in: Pitt, *The War Speeches of William Pitt the Younger*, edited by Reginald Coupland (Oxford, 1915), pp. 53-77].

[94] 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 p. 91 [Microfiche reprint of the original edn (Munich, 1990); also edited by Reinhard Strecker (Leipzig, 1922)]. Similarly: Schmettow, *Gedanken* (note 44), who, at pp. 57-58, referred to balance-of-power politics as "Charlatanerey" committed by government ministers.

Prussia from nowhere and, among other moral phenomena, provided a new stimulus to humankind for heroic deeds, national pride without the nation. It may well be that the watching of that puzzling spectacle may offer a refreshing delight for the mind of the reflecting observer, but it can neither satisfy him nor instruct him on what he is in need of."[95] The authorities, Fichte argued, were shamefully exploiting their subjects' suffering to engage in petty games over rank and glory, were not concerned about the security and well-being of their subjects, as the government contracts appeared to demand, and were keeping armies as war machines and lifeless containers of their vanity. The balance of power, Fichte concluded was a chimera which whoever propagated it would ridicule. Fichte's sarcasm anticipated the nationalist tendencies which downgraded the machine model of the balance of power to a metaphor for petty suppressive strategies, and denied the desirability of efforts to maintain the status quo. In his review of the results of the French Revolution, then, Fichte displayed a conspicuous lack of concern for the maintenance of stability at the levels both of the system and of the states. The machine model, to him, stood in contrast to nature, because it was "artful" and allowed no dynamism. Further doubts emerged whether stability as such could be a value in its own.[96].

In 1801, the Göttingen statistician and historian Arnold Herrmann Ludwig Heeren (1760 – 1842), who, like Gentz saw "a new order of things rising in Europe" (eine neue Ordnung der Dinge in Europa) through the partitions of Poland,[97] inserted into his analysis of British colonial policy the warning that even "the most professionally calculated equilibrium system could never provide more than an insecure guarantee against the appearance of a favourable moment, at which the nation, powerful through its resources or the talents of its leaders or through both, grabs the leadership. This, after the usual course of events, will sooner or later degenerate into repression or tyranny."[98] Thus, while still accepting the argument of eighteenth-century analysts that the relations among the states of Europe should remain in balance, Heeren admitted that the balance could be destroyed through government action, thereby acknowledging the lack of flexibility of the machine model in view of ongoing changes.

Johann Peter Friedrich Ancillon (1767 – 1837), teacher of the Prussian Crown Prince, later King Frederick William IV (1840 – 1861) was more straightforward in his critical attitude against the conventions of theorising about the balance of power. In a treatise published only in 1825 but reflecting the political conditions of the early years of the nineteenth century, he joined contemporaries[99] in an attack against eighteenth-century theories of the balance of power. Explicitly criticising Montesquieu, Ancillon denounced the balance of power as fictitious, absurd and even dangerous: 'Never has there been a political balance, and there can never be one. Likewise, there can never be a balance of powers within the several states; there has always been preponderance, and it will always rebuild itself. Had a balance ever existed, or could it ever come into existence, no revolutions in the political system [of states] would ever have occurred, but an absolute and unchangeable repose would have been established. The balance of the political world is as impossible as the balance of wealth and energies are in civil society. Were a balance possible, it would not even be desirable, for movement, activity, tension are the first conditions of life and development.' [100] The concept of tension, seemingly as a core element of life, appeared

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[95] Ibid., pp. 93-94.

[96] Johann Wilhelm von Archenholtz, 'Das Gleichgewichts- und Gravitätssystem', in: *Minerva* 1 (1807), pp. 377-384. Dominique Dufour de Pradt, 'Plan for Establishing a Balance of Power', in: *The Pamphleteer* 1 (1813), pp. 288-298. J. Heinichen, 'Ueber das politische Gleichgewicht', in: *Minerva* 4 (1813), pp. 177-200. Stadion, 'Gutachten' (note 54), p. 343. Charles Guillaume Théremin, *Des interêts des puissances continentals relativement à l'Angleterre* (Paris, 1795).

[97] Arnold Herrmann Ludwig Heeren, *Handbuch der Geschichte des europäischen Staatensystems und seiner Colonien*, third edn (Göttingen, 1819), p. 557 [first published (Göttingen, 1809); second edn (Göttingen, 1811); reprinted in: Heeren, *Historische Werke*, vol. 3 (Göttingen, 1822); reprint of this edn (Frankfurt, 1987)].

[98] Arnold Hermann Ludwig Heeren, 'Versuch einer historischen Entwickelung der Entstehung und des Wachsthums des Brittischen Colonial-Interesses [1801]', in: Heeren, *Historische Werke*, vol. 1 (Göttingen, 1821), pp. 113-343, at p. 259 [reprint (Frankfurt, 1987)].

[99] Constance Bertolio, *Le nouvel équilibre politique à établir en Europe* (Paris, 1801).

[100] Johann Peter Friedrich Ancillon, 'Nécessité d'une garantie extérieure de l'existence et des droits des états.

simultaneously in the sciences,[101] music,[102] the military[103] as well as dancing and sports.[104]

The balance of power became the subject of diplomatic controversy already at the beginning of the Congress of Vienna. Hardenberg, the Prussian delegate opined that the future "repose" (Ruhe) of Europe would have to be different from what had existed in the eighteenth century.[105] Nevertheless, the Congress accomplished no agreement with regard to a prognosis what kind of effects the newly to be established German Confederation could have on the future balance of power. Talleyrand took a radical stance arguing that the Corps Germanique would no longer have the capability to preserve the general balance of Europe, because it appeared to have lost its own balance.[106] Yet Hardenberg insisted that the power of Germany, into which Austria and Prussia were to be united, was to become the genuine basis for the European balance.[107] Hacke, the delegate from Baden, would not agree with either view as he believed that both Austria and Prussia were solely aiming at the partition of Germany and, to that end, wanted to promote the balance which Hacke sought to avoid.[108] Portions of Fichte's critique of balance-of-power ideologies, then, had crept into the minds of some delegates at the Congress. While Hardenberg still belonged to the club of eighteenth-century political arithmeticians, keen on counting souls,[109] Hacke applied principles of the critique of ideology and Talleyrand joined the critics who were arguing that the balance of power could be not be measured through statistical data relating to population, conditions of trade and industry as well as military capabilities.[110] During the phase of the preparation of the Congress, the former enemies of France had committed themselves to the restoration of a purportedly real and firm balance.[111] But once the Congress had assembled, the delegates no longer appeared capable of or even legitimised to bring into operation that kind of balance in Europe.

This was so because most of the delegates, who joined Talleyrand in committing themselves to pursue that goal,[112] were determined not to recognise the demand that the revolutionary movement had put on the political agenda in 1789, namely allocating sovereignty to nations, not rulers. Hence, already contemporary critical observers[113] noted that the European states

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Pendence générale des peuples de l'Europe à créer un système d'équilibre. Plan et point de vus de cet ouvrage', in: Ancillon, Considérations générales sur l'histoire. Ou Introduction à l'histoire des revolutions du système politique de l'Europe (Berlin and Paris, 1801), pp. 71-99. Ancillon, *Ueber den Geist der Staatsverfassungen und deren Einfluss auf die Gesetzgebung* (Berlin, 1825), p. 322.

[101] See: Dietrich von Engelhardt, *Historisches Bewusstsein in der Naturwissenschaft* (Freiburg and Munich, 1979).

[102] See: August Nitschke, *Historische Verhaltensforschung* (Stuttgart, 1981).

[103] See: Harald Kleinschmidt, 'Spannung. Zur Entstehung eines militärischen Begriffs des 19. Jahrhunderts', in: *Archiv für Kulturgeschichte* 74 (1992), pp. 387-414.

[104] Johann Christoph Friedrich GutsMuths, *Gymnastik für die Jugend*, second edn (Schnepfental, 1804) [reprint, edited by Hans Groll (Studientexte zur Leibesübung, 7) (Frankfurt, 1970)]. For an interpretation of this work see: Henning Eichberg, *Leistung, Spannung, Geschwindigkeit. Sport und Tanz im gesellschaftliche Wandel des 18. / 19. Jahrhunderts*(Stuttgarter Beiträge zur Geschichte und Politik, 12). (Stuttgart, 1978).

[105] Karl August Freiherr von Hardenberg, '[Remarks on the Preparations of His Plan for a Constitution, 3 September 1814, Addressed to Prince Metternich]', hrsg. von Klaus Müller, *Quellen zur Geschichte des Wiener Kongresses 1814/1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 25) (Darmstadt, 1986), pp. 337-339, at p. 338.

[106] Charles-Maurice de Talleyrand-Périgord, *Mémoires*, edited by Albert von Duc de Broglie, vol. 2 (Paris, 1891), p. 534.

[107] Hardenberg, 'Remarks' (note 105), p. 338.

[108] Hacke, 'Report' (note 18), p. 346.

[109] Wilhelm Butte, *Ideen über das politische Gleichgewicht von Europa mit besonderer Rücksicht auf die jetzigen Zeitverhältnisse* (Leipzig, 1814), pp. 34-37. Arthur Young, *Political Arithmetic* (London, 1774) [reprint (New York, 1967); microfilm edn (The Eighteenth Century, Reel 6078, nr 02) (Woodbridge, CT, 1986)].

[110] Charles-Maurice de Talleyrand-Périgord, '[Letter to Metternich, 19 December 1814]', in: Comte d' Angeberg [i. e. Leonard Jakób Borejko Chodźko], *Le congrès de Vienne et les traités de 1815*, vol. 1 (Paris, 1863), pp. 540-544 [also edited by Klaus Müller, *Quellen zur Geschichte des Wiener Kongresses 1814/1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 25) (Darmstadt, 1986), pp. 268-273]. Talleyrand, *Mémoires* (note 106), p. 100].

[111] Treaty of Chaumont, 1 March 1814, Preamble, in: *CTS*, vol. 63, S. 84-95, at p. 84.

[112] Talleyrand, 'Letter' (note 109), pp. 271-272.

[113] George Canning, '[Address on Spain to the House of Commons, 14 April 1823]', in: Canning, Speeches, edited

system being carved out during the Congress would not satisfy national "passions". In their view, the balance of power was at best a "secondary guarantor of national independence". Later retrospective critics of the Congress diplomacy requested that something they termed 'national spirit' should become the prime factor of the balance of power: "The Balancing System is itself only a secondary guard to national independence. The paramount principle, the moving power, without which all such machinery would be perfectly inert, is national spirit. The love of country, the attachment to laws and government, and even to soil and scenery; the feelings of national glory in arms and arts, the remembrances of common triumph and common suffering, with the mitigated but not obliterated recollection of common enmities and the jealousy of dangerous neighbours, instruments employed (also by nature) to draw more closely the bands of affection to our country and to each other, – this is the only principle by which sovereigns could in the hour of danger rouse the minds of their subjects. Without this principle, the policy of the Balancing System would be impotent."[114] Under these circumstances, the machine model was useless as a means for the conceptualisation of the balance of power.[115] Jurist Jacob Christoph Friedrich Saalfeld (1785 – 1834) summed up the debates in 1833 claiming that the balance of power was not determined by nature or divine will but "the product of spiritual culture and increasing traffic, repeatedly appearing in history to a larger or smaller extent" and having the ultimate goal of "securing the independence and sovereignty of the several states". Yet underneath that general conceptual level, Saalfeld admitted that the balance of power system of his own time had been erected after Napoleon and differed "essentially from the earlier [system] in some respects due to totally different conditions".[116]

The search for the new model of the balance of power began already while the Congress of Vienna was going on. In his memorandum of 1813 on the future constitution of the German Confederation, Wilhelm von Humboldt noted that, as it seemed to him, nature assembled individuals within and, at the same time, divided humankind into nations. Individuals, he believed, were nothing in themselves, while families had the combined value of their members. Only when families became united into larger groups, could they truly develop their energies. Although politics was not compelled to respect this process, it had no possibility of confronting the order seemingly dictated by nature.[117] Humboldt thus described an incremental process of the formation of ever larger groups, all of which would constitute more than the total sum of their members. According to him, individuals within a family were like organs in a living body, units in themselves while integrated into a larger unit. Even though Humboldt used elements of the language of eighteenth-century social and political theory, the order dictated by nature, to which Humboldt referred in this passage, was no longer that of the same century. Contrary to then established social and political theory, it was no longer Humboldt's aim to describe groups and institutions as if they had been composed like machines. Instead, he wanted to demonstrate that individuals were capable of adding to their own energies within groups in the same way as smaller groups appeared to be capable of strengthening their energies by merging into larger groups. In taking this stance, Humboldt followed the application of the language of biology. Contemporary theorists also came under the influence of biological diction when they expected that of two persons, "one will develop more happily and faster than another one" and that this principle would apply to two "nations" as well.[118] Within philosophical perspective, Hegel drew the conclusion that changes within a state were the same as

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by Roger Therry, vol. 5 (London, 1828), pp. 4-26 [partly printed in: James Joll, ed., Britain and Europe (London, 1961), p. 86]. Robert Stewart Viscount Castlereagh, 'State Paper [5 May 1820]', in: Harold William Vazeille Temperley, ed., *Foundations of British Foreign Policy* (London, 1938), pp. 49-63 [also in: Adolphus William Ward and George Peabody Gooch, eds, *The Cambridge History of British Foreign Policy. 1783 – 1919*, vol. 2 (Cambridge, 1923), Appendix A, pp. 622-633, reprint (Cambridge, 1970); also in: Joll, ed., *Britain* (as above), S. 69-82, at p. 80].

[114] MacKintosh, 'Address' (note 61), pp. 66-67.

[115] Gould Francis Leckie, *An Historical Research into the Nature of the Balance of Power in Europe* (London, 1817).

[116] Jacob Christoph Friedrich Saalfeld, *Handbuch des positiven Völkerrechts* (Tübingen, 1833), pp. 18-19, 22.

[117] Humboldt, 'Denkschrift' (note 39), pp. 97-98.

[118] Heinrich Gottlieb Tzschirner, *Ueber den Krieg* (Leipzig, 1815), pp. 92-93.

changes within the life cycle of individual persons.[119] The belief in the dynamics of change, tied to the model of the living body, replaced the static approach that had been connected with the machine model,[120] even though the conventional scales model continued in use in the language of social and political theory.[121]

The new model of the living body placed the balance of power into a context that differed radically from those of the scales and the machine. While the previous models had always been limited to Europe in their applicability, the new model was flexible and principally extensible to the world at large. This was so because, like the living body, the international balance-of-power system, to which the new model came to be applied as well, was dynamic itself. Consequently, the British Foreign Secretary George Canning (1770 – 1827) expected already in 1826 that the balance-of-power system could be expanded to the boundaries of the globe.[122] Moreover, the application of the new model, drawn on what appeared to be biological facts, was hard to combine with the political demand that some equilibrium among states should be maintained through the strict abidance by the norms of international law. For that law could no longer be acknowledged as partly resulting from the unchangeable law of nature but had to be considered flowing from legal acts willed by governments of independent states.[123] Therefore, governments of states not only received the task of building nations,[124] but to integrate the states under their control into the international system as a superstatal body of potentially global extension.

The 'essence' of the state, its purpose and the tasks of its authorities were, however, subject to deep controversy throughout the nineteenth century. While the contract theory of the legitimacy of government prevailed in the English-speaking world, it came under pressure in France[125] and was entirely rejected in the German-speaking areas. Conservative theorists tried to rescue elements of the theory by deriving the state-establishing contract from some abstract "idea of reason". What they termed the "original treaty for the state" appeared in their view as an indefinite "treaty of subjection to rule" instead of an "agreement with limited duration". The alleged "treaty of subjection to rule" seemed to form a legal relationship, "in which both contracting parties mutually take over rights and duties" (in welchem beide kontrahierenden Theile gegenseitig Rechte und Pflichten übernehmen), thereby excluding any option for "popular sovereignty" and "all arbitrariness from above" (alle Volksgewalt von unten und alle Willkür von oben). Even though this theory placed government under the rule of law, it stood against any form of participation in political decision-making from below.[126]

Already Fichte began with the criticism of attempts to categorise states as products of abstract reason. In essence already in his political analysis of the present published in 1806 and more pointedly in his *Addresses to the German Nation* of 1807/08, he went far beyond Hegel's complaint

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[119] Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts*, § 269, [1821], in: Hegel, *Werke*, vol. 7 (Frankfurt, 1970), p. 415.

[120] Arthur Schopenhauer, *Die Welt als Wille und Vorstellung*, vol. 1 (Schoepnhauer, Sämtliche Werke, edited by Arthur Hübscher, vol. 2), fourth edn (Mannheim, 1988), pp. VII-VIII [first edn of the edn by Hübscher (Leipzig, 1938); first edn of Schopenhauer's Collected Works, edited by Julius Frauenstädt (Leipzig, 1877); first published (1819)].

[121] Heinrich Ahrens, *Cours de droit naturel* (Paris, 1838), pp. 503-506 [second edn (Leipzig, 1844); fifth edn (Brussels, 1860); seventh edn Leipzig, 1875]; eighth edn (Leipzig, 1892)].

[122] George Canning, 'Speech to the House of Commons [12 December 1826]', in: Canning, *Speeches*, edited by Roger Therry, vol. 6 (London, 1836), pp. 109-111.

[123] Humboldt, 'Denkschrift' (note 39), pp. 108-111. James MacKintosh, *A Discourse on the Study of the Law of Nature and Nations* (London, 1799) [another edn (London, 1800); microfilm edn (The Eighteenth Century, Reel 9959, nr 16) (Woodbridge, CT, 1999); second edn (Edinburgh, 1835); another edn (Edinburgh, 1836); third edn (Boston, 1843)].

[124] Goldmann, *Pentarchie* (note 81), p. 21.

[125] Ernest Renan, *Qu'est-ce que c'est la nation?* [address to the University of Paris-Sorbonne, 11 March 1882] (Paris, 1882) [English version in: Alfred Eckardt Zimmern, ed., *Modern Political Doctrines* (London, 1939), pp. 186-205].

[126] Karl Heinrich Ludwig Pölitz, *Die Staatswissenschaft im Lichte unserer Zeit*,second edn, vols 1. 3. 5 (Leipzig, 1828), vol. 1, pp. 172, 180 [first published (Leipzig, 1824)]. Carl Friedrich Vollgraff, *Die Systeme der praktischen Politik*, 4 vols (Gießen, 1828-1829).

about the lack of statehood in Germany and advocated the novel concept of the state as the political organisation for the nation.[127] He conceived of incumbents to rulers' offices as governments of states and imposed the task upon them to transform the state population into a nation. Governments, he insisted, had the task of shouldering this task, because security and well-being of every individual could be guaranteed only within the nation and the state. Therefore, Fichte ranked the security of the state prior to the security of the individual. In the German-speaking areas, Fichte's concept of the national state was not only directed against the then existing French occupation of Prussia, but also, and no less poignantly, against rulers within the Holy Roman Empire continuing in office as sovereigns beyond the compensation act of 1803. Fichte thus defined the state as an institution of governance for a population as a homogeneous geno group seemingly equipped with a single political will and a history appearing to extend far back into the remote past. With this definition of the state, Fichte established a hierarchy of values that was the exact opposite of the hierarchy which had been in existence in previous centuries. The established contractual theory of the legitimacy of government had rested on the assumption that the provision of comprehensive security to individual subjects should be the prime task of government. By contrast, Fichte argued that the maintenance of military security against perceived external threats should be recognised as the first condition for the comprehensive security of the individual within a state and that all nationals should testify their loyalty to the state through declarations of willingness to sacrifice their lives for the state. The state appeared as a vastly expanded living body surrounding the nationals. In the same way as parts of a living body could not exist outside or without the whole body, no single national could, according to Fichte, exist outside or without a state. As individual nationals appeared to have to rely on the security of the state for their very existence, the demand seemed just that individual nationals should give priority to the security of the state over their own security. "A healthy principle of the state... refreshes the blood circulation of the entire national body" (Ein gesundes staatsprinzip … erfrischt den blutumlauf im ganzen volkskörper), stated historian Friedrich Christoph Dahlmann (1785 – 1860) in his *History of the French Revolution* of 1845.[128] The new model of the living body awarded qualities of actorship to the state, whose "independence" within the international system the government had the task to guarantee, as philosopher Friedrich Jacob Christoph Saalfeld[129] and other early nineteenth-century theorists demanded.[130]

The new model of the living body soon became self-evident in nineteenth-century political theory. Richard Cobden (1804 – 1865), merchant and free trade activist established in 1836 a style of criticism that became dominant in English language theorizing about international relations. Cobden insisted that it was by no means clear how the balance was to be described in political terms, how it could be measured provided that it existed at all.[131] Cobden showed no hesitation in extending the time frame for the new biologistic model back to the beginning of the war on the succession in Spain, when, in Cobden's perspective, King William III seemed to have use model already.[132] Yet he claimed that "after upwards of a century of acknowledged existence", the model had come "to be less understood now than ever".[133] Cobden thereby recorded some equivocal usage of the model in political theory and practice, which, he thought, had its roots in the matter itself. Exhibiting a jungle of contested arguments, he concluded: "The balance of power, then, might in the first place, be very well dismissed as a chimera, because no state of things, such as the 'disposition', 'constitution' or 'union' of European powers, referred to as the basis of their systems, by Vattel, Gentz and Brougham, ever did exist; and, secondly, the theory could, on other grounds, be discarded as fallacious, since it gives no definition – whether by breadth of territory, number of inhabitants or extent of wealth – according to which, in balancing the respective powers, each state shall be estimated; whilst, lastly, it

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[127] Fichte, 'Reden', pp. 264-279.

[128] Friedrich Christoph Dahlmann, *Geschichte der französischen Revolution bis auf die Stiftung der Republik* (Leipzig, 1845), p. 13.

[129] Saalfeld, *Handbuch* (note 116), pp. 18-19, 22.

[130] Georges Bonaventure Battur, *Traité de droit politique et de diplomatie*, vol. 2 (Paris, 1822), p. 292; Leckie, *Research* (note 115). Pölitz, *Staatswissenschaft* (note 126), vol. 3, pp. 18-19.

[131] Cobden, 'Balance' (note 47), pp. 256-257, 262, 264-265.

[132] Ibid., pp. 256-257.

[133] Ibid., p. 257.

would be altogether incomplete and inoperative, from neglecting or refusing to provide against the silent and peaceful aggrandizement which springs from improvement and labour."[134] Cobden cast his definition into the potential and, in doing so, testified to the declining applicability of general standards from which agreements over evaluations and measurements of the balance might be accomplished. Yet Cobden went even further in denying that there was any possibility of restricting the application of the biologistic model to Europe. Assuming, for the sake of the argument, that against all odds, "an equilibrium existed in complete efficiency",[135] he analysed the foreign policy of his own time. His conclusion from that analysis was that the application of the model would not lead to satisfactory explanations of foreign policy, because "the United States are not parties to the balance of power", and further because, in Cobden's view, "there can be no justification for the exclusion of the United States from a system of interrelated states".[136] As the balance of power, in its then current handling, did not include the United States as "the richest, most commercial and, for either attack or defence, the most powerful of modern empires", it ought to be regarded as a nuisance.[137] Although Cobden did not refer to Justi's eighteenth-century criticism as supporting evidence, he used arguments that did not differ fundamentally from those that Justi had already employed, with the exception of the demand that the USA should be included in balance-of-power calculations. However, in 1758, an outsider had suggested these arguments while, from 1836, they met with an ever increasing appreciation.

Carl von Clausewitz, theorist of war, launched a further attack on balance-of-power theory. Clausewitz's concept of tension stood in direct opposition against the balance of power. To him, the balance of power was repose, in which different conditions and interests were compatible with one another. By contrast, tension seemed to be a dynamic process targeted at the accomplishment of something new and continuing until the new condition would have been reached.[138] Clausewitz believed that battles could be fought under conditions of repose and tension alike; yet he expected that the main battle, deciding the entire war, could only be fought under tension.[139] For him it was self-evident that the decision whether the condition of repose or of tension was prevailing would have to be made in the course of the battle, not ex post after the end of the war. The insight in the prevailing condition of war was, so Clausewitz imagined, part of the field marshal's genius.[140] For Clausewitz, then, the maintenance of the balance of power was no longer the main goal of military strategy, because he no longer deemed it relevant for the determination of war aims and the accomplishment of victory in war. Instead he thought that the interests of rival states were continuously oscillating between efforts to preserve the balance of power and the push toward the implementation of change. Once the balance of power had been upset, however, tension was to rise inevitably, and then even the balance of power would usher in change.[141] Therefore, according to Clausewitz, the balance of power could by itself contribute to change, once tension had arisen. To him, the balance of power was no longer exclusively directed at the preservation of stability but could convert into an instrument for the promotion of change. Which role the balance of power was to take in war, did no longer depend on careful arrangements of parts of a machine, but on the reciprocal effects of the ever changing interests of states as seemingly autonomous actors.

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134 Ibid., pp. 265-266, 269.

135 Ibid., p. 269.

136 Ibid., p. 279.

137 Ibid., p. 279. Similarly: August Wilhelm Heffter, *Das europäische Völkerrecht der Gegenwart*, fourth edn (Berlin, 1861), p. 14 [first published (Berlin, 1844); second edn (Berlin, 1848); third edn (Berlin, 1853-1855); fourth edn (Berlin, 1861); fifth edn (Berlin, 1867); sixth edn (Berlin, 1873); seventh edn (Berlin, 1881); eighth edn (Berlin, 1888)].

138 Clausewitz, *Vom Kriege* (note 20), part I, chap. III/18, p. 199.

139 Ibid., part I, chap. III/18, pp. 199-200; part I, chap. IV/11, p. 241.

140 Ibid., part I, chap. IV/10, pp. 235-240.

141 Ibid., part II, chap. VI/6, p. 380.

New Theories of War and Peace

The change of the machine model to the model of the living body in social and political theory at the turn towards the nineteenth century also impacted on theories of war and of international law. It sparked an expansion of the application of the concept of the international system, the perception of its structures of order and the characteristics of its units. Whereas European theorists had conceived international systems drawn on the machine model as limited within fixed borders, they considered the bounds of international systems based on the model of the living body as changeable. Moreover, the previously uncontested perception of the world as divided into a pluralism of international systems, governed by different norms, gave way to the demand that the world should be enshrined into one single international system under the rule of only one single system of norms, pertaining essentially to international law but also potentially comprising international morality. The new perception of the international system rendered redundant the fixing of systemic borders as the task of legal, military and political theory. By contrast, European theorists of war and of international law believed to have to tackle the problem of determining the agent who could and should push the borders of the European international system from its European foundations to boundaries of the globe. In accordance with the model of the living body, applied in the theory of war and of international law, only intentionally global action could be recognised as systemic international action. The claim, some action, de facto limited in its range to a certain part of the world, were systemic action, received skeptical responses at best, if it was not decried straightforwardly as unreasonable.[142] Only governments, whose actions were recognisable as being directed to accomplish impacts on the globe at large, could expect to be accepted as systemic actors and find recognition as 'great powers'.

Despite the considerable number of writings devoted to many aspects of the conduct of war and to military organisation to about 1800,[143] it has remained the privilege of the nineteenth century to have delivered the first general theory of war. The most influential contributor to this theory has been Carl von Clausewitz with his unfinished *opus magnum Vom Kriege*. In this work, he categorised war as the military contest of nations in arms. That was to mean that the armed forces of a state had to be fully integrated into the nation backing them up with full support. Clausewitz argued that the integration of the armed forces into the nation was the prime condition for winning a war under the condition of tension.[144] In other words, the political unity of a nation was to Clausewitz the first condition of military success. Political unity was to result from long-term government action directed to allow the armed forces to be prepared for war at any time. Clausewitz thus reduced the concept of security from the comprehensive protection of individuals to measures aimed at the preservation of the integrity of states. To that end, he demanded that governments of states should be entitled to operate as the sole legitimate providers of security for the nation which he constructed as the political union of the state population. Clausewitz, like Fichte, not only prioritised the military security of the state and the nation over the comprehensive protection of the individual against a wide variety of hazards, but also urged governments to take measures enabling armies to launch military operations at any time. In doing so, Clausewitz reversed the established Augustinian paradigmatic sequence of peace, war and peace into its direct opposite, the paradigmatic sequence of war, peace and war. With his demand that nations in arms should be prepared for war at any time, Clausewitz obliged political decision-makers and military planners to take into their considerations the finiteness rather than the stability of peace together with the likelihood of the next war.[145]

Clausewitz's revision of the Augustinian paradigmatic sequence of peace, war and peace

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[142] Ancillon, *Geist* (note 100), pp. 317, 320, 321-322, 325, 335-336. Robert Stuart Viscount Castlereagh, 'Principles of the Concert [1818]', in: Evan Luard, ed., *Basic Texts in International Relations* (London, 1992), S. 340-344, at p. 341.

[143] For an extensive survey see: Max Jähns, *Geschichte der Kriegswissenschaften vornehmlich in Deutschland*, 3 vols (Geschichte der Wissenschaften in Deutschland, 21) (Munich, 1889-1891) [reprint (New York and Hildesheim, 1971)].

[144] Clausewitz, *Vom Kriege* (note 20), part I, chap. IV/10, pp. 238-239.

[145] Ibid., part I, chap. I/9, p. 24.

had significant consequences for the concept of security. Nineteenth-century military and political theorists created the dilemma that the comprehensive protection of the individual appeared to become possible only under the condition that individuals declared their willingness to sacrifice their own personal security. This dilemma obstructed the acceptance of the contractual theory, according to which the legitimacy of rule critically hinged upon government capability to perform well as comprehensive security provider for the governed. Hence, the reception of Clausewitzian military theory obfuscated the contractual theory mainly in the German-speaking areas, where Clausewitzian military theory was received most eagerly during the nineteenth century.[146] It was replaced there by the expectation that the nation and the state were the highest level of the postulated evolution of human social organisation and a self-evident type of political community at that, apparently not in need of justification in terms of political theory.[147] This theory of legitimacy was illiberal through its request that individuals should subordinate their legitimate interests to the interests of the state and the nation, into which they had been born. It had, it is true been prefigured in the eighteenth-century work of popular philosopher Thomas Abbt (1738 – 1766).[148] But Abbt had tied to the machine model his demand that subjects should declare their willingness to die for the state. He had described "love for the fatherland" (Vaterlandsliebe) as the most important "spring keeping the political machine in motion" (Triebfeder, welche die politische Maschine im Gang erhalten), thereby professing to the preservation of state stability as his main concern.[149] By contrast, nineteenth-century theorists justified their demand that nationals should sacrifice themselves for the security of the state, with the argument that change was the law of life and death and that states without nations in arms were doomed to destruction.[150]

The turn away from the Augustinian paradigmatic sequence of peace, war and peace was prepared in the political philosophy of Immanuel Kant. Kant was not a pacifist, but viewed war as the necessary "use of force for want of jurisdiction" in the state of nature seemingly prevailing in the relations among states.[151] He remained within the convention division of the law of war into the law on the use of force (*ius ad bellum*), which he identified with the law of just war, the law in war (*ius in bello*), which he categorised as providing the instruments for the limitation of the means of war to what deemed to him to be required for the restoration of peace, and the law after war (*ius post bellum*), which he, like Christian Wolff, associated with the legal norms for peace-making.[152] Like Rousseau, Kant rejected the doctrine that in war all subjects of the warring parties were enemies, but

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[146] Johann Gottlieb Fichte, *Grundlage des Naturrechts nach Principien der Wissenschaftslehre* [Jena and Leipzig 1797], in: Fichte, *Werke 1797–1798*, edited by Reinhard Lauth and Hans Gliwitzky (Fichte, Gesamtausgabe, Series I, vol. 4) (Stuttgart, 1970), pp. 151-165.

[147] Johann Baptist [Giovanni Battista] Fallati, 'Die Genesis der Völkergesellschaft', in: *Zeitschrift für die gesammte Staatswissenschaft* 1 (1844), pp. 160-89, 260-328, 538-608. Pfizer, *Entwicklung* (note 72). Gerhard Johann David von Scharnhorst, 'Entwickelung der allgemeinen Ursachen des Glücks der Franzosen in dem Revolutionskriege und insbesondere in den Feldzügen von 1794 und 1797', in: Scharnhorst, ed., *Militärische Denkwürdigkeiten unserer Zeiten* (Neues militärisches Journal, 8) (Hanover, 1797), pp. 1-154 [partly edited in: Scharnhorst, *Ausgewählte Schriften*, edited by Ursula von Gersdorff (Bibliotheca rerum militarium, 37) (Osnabrück, 1983), pp. 47-110]. Friedrich Wilhelm Joseph von Schelling, *Vorlesungen über die Methode des academischen Studiums*, 10. Vorlesung: Über das Studium der Historie und der Jurisprudenz, der Staat als Einheit (Stuttgart, 1803) [second edn (Stuttgart, 1813); third edn (Stuttgart, 1830); newly edited (Leipzig, 1907; 1911); (Stuttgart, 1954); (Hamburg, 1974; 1990); (Hamburg, 2011)]. Max von Seydel, *Grundzüge einer allgemeinen Staatslehre* (Würzburg, 1873), p. 1. Welcker, *Vervollkommung* (note 72).

[148] Thomas Abbt, *Vom Tode für das Vaterland* (Abbt, Vermischte Schriften, vol. 2) (Berlin, 1770), p. [6] [first published (Berlin, 1761); newly edited (Frankfurt and Leipzig, 1873); also edited by Paul Menge (Leipzig, 1915); Paul Friedrich (Leipzig, 1915)].

[149] Ibid., p. 76.

[150] Fichte, 'Reden' (note 6), pp. 266, 270-271.

[151] Immanuel Kant, *Gesammelte Schriften*, vol. 19 (Berlin, 1934), nr 7824, 7825, 7833, pp. 527, 529.

[152] Immanuel Kant, *Die Metaphysik der Sitten*, part 1: Metaphysische Anfangsgründe der Rechtslehre, §§ 56, 57, 58, second edn [Königsberg 1798], in: Kant, *Werke in zwölf Bänden*, edited by Wilhelm Weischedel, vol. 8 (Frankfurt, 1968), pp. 309-499, at pp. 479-472 [first published (Königsberg, 1797)]. Kant, *Zum ewigen Frieden*, 6. Preliminary Article [first published (Königsberg, 1795)], in: Kant, *Werke in zwölf Bänden*, edited by Wilhelm Weischedel, vol. 11 (Frankfurt, 1968), pp. 193-251, at pp. 200-202.

admitted only regular armed forces as enemies. He concluded that, even though the law of war regulated the use of martial arms, it left "untouched the law of human beings" (das Recht der Menschen unangetastet), who as "citizens" of states were at peace even in times of war.[153] The struggle about contested rights among warring parties could only be terminated through a war-ending peace agreement.[154] However, this argument about of war led Kant to the Hobbesian postulate that the "state of peace among human beings" was not a naturally existing condition, as, according to Kant, no "state of nature" (kein Naturzustand) was a "state of war" (Zustand des Krieges); consequently, perpetual peace could not come about through some naturally designed automatism but would have to be "formally instituted" (gestiftet).[155] With this conclusion, Kant turned sharply against early eighteenth-century peace theorists who had postulated that perpetual peace would follow automatically once the causes of war would have ceased to exist. For the establishment of peace, Kant then set three conditions, first that government should become subject to the rule of law in accordance with a constitution; moreover, the constitution guaranteeing the rule of law should be "republican", not democratic: and finally, international law should be based on a "federalism" (Föderalism) or "federation of peoples" (Völkerbund) of independent republican states, not on an "international state" (Völkerstaat). In the "federation of peoples", international law was to be no more than the law on the use of force. Kant assumed that the law of war presupposed the existence of a pluralism of states and that the law of war was incompatible with the concept of the "international state", because there could not be any war within an "international state". Consequently, Kant argued that the making of a contract to establish a "federation of peoples" was the only way to lead sovereign states, whose governments were legally entitled to go to war, out of "their natural condition" (ihrem Naturzustande). Kant used Wolff's formula of the *civitas maxima*, translating it as "cosmopolitan law" (Weltbürgerrecht). But he demanded that it should be confined to regulating "hospitality" as the right of visit. Contrary to Wolff, he did not identify "cosmopolitan law" as the highest source of international legal norms but merely as an instrument for the regulation of communication among states. Kant thus confined his "cosmopolitan law" to the ancient *ius peregrinationis* and sharply rejected any claims for some alleged international right of occupation.[156]

According to Kant, then, the general and perpetual peace, not ending a specific war, consisted in the enforcement of the rule of law with regard to relations among states through a contractually established consensus. The relations among states were to be kept stable, whence Kant demanded that no state should be placed at the disposition "through hereditary succession, exchange, purchase or gift" (Erbung, Tausch, Kauf oder Schenkung). Kant thus pleaded against any priority of dynastic hereditary rights, did not approve of transfers of rights to rule through diplomatic deals and opposed policies apt to call into question the guarantee of the continuing existence of states.[157] He gave the form of a treaty to his treatise on perpetual peace, dividing the text into groups of "preliminary" and "definitive" "articles". With this division, Kant referred to the eighteenth-century practice of differentiating between preliminary and definitive peace treaties, but assembled both groups of "articles" into one single hypothetical treaty, prescribing the tentative and the finite conditions for perpetual peace. For Kant, perpetual peace was identical with the unity of humankind. Hence, the future "unification of the human species" (Vereinigung der Menschengattung) appeared to him to be part of a long-term "plan of nature" that he postulated like some of his contemporaries.[158] The possibility of perpetual peace thus existed in the long term and, as such, was not dependent upon human will. Nevertheless, Kant argued that human will was only required in order to allow the implementation of the "plan of nature".[159] Hence Kant explicitly rejected the

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[153] Kant, *Schriften* (note 151), nr 7824, 7827, pp. 527, 529.

[154] Ibid., nr 7837, p. 530.

[155] Kant, *Frieden* (note 152), Section II, Introduction, p. 203.

[156] Ibid., 1., 2., 3. Definitive Articles, pp. 204, 206-207, 209, 212-214.

[157] Ibid., 2. Preliminary Article, pp. 196-197.

[158] Thomas Abbt, *Geschichte des menschlichen Geschlechts, so weit selbige in Europa bekant worden vom Anfange der Welt bis auf unsere Zeiten* (Halle, 1766). Vogt, *System* (note 75), pp. 45-46.

[159] 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].

expectation that perpetual peace could come about in the immediate future. Grotius, Pufendorf and Vattel, who had envisaged perpetual peace as impending, were "miserable comforters" (leidige Tröster), whose theories Kant would not credit with "the least legal force" (die mindeste gesetzliche Kraft).[160] In this respect, Kant exhibited no difference against subsequent nineteenth-century theorists who would perceive international law merely as "external state law" (auswärtiges Staatsrecht).[161] By postponing the appearance of perpetual peace to the distant future, Kant launched the demise of perpetual peace theory. Even though some authors elaborated upon Kant's peace theory in the early years of the nineteenth century,[162] some in a critical tone,[163] the Clausewitzian paradigmatic sequence of war, peace and war replaced its then 1400 year old Augustinian predecessor. Jurist Carl Kaltenborn von Stachau (1817 – 1866), who in 1847 proposed to define war as a legal instrument to enforce the law, to limit the law of war to formal aspects of determining the condition of the law on the use of force and to grant material contents only to the law of peace, was still remindful of the Augustinian paradigmatic sequence but no longer found any approval whatsoever.[164]

Kant was also rather early in exposing the poverty of the machine model of the balance of power while the French Revolution was going on. Already in 1793, he categorised as "a mere chimera" (ein bloßes Hirngespinst) the idea of bringing about perpetual peace solely through maintaining the balance of power. This, in his view, was so because the balance of power could not accomplish stability against even mild external shocks.[165] Kant identified the French Revolution as one of such shocks and a major one at that. Among the observers of the Revolution he diagnosed an enthusiastic desire for participation in the revolutionary activities, with which he may have meant the eagerness to bring about similar changes elsewhere in Europe.[166] He warned these apparent enthusiasts that, in his view, a democracy allowed only one path towards the "constitutional rule of law" (einer rechtlichen Verfassung), namely that of the "violent revolution". Kant demanded that the constitutional rule of law could not be established as some abstract form of the state but had to result from the actual form of government, and that only the "republican form of government", guaranteeing freedom, subjection to a single general legislation and equality to all inhabitants of a state, could prevent the concoction of a type of rule that was "despotic and violent".[167] During the French Revolution, which Kant described as "filled with misery and brutality", the revolutionaries

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[160] Kant, *Frieden* (note 152), 2. Definitive Article, p. 210.

[161] Oppenheim, *System* (note 42), chap. I/2, p. 2.

[162] Karl Christian Friedrich Krause, *Entwurf eines europäischen Staatenbundes als Basis des allgemeinen Friedens und als rechtliches Mittel gegen jeden Angriff wider die innere und äußere Freiheit Europas* [1814], edited by Hans Reichel (Philosophische Bibliothek, 98) (Hamburg, 1920). Wilhelm Traugott Krug, 'Allgemeine Uebersicht und Beurtheilung der Mittel, die Völker zum ewigen Frieden zu führen', in: *Leipziger Literatur-Zeitung* (1812), col. 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). Justus Sincerus Veredicus [= Carl Justus Hochheim], *Von der Europäischen Republik. Plan zu einem ewigen Frieden* (Altona, 1796). *Vorschläge zu einer organischen Gesetzgebung für den Europäischen Staatenverein zur Begründung eines dauerhaften Weltfriedens* (Leipzig, 1814). Karl Salomo Zachariä von Lingenthal, *Janus* (Leipzig, 1802).

[163] Gustav Hugo, *Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts* (Hugo, Lehrbuch eines civilistischen Curses, Bd 2), third edn (Berlin, 1809), pp. 82-85 [first published (Berlin, 1798); second edn (Berlin, 1799); third edn (Berlin, 1819); reprint of the third edn (Glashütten, 1971)]. Tzschirner, *Krieg* (note 118), pp. 62-67.

[164] Carl Kaltenborn von Stachau, *Kritik des Völkerrechts nach dem jetzigen Standpunkte der Wissenschaft* (Leipzig, 1847), p. 278. Luigi Taparelli d'Azeglio, SJ, *Essai théorique du droit naturel*, vol. 3 (Paris, 1857), pp. 41, 104-106 [first published (Rome 1855); second Italian edn (Prato, 1883)].

[165] Immanuel Kant, 'Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nichts für die Praxis [1793]', in: Kant, *Werke in zwölf Bänden*, edited by Wilhelm Weischedel, vol. 11 (Frankfurt, 1968), pp. 127-172, at pp. 171-172.

[166] Immanuel Kant, 'Der Streit der Fakultäten [1798]', in: Kant, *Werke in zwölf Bänden*, edited by Wilhelm Weischedel, vol. 11 (Frankfurt, 1968), pp. 265-393, at pp. 358-359.

[167] Kant, *Frieden* (note 152), 1. Definitive Article, p. 208; 2. Definitive Article, p. 209.

appeared to have created a representative form of state but no "republican form of government".[168] In his late writings, Kant thus commented critically on the changes that French Revolution seemed to have provoked. His concept of the 'republican form of government' was derived from his overarching concept of the rule of law, which in turn grew out of the eighteenth-century concerns for the maintenance of the stability of the world. With his confidence that respect for the rule of law could guarantee the continuity of the European system of states against the dynamism spilling over from the French Revolution, Kant was a quixotic but not completely isolated fighter.[169] But with his prognosis that peace could only result from human consensual action, Kant was a path breaker for the nineteenth century. Already in 1816, the US government applied Kantian thought to the practice of making peace treaties when it concluded a treaty establishing peace with the Cherokee. The US government had taken that step even though peace between the contracting parties had been set already in previous treaties without any war having occurred in the meantime.[170]

Up until the 1860s, European and the US governments entered into numerous treaties with rulers and governments outside Europe on the basis of the belief that peace did not exist as a naturally endowed condition but had to arise through legislative acts. While the number of treaties of this kind grew incrementally and the areas over which they came to be enforced, steadily expanded across the globe, the public law of treaties between states accomplished a higher degree of leverage on treaty-making practice than ever in the long history of treaties between states. Although the customary legal norms that Grotius, Pufendorf and Martens had laid down in their texts, remained valid, nineteenth-century theorists would no longer derive these norms from the law of nature but insisted that the will of states generated international legal norms and resulted from human action alone.

The Expansion of International Law

The living-body model of the balance of power not only promoted the reformulation of theories of war and peace but also the acceptance of the perception of international law as "external state law" seemingly originating from government action. Thus, already early in the nineteenth century, theorists put the critical question on their agenda why the postulated state wills should subject themselves to international legal norms. Hegel, for one, offered an easy answer defining international law as the general law "expected to be valid among states by and for itself" (an und für sich zwischen den Staaten gelten sollende). Its "principle", according to Hegel, was the obligation to honour existing treaties (*pacta sunt servanda*). Yet Hegel conceded that this obligation was not enforceable over sovereigns and that, by consequence, conflicts among states could, without voluntary agreement, "only be resolved through war" (nur durch Krieg entschieden werden).[171] Although Hegel was ranked among the deniers of international law,[172] he did not actually doubt the existence of international law as such but argued against the position that he ascribed to Kant and according to which international law should have been regarded as enforced even against the will of sovereigns. Against this position, Hegel insisted that only states were legitimised to act in terms of international law through their governments and that only states were subjects of international law equipped with their own wills. According to Hegel, then, the bindingness of international legal norms as positive rules crucially hinged on the wills of the states whose governments handled them. Hegel's philosophy of law thus featured the idea that states could be actors and should be recognised as such by international law. For Hegel, then, international law was no more than an instrument for peaceful conflict resolution.

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[168] Kant, 'Streit' (note 166), pp. 358-359.

[169] For a similar close contemporary argument see: Novalis [= Friedrich Leopold Freiherr von Hardenberg], 'Die Christenheit oder Europa [1799]', in: Novalis, *Schriften*, edited by Richard Samuel, Hans-Joachim Mahl and Gerhard Schulz, vol. 2 (Stuttgart, 1960), pp. 507-524, at pp. 517-518, 522.

[170] Treaty Cherokee – USA, 14 September 1816, in: *CTS*, vol. 66, pp. 326-327. For an interpretation see: Stuart Banner, *How the Indians Lost Their Land. Law and Power on the Frontier* (Cambridge, MA, 2005), p. 126.

[171] Hegel, *Grundlinien* (note 119), §§ 333, 334, pp. 499-500.

[172] Kaltenborn, *Kritik* (note 164), pp. 309.

Radicalising Hegel, John Austin and other early nineteenth-century jurists argued the theory that international law could not be set by a legislator above states and that, by consequence, it could not be binding for anyone. Instead, Austin posited that norms above states were binding only in the sense of the moral obligation to implement them. Austin thus shifted the obligation to follow the norms regulating communication among states out of the sphere of law into the sphere of morality.[173] In doing so, Austin explicitly referred to Georg Friedrich von Martens, whose formula of the "positive law of nations" (positives Völkerrecht) he translated as "positive international law". However, for the purposes of his argument, Austin then denied the existence of "positive international law" and recast Martens's phrase into "positive international morality". He did so with the argument that binding positive international law could not possibly exist. Other theorists followed suit in denying international law as a set of legally binding norms. To these theorists, answers to important questions about war, drawn on international law, could not have binding effects, but appeared to "hover" in a "shaky political equilibrium". Therefore, they concluded, the relationship of states as "direct subjects of international law" (unmittelbare Subjekte des Völkerrechts) to one another could not be regulated through set legal norms in the same way as the relationship among "the indirect [subjects], i. e. individuals [as citizens of states]".[174] The transfer of Hegel's notion of the subject from philosophy into the theory of international law likened states to individuals and identified them as actors, as if they were integrated bodies and could speak with one voice.

Moreover, early nineteenth-century theorists of international law refashioned the concept of customary law which they no longer derived from postulate of divine will or the general 'system' of nature but from some "popular conviction" allegedly valid only within a specific national community.[175] According to these theorists, most notably the Berlin lawyer Georg Friedrich Puchta (1798 – 1846), custom presupposed the existence of law and emerged directly from the nation.[176] Within this theory of customary law, the nation took the role of the originator of the law, with the consequence that customary law could no longer be perceived as valid for humankind as a whole. The theory posited not only states as actors, but also nations. Based on the living-body model, the theory considered nations as quasi living "moral persons". The theory thus supported the claim that not only state law should match the non-legal category of the 'popular conviction', but also the further claim that international law should be compatible with the shared convictions of nations situated in a "community with other nations" (Gemeinschaft mit den anderen Völkern).[177] According to this theory, law was unconceivable without being rooted in a legal community, both at the level of the state and at the international level. Theorists deemed the law of nature as unset law,

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[173] Austin, *Province* (note 5), p. 127. Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol. 1 (Berlin, 1840), p. 33; similarly: Henry Wheaton, *Elements of International Law*, English edn, third edn, edited by Alexander Charles Boyd (London, 1889) [first published (London and Philadelphia, 1836); third edn (Philadelphia, 1846); new edn by William Beach Lawrence (Boston, 1855); second edn of the edn by Lawrence (Boston and London, 1863); eighth edn, edited by Richard Henry Dana (Boston and London, 1866), vol. 1, § 13, pp. 18-19; new English edn, edited by Alexander Charles Boyd (London, 1878); second edn of the edn by Boyd (London, 1880); third edn of the edn by Boyd (London, 1889); fourth English edn, edited by James Beresford Atlay (London, 1904); fifth English edn, edited by Coleman Phillipsen (London, 1916); sixth English edn, edited by Arthur Berriedale Keith (London, 1929); reprint of the original edn (New York, 1972); reprint of the edn by Dana, edited by George Crafton Wilson (Oxford, 1936); reprint of this edn (New York, 1972); reprint of the first ed by Dana (New York, 1991)].

[174] Kaltenborn, *Kritik* (note 164), pp. 228-229.

[175] 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); forming part of: 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)]. Georg Friedrich Puchta, *Gewohnheitsrecht*, vol. 1 (Erlangen, 1828 – 1837), book 2, pp. 143, 161 [reprint (Darmstadt, 1965)].

[176] Puchta, *Gewohnheitsrecht* (note 175), vol. 1, book 2, pp. 143-147, book 3, pp. 7-8. Puchta, '[Review of: Georg Beseler, *Volksrecht und Juristenrecht* (1843)]', in: *Jahrbücher für wissenschaftliche Kritik* 1 (1844), col. 1-30, at col. 16-17.

[177] Ahrens, *Cours* (note 121), § 137, p. 562.

regarded as valid for all humankind, to be applicable solely under the condition that "the nation was ready to apply it" (Empfänglichkeit des Volkes). Legal theorist Johann Caspar Bluntschli (1808 – 1881) assumed that an abstract "idea of law" could only convert into law if it "is accepted into the consciousness of the nation and at the same time is endowed by it with binding force" (zugleich von dem Bewußtsein des Volkes aufgenommen und durch dieses mit verbindlicher Kraft ausgerüstet sei).[178] According to Bluntschli, the validity of international legal norms depended on the membership of states as legal subjects in the legal community of nations as the apparent originator of the law. Already at the turn towards the nineteenth century, historically minded jurists identified a gap between legal norms seemingly flowing from the wills of states and allegedly in agreement with "the consciousness of the nation" on the one side and, on the other, theoretically formulated legal norms. Hey detected this gap not only in the systematics of jurisprudence but also traced its evolution through time. They brand marked the latter type of norms as abstract, speculative law of nature applied to the human world. They named authors such as Hobbes, Pufendorf and Burlamacqui as advocates of this type, while associating Suárez, Grotius and Bynkershoek with the former type of legal norms.[179] They classed Suárez, Grotius and Bynkershoek as precursors of the nineteenth-century concept of international law.

However, the question of how far the international legal community as the originator of international law could expand, specifically if that community was not defined in religious terms,[180] triggered widely different answers, which, early in the nineteenth century, did not regularly extend the scope of the international legal community beyond Europe, the Mediterranean area as well as the European settler colonies in America and the states emerging from them. Nevertheless, the practice of concluding peace treaties, not ending wars, between governments in Europe and the USA on the one side, governments in Africa, Asia and among Native Americans on the other, reflected the expectation that the political communities existing in these parts of the world did not belong to the international legal community in the perception of the European and American treaty partners. Consequently, in the view of these theorists, even the application of international customary law beyond the concocted international legal community could not be taken for granted but often seemed to require the conclusion of treaties obliging parties to abide by the agreed norms, However, the existence of treaties per se did not automatically imply recognition of treaty partners in Africa, Asia and America as members of the international legal community, into which admission appeared to be possible solely through discretionary legal acts.

A US Supreme Court verdict of 1823 early put on record the discrepancies that had, since the second half of the eighteenth century, arisen between the legal norms seen as valid in that international legal community and the legal norms regarded as valid among Native Americans. Under John Marshall as president, the Court accepted a case concerning the criteria for determining the legality of acquisitions of land by European settlers from Native Americans. The question in this particular case was whether European settlers were entitled to purchase land directly from Native Americans or could only acquire land that US government had previously bought from Native Americans and marked for redistribution among settlers. The Court ruled that direct land purchases were unlawful and based its decision on a comprehensive review of the history of European settlement in North America. The Court concluded that Native Americans were "sovereigns ... and the absolute owners and proprietors of the soil ... of the territory" and that no one could bereave them of their sovereignty. However, the Proclamation in the name of King George III of 1763, that is, after the transfer of control over the French colonies in North America into British rule, had placed under the "protection" of the Crown Native Americans settling in areas west of the sources of rivers mouthing into the Atlantic Ocean, that meant, west of the Appalachians, thereby expanding the control of the British king over Native American states beyond the arrangements made in 1677.[181]

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[178] Johann Caspar Bluntschli, *Allgemeines Statsrecht*, fourth edn, vol. 1 (Munich, 1868), S. 20-21 [first published (Munich, 1851); sixth edn (Munich, 1876)].

[179] Robert Plummer Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe since the Time of the Greeks and Romans to the Age of Grotius*, vol. 1 (London, 1793), p. 4 [reprint (New York, 1973)].

[180] Ibid., pp. 123-125.

[181] *A Proclamation* [in the name of King Georg III, single sheet, 7 October 1763] (London, 1763) [edited by Clarence S. Brigham, *British Royal Proclamations Relating to America. 1603 – 1783* (Transactions and Collections of the

The Court argued that the Proclamation had reduced the "rights to complete sovereignty" of the Native Americans because they had no longer been able to dispose of their land at their own complete discretion. Since the late 1770s, the emerging US government had recognised the sovereignty of Native American states through several treaties, among them the peace agreements with the Delaware of 1778 and the Seneca, Mohawks, Onondagas, Cayugas, Oneida and Tuscarora of 1784. The treaty of 1778 was motivated by US strategic concerns in the then ongoing War of Independence, namely the assuring of the right of passage for US troops engaged in campaigns against British positions (Art. III). The US government thus put on record its recognition that the Delaware were in possession of sovereignty rights of their territory. The treaty of 1784 ended the war that the US government had conducted against the Seneca who had been tied by their treaty with the British government of 1764. It placed the Seneca, Mohawks, Onondagas and Cayugas under the "protection" of the USA (Preamble), while granting to the Oneida and Tuscarora "the possession of the lands on which they are settled" (Art. 2). In its verdict of 1823, the Court took the view that the US government had taken over the "protectorate" from the Royal Proclamation, pretending that the USA were the successor state to the UK, even though the legal construct of state succession was absent from eighteenth-century theory and had not been claimed in the treaty. By contrast, the treaty of 1784 could not possibly have newly established the US "protectorate" over the Seneca and the three other Native American states, had the US government then attributed any legal significance to the Royal Proclamation, according to which such a "protectorate" was already in existence. Moreover, the Court ignored the wording of a treaty between the Creek and the USA of 1790, which had confirmed to the Creek the legal entitlement to use of their traditional hunting grounds,[182] but noted that "the tribes of Indians ... were fierce savages" and "people with whom it was impossible to mix and who could not be governed as a distinct society". Therefore, the Court argued, European settlers had not had any other choice but to subject Native Americans to their control by the use of force. Although it deemed conquests of occupied land "extravagant", the Court further argued that, once they had taken place, they provided the factual basis for a legal order, which could no longer be called into question. According to this legal order, the Court used these treaties to support its verdivt that the US government had the entitlement to purchase land from Native Americans and to redistribute it among settlers. The Court thus left untouched Native American sovereignty which it derived from the law of nature, while also granting some right of conquest to the European settlers. In accordance with contemporary treaties, it denounced Native Americans as "savages", classed them as targets of "civilising" missions and excluded them from the international legal community that the European settlers appeared to have transferred to the American continent.[183]

The US Supreme Court decision of 1823 thus provided the record that the international legal community as the originator of positive as well as customary international law was not thinkable as a given global community of states and nations. Therefore the assumption became inevitable that international law could not possibly consist of generally valid unset legal norms. The law of nature as the "elaborate, rationally structured theory of law" of the eighteenth century[184]

American Antiquarian Society, 12) (Worcester, MA, 1911), p. 215; also in: Arthur Berriedale Keith, ed., *Selected Speeches and Documents on British Colonial Policy. 1763 – 1917*, vol. 1 (The World's Classics, 215) (London, 1918), pp. 3-11; reprints of this edn (Oxford, 1948; 1961); partly printed in: http.//indigenousfoundations.art.ubc.ca/home/g]. Treaty Hottoways/Naneymond/Pamunkey/Waonske – Great Britain, 29 May 1677, in: *CTS*, vol. 14, pp. 257-263.

[182] Treaty Seneca – UK, Johnsonhall, 3 April 1764, in: *CTS*, vol. 42, pp. 499-502. Treaty Delaware – USA (Continental Congress), 27 September 1778, in: *CTS*, vol. 47, pp. 87-89, at p. 87. Treaty Six Nations [Seneca, Mohawks, Onodagas, Cayugas, Oneida, Tuscarora] – 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. 297-298. Treaty Creek – USA, 7 August 1790, Art. VII, in: *CTS*, vol. 51, pp. 37-41, at p. 39. On state succession, see Huber, *Staatensuccession* (note 45). Schönborn, *Staatensukzession* (note 45).

[183] USA, Supreme Court. Johnson v. M'Intosh 21 U.S (8 Wheat) 543 (1823) [http://supreme.justitia.com/cases/federal/us/21/!]. Treaty Choctaw – USA, Doah's Stand, 18 October 1820, in: *CTS*, vol. 71, pp. 270-274, Art. I (p. 270) combining the cession of territory with the announcement „to promote civilization".

[184] 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.

ceased to serve as the frame for the theory of international law, even though the phraseology of natural law continued in use as a conventionalism in the one or the other handbook of international law.[185] Some theorists, who were willing to at least mention the law of nature, described it, with explicit contempt for Hobbes and Rousseau, as a product of nonsensical imagination and condemned it with the assertion that "the germ of state formation" had been "implanted" into humankind from the very beginning.[186] Consequently, if there were natural rights, they appeared not to be given by nature but elements of the nature of the state.[187] Some historically minded theorists, though, did reflect on Christian Wolff's *civitas maxima* and supported the assumptions that the law could "constitute the norm and order for human communities" and was positioned above the state in this capacity, that the state was "not the highest and absolute institute of the law", and that the law above the state was international law.[188] But even these theorists were not willing to sacrifice state sovereignty on the altar of international law but demanded, totally in agreement with the living-body model, that state and international law should 'livingly penetrate each other' (sich lebendig durchdringen) without specifying how such penetration could be accomplished.[189] Even though international law might be positioned above states, it would still have to be made compatible with state law. Consequently, treaties between states were to be honoured for the sake of regulating communication among states not because of the naturally existing "moral-legal principle of loyalty" but because the "willingness to conclude treaties" appeared to be identical with the "willingness to abide by treaties".[190] The will of the state thus took the place of the obligation by natural law. These positions turned eighteenth-century natural law theories into their very opposite.

Jeremy Bentham's formula of international law found application beyond English-speaking areas already early in the nineteenth century. For one, Andres Bello (1781 – 1865), jurist and long-term rector of the University of Chile, defined what he called "international law or law of nations" as the "collection of laws or general rules of conduct that nations must observe for their own security and the common benefit".[191] Bello as his contemporary legal theorists recast international law as the law of communication among states on the basis of the perception of the wide conceptual gap between international law and the law of nature. Because nineteenth-century legal theorists were unwilling to derive international law partly from the law of nature, they had to search for other "sources". However, from the point of view of jurisprudence, these "sources" were not to be looked for in some written documents that had somehow been preserved from the past, as the methodology of historical research demanded.[192] Instead the "sources" of law had to be detected in specific patterns of actions which could emerge from the alleged wills of states at any time and were to lead to the formulation and enforcement of legal norms in the international arena.[193]

Jurist Richard Wildman (1802 – 1881) early on drew on the triad of customary law, legislation and views established in jurisprudence as "sources" of international law by the Berlin jurist Friedrich Carl von Savigny (1779 – 1861), who focused on state law and, in turn, based himself on Roman legal thought.[194] Wildman modified Savigny's general suggestion specifying,

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3-18, at p. 16.

[185] Friedrich Adolf Schilling, *Lehrbuch des Naturrechts oder der philosophischen Rechtswissenschaft* (Leipzig, 1859).

[186] Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisierten Staten*, § 529 (Nördlingen, 1868), S. 296 [second edn (Nördlingen, 1872); third edn (Nördlingen, 1878)]. Bluntschli, *Statsrecht* (note 178), book III, Chap. V/1, vol. 1, p. 261.

[187] Bluntschli, *Völkerrecht* (note 186), § 529, p. 296.

[188] Kaltenborn, *Kritik* (note 164), pp. 258-259.

[189] Ibid., p. 263.

[190] Schilling, *Lehrbuch* (note 185), § 117, pp. 177-180.

[191] Andres Bello, *Principios de derecho de jentes*, § 1 (Santiago de Chile, 1832), p. 1. In German speaking areas, the new formula has found no more than sluggish reception. For an early case see: August Michael von Bulmerincq, *Das Völkerrecht oder das internationale Recht*, second edn (Freiburg, 1889) [first published (Freiburg, 1887)].

[192] Johann Gustav Droysen, *Historik* [1857], § 1, edited by Rudolf Hübner, fifth edn (Darmstadt, 1969), S. 67; newly edited by Peter Ley (Stuttgart, 1977) [latest printed version (1882)].

[193] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), S. 30 [second edn (Tübingen, 1907); reprint (Aalen, 1958)].

[194] Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1814),

with regard to the international arena,laws and orders, treaties (to the extent that they contained statements pertaining to international law), opinions of previous jurists, such as Grotius, as well as verdicts by international courts of arbitration, such as the Consolato de Mare.[195] In Wildman's list, existing unset laws and orders took the place of customary law, while treaties of general contents were equated with legislation. Wildman added verdicts by international courts of arbitration, referring to a thirteenth-century institution.[196] The doctrine of the "sources of international law" provided the methodological basis for the rejection of the law of nature as the framework from which international legal norms could be derived. By consequence, nineteenth-century theorists could justify the demand to recognise the rule of law above states in no other way but through the postulate that this demand should flow from the wills of states whose governments were willing to communicate in the international system. Savigny's as well as Wildman's lists reflected some skepticism against codification by legislative assemblies, widely spread among professionals in the earlier nineteenth century. In contemporary legal theory, customary law, commonly perceived as "law of the people" [Volksrecht], together with opinions of jurists as juridical law [Gelehrtenrecht], received priority over codification through legislative assemblies, whose work appeared as unsystematic and inconsistent to legal theorists.[197]

Around the middle of the nineteenth century, the Tübingen jurist and parliamentary deputee Robert von Mohl (1799 – 1875) explicitly equated the "international" relationship with "the relationship among independent national organisms",[198] thereby employed the living-body model together with the slogan "organism", which was rising to prominence at the time as a label for actors in terms of international law.[199] Mohl defined the "maintenance of the international community" as the overall purpose of international law and, in doing so, integrated nations as well as states into the international community, as if they were organs in a living body. Mohl, like other jurists of his time,[200] thus took for granted the existence of the "law of international communication of humankind" (Rechts des internationalen Verkehrs der Menschen) and included all government measures to the end of elevating "the essential interests of foreigners, when necessary" (nöthigen Falls auch die Lebenszwecke Fremder zu fördern) to an issue of the "maintenance of the international community".[201] Mohl expected that a comprehensive legal order among states could emerge pragmatically from cooperation on legislation and law enforcement, specifically on measures relating to emigration, the prevention of the spreading of "infectious diseases", the promotion of education, research and trade, the easing of grants of permissions of stay, the protection of rights of foreigners and the avoiding of double taxation of individuals across international borders of states.[202] Mohl's list reflected the pragmaticism of a utilitarian jurist who was concerned about the usefulness of state institutions for the protection of what appeared to him as legitimate interests of nationals and foreigners alike. Mohl's "international community", however, was not necessarily global in extension but rather a local club of neighbouring states in a relatively small area, where nationals would frequently communicate across international borders of states. Hence, it comprised states in southwestern Germany, as they had emerged from the state succession processes of the earlier nineteenth century. According to this theory, international law regulated relations within "a pluralism

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S. 7 [second edn (Heidelberg, 1828); third edn (Heidelberg, 1840); new version of the third edn (Freiburg, 1892); reprints of the first edn (Hildesheim and New York, 1973); (100 Jahre Bürgerliches Gesetzbuch, Pandektenrecht 54) (Goldbach, 1997)]. Similarly: Georg Beseler, *Volksrecht und Juristenrecht* (Leipzig, 1843). Supplement by Georg Friedrich Puchta (Leipzig, 1844), pp.109-139.

195 Richard Wildman, *Institutes of International Law*, chap. 1 (Philadelphia, 1850), p. 20.

196 Fernando Jordá, *Das „Consulat des Meeres" als Ursprung und Grundlage des Neutralitätsrechts*. LLD Thesis (University of Hamburg, 1932).

197 Beseler, *Volksrecht* (note 194). Puchta, *Gewohnheitsrecht* (note 175), vol. 2, book 4, p. 229.

198 Robert von Mohl, *Staatsrecht, Völkerrecht und Politik*, vol. 1 (Tübingen, 1860), pp. 583-584.

199 Albert Theodor van Krieken, *Über die sogenannten organischen Staatstheorien* (Leipzig, 1873).

200 Fallati, 'Genesis' (note 147). Schilling, *Lehrbuch* (note 190), § 117, p. 177. Witold Zaleski, *Zur Geschichte und Lehre der internationalen Gemeinschaft* (Tartu, 1866).

201 Mohl, *Staatsrecht* (note 198), p. 595.

202 Ibid., pp. 602-636.

of states" (der Vielheit der Staaten) and had expanded "in history",[203] as if it was a living body by itself. The theory rested on the assumptions that international law was based on the "general legal consciousness", determining government action in the "international community"; that "legal consciousness" appeared to be recognisable in "legal habits and customary laws" (Rechtssitten und Gewohnheitsrechten), that is in the "law of peoples", but to be also in need of "confirmation through treaties" as legislative state acts.[204]

Even though the theory was cast in general terms, it was in fact limited in its range to parts of Europe and America. Contemporary texts confirm the limitation by specifying "habits" as Christian, purportedly just comprising "all Christian and civilised European and American nations" (sämmtliche christliche und gesittete europäische und amerikanische Völker).[205] In this respect, international law was to be valid only with regard to relations among states which theorists were willing to accept as Christian and as "civilized". Theorists thus believed that relations between Christian and non-Christian as well as among non-Christian states could not exist "on the basis of the law" (auf der Basis des Rechts).[206] They refused to credit political communities whose members appeared to be ignorant of the concept of property in land, with the capability of uniting into states, but categorised them as "hordes" living somewhere in the world in some state of nature.[207] Some theorists such as jurist Karl Theodor Pütter (1803 – 1873) allowed some "primordial and natural international law" (Ur- und Naturvölkerrecht) to exist among "hordes of fishermen and hunters" (Fischer- und Jäger-Horden), but speculatively positioned this system of law in the apparently remotest of three main past periods of the so-called "practical European international law".[208] In the perspective of theorists, international law thus turned into the house law of the club of seemingly Christian and "civilized" states. Next to the internal "European Concert" of purportedly "great powers", theorists postulated a further hierarchy, in its highest echelon, was to feature states among which international law appeared to be valid. By contrast, all other political communities, even when they were recognised as states, appeared to exist outside the realm of validity of international law.

Access by new members into the club of states, for which international law was the house law, appeared to require approval by existing members, with that approval depending on the fulfillment of rigid criteria and access of non-European states being considered as highly unlikely: "Access of non-European non-Christians is not to be expected, because our international law rests on our customs, our common culture" (Von außereuropäischen Nichtchristen ist das nicht zu erwarten, da unser Völkerrecht gerade auf unseren Sitten, auf unserer gemeinsamen Kultur beruht.)[209] Already by the early nineteenth century, international law had shrunk to an allegedly specific feature of European culture, which to regulate exclusively the European club of states appeared to be legitimised. As there never came into existence a formal binding agreement about how these "customs" were to be defined, recourse to them remained arbitrary. The area under the control of the Ottoman Sultan was, according to the feeling of some theorists already during the 1830s and 1840s, belonging to the "concert" of European diplomats.[210] Already at the time of the Crimean War, representatives of Austria, France, Sardinia and the United Kingdom met in London to discuss their relations with the Sultan. They agreed that the territories under the Sultan's control were to be dealt with as a state in the same way as all others and called it Turkey. The London conference concluded with a protocol on 14 April 1854 that obliged all participants to ensure that Turkey remained in the "general balance of Europe" (allgemeinen Gleichgewicht Europas).[211] On the basis of this protocol,

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[203] Oppenheim, *System* (note 42), §§ 2, 4, pp. 3, 5.

[204] Ibid., §§ 4, 7, pp. 5, 7.

[205] Pölitz, *Staatswissenschaft* (note 126), vol. 5, pp. 38-39. Kaltenborn, *Kritik* (note 164), pp. 215-216, 228. Ward, *Enquiry* (note 179), pp. 123-125.

[206] Carl Kaltenborn von Stachau, *Zur Geschichte des Natur- und Völkerrechts sowie der Politik*, vol. 1: Die Vorläufer des Hugo Grotius auf dem Gebiete des ius naturae et gentium sowie der Politik im Reformationszeitalter (Leipzig, 1848), p. 270.

[207] Theodor von Schmalz, *Das europäische Völkerrecht* (Berlin, 1817) , pp. 4-5 [reprint (Frankfurt, 1970)].

[208] Karl Theodor Pütter, *Beiträge zur Völkerrechts-Geschichte und Wissenschaft* (Leipzig, 1843), p. 26.

[209] Schmalz, *Völkerrecht* (note 207), p. 36.

[210] Pütter, *Beiträge* (note 208), p. 12. Wheaton, *Elements* (note 173), edn by Dana, § 71, p. 99.

[211] Treaty Turkey – UK, London, 14 April 1854, Preamble, in: *CTS*, vol. 111, pp. 394-397, at p. 394 [see also:

the Turkish Foreign Minister Mehmet Emin Ali Pasha (1815 – 1871) submitted a demand to the peace negotiations taking place in Vienna in April 1855. Ali Pasha demanded the inclusion of a passage into the future peace treaty according to which Turkey would share "the advantages of the Concert established among the several European states on the basis of public law".[212] Ali Pasha sought to make sure that, in consequence of the peace agreement, Turkey would no longer just be tolerated as a part of the European states system but that the Turkish government would be entitled to participate actively in the conduct of international relations within Europe. Since the fifteenth century, the Ottoman Turkish Empire had in so far been exposed to the law of war and peace considered valid in Europe, as its European war enemies and treaty partners had often applied that law to the disadvantage of the Ottoman Turkish Empire. Ali Pasha intended to use the opportunity of the preparation of the peace agreement to give a voice to the Turkish government in the shaping of international law.

The Paris Peace Treaty of 30 March 1856, ending the Crimean War, indeed included a passage which was based on Ali Pasha's demand. Even the Prussian government agreed to the peace treaty, although it had not joined the war.[213] The text of the treaty followed the invocation of the "Omnipotent God" (Dieu Tout-Puissant) as a guarantor, a formula that was acceptable for Christians and Muslim alike. In Article VII of the treaty, all parties to the war and Prussia declared their willingness to admit Turkey "to the participation in the advantages of European Public Law and the European Concert". This formula differed in important detail from Ali Pasha's original demand. Ali Paschal had categorised the "European Concert" as based in public law and had not used a single word implying an act of the admission of Turkey into that "Concert". By contrast, the text of the treaty featured an explicit statement recording Turkey's "participation" in the "Concert". While the Turkish side had taken for granted that Turkey was already a member of the "Concert" and was merely seeking to add an active role to its membership, the treaty stipulated what could be read as an act of admission granted by the grace of the members of the "Concert". The treaty thus reduced Turkey to an applicant asking for benefits, a position that Ali Paschal had not taken at all. In view of the representative of Austria, France, Prussia, Sardinia and the United Kingdom, Article VII of the treaty had the purpose to clarify through the application of international law, that the "European Concert" was a club of states, membership in which could not be demanded as a legal entitlement, but depended on cooptation by existing members. Article VII also specified the "advantages" of membership in the "European Concert", namely the guarantee of the inviolability of the territorial borders of the Turkish state. All parties to the treaty, including Russia, thereby agreed to recognise the territorial integrity of the Turkish state. As within nineteenth-century concepts of European international law, territorial integrity could only be granted to purportedly "civilized" states,[214] the treaty implied that it was no longer possible to conduct a war against Turkey with the claim that Turkey was not a "civilized" state. Czar Alexander II of Russia (1855 – 1881), however, revealed dissent among the contracting parties and publicly stated his view in his Peace Manifesto of 19 / 31 May 1856 that Article VII of the Paris Peace Treaty referred not to the territorial integrity of the Turkish state but to the rights of Christians under the rule of the Sultan. In Russian perspective, therefore, the treaty did not contain any guarantee of Turkey's territorial integrity but a legal entitlement for intervention into Turkish domestic affairs.[215] On the other side, the Turkish government had, through the treaty, effectively waived its right to act in accordance with the traditional Muslim law of war and peace. That law allowed Muslim governments to merely conclude finite peace treaties with non-Muslims. By contrast, the treaty imposed an indefinite peace. Following the Paris Peace Treaty, the Turkish government became obliged to respect the theory of

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London: British National Archives, F/O, British Foreign State Papers, Bd 44, pp. 82-83].

[212] Mehmed Emin Ali Pascha, '[Memorandum, dated April 1855]', in: London: British National Archives, F/O, British and Foreign State Papers, vol. 45, pp. 92-93.

[213] Treaty of Paris, 30 March 1856, Art. VII, in: *CTS*, vol. 114, pp. 410-420, at p. 414.

[214] Carl Wilhelm von Tröltsch, *Versuch einer Entwickelung der Grundsätze, nach welchen die rechtliche Fortdauer der Völkerverträge zu beurtheilen ist. Eine gekrönte Preisschrift*, part I, §§ 1, 7, 16 (Landshut, 1808), pp. 1, 10. Leonhard von Dresch, *Über die Dauer der Völkerverträge* (Landshut, 1808).

[215] Hugh McKinnon Wood, 'The Treaty of Paris and Turkey's Status in International Law', in: *American Journal of International Law* 37 (1943), pp. 262-274.

international law that had been established in Europe since the turn towards the nineteenth century. According to this theory, peace could only come about as a consequence of human legislative action and could not be derived from divine will. The Paris Peace Treaty thus imposed European international law upon Turkey and subjected it to European "civilization". In conclusion, the treaty is not remarkable through its Article VII but because of the stipulation of the expansion of European international law in its nineteenth-century structure. This expansion took place tacitly through the conclusion of public treaties by international law. Hence, the assertion, often repeated in diplomatic and legal historiography, that Turkey should have been admitted to the European states system through the Paris Peace Treaty of 1856,[216] is untenable.

The Reduction of the Number of Actors under International Law

Theorists not only of international law but also of the state, nation, society and culture[217] created a hierarchical order of social "organisms" through the application of the systems model of the living body. They positioned European states at the highest rank of their hierarchical order, which they constructed not only as a synchronic ranking scheme embracing the states, nations, societies and cultures of their own time, but also diachronically as a metaphysical path on which humankind apparently "developed" from its alleged "primitive" beginnings of small "hordes" to seemingly "higher" levels of "organisation" in states and national societies. These theorists ascribed different speeds of "development" to various political communities, credited European states with the highest speed, while locating states and political communities known to them elsewhere in the world at lower levels. For one, Jeremy Bentham explicitly restricted the reach of his 1789 *Plan for an Universal and Perpetual Peace* to 'civilized states' and named France together with the United Kingdom as their prototypes, but would not include into his list states and political communities outside Europe.[218] Other contemporary theorists, in contradistinction against seventeenth-century authors, used racist arguments when they postulated some "barbarian international law" "between small neighbouring states consisting of subhuman with a barbarian mentality" ([b]arbarisches Völkerrecht [z]wischen kleinen benachbarten Staaten, welche aus Unmenschen von dieser Gemüthsart bestuhnden) for most states in Africa, the South Pacific and among Native Americans.[219] In the course of the process of the build-up of a "society of nations" (Völkergesellschaft),[220] subject to European international law, first the number of types of international actors was to decline and then their absolute numbers as well.[221]

Already during the first half of the nineteenth century, theorists of international law revealed their eagerness to reduce the number of types of international actors. In order to accomplish that goal, they established a legal norm according to which only governments of sovereign states should be entitled to conclude treaties by international law. According to this norm, even so-called 'semi-sovereign' states could no longer be parties to treaties by international law, as they appeared to have surrendered their treaty-making competence to other states.[222] Through applying their norm,

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[216] E. g.: Winfried Baumgart, *Vom europäischen Konzert zum Völkerbund. Friedensschlüsse und Friedenssicherung von Wien bis Versailles* (Erträge der Forschung, 25) (Darmstadt, 1974), p. 2 [second edn (Darmstadt, 1987)].

[217] Bluntschli, *Studien* (note 45), pp. 3-30. Heinrich Ahrens, *Die Philosophie des Rechts. Die organische Staatslehre auf philosophisch-anthropologischer Grundlage*, vol. 1 (Vienna, 1850), p. 43. Peter Conradin Planta, *Die Wissenschaft des Staats, Oder Die Lehre vom Lebensorganismus*, vol. 2, second edn (Chur, 1852), pp. 1, 98-138. Albert Schäffle, *Bau und Leben des socialen Körpers*, vol. 4 (Tübingen, 1881), pp. 216-219. Herbert Spencer, *The Principles of Sociology*, vol. 1, vol. 3 (New York and London, 1877), S. 449-453 [first published (London, 1876); further edns (London, 1882; 1893); (New York, 1897; 1901; 1906; 1912); reprints (Osnabrück, 1966); edited by Stanislav Andreski (London and Hamden, CT, 1969); (Westport, CT, 1975); edited by Jonathan H. Turner (New Brunswick, 2002)]. Otto von Gierke, *Das Wesen der menschlichen Verbände. Rede bei Antritt des Rektorats am 15. Oktober 1902* (Leipzig, 1902), p. 12.

[218] Bentham, 'Plan' (note 175), p. 546.

[219] Isaak Iselin, *Ueber die Geschichte der Menschheit*, vol. 1 (Frankfurt and Leipzig, 1764), pp. 181-186, 190-230.

[220] Fallati, 'Genesis' (note 147).

[221] Schmalz, *Völkerrecht* (note 207), pp. 3-5.

[222] Wheaton, *Elements* (note 173), edn by Boyd, § 252, p. 356.

theorists also excluded long-distance trading companies from entering into binding obligations by international law. In practical politics beyond the theory of international law, the process of the reduction of the number of types of international actors is already on record in the compensation scheme for the Holy Roman Empire of 1803. At this time, the English East India Company (EIC) was the only remaining long-distance company that had been founded in the course of the seventeenth century. By contrast, other companies had been replaced by successor institutions without chartered treaty-making competences, such as the French East India Company in 1785, had been dissolved, such as the Danish Guinea Company in 1776, or had gone bankrupt, such as the Dutch West India Company in 1791 and the Dutch East India Company in 1798. The EIC, it is true, had been subjected to the control, first of Parliament, then of the government of the United Kingdom in response to scandals relating to the expansion of their control over Bengal during the 1770s, but it continued to act as a sovereign in South and Southeast Asia. Often in the name of the British government, it concluded treaties by international law, covering agreements on cooperation, the establishment of "protectorates" and cession of territory to the middle of the nineteenth century, mainly with rulers and governments in South Asia. For one the "protectorate" treaty between the EIC and the Maharaja of Jodpur of 6 January 1818 stipulated in its Article II that the British government "engages to protect the principality and territory of Jodhpur". Article IV prohibited the Maharaja from establishing treaty relations with other states, while Article V restricted his *ius ad bellum*.[223] A treaty of cession came into existence between the EIC and the Maharaja of Satare on 25 September 1819. The British side surrendered territory to the Maharaja who, in return, obliged himself to cooperate with the EIC.[224] The treaty of cession concluded between the EIC and the Maharaja of Lahore on 9 March 1846 was a peace agreement. The unusually long preamble to his treaty[225] featured a narration of the history of bilateral relations since 1809, when a previous treaty had been made. The narration claims to be an account of repeated breaches of that treaty through allegedly unprovoked attacks on British territory. The ensuing war terminated with the military occupation of Lahore by British troops. According to the treaty, the occupation was to lay the foundation for the "perpetual" peace that was being established through Article I of the treaty. Articles II and III imposed cession of territories to the British side.[226] In his further treaty with the EIC of 29 March 1849, the Maharaja of Lahore finally ceded all rights, titles and claims for sovereignty over the Punjab to the EIC, which occupied all land in public property.[227] These measures of the occupation of vast land in South Asia to the control of the EIC were flanked by an ideology that linked the concession of legal equality to its treaty partners with the recognition by the EIC of its partners as purportedly "civilized" states. The EIC explicitly defined "civilization" in the contemporary European terms of constitutional government, respecting the rule of law, the forming of a 'nation' based on "patriotism" and respect for the maintenance of peace. The EIC reserved for itself the privilege of determining whether these conditions were being fulfilled. Only in the unlikely case that EIC officials accepted that this was the case, would the EIC grant the option of including Lahore into what it called its "multinational empire" of the recognised states in South Asia under British suzerainty.[228] In applying this ideology, the EIC allowed itself to be enlisted as a British government agent for the negotiation and conclusion of treaties by international law. It no longer acted in pursuit

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[223] Treaty English East India Company – Jodhpur, Delhi, 6 January 1818, Art. II, IV, V, in: *CTS*, vol. 68, pp. 243-245, at p. 244.

[224] Treaty English East India Company – Maharajah of Satare, 25 September 1819, Art. I, II, in: *CTS*, vol. 70, S. 405-415, at p. 406.

[225] Treaty English East India Company – Lahore, 9 / 11 March 1846, Preamble, in: *CTS*, vol. 99, pp. 367-376, at p. 368.

[226] Ibid., Art. I, II-III, pp. 368-369.

[227] Treaty English East India Company – Lahore, 29 March 1849, Art. I-II, in: *CTS*, vol. 103, pp. 17-19, at p. 18.

[228] Neil Benjamin Edmonstone, '[Letter to Lord Hastings, Vice-President of the English East India Company, 1813]', partly printed in: Dirk H. A. Kolff, 'Colonial War in India. 1798–1818', in: Patrick J. N. Tuck, ed., *The East India Company*, vol. 5: Warfare, Expansion and Resistance (London, 1998), p. 178 [first published in: Jaap A. de Moor and Hendrik Lodewijk Wesselink, eds, *Imperialism and War* (Leiden, 1989), pp. 22-49; also in: Biswanath Ghosh, *British Policy Towards the Pathans and the Pindaris in Central India. 1805–1818* (Kolkatta, 1966), pp. 198-199]. James Mill, *The History of British India from 1805 to 1835*, vol. 3 (London, 1858), pp. 394-396.

of its own interests, no longer in its own name and no longer at its own risk, but under British government guidance. As a non-state actor, it allowed itself to become involved in activities, such as territorial expansion, that were no longer directly connectable with trade but implied the use of military force. In the nineteenth century, then, the EIC continued to perform as an international actor merely in name, while it had already surrendered its essential decision-making competence to the British government.

Moreover, already at the time of the Congress of Vienna, new forms of colonial control came into being without participation of long-distance trading companies. Following the end of warfare against Napoleon, the issue of the Indian Ocean positions had to be settled which William V as Stadhouder of the Netherlands had surrendered to the British government on behalf of the former Dutch East India Company (VOC) in 1795.[229] In British perspective, the Cape of Good Hope and Batavia had been of paramount interest. In 1795, all VOC positions were transferred to British control except the Dutch factory and storehouse on Deshima Island in Nagasaki port. Hendrik Doeff (1764 – 1837), at that time director (*Opperhoofd*) of the factory, remained in office and acted as the Company's representative after the bankruptcy. The Japanese government treated him as the representative of some Dutch Kingdom, although no such institution was in existence at the time.[230] Doeff was able to maintain his status because, as a consequence of warfare against France, few ships reached Deshima between 1792 and 1815. The British government even waited until 1808 before it dispatched the *Phaeton* from Batavia on a mission to Deshima seeking to establish itself in control of the island. But the Governor of Nagasaki (*Nagasaki Bugyō*) refused to allow the ship to land under the British flag, citing a Japanese government policy according to which only Dutch and Chinese ships were entitled to arrive at Nagasaki. Doeff as well refused to surrender to British control. When the *Phaeton* crew began to make use of firearms on board, the Japanese side mobilised its own military and forced the *Phaeton* to withdraw.[231] That the EIC still had its trading privilege, which had been made out in 1609, on the basis of which it would have been legally entitled to request admission to Japan, was unknown at that time to British government in Westminster, the British administration in Batavia and the *Phaeton* crew alike.[232] Apparently, the privilege had been mislaid and turned up again in the Bodleian Library only at the end of the 1980s.[233] Thus, between 1794 and 1814, Deshima was the only spot on earth where the Dutch flag continued to be hoisted. In the aftermath of the *Phaeton* incident, the Japanese government recognised the need to provide explicit written regulations for the landing of European ships at ports in the archipelago. In 1825, it promulgated an edict according to which of ships of all European states, only Dutch vessels could access Japan.[234]

Following the end of the wars against France, the restitution of the former Dutch positions thus came on the agenda. It was evident that these positions could no longer be restored to the VOC

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[229] William V, Draft Order (note 48).

[230] Els M. Jacob, 'Niet alleen woorden als wapen. De Nederlandse poging tot openstelling van Japanse havens voor de international handel (1844)', in: *Bijdragen en mededelingen betreffende de geschiedenis der Nederlanden* 105 (1990), pp. 54-77. Fukuyo Matsukata, 'King Willem II's 1844 Letter to the Shogun. Recommendation to Open the Country', in: *Monumenta Nipponica* 66 (2011), pp. 99-122. Yōko Nagazumi, 'Tsūshō no kuni kara Tsūshino no kuni e. Oranda no kankaku no igi', in: *Nihon rekishi* 458 (1986), pp. 43-61. Manfred C. Vernon, 'The Dutch and the Opening of Japan by the United States', in: *Pacific Historical Review* 28 (1959), pp. 39-48.

[231] Hendrik Doeff, *Herinneringen uit Japan* (Haarlem, 1833), pp. 171-174 [reprint (Classica Japonica, section 3, series I, vol. 6) (Tenri and Tokyo, 1973)]. On the incident see: 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]. Hirotsuka Ōtsuka, 'Japan's Early Encounter with the Concept of the "Law of Nations"', in: *Japanese Annual of International Law* 13 (1969), pp. 35-65. Noell Wilson, 'Tokugawa Defense Redux. Organizational Failure in the *Phaeton* Incident of 1808', in: *Journal of Japanese Studies* 36 (2010), pp. 1-32.

[232] However, some information about the privilege was available in London around the middle of the nineteenth century: Thomas Rundall, *Memorials of the Empire of Japan* (Works Issued by the Hakluyt Society. First Series, vol. 8) (London, 1850), Notes, s. p. [reprint (New York, 1963)].

[233] Derek Massarella and Izumi K. Tytler, 'The Japonian Charters: The English and Dutch Shuinjo', in: *Monumenta Nipponica* 45 (1990), pp. 189-205.

[234] Yasunori Arano, 'Kaikin to sakoku', in: Arano, ed., *Gaikō to sensō* (Tokyo, 1992), pp. 191-222, at pp. 193-203.

but would have to be returned to the newly established Kingdom of the Netherlands. In its treaty with the Netherlands of 1814, the British government formally recognised its obligation to do so (Art. VI), while avoiding discussions of the issue at the Congress of Vienna. Instead, it opted for a bilateral treaty on those colonies, factories and positions which stood in Dutch possession at the beginning of the "most recent war", namely on 1 January 1803 (Art. I). In the treaty, the British side assured that it would return all of these positions with the explicit proviso that 'Native Inhabitants and Aliens' were to be given a time span of six years from the transfer to emigrate and to sell their private property (Art. VII).[235] The treaty did not cover areas that had come under British control otherwise, such as the Kingdom of Kandy in Sri Lanka, over which the British government had taken control by the Treaty of Amiens of 27 March 1802. Even though this treaty oblöiged the British government to restore to the then "Batavian Republic" "colonies" that had stood under Dutch rule up to 1794 (Art. III, VI),[236] the treaty was implemented only with regard to positions in the Caribbean. Due to the resumption of the war against France in 1803, the British government reoccupied the positions and kept them under its control until 1814. The native population groups were not involved, even though they were directly affected by these deals.

Nevertheless, not all relevant positions were in fact returned to the Netherlands in 1814. In 1814, the Kingdom of Kandy lost the sovereignty that the VOC had previously recognised through several treaties between 1638 and 1766. The British government had the entire island conquered, placed it under its rule and exempted it from the obligations it had agreed upon in the London Convention of 1814.[237] Moreover, the British government explicitly claimed for itself possession of the Cape of Good Hope, according to the British-Dutch convention of 1814[238] which then appeared to allow surveillance of the seaborne traffic between Europe and the Indian Ocean. The British government also reserved for itself the position at Bengkulu (Bencoolen) on the southern coast of Sumatra. On the other side, the government of the new Kingdom of the Netherlands pledged not to build any fortifications in Asia. Deshima remained unmentioned as it was considered to be Japanese territory and thus beyond the reach of any European government.

Within the full range of issues discussed during the Congress of Vienna, the restitution of VOC positions to the Kingdom of the Netherlands was a minor point only. However, the restitution issue had considerable implications for the change of form of European colonial rule in the "Old World", as it marked the beginning of direct government intervention into the regulation of relations between European states on the one side and, on the other, states in Africa and Asia. Even though the Treaty of Paris of 1763 the French government had renounced control over its positions in South Asia in favour of the British government,[239] the treaty affected government control over these positions only on the French side. By contrast, on the British side, the EIC became the sovereign in control of these positions. In so far, the treaty did not directly intervene into British colonial administration in South Asia. The London Convention of 1814 did precisely this: It stipulated the transfer of government entitlements to rule in parts of the "Old World", thereby excluding the EIC and, in consequence, reducing the number of types of international actors as legitimate treaty parties. The London Convention converted those territories, over which it transferred entitlements to rule, from subjects into objects under international law.

Further parts of the 'Old World' were soon given the same status of objects of international law. With regard to Southeast Asia, the British-Dutch treaty of 17 March 1824 followed the precedence set by the London Convention of 1814. It prescribed the exchange of control between

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[235] Treaty Kingdom of the Netherlands – UK, London, 13 August 1814, Art. I, VI, VII, in: *CTS*, vol. 63, pp. 321-330, at pp. 323-326.

[236] Treaty Batavian Republic – France – Spain – UK, Amiens, 27. März 1802, Art. III, VI, in: *CTS*, vol. 56, pp. 289-304, at pp. 292, 296.

[237] Treaty Kandy – UK, 2 March 1815, Art. IV, in: *CTS*, vol. 63, pp. 484-486, at p. 485. On Kandy's sovereignty see: Sinnappah Arasaratnam, 'The Kingdom of Kandy. Aspects of Its External Relations and Commerce. 1658–1710', in: *The Ceylon Journal of Historical and Social Studies* 3 (1960), pp. 109-127. Geoffrey Powell, 'The Fall of Kandy, 1815', in: *The Ceylon Journal of Historical and Social Studies*, N. S. 1 (1971), pp. 114-122. Powell, *The Kandyan Wars. The British Army in Ceylon. 1803–1818* (Kandy, 1973) [reprint (New Delhi, 1984)].

[238] Treaty Netherlands (note 235), Art. I, p. 323.

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

Bengkulu and Melaka, whereby Bengkulu came under Dutch, Melaka under British rule. The treaty thus divided Southeast Asia west of Siam into a continental British and a maritime Dutch zone (the Indonesian archipelago with the exception of Timor under Portuguese control), while reciprocally installing the freedom of trade and the waiving of customs duties.[240] Again, as in the cases of the agreements concluded at the time of the Congress of Vienna, local native population groups were not parties to the treaty, although recognised sovereign states existed in the areas over which entitlements to rule were transferred. Again, the EIC was no longer party to the treaty. Beyond positions of limited extension, neither of the contracting parties exercised any control over Southeast Asia, for which not even a geographical name existed in Europe at that time.[241] However, the British-Dutch treaty of 1824 did lay the foundations for future colonial rule in that it constituted zones of influence under the sway of either treaty party. The further course of the nineteenth century witnessed colonisation mainly through military conquest in the Dutch zone[242] and through a combination of the application of military force and the conclusion of unequal treaties in the British zone. A case, upon which the EIC resorted to the fusion of both strategies, was the island of Singapore, which had, from the early seventeenth century, been known for its location controlling the southern tip of the Malay Peninsula and which the EIC wrested from the control by the Sultan of Johore in 1819.[243] In this way, Southeast Asia became the testing ground for the subjection of Africa and large parts of Asia to European colonial rule. Despite these long-term consequences, the sovereign states in Southeast Asia continued to retain their capability to conclude treaties under international law in European and US government perspective. This is on record through numerous peace and trade agreements through which European and the US governments sought to regulate their relations with rulers and governments all over Southeast Asia up to the 1850s. The continuing practice of the conclusion of bilateral treaties between European and the US governments on the one side, rulers and governments in South and Southeast Asia as well as Africa on the other did not stand against the view prevailing among governments and theorists in Europe and North America alike, according to which only states were admitted as legal parties to treaties by international law. Hence, only rulers and governments of states appeared to be entitled to act in international law, with the exceptions of the Holy See as the head of the Catholic Church and the Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes and of Malta, both with headquarters in Rome, both of which remained the only legitimate non-state actors under international law.

Imposing the European Public Law of Treaties between States in West, South, Southeast and East Asia as well as in the South Pacific

A network of mainly bilateral treaties thus covered a steadily enlarging part of West, South and Southeast Asia in the course of the nineteenth century. On behalf of the British government, the EIC concluded a bilateral agreement with Siam in 1826, which was revised through an instrument made out by the British government without involvement of the EIC in 1855. Both treaties followed the formulary of peace treaties, combining the setting of peace with the establishment of 'friendship'.[244] Both treaties were non-reciprocal and comprised stipulations relating to rights and duties of British

[240] Treaty Kingdom of the Netherlands – UK, London, 17 March 1824, Art. II, III, IV, IX, X, in: *CTS*, vol. 74, pp. 87-107, at pp. 90-92, 94.

[241] Donald K. Emmerson, '"Southeast Asia". What's in a Name?', in: *Journal of Southeast Asian Studies* 15 (1984), pp. 1-21.

[242] Merle C. Ricklefs, 'Balance and Military Innovation in 17th-Century Java', in: *History Today* 40 (1990), pp. 40-46 [reprinted in: Douglas M. Peers, ed., *Warfare and Empires. Contact and Conflict between European and Non-European Military and Maritime Forces and Cultures* (An Expanding World, 24) (Aldershot, 1997), pp. 101-108].

[243] Claude Duret, *Thresor de l'histoire des langues de cest univers, contentant les origines, beautés, perfections, décadences, mutations, changements, conversions et ruines des langues* (Cologne, 1613) [reprint (Geneva, 1972)], p. 880. Treaty English East India Company – Johor, 26 June 1819, in: *CTS*, vol. 70, pp. 201-203.

[244] Treaty English East India Company – Siam, Bangkok, 20 June 1826, Art. I, in: *CTS*, vol. 76, pp. 303-312, at p. 304. Treaty Siam – UK, Bangkok, 18 April 1855, Art. I, in: *CTS*, vol. 113, pp. 83-92, pp. 84-85.

subjects doing business in Siam, while leaving unmentioned any rights or duties of Siamese subjects in the UK.[245] However, the revised treaty of 1855 granted far more extensive privileges to British subjects in Siam than the original version of 1826. Thus, the British side received entitlement to dispatch a consular representative to Siam, obtained consular jurisdiction, the freedom of religious practice and the privilege of consular registration for British subjects, the rights to land British warships in Siamese ports and, with explicit specification, the privilege of the duty-free import of opium.[246]

Not only governments of European states but also the US government applied the European public law of treaties between states. Already in 1830, the US government arranged for a treaty of trade with the Ottoman Turkish Empire. This agreement was reciprocal in the technical sense that it granted the same rights of the freedom of trade and the deployment of diplomatic emissaries to both treaty partners.[247] By contrast, the 1833 treaty between Muscat and the USA was non-reciprocal in its specific dispositive stipulations granting rights and privileges merely to the US side.[248] Furthermore, the US government entered into non-reciprocal agreements with Siam in 1833[249] and with Brunei in 1850,[250] obtaining the unilateral privilege of the freedom of trade. The latter agreement, written out in the formulary of a peace treaty, stipulated the rights of the freedom of residence together with the freedom to acquire property in land for US citizens and unrestricted access by US vessels to ports in Brunei, while mentioning no such rights for Brunei subjects in the USA.[251]

European and the US governments thus sought to establish regular relations among states on the basis of international legal norms seen as valid in Europe. Governments claimed to pursue the intention of setting peace through contractual agreements, even though these agreements did not end any wars. Even many treaties of trade took the form of peace treaties, often in accordance with the verbal commitment to the Kantian expectation that "perpetual peace" could emerge from treaty-making. By consequence, the agreements coming into existence in the first half of the nineteenth century and binding states in Europe and North America on the one side, in large parts of Asia on the other, were rather similar in layout, even when some of their specific stipulations might vary. This formulary rested on the theoretical postulate that only states could enter into legally binding agreements by international law, that, in other words, "nations" not recognised as states by governments in Europe and North America, came to be classed as "nations" in "uncivilised states", seemingly without capacity of actorship in terms in international law. Consequently, within European international legal theory, "nations" not residing in fully recognised states in terms of the theory, were denied the status of actors under international law and therefore could not be subjects of binding international agreements. The theory restricted the principled applicability of the law of public treaties among states to "civilised" states arguing that seemingly "uncivilised" states had not "yet reached the highest level of social formation in many respects" (sie erreichten bisher in vielen Rücksichten in Vergleich mit anderen die höchste Stufe geselliger Bildung)**,** while supporting the claim that treaties could not remain valid beyond the accomplioshment of some nebulous "state purpose**"**.[252] It further demanded that governments of purportedly "civilised" states should formally recognise allegedly "uncivilised" states before these states could come under the rule of the law of treaties among states. The theory thus envisaged an exclusive club of states, for which international law could be regarded as valid without the enforcement of specific agreements and demanded that treaties should be employed as instruments to facilitate the application of European international law

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[245] Treaty Siam (note 244), Art. V, pp. 305-306, Art. VI, p. 306. Treaty Siam (note 244), Art. IV, pp. 85-86.

[246] Treaty EIC (note 244), Art. II, p. 85, Art. III, p. 85, Art. VI, p. 87, Art. VII, p. 87, Art. V, pp. 86-87, Art. VIII, pp. 87-88.

[247] Treaty Ottoman Turkish Empire – USA, 7.May 1830 Art. I, II, in: *CTS*, vol. 81, pp. 7-11, at p. 9.

[248] Treaty Muscat – USA, 21 September 1833, in: *CTS*, vol. 84, pp. 37-40.

[249] Treaty Siam – USA, 20 March 1833, Art. I, II, in: *CTS*, vol. 83, pp. 211-215, at pp. 212-213.

[250] Treaty Brunei – USA, 23 June 1850, in: *CTS*, vol. 104, pp. 151-154.

[251] Ibid., Art. II, Art. III, VII, pp. 152, 154.

[252] Tröltsch, *Versuch* (note 214), part I, §§ 1, 7, 16, pp. 1, 10, 20. Dresch, *Dauer* (note 214). Wilhelm Butte, *Ideen über das politische Gleichgewicht von Europa mit besonderer Rücksicht auf die jetzigen Zeitverhältnisse* (Leipzig, 1814), pp. 21-22.

beyond America and Europe. Consequently, the conclusion of treaties under international law, when performed outside America and Europe, was, in the perspective of European and the US governments, the legal act of ensuring the applicability of European international law upon states in areas outside Europe and America without, at the same time, automatically ensuring the acceptance of these states into the exclusive club of privileged international actors. In other words, the practice of treaty-making, framed by international legal theory and implemented by European and US governments already early in the nineteenth century, imposed a hierarchy of states that positioned states in America and Europe at the highest level and crediting only governments of states at this level with legal personality as full actorship capacity in terms of international law. Other states, positioned at some lower level in the hierarchy, might be treated as "co-existing" states whose governments received recognition as treaty partners without, however, being considered as endowable with the same legal entitlements as the European and the US governments. The practical consequences of the imposition of this hierarchy of states were, among others, the non-reciprocal enforcements of consular jurisdiction, together with the privileges of the freedom of the acquisition of property in land, and the freedom of trade, all to the exclusive advantage of the European and US treaty partners.

The treaty formulary, however, continued to follow the principles that had been in existence since the seventeenth century and which, in turn, connected with the formulary of the solemn diploma in use since the seventh century.[253] According to this tradition, a treaty between states consisted, first, of a preamble specifying the contracting parties and narrating what was given out as key events bringing about the agreement, second, of the main legal dispositions and, third, concluding stipulations about the principles of the enforcement and the date of the treaty. The preambles commonly named the contracting parties together with the plenipotentiaries representing their states and endowed with procura to sign legal instruments, listed reasons for entering the treaties usually in stereotype terms and determined the purposes to be accomplished through the agreements. Commonly, the stipulations following the preamble were labelled "articles", whereby this label did not form part of the tradition of solemn diplomas but was borrowed from oaths and military instructions.[254] The material dispositions were usually grouped into general and particular stipulations. The practice of publishing treaties in printed collections, expanding in the course of the eighteenth century, further harmonised the treaty formulary with the consequence that only few formally enforced treaties by international law have since then been composed without preambles.

European and the US governments regarded not only treaties of peace but also of trade as instruments subjecting to European international law their relations with states in large parts of Asia. As a rule, these agreements were made out indefinitely, thereby remaining in force as long as they not replaced by new agreements. This was so because, according to the European law of treaties between states, the unilateral modification of valid treaties between states was impossible, unless explicitly stated in the text of a treaty itself. Thus, already early in the nineteenth century, the agreements themselves turned into vehicles for the dissemination of the European law of international treaties between states in those parts of Asia, where there was no European colonial rule at that time and whose states were recognised as such by European and the US governments.

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

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

Moreover, following the US Supreme Court verdict of 1823, treaties served the US government as instruments of territorial expansion to the disadvantage of Native Americans far into the second half of the nineteenth century. These treaties either stipulated the "cession" of territory to the US government, [255] thereby destroying then existing Native American states, or established "protectorates" under US government suzerainty. [256] With regard to either strategy, US government policy did not differ from the treaty-making practice of European governments. European as well as the US governments fused the recognition of the treaty-making capability of their contracting parties in the preambles and then enforced non-reciprocal material stipulations to the disadvantage of their treaty partners. The US government, however, went ahead in obliging its treaty partners in North America to either renounce sovereignty completely or waive their right to conduct international relations at their own discretion. Already early in the nineteenth century, the US government also gave ample record of its perception of Native Americans as „uncivilised", repeatedly likening them to „children", allegedly in need of supervision and control.[257]

Next to the recognition of the treaty-making capability the European law of treaties among states contained two further features that the European and US sides took for granted and thus remained implicit in the texts of the instruments. These were the basic norm *pacta sunt servanda* and the principle of the use of literacy. The basic norm *pacta sunt servanda* obliged the signatory parties to the unconditional and full implementation of every treaty stipulation and imposed sanctions against its breach, including the right to declare war. It did so under the proviso that agreements had been concluded voluntarily on all sides.[258] This proviso was explicitly stated in international legal theory, but never mentioned in any treaty text and never given in the cases of treaties of cession and the establishment of "protectorates".[259] In the case of indefinite treaties, *pacta sunt servanda* also covered the principle that agreements, specifically those setting peace, were binding not only for the signatories in office but also for their heirs and successors, even if this principle was not explicitly stated in the treaty texts.

The implication that breaches of the basic nor *pacta sunt servanda* could form the justification for declarations of war, was even more crucial for the expansion of European law of treaties between states insofar as the second implicit principle of that law, the linking of the validity of international agreements to the existence of a written text, remained a feature of customary law until 1969, even though it has been on record since the sixteenth century.[260] According to this

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[255] Tröltsch, *Versuch* (note 214), § 21, S. 58-59.

[256] Examples of early cession treaties: Treaty Choctoaw 1820 (note 183). Treaty Choctaw – USA, Washington, 20 January 1825, in: *CTS*, vol. 75, pp. 72-74. Treaty Choctaw – USA, 27 September 1830, in: *CTS*, vol. 81, pp. 121-130. Treaty Cherokee – USA, 6. Mai 1828, in: *CTS*, vol. 78, pp. 294-298. Treaty Cherokee – USA, 14 February 1833, in: *CTS*, vol. 83, pp. 174-177. Treaties Chasta/Chippewa/Choctaw and Chicksaw/Creek/Delaware/Iowa/Kaskasia/Kickapoo/ Menominee/Miami/Nisqualli/Omaha/Oto and Missouri/ Peoria/Puyallup/Rogue River/Sauk and Foxes/Shawnee/Umpqua and Kalapuya – USA, 15 / 16 March, 6 / 10 / 12 / 17 / 18./ 30 May, 5 / 13 June, 30 September, 4 / 15 / 18 / 39 November, 9 / 26 December 1854, in: *CTS*, vol. 112, pp. 318-374. Examples of "protectorate" treaties: Treaty Choctaw – USA, 27 September 1830, in: *CTS*, vol. 81, pp. 121-130. Treaty Cherokee – USA, New Echota, 29 December 1835, in: *CTS*, vol. 85, pp. 410-420.

[257] Thomas Jefferson, [Address to Congress, 18 January 1803], in: Reuben Gold Thwaites, ed., *Original Journals of the Lewis and Clark Expedition. 1804 – 1806*, vol. 7 (New York, 1905), pp. 206-209, at p. 207 [reprint, edited by Bernard De Voto (New York, 1969)]. New York [City] 'Removal of the Indians. Documents and Proceedings Relating to the Formation and Progress of a Board in the City of New York, for the Emigration, Preservation and Improvement of the Aborigines of America [22 July 1829]', in: *The North American Review*, vol. 30, nr 66 (1830), pp. 61-121, vol. 31, nr 68 (1831), pp. 396-442, at p. 120. John H. Eaton, [Letter to William Carroll, Governor of Tennessee, 29 May 1829, Washington: Office of Indian Affairs, Letters sent; microfilm in Washington: National Archives], partly printed in: Michael Paul Rogin, *Fathers and Children. Andrew Jackson and the Subjugation of the American Indians* (New York, 1975), p. 225. Horace Greeley, [Commentary by the Presidential Candidate after His Journey through the North American West, 1859], in: James Parton, *Life of Andrew Jackson*, vol. 1 (Boston, 1866), p. 401.

[258] Wheaton, *Elements* (note 173), edn by Boyd, § 253, pp. 356-357.

[259] Gerrit W. Gong, *The Standard of "Civilization" in International Society* (Oxford, 1984), p. 43.

[260] Jan Klabbers, *The Concept of Treaty in International Law* (Developments in International Law, 22) (Leiden and

principle, the partners to a treaty had solely agreed upon what had come to be laid down in the written text of a treaty. Put differently, what was not written in the text of a treaty could not be claimed as having been agreed upon, at least in the perception of the European and US governments as signatory parties. As unilateral changes of the texts of treaties were prohibited, the insertion of additional clauses into the texts required consent by all signatories. Enforcing the basic norm *pacta sunt servanda*, thus, was conditional, within European law of treaties between states, upon the application of the principle of literacy, at least with regard to treaties stipulating binding obligations. As this principle was never entered into the text of any treaty, it remained necessarily unintelligible to treaty parties unfamiliar with the details of the European law of treaties between states.

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,[261] 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 (Li Bu). 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.[262] The Li Bu asked Macartney to enact the so-called "Kowtow" (prostration), a rite which positioned the Chinese ruler at the top of a hierarchy of rulers in the world.[263] 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.[264] 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. 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,[265] in the course of which he inclined

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Boston, 1996), pp. 12, 249.

[261] 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, at pp. 482-484, § 33.

[262] George Macartney, [Confirmation of the Receipt of the Instruction Given to Him on the occasion of his Mission to China, 4 January 1792; Ms. London: India Office, China-Macartney, 6/12/9], edited by 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*, Nr XXVI, edited by John Lancelot Cranmer-Byng (Britain and the China Trade, 8) (London, 2000), pp. 95, 167 [first printing of this edn (London, 1962)].

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

[264] 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.

[265] Helen Robbins, *Our First Ambassador to China* (London, 1908), p. 284. Aeneas Andersen, *A Narrative of the British Embassy to China in the Years 1792, 1793 and 1794* (London, 1795), pp. 145-165 [Microfilm edn (The Eighteenth Century, Reel 3870, nr 03); abridged version, second edn (Dublin, 1796); third edn (London, 1796);

one knee and the upper part of his body towards the floor. Thereupon, Macartney was in fact permitted to submit the royal letter containing the request to "open" the state.[266] 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 had 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.[267]

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.[268] 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%.[269] On his part, Macartney concluded that the Chinese view of the world differed from his own,[270] 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.[271] 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.[272] By contrast, even in the very first years of the nineteenth century, contemporary theorists had taken for granted the legitimacy of 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).[273] 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, as Cobden was arguing, and the enforcement of the freedom of trade might even justify the use of military means.

The British-Chinese relationship changed abruptly through the First Opium War (1839 – 1842). The war had arisen from the destruction of opium that British merchants had imported from South Asia to China. Under instruction from government commissioner Zexu Lin (1785 – 1850), who was aware of the negative consequences of opium consumption for the general public, the port

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(London, 1797). George Leonard Staunton, *An Historical Account of the Embassy to the Emperor of China* (London, 1797), S. 129-137, 143-144 [Microfiche edn (Hildesheim, 1994-1998).

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

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

[268] *Kraft*, Dschungarenkrieg (note 262), nr I, III, pp. 28, 40, 124, 131. Peter C. Perdue, *China Marches West. The Qing Conquest of Central Eurasia* (Cambridge, MA, 2005), pp. 256-301.

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

[270] Hüttner, *Nachricht* (note 266), pp. 219-220.

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

[272] 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).

[273] Tzschirner, *Krieg* (note 118), p. 70. Similarly already: Kant, *Frieden* (note 152), pp. 215-216.

authorities in Canton (Gŭangdōng) had sought to restrict the import of opium. In response, the British side renewed its demand for the unrestricted "opening of the state" and declared war. The British side conducted the war at a low level, mainly because the British navy had to cover longer distances than in any previous military engagement. The British-Chinese Treaty of Nanjing of 29 August 1842[274] concluded the war. The Chinese armed forces had not been defeated, but the Chinese government opted for a peace agreement drawing on its ancient tradition of military theory, as it viewed as unlikely the final victory over the enemy. The Treaty of Nanjing differed from the agreements discussed so far, in that it was a peace treaty in the technical sense of a war-ending agreement. The contracting parties mutually recognised each other as sovereigns and announced in Article I that, following the cessation of hostilities, they were willing to establish a firm peace and to maintain friendly relations henceforth.[275] By contrast, the further dispositive stipulations were all non-reciprocal and, in this respect, unequal.

The best known stipulations of the treaty are the grant of the privilege of the freedom of trade and the transfer of the island of Hong Kong from Chinese under British rule.[276] Beyond these items, however, the treaty featured further regulations which, different from the Chinese obligation to pay war indemnities totalling 21 million Mexican silver dollars, subjected the Chinese state as a whole to British influence indefinitely. Among these regulations was the Chinese permission to grant the privilege of residence to British subjects at Gŭangzhōu, Xiàmén, Fúzhōu, Níngbō und Shánghăi,[277] the release from prison of all Chinese subjects who had been kept in confinement because of then unlawful relations with British merchants,[278] and the limitation of Chinese government authority over the administration of import duties.[279] The Nanjing Treaty was made out and signed in a Chinese and an English version. Yet because no one in the British Foreign Office could read and write in Chinese characters at the time, the Office had the Chinese version copied in collotype photography in 1843, in order to obtain a record to be preserved in its own files. Most likely, this was the first occasion of the use of this reproduction technique for a government document in Europe.[280] The treaty was then supplemented by the additional British-Chinese agreement at Hu-mun Chase of 8 October 1843, which granted to British subjects the freedom of residence in the treaty ports under the surveillance of British consular officers.[281] Meanwhile, the island of Hong Kong, off the coast of Gŭangdōng, quickly turned into a hiding place for pirates, as Gŭangdōng had been a centre of Chinese piracy in the early nineteenth century. In 1860, the Chinese government ceded to village of Kowloon (Gaŭ Lúng) on the mainland facing Hong Kong, so that British control began to extend onto a stretch of land on the Continent as well. All the regulations were unequal, as they stipulated obligations on the Chinese, rights and privileges on the British side.

The fusion of the preamble, recognising the legal equality of the sovereign treaty partners, with non-reciprocal material dispositive stipulations was, in the case of the Treaty of Nanjing and subsequent British-Chinese agreements, consistent with European international law, as the Chinese side had requested a ceasefire and thus appeared to have conceded military defeat. In European perspective, the apparently defeated side could only become obliged to accept and implement the conditions of the peace, if it remained and continued to be recognised as a sovereign. Otherwise, the British side would have become compelled to continue its war to the complete destruction of the Chinese state. But the destruction of the Chinese state was neither the British war aim nor did the military means the British government was ready to deploy, let alone even to project such a war aim.

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[274] Treaty China – UK, Nanjing, 29 August 1842, in: *CTS*, vol. 93, pp. 466-474.
[275] Ibid., Art. I, p. 466.
[276] Ibid., Art. III, p. 467.
[277] Ibid., Art. II, p. 467.
[278] Ibid., Art. IX, p. 468.
[279] Ibid., Art. X, p. 468.
[280] 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.
[281] Treaty China – UK, Hu-mun Chase, 8 October 1843, Art. VII, in: *CTS*, vol. 95, pp. 325-327, at p. 325.

The British government thus on principle conducted its peace negotiations within the framework of the European law of treaties among states. The Treaty of Nanjing enforced neither reciprocity nor equivalence of rights and obligations, because, in British perspective, it was a war-ending treaty. In that perspective, the war had ended with a military decision, identifying the Chinese side as the loser and the British side as the winner. The British government did conceive of the treaty as an instrument to convert what appeared to it as the current military situation into a lasting legal relationship. Reciprocity counted as a formal legal term comprising mutually binding rights and obligations in each article of a treaty. Equivalence meant the political decision to weight as equal the sum of certain non-reciprocal stipulations. The British government considered neither concept as appropriate means to end the war. Consequently, the treaty was to combine the statement of the legal equality of its signatories with the lack of reciprocity of most of the material dispositions, while the accomplishment of the equivalence of stipulations was not an issue of the treaty negotiatons at all. However, the British demand to "open" the state for the freedom of trade was not part of the conventional framework of peace treaty-making, but an innovation applied only in the nineteenth century. According to the Treaty of Nanjing, the newly to be established freedom of trade was not restricted as a privilege to British subjects but had effects on Chinese foreign relations with the world at large. Implementing principles of the freedom of trade was, therefore, a matter of British government policy through the use of military force. In doing so, the British government obliged its Chinese counterpart to accept the general principles of the freedom of trade, without granting the same privilege of free trade to Chinese subjects in the UK.

Yet in Chinese perspective the process of peace-making had a different outlook. In China, there was until then no tradition of laying down the texts of agreements between states and rulers in writing, even though written treaties had been signed between China and Russia in 1689[282] and 1727[283] respectively. Despite these agreements, both of which stipulated the legal equality of the signatory parties according to the European law of treaties between states, the Chinese government did not then regard the mutual recognition of sovereignty as identical with the concession of legal equality. Quite on the contrary, the Chinese government continued to adhere to its traditional claim for world rule and merely allowed agreements containing temporary regulations about relations with governments of other states under the condition that the Qīng received recognition of the priority of their rank. In the Chinese version of the Treaty of Nanjing, the Chinese government implemented this tradition by using its dynastic name in lieu of China as its name for the contracting party, in contradistinction against the English version of the same treaty. The Chinese version thus did not feature China as the "Middle Kingdom", but the ruling dynasty as the signatory. To manifest its position of superiority in the text of the treaty, the Qīng government had several passages inserted, specifying the technical terms under which the British side was bound to communicate with the Qīng. These technical terms, in their Chinese readings, displayed the elevation of the Qīng over their British counterpart. The significance of these terms remained unintelligible to the signatories on the British side.[284] Moreover, the British demand for the cession of territory was not categorisable in terms of Chinese public law and tradition of political theory. At best, what had been agreed upon in Chinese perspective was a temporary toleration of British control under Qīng suzerainty, even though the text of the treaty featured phrases that were incompatible with this reading. Moreover, not only the concept of sovereign equality did not have legal meaning in Chinese tradition, but also the

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

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

[284] Treaty China (note 274), Art XI, pp. 468-469.

entire European international legal terminology had no equivalents in Mandarin.

Already in 1839 Ze-xu Lin, who had commissioned the destruction of opium in Canton, realised the discrepancy of terminologies and authorised the translation of a standard European textbook on international law. Peter Parker (1804 – 1888), a US-missionary working in China, opted for Vattel's work,[285] as that text appeared to render most easily compatible the terms of the European tradition of international law with the Chinese pursuit of a policy to maintain "good government" and peace. The scholar Yuan Wei (1794 – 1857) inserted the translated version into his compilation of information on "states beyond the sea", published in 1847. The translation project was based on the well-founded expectation that the then valid East Asian law of war and peace should contain the same basic principles that Vattel had assembled. Yet the translation only comprised a few short passages[286] and then broke off. With the failure of the translation project, the last attempt was thwarted to establish a common platform for the European international law and the East Asian law of war and peace. For the Qīng government, then, it was not actually the lack of reciprocity of most of the stipulations of the Treaty of Nanjing that caused problems but the fusion of these stipulations with a preamble that ranked both contracting parties as legal equals. The treaty became unbearable for the government, as it enforced the freedom of trade with the inclusion of trading goods of whose negative effects on the population the government was aware. Because the treaty obliged the government to practically restrict its own ordering competence vis-à-vis the population under its control, it coerced the government to jeopardise its own legitimacy. Despite these difficulties, the Qīng government insisted upon its privilege to verbalise distinctions of rank in notifications written in Chinese, whereby it came to be placed at the higher rank than the British government.

Moreover, the Chinese government not only curtailed its own domestic policy competences, but, despite the niceties of wordings, it also waived two long-term principles of foreign policy. First, following the military setback in the Opium War, it admitted the British government as an equal in legal terms. This concession alone had serious impacts on the conduct of relations between China and its neighbours in East and Southeast Asia. This was so, because the Chinese government, in consequence of the Treaty of Nanjing, lost its position as the protective power for East and Southeast Asia and thereby appeared to open the entire region to external military and political pressure. Specifically in Japan, the enforcement of the Nanjing Treaty raised serious concerns. King William II of the Netherlands (1840 – 1849) added to these concerns through his warning that the British government might be willing to bring about the "opening" of Japan as well under the pretext of supporting the expansion of international maritime traffic. The government in Edo responded to William's warning with the confirmation that it was bound by ancient laws and would not change the regulations on access to Japan and informed the King of the Netherlands that it would not send any further statements regarding this issue.[287] Yet the Dutch government was unimpressed and continued to submit warnings of aggressive plans cherished by European and the US governments. In doing so, the Dutch government acted in pursuit of its own interests, seeking to keep in force the factual monopoly that it had on the management of trade between Japan and Europe under the protection of the government in Edo.[288]

Second, the Chinese government acknowledged the principle of sovereignty in general,

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[285] Vattel, *Droit* (note 46), chap I/8, nr 90, pp. 84-85 (on trade), chap. II/8, nr 100, 101, pp. 328-330 (on war), chap. III/1, nr 1-4, pp. 1-2 (on war).

[286] Peter Parker, '10th Report of the Medical Missionary Society, Nr 6505', in: *The Chinese Repository* 8 (1840), p. 635 [transmitted in: Yuan Wei, *Hai guo tu zhi* [1847]. New edn (Chang Sha, 1998); texts translated from Vattel's handbook edited by Stefan Kroll, *Normgenese durch Re-Interpretation. China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Studien zur Geschichte des Völkerrechts, 25) (Baden-Baden, 2012), pp. 63-72].

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

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

which in its Bodinian phrasing included the recognition of a pluralism of sovereigns. Even if it might have been considered possible on the Chinese side to revoke the non-reciprocal regulations of the Treaty of Nanjing through a sweeping military victory at a later point of time, it would still remain impossible to revert to the established Chinese policy of conducting relations with other states on the basis of tributes payable to the Chinese side. This was so because, following the Treaty of Nanjing, China was not merely equal in legal terms with the United Kingdom but also with its neighbours in East and Southeast Asia, notably Japan and Annam. Hence, the superimposition of European international law and the rules of free trade destroyed an international system that had been in existence in East Asia for some 1500 years. The Qīng government continued to cherish hopes throughout the 1840s that the Treaty of Nanjing would prevent the "occurrence of further difficulties in the future" (yóng tú hòu huàn).[289] However, the government in Edo was quick to understand the consequences the treaty had for itself. In an official memorandum of 1857, it rejected all requests to 'open' the state noting that the responses by the Qīng government during the first Opium War had encouraged diplomatic representatives from European and the US governments to raise similar demands as the British government had done.[290] Indeed, governments other than the British soon started to intervene in East Asia as well. Already immediately after the conclusion of the Treaty of Nanjing, the US government sent Caleb Cushing (1800 – 1879) as its emissary to China with the mandate to request the desire to "open" the state for US merchants. Cushing was instructed to make clear that the USA was an independent state, equal to all others.[291] The US government would therefore find it impossible to remain on friendly footing with the "Emperor of China" if subjects of any other government would receive more far-reaching trading privileges than US citizens.[292] Cushing concluded the Treaty of Wang Hiya between China and the USA on 3 July 1844. The treaty gave the same privileges to US citizens that British subjects had obtained through the Treaty of Nanjing, including the concession of free trade.[293]

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.[294] In its dispositive part, the edict takes the form of a declaration in the name of Queen Victoria of Great Britain (1837 – 1901). 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.[295]

The so-called "Treaty of Waitangi" is a document of state destruction through legal

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

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

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

[292] USA, Senate, '[Instruction by the Minister in Charge of Foreign Affairs, Daniel Webster, 3 May 1853] ', 28th Congress, Second Session, Discussion, Nr 138, p. 5.

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

[294] *J. M. Ross*, 'Te Tiriti o Waitangi. Texts and Translations', in: *New Zealand Journal of History* 6 (1972), pp. 129-167.

[295] 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.

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 (1792 – 1842), 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.[296] 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. In addition, Queen Victoria had, at the request by the colonial lobbyist Edward Gibbon Wakefield (1796 – 1862)[297] and through her Minister of War and Colonial Affairs Constantine Henry Phipps, Marquis of Normanby (1797 – 1863),[298] explicitly instructed Hobson in 1839 to proceed with the enforcement of British rule only under unequivocal consent from the Māori.[299] 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 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.[300] In the Māori case, war was the result of state destruction, not conversely state formation a result of war.

Early Forms of the Expansion of European Government Colonial Control in Africa

Specifically the British and the French governments also became involved in relations with states in

[296] Ian Wards, *The Shadow of the Island* (Wellington, 1968), p. VII.

[297] 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).

[298] 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), Sp. 7.

[299] 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.

[300] 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)].

Africa from the beginning of the nineteenth century. In 1807, the British government had enacted a general prohibition of the slave trade in areas under its control. Jointly with its French counterpart, the French delegation at the Congress of Vienna requested the enforcement of a general ban on the slave trade in terms binding by international law. This was the occasion at which Africa came on the Congress agenda. Indeed, the Congress passed a decision outlawing the slave trade by international law.[301] Through the London Convention of 1814, the government of the newly established Kingdom of the Netherlands obliged itself to stop the slave trade in areas under its sway.[302] Several bi- and multilateral agreements followed relating to the same issue, the treaty between Portugal and the UK on 18 July 1817,[303] the treaty between Spain and the UK on 23 September 1817,[304] and the so-called "Quintuple Treaty" of 20 December 1841 between Austria, France, Prussia, Russia and the UK, which prohibited the transportation of slaves on ships under Austria, Prussian and Russian flags. The latter treaty classed the slave trade as an act of piracy, thereby equating the slave trade with a breach of international law.[305] The various legal instruments contained statements rendering the slave trade incompatible with the principles of humanity and general morality. However, neither the British nor the French government, seeking to stop the slave trade, opted for the only approach capable of enforcing the ban that would have been straightforward and compatible with the principles stated in the treaties. That approach would have consisted in completely outlawing slavery in the American colonies and post-colonial slave-holding states. Instead, both governments pursued the strategies, first, of capering slave ships and freeing the deported Africans found on board and, second, of concluding treaties to pressure the governments of states located specifically on the shores of West and Southwest Africa to refrain from participating in the slave trade. In other words, instead of suppressing the demand, the British and French governments sought to dry out the supply.[306] But the choice of these means did not prevent the slave trade; instead, it only increased the prices for the slaves in America.

In addition to the ban on the slave trade, further issues, among them the regularisation of trade and political support for Christian missionary activities became laid down in treaties under international law between African and European states from the turn towards the nineteenth century. Already in 1799, naturalist Joseph Banks (1743 – 1820) requested that the British government should guarantee the security of traders along the coasts between the Atlantic island of Arguim and the mountain range of Sierra Leone "either by conquest or by treaty". Subsequently, the British authorities on the Cape launched a war against the Xhosa in 1811/1812.[307] Yet, elsewhere during the first half of the nineteenth century, European governments rarely chose the path of conquest and occupation, although military force came to be used on occasions. Instead, European governments sought to impose a legal framework which allocated certain rights and privileges primarily to British and French merchants as well as Anglican and Catholic missionaries on the West African coasts.

Already the earliest British and French agreements with rulers and governments in West Africa featured the full formulary of treaties under international law. That does not mean that all treaties featured that formulary completely, as specifically preambles could be rudimentary. But the British and French emissaries brought the European treaty formulary as such to Africa and used it as the basis for the agreements they were determined to make, and ignored African practices of treaty-making. For one, the British government, in 1788, obliged King Nambaner of Sierra Leone to

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[301] Déclaration des Puissances sur l'abolition de la traite des Nègres, Vienna, 8 February 1815, in: *CTS*, vol. 63, pp. 474-475.

[302] Treaty Netherlands (note 235), pp. 326-327.

[303] Treaty Portugal – UK, 28 July 1817, in: *CTS*, vol. 67, pp. 396-417.

[304] Treaty Spain – UK, 23 September 1817, in: *CTS*, vol. 68, pp. 46-81.

[305] Quintuple Treaty Austria – France – Prussia – Russia – UK, 20 December 1841, in: *CTS*, vol. 92, pp. 438-469.

[306] Treaty New Calabar/Bonny – UK, 9. April 1837, in: *CTS*, vol. 86, pp. 419-423. Treaty Sherbro – UK, 4 / 7 July 1849, in: *CTS*, vol. 103, pp. 197-202. Treaties Aago/Adaffie/Adinnar/Aghwey/Badagry/Blockhouse/Bussama/ Dahomey/Egba/Grand Popoe/Jaboo/Little PopoePorto Novo – UK, 29 /30 January 1852, 2 / 25 / 28 February 1852, 9 / 18 March 1850, in: *CTS*, vol. 107, pp. 423-456.

[307] Joseph Banks, [Letter to Lord Liverpool, President of the Committee for Trade, 8 June 1799], in: London: British Library, Add. Ms. 38233, fol. 94-95. Ben Maclennan, *A Proper Degree of Terror. John Graham and the Cape's Eastern Frontier* (Johannesburg, 1986).

sign a treaty ceding to the British government some stretch of coastal land for the establishment of the colony of Freetown, designed to provide shelter for freed slaves returning to Africa. The same government, through the governour of its Cape Coast Castle, concluded a treaty with the King of Ashanti (Asantehene) in what is Ghana today on 7 September 1817. The agreement was a peace treaty not ending a war. It obliged Ashanti to guarantee the security of the British Gold Coast Colony (Art. III), to accept a British diplomatic resident in the capital city Kumasi (Art. V) and to ensure the freedom of trade (Art. VI). The British governour obtained the privilege to provide "protection" to Ashanti (Art. VII) and to sit in court over criminal cases (Art. VIII).[308] These stipulations were non-reciprocal, most of them enforcing rights for the British and obligations for the Ashanti side.

Moreover, the British government reserved for itself the rarely recorded privilege of providing education for royal princes and princesses in missionary schools at Cape Coast Castle. The privilege put the British government into a position in which it could expose subsequent generations of Ashanti rulers to the European Christian educational tradition. This is a remarkable initiative in view of the practice of literacy as the standard of communication in what contemporary British observers described as a bureaucratic government in Ashanti. The Ashanti–British treaty of 1817 thus confirms that the British government did not at that time pursue a policy of literalisation but sought to accomplish the imposition of European cultural norms and values in a state that appeared as 'civilised' in contemporary European perspective.[309]

Not in every case were British privileges in states on the West African coasts restricted to the accomplishment of long-term cultural changes and to the provision of 'protection', but could become more extensive. Thus the treaty between North Bullom (Sierra Leone) and the UK of 2 August 1824 transferred some North Bullom areas into the property of the British governour of the colony of Freetown.[310] In the following year 1825 the peace treaty between Sherbro Bullom (Sierra Leone) and the UK, which belonged to the few instruments not featuring articles, enforced the surrender to the British of all territories belonging to Sherbro Bullom by exclusive, complete, free and unlimited right, title, ownership and sovereignty in an area specified in the treaty. The British governour of Freetown obliged himself to provide "protection" to Sherbro Bullom against the neighbouring state of Kusso. The preamble to the treaty narrated the events which had led to the agreement. According to the narration, Sherbro Bullom had been engaged in war with Kusso for some time, British subjects had been affected by the war and persons from Sherbro Bullom had been enslaved.[311] The treaty, obliging Sherbro Bullom to end these practices, was a cession agreement to the disadvantage of a state that the British government had recognised as sovereign. The text gave out the agreement as part of a civilising mission and, at the same time, placed it into the context of the campaign for the ban of the slave trade. In 1848 and 1849, Sherbro Bullom became included into the British-stipulated network of legal instruments seeking to enforce the ban of the slave trade.[312] The Sherbro Bullom–UK treaty of 7 July 1849 bore the formulary of a peace agreement, styling itself as an instrument to "pacify" relations between Sherbro Bullom and its neighbours. It imposed British consular jurisdiction, enforced the freedom of trade and permitted missionary activities.[313] On the basis of the agreement of 1817, a similar "pacification" mission also led to the treaty

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

[309] Contemporary British sources confirmed the use of Arabic for government record keeping in Ashanti are: Bowdich, Mission (note 309). Joseph Dupuis, *Journal of a Residence in Ashantee* (London, 1824) [reprint, edited by H. E. T. Ward (London, 1968); Microfilm edn (Hildesheim, 1994)].

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

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

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

[313] Treaty Sherbro (note 312), Art. I, VII, VIII, IX, pp. 199-200. On these images see: Adam Kuper, *The Reinvention of Primitive Society. Transformations of a Myth*, second edn (London, 2005) [reprints (Oxford, 2009); first published s. t.: *The Invention of Primitive Society. Transformations of an Illusion* (London and New York, 1988); reprints (London, 1997; 2003)].

concluded in 1831 between Ashanti and Fante on the one side, the UK on the other. This treaty obliged the Asantehene to maintain peace with Fante in what constituted a partial waiver of his *ius ad bellum* and to provide two princes as hostages to guarantee the agreement. The King also was to renounce all rights to tribute from Fante, while the Fante had to promise not to offend the Asantehene. Also, the freedom of trade was imposed. In the case of this treaty, then, the British government combined its "pacification" mission with the goals of reconstituting inter-state relations in West Africa and of enforcing the freedom of trade for British merchants.

The treaty between Bonny and the UK of 1836 is a further example for the penetration of the European law of treaties into West Africa. The agreement regulated the relations between the Kingdom of Bonny, an island in the Bight of Bonny (until 1972: Bight of Biafra) in what is Nigeria today, and the UK. The treaty styled the Bonny ruler as 'King' and, like the earlier European–West African treaties, recognised the legal equality between Bonny and the UK. It imposed extraterritoriality of British subjects in Bonny (Art. 1), prescribed the peaceful resolution of conflicts between crews of British ships and subjects of the King of Bonny (Art. 2) according to a formalised procedure (Art. 3), stipulated the need for the confirmation of all trading agreements by a British officer in charge or, in the case of the absence of this officer, by the captain of a British ship anchoring at Bonny (Art. 4), demanded the concession of the full freedom of trade for every British ship arriving in Bonny after payment of customs duties (Art. 5), guaranteed the integrity of the property of British captains and traders on ships as well as in warehouses on the shore (Art. 6), made the King of Bonny responsible for the payment of debts incurred by Bonny subjects to captains of British ships and, in return, obliged captains of British ships to compensate Bonny traders for all British debts prior to the departure (Art. 7).[314] This treaty was thus a bilateral trading agreement, whereby the main trading good was plant oil. It was non-reciprocal in that it regulated the doings of British captains and traders in Bonny, but not of Bonny captains and traders in the UK. It guaranteed many rights to British traders in Bonny, while imposing few obligations upon them. Conversely, it prescribed only obligations to the King of Bonny and Bonny subjects.

At the same time, the French government proceeded similarly in conducting its relations with states in West Africa. Already in 1819, it concluded a treaty of cession with the Kingdom of Wallo (Senegal), which it recognised as a sovereign state. The goals of the alleged 'pacification' of and the maintenance of public security in Wallo served as the pretext for the transfer of territory to French control. The French government further reserved for itself the right to build a fortification and the establish an alliance between the "French institutions in Senegal and the Kingdom of Wallo" (établissements Français du Sénégal et le Royaume de Wallo).[315] However, it opted for a different policy in the North of Africa towards Algiers. A French military contingent occupied the city in 1830 with the intention of subjecting it to French government control. Because the Algerian population resisted the invasion, the French occupation forces became involved in a protracted war.

These agreements recorded the European practice of treaty-making in Africa during the first half of the nineteenth century. They reflected the assumption shared by the involved European governments that it should be the task of European governments to ensure the governmentality[316] of their treaty partners in Africa. The treaties also combined preambles stipulating the sovereign equality of the signatory parties with mainly non-reciprocal dispositive sections. Treaties that featured reciprocal rights and obligations were rare and most of these agreements related states in other parts of the world.[317] Statements in preambles implying the recognition of the sovereign equality of treaty partners flew from the principles contained in the nineteenth-century theory of European law of treaties between states. According to these principles, legally binding agreements under international law could only come into existence among sovereigns, with the Bodinian consequence that the contracting sovereigns had to recognise their legal equality. Therefore, the

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[314] Treaty New Calabar (note 306), pp. 420-422.

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

[316] On this term see: Michel Foucault, 'Governmentality [Lecture. Paris: Collège de France 1978; English version first published in: *Ideology and Consciousness* 4 (1978)], in: Foucault, *The Foucault Effect. Studies in Governmentality*, edited by Graham Burchell, Colin Gordon and Peter Müller (London, 1991), pp. 87-104.

[317] Treaty France – Hawaii, 24 July 1837, in: *CTS*, vol. 87, p. 28. Treaty France – Tahiti, 4 September 1838, in: *CTS*, vol. 88, p. 110.

treaties made out between African and European governments entailed the necessary consequence that African governments received from their European treaty partners the factual recognition not merely as sovereigns, but also as states. This was the inevitable consequence of the application of the European law of treaties between states, even when these agreements stipulated the cession of territory or the partial renunciation of the *ius ad bellum* and although contemporary European legal and political theorists would not be willing to categorise African states as "civilised". This was so, because, according to European international legal theory, governments of states could only cede territory or limit their sovereign rights and competences as long as they continued to act as sovereigns.[318] Moreover, most of the treaties were written out indefinitely, thereby serving as the durable legal basis for the recognition of African states as sovereigns by their European counterparts. Nevertheless, whereas European theory classed international law as the house law of the club of American and European states, the practice of concluding treaties in accordance with European state practice tacitly expanded the geographical reach of the same European international law to Africa and Asia. Put differently, the application of international law as the house law of the club of American and European states facilitated the superimposition of the European law of treaties between states upon other parts of the world, while not admitting these treaty partners into the club of "civilized" states.

The reverse is also true: Parts of Africa came under the sway of European international law tacitly in consequence of the superimposition of the European law of treaties between states. Towards the end of the nineteenth century, a British diplomat could compile a three-volume description of European rule in Africa under the title *A Map of Africa by Treaty*. In this work, he listed many of the treaties known to him and analysed them as valid legal instruments.[319] The superimposition of the European law of treaties under international law, however, began to take place outside the framework of colonial rule which, early in the nineteenth century, had been established under British government control in areas around the Cape of Good Hope, Freetown and Cape Coast Castle, the Portuguese positions at Luanda and Mozambique and the Dutch positions at Elmina, St Antonim in Axim, Batenstein in Butri, Oranje in Sekondi, St. Sebastiaan in Shama and Fort Hollandia in Potelsa.[320] The expansion of European government control was, therefore, drawn on international law, not on state law, up until the 1880s. By consequence, international law could, until then, legitimise, in European perspective, the application of military force solely under the condition that evidence for breaches of treaties, if not the breach of the law of treaties among states, appeared to exist.

During most of the nineteenth century, representatives of those European governments who concluded treaties with rulers and governments of states in Africa, West, South, Southeast and East Asia as well as the South Pacific, strictly refused to allow any departure from the then customary principles of international law they believed to be entitled to take for granted. In the same way as in agreements made out among European rulers and governments, the basic norm *pacta sunt servanda* as well as the principle of the recording of treaties in writing remained implicit in the agreements between European governments on the one side, rulers and governments in Africa, West, South, Southeast and East Asia as well as the South Pacific on the other, even in states in which orality was practicised as the standard of communication. Even though most, but not all, African and South Pacific treaty partners to European governments will not have been willing to accept as necessary the principle that treaties should be laid down in writing, representatives dispatched by European governments, without exception, insisted upon the application of the principle of literacy, thereby imposing the European treaty-making procedure. In addition to the frequent lack of voluntariness of treaty acceptance, the enforcement of the basic norm *pacta sunt servanda* in its European rendering and in conjunction with the principle of the recording of treaties in writing formed the platform for the rise of misunderstanding and domestic political opposition against the treaties. This was the case first and foremost when treaties stipulated cessions of land which stood in

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[318] Schmalz, *Völkerrecht* (note 207), pp. 202-210. Wheaton, *Elements* (note 173), edn by Boyd, § 16, p. 29.

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

[320] René Baesjou, ed., *An Asante Embassy to the Gold Coast. The Mission of Akyemsou Yaw to Elmina. 1869 – 1872* (African Social Research Documents, 11) (Leiden and London, 1979), p. 17.

collective ownership according local law. As European representatives dispatched to Africa, Asia and the South Pacific, would commonly be unwilling to recognise titles in collective ownership of land, treaties stipulating cessions often annihilated land tenure rights, when these were placed in collectivities. More importantly even, in many states in Africa, Asia and the South Pacific, collectively owned land was principally considered to be unalienable with the consequences that cession treaties stipulated transfers of land that were illegal by local law. When, following the enforcement of cession treaties, collectively owned land was reallocated to immigrating European, such as in New Zealand, persistent warfare was the consequence.

The Transformation of the Concept of War in the Early Nineteenth Century

Word and concept of colonial war were unknown both to the theory of war and the theory of international law prior to the nineteenth century, although colonies as settlements were in existence in America and known under that word.[321] Armed resistance against settlement colonies and colonial rule then neither contributed to the formation of a specific concept of war nor did it produce a distinct word for the resulting military conflicts. On the contrary, these conflicts remained subsumed under the general concept of war. Not even Clausewitz and other early nineteenth-century military theorists knew word or concept of colonial war but defined war in universal terms as a military conflict among states, without restriction to certain parts of the world or to types of the use of force.[322] What the political structure of these states was, how wars were conducted among them and what degree the integration of armed forces into state populations was accomplished, could, according to Clausewitz, decide about victory and defeat, but remained without impact on the conceptualisation of war.[323] As late as in 1855, economist Leone Levi (1821 – 1888), who taught at King's College, London, and, in his handbook of international law, listed a total number of 286 wars since the introduction of Christianity, displayed no knowledge of a concept of colonial war.[324] One of the implications of the adherence to the general concept of war was the respect of the sovereign right of the choice of the means of war, which remained part of strategic calculations and did not become an issue of international law according to Clausewitz. Thus neither Clausewitz nor Levi imagined that, in some part of the world, military conflicts could occur, which were wars in the sense of military theory but were not conducted as wars among states in legal terms.[325] To the early nineteenth century, the European tradition of military theory left no room for discriminatory culturist differentiation among belligerents according to some purported standard of "civilisation". In short, Clausewitz theorised wars as military conflicts among states but would not assume that there was a part of the world where there were no states.

Moreover, Clausewitz remained firm regarding his distinction between the tasks of political leadership and military command. On the one side, he unequivocally demanded the priority of political leadership over military command but he was equally determined to request that political leadership should not interfere into the choice of strategy and tactics.[326] Clausewitz viewed war and politics as interdependent but not as integrated and obliged military commanders to conduct war under the strategic goal of doing the "main battle" in the state of tension. Long-term measures apt to focus the entire state population on the accomplishment of the declared war aim appeared as the prime condition under which the constant rise of tension could become possible. Therefore, strategic planning, Clausewitzian style, was a matter of long duration to be undertaken in due time before the

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[321] James I, King of Great Britain, [Privilege for the London Company of Merchant Adventurers for a Planned Settlement in America, 10.April 1606] [http://avalon.law.yale.edu/17th_century/va01/asp].

[322] Clausewitz, *Vom Kriege* (note 20), book I, chap. 1/2, p. 17. Bello, *Principios* (note 191), part II, chap. I/1, p. 100. Schmalz, *Völkerrecht* (note 207), pp. 216-217. Joseph Matthias Gérard de Rayneval, *Institutions du droit de la nature et des gens* (Paris, 1803), pp. 199-200.

[323] Clausewitz, *Vom Kriege* (note 20), book I, chap. 1/25, p. 35.

[324] Leone Levi, *The Law of Nature and Nations* (London, 1855), pp. 65-66.

[325] Clausewitz, *Vom Kriege* (note 20), book I, chap. 2, p. 48.

[326] Ibid., book I, chap. 1/24, 26, pp. 34, 35-36; book VIII, chap. 6B, pp. 674-681.

beginning of a war.[327] Political leadership, together with military command, had to be willing to envisage the possibility of a future war. Thus, Clausewitz strictly opposed the idea that "even the indisputable decision at the end of an entire war ... was to be viewed an absolute one" (selbst die Totalentscheidung eines ganzen Krieges [...] immer für eine absolute anzusehen), because the defeated state would perceive even a completely lost war "often as just a temporary evil" (oft nur ein vorübergehendes Übel) that could be overcome at some time in the future.[328] For Clausewitz, then, ending a war was by no means equivalent of constituting peace but just the transient subjection of one belligerent to the will of another. The possibility of a subsequent war among the same belligerents appeared to be given.

With his rejection of the Augustinian paradigm of peace, war and peace, Clausewitz also took issue with eighteenth-century criticism of the so-called 'armies that remained standing'. Critics had then argued that these armies were not only unnecessary because they allegedly promoted idleness, but also dangerous because they could destabilise peace. For one, Bülow had still ridiculed "armies that have remained standing" as "police guards and night guards of the state" in states such as "China and the Imperial City of Hamburg".[329] Also the restriction of the belligerent status to sovereigns was ultimately justified with the orientation of war towards the restoration of peace according to the Augustinian paradigm.[330] Clausewitz wiped away these critical concerns with the simple statement that the occurrence of future wars was inevitable and necessitated armies that remained standing in times of peace.

Even though European military theory transmitted an undifferentiated concept of regular war into the early nineteenth century, it displayed familiarity with the specific concept of the "little war" already from the middle of the eighteenth century.[331] At that time, "little war" comprised, within a larger strategic plan of undifferentiated regular wars, certain elements that were entrusted to auxiliary and specific contingents, such as the protection of camps and support for logistics. From the early nineteenth century, however, the concept of "little war" began to cover forms of combat that appeared to be conducted outside the framework of regular war. The reconceptualisation of the "little war" had far-reaching consequences not only for strategy and tactics but, more importantly, for the blurring of the distinction between combatants and non-combatants. During the eighteenth century, the conceptual and legal distinction between the battlefields of combatants and the settlements of non-combatants had been meticulously observed, even though it could happen that a settlement was located in the middle of a battlefield. Clausewitz and contemporary theorists alike took this distinction for granted.[332] Although Clausewitz applied this distinction, he adhered to the conventional view that the "entire flow which the inhabitants of the land [as non-combatants] have on war is nothing less than unrecognisable" (der Gesamteinfluß, den die Einwohner des Landes auf den Krieg haben, [ist] nichts weniger als unmerklich) and even justified cruelties against

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[327] Ibid., book III, chap. 17, pp. 198-199; book IV, chap. 9, p. 229-234.

[328] Ibid., book I, chap. 1/9, p. 24.

[329] Bülow, *Geist* (note 82), p. 240.

[330] Schmalz, *Völkerrecht* (note 207), S. 228-229. Bluntschli, *Statsrecht* (note 178), nr 1000, p. 670.

[331] Georg Wilhelm von Bolstern, *Der Kleine Krieg. Oder die Maximen der leichten Infanterie, Kavalerie, Scharschützen und Jäger* (Magdeburg, 1789). Armand Charles Augustin De la Croix, *Abhandlung vom kleinen Krieg zum Gebrauch der Freycompanien* [Paris, 1752], in: *Kriegsbibliothek. Oder gesammelte Beiträge zur Kriegswissenschaft*, 1. Versuch (Breslau, 1755), pp. 105-132. Andrew [Andreas] Emmerich, ed., *The Partisan in War. Or The Use of a Corps of Light Troops to an Army* (London, 1789). Johann von Ewald, *Abhandlung über den kleinen Krieg* (Kassel, 1785). Thomas Auguste LeRoy de Grandmaison, La petite guerre (Paris, 1756) [reprint (Bibliotheca rerum militarium, 14.) (Osnabrück, 1972)]. Philippe-Henri de Grimoard De Guy le Comte *Traité sur la constitution des troupes légères* (Paris, 1782). De Jeney, L*e partisan. Ou l'art de faire de Petite-Guerre avec succès selon de génie de nos jours* (The Hague, 1759). [Philipp Julius Bernhard von Platen], *Le Husard. Ou courtes maximes de la petite guerre* (Berlin, 1761). Georg Wilhelm von Freiherr Valentini, *Abhandlung über den kleinen Krieg und über den Gebrauch der leichten Truppen* (Berlin, 1799) [secnd edn (Berlin, 1802); third edn (Berlin, 1803); fourth edn (Berlin, 1820)]. De Vernier, *Instructions militaires concernant la petite guerre* (Basle, 1773).

[332] Bülow, *Geist* (note 82), pp. 211-212, 225-226, 238, 240, 246. Jakob Otto August Rühle von Lilienstern, *Apologie des Krieges* [first published (Frankfurt, 1814)], edited by Jean-Jacques Langendorf (Vienna, 1984), p. 62.

non-combatants as an instrument of tactics.[333] Hence, he did not exempt non-combatants from the conduct of war but identified them as potential targets. Moreover, the blurring of the distinction between combatants and non-combatants was recognisable as a feature of the conduct of war already around 1800 in the change of meaning of the word partisan in many European languages. Since this time, the meaning of this word covered no longer not only the follower of a particular party and its opinions, who might in a military context operate in enemy territory, but added the new meaning of an irregular warrior who did not appear bound by the conventions of the law of war. The partisan thus came to denote a novel type of warrior who appeared not to be in need of combatant status, not have the obligation to carry weapons openly and not to have to identify himself as member of a regular army. Once the concept of the "little war" covered combat against partisans in the new sense of the word, the "little war" could be equated with the irregular war, with the implication that non-combatants could become targets of irregular wars, if they were accused of cooperating with or sheltering partisans. When this distinction had become irrelevant in conceptual and legal terms within the context of the "little war" as a type of irregular war, theorists such as Columbia University constitutional lawyer James Kent (1763 – 1847) could even claim, against Rousseau, that in all kinds of war not merely combatants were enemies but all nationals of states at war. Within this theoretical position, all residents in warring states could become targets, no matter whether the wars were regular or irregular or whether residents were combatants or non-combatants.[334]

The change of the concept of the "little war" was not confined to the realm of legal theory but impacted immediately upon the practice of the conduct of war, becoming evident through the Spanish resistance against the invasion of French troops under Napoleon during the Peninsular War. In his *Confession* of 1812, Clausewitz explicitly referred to events of this war, when he discussed the cruel treatment of insurgents taken as prisoners of war by the French regular invasion army. Clausewitz justified the harsh treatment with the tactical argument that, in this case, the insurgents could only have been overcome through the use of a higher degree of cruelty than that applied by the insurgents themselves.[335] The phrase "little war" came in use in its Spanish rendering *guerilla* to summarise the tactics of the insurgent population groups.[336] Already early in the nineteenth century, the new phraseology referred to patterns of the conduct of war far beyond the range of applications the "little war" terminology had had in the eighteenth century. Specifically, *guerilla* came in use as a term for patterns of combat action, which turned non-combat settlements into battlefields and allowed *guerilleros* to use non-combatant settlements as shelter. Hence, the obfuscation of the dividing line between battlefields and non-combatant settlements became part of the technical military terminology of the "little war". The British command in the war against the Xhosa at the Cape of Good Hope decided to apply the tactics of the "little war", neither using the terminology nor devoting any theoretical considerations to its decision.[337] First and foremost, this consequence emerged when commanders of regular armed forces decided to carry combat action into the settlements in order to hunt for insurgents in response to their use of hit-and-run tactics. In this way, commanders of regular armed forces, as Rühle von Lilienstern already diagnosed, "removed the old absolute barrier between the civilian and the military completely with the effect that the army became nationalised and the nation militarised" (die alte absolute Schranke zwischen Zivil und Militär ohne Vorbehalt auf und bewirkten, dass das Heer nationalisiert, die Nation militarisiert wurde)[338] The new definition of the 'little war', in its widest meaning, then included the entire

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[333] Clausewitz, *Vom Kriege* (note 20), book VI, chap. 6, p. 378.

[334] James Kent, *Commentaries on American Law*, vol. 1 (New York, 1826), p. 53 [new edn (Philadelphia, 1889)].

[335] Carl von Clausewitz, 'Bekenntnisschrift vom Februar 1812', in: Clausewitz, *Schriften – Aufsätze – Studien – Briefe*, edited by Werner Hahlweg (Deutsche Geschichtsquellen des 19. und 20. Jahrhunderts, 45) (Göttingen, 1966), pp. 682-751, at pp. 733-734.

[336] Werner Hahlweg, *Guerilla. Krieg ohne Fronten* (Stuttgart, 1968), pp. 11-12, 21-23.

[337] Philip Martin Rink, 'Kleiner Krieg – Guerilla – Razzia. Die Kriege des „französischen Imperiums". 1808 – 1848', in: Tanja Bührer, Christian Stachelbeck and Dierk Walter, eds, *Imperialkriege von 1500 bis heute* (Paderborn, Munich, Vienna and Zurich, 2011), pp. 425-442. Rink, 'Vom kleinen Krieg zur Guerilla. Wandlungen militärischer und politischer Semantik im Zeitalter Napoleons', in: Rasmus Beckmann and Thomas Jäger, eds, *Handbuch Kriegstheorien* (Wiesbaden, 2011), pp. 359-370.

[338] Johann Gottlieb Fichte, *Über den Begriff des wahrhaften Krieges in Bezug auf den Krieg im Jahres 1813*

population of a state at war. This new terminology had all features of the totality of war, even if this phrase appeared only towards the end of World War I.[339] It rendered the new patterns of the conduct of war total in agreement with the concept of totality as it was defined in early nineteenth-century political theory.[340] This new concept of the 'little war' as the total war boosted the demand, known in essence already from the second half of the eighteenth century, that all subjects to a ruler should be prepared to sacrifice their lives for the ruler and the state.[341] In conjunction with the Fichtean argument that individuals could derive their personal identity only from the collective identity of the nation, the new concept of the "little war" implied that entire state population groups could become military targets.

The new terminology of the "little war" as total war came up in Europe but soon transpired onto warfare by European armies in other parts of the world. After the precursor use of the tactics during the war against the Xhosa in 1811/1812, the next occasion was the beginning of the French military occupation of Algiers in 1830, which local populations resisted. Without familiarity of the innovations of European military terminology, but with precise insight in the strategic limitations of the French occupation army, one of the leaders of Algerian military resistance, Sidi d'Haddsch Abd el-Kader Uled Mahiddin (c. 1808 – 1883), quickly adopted patterns of partisan *guerilla* warfare,[342] through which the resistance forces could stand up against the invasion army. Lack of topographical knowledge, the languages and cultures of occupied population groups on the side of the French invasion army often allowed the resistance forces to ambush the invaders, which did not suffer serious defeats but received painful setbacks. The Prussian officer Carl von Decker (1784–1844), teacher at the Royal Military Academy (Allgemeine Königliche Kriegsschule) in Berlin and an observer of the Algerian war theatre, was the first to describe the new patterns of combat in detail. Even though also Decker did not use the term "colonial war", he did give full expression to the concept of colonial war as "little" and irregularwar. According to Decker, who was in full agreement with the French supreme commander Thomas-Robert Bugeaud de la Piconnerie (1784 – 1849) on this issue, French warfare in Algiers was not a regular war but a military conflict to the end of enforcing French occupation against the allegedly unlawful resistance from the local population. Decker classed this population as non-European groups of nomads against whom French occupation forces apeared not to be tied to the norms of the law of war.[343] The Algerian war theatre produced the neologism *razzia* for this type of warfare,[344] and Decker confirmed the novelty of this word with his observation that the existing literature on the art of war and its underlying theories had nothing to say about the *razzia*.[345] Indeed, only the Qīng government in China had then justified its eighteenth-century wars against the Dzungars with arguments equivalent of those of the 'little war' as total war. It had Dzungar warriors denounced as nomads, blamed them for using hit-and-run tactics and responded with patterns of total war indiscriminately applied to combatants and non-combatants.[346]

Decker further argued that the European law of regular war could not be applied beyond the confines of the European continent because it appeared to him to be drawn on the recognition of European norms and values. As a military theorist, then, Decker limited the applicability of the general concept of war of the previous centuries to military conflicts within the European

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(Tübingen, 1815) [new edn (Leipzig, 1914); another new edn, edited by Rudolf Oelschlägel (Rammenau, 1987), pp. 26, 28]. Rühle, *Apologie* (note 332), pp. 68-69.

339 Léon Daudet, *La guerre totale* (Paris, 1918), pp. 8-9. Alphonse Séché, *Les guerres d'enfer* (Paris, 1915), p. 124 [second edn (Paris, 1915); further edn (Paris, 1938)].

340 Adam Heinrich Müller, *Die Elemente der Staatskunst*, edited by Jakob Baxa (Vienna and Leipzig, 1922), p. 48 [further edn (Jena 1922); first published (Berlin 1809)].

341 Abbt, *Vom Tode* (note 148), p. [6].

342 Carl von Decker, *Algerien und die dortige Kriegsführung*, vol. 1 (Berlin, 1844), pp. 250-251, 258-260.

343 Thomas-Robert Bugeaud de la Piconnerie, *Par l'épée et par la charrue*, edited by Paul Azan (Paris, 1948), pp. 55-58, 125.

344 Thomas Rid, 'Razzia. A Turning Point in Modern Strategy', in: *Terrorism and Political Violence* 21 (2009), pp. 617-635.

345 Decker, *Algerien* (note 342), vol. 2, pp. 104-105.

346 Kraft, *Dschungarenkrieg* (note 262), nr I, pp. 28, 124, nr III, pp. 40, 131.

community of states to which armed forces under the control of the Turkish government seemed to belong, but not the apparently unorganised insurgents in North Africa. In the same way as theorists of international law then denied that the law of nature could be the framework for the deduction of positive legal norms, Decker refused to accept a general concept of war enshrined in the law of war and credited with universal validity. In contradistinction against theoretical options of the eighteenth century, European military theorists as well as military commanders of the nineteenth century readily conformed to the application of the distinction between regular and irregular war and, in doing so, ranked interstate wars as the sole type of regular wars. The identification of interstate wars as regular wars had the consequence that European warfare against political communities which military theorists as well commanding officers would not recognise as states, but classed as inhabited by purportedly nomadic "tribes", could be exempted from the norms of the law of war on the basis of the allegation that enemies resorting to seemingly irregular acts of resistance were not to be recognised as legitimate combatants.[347] The narrowing of the forms of regular war to military conflicts among states opened the venue for the conceptualization of colonial war as the prototype of irregular war.

Military theorists did admit that the conceptual borders between combatants and non-combatants could be blurred both in regular and in irregular wars. However, in either case, this was the result of opposing cause-effect relations. With regard to regular war, non-combatants could turn into combatants if, in the perception of commanders of regular forces, they refused to respect the law of war. According to this logic, regular troops expanded the range of the combatant status as an act of the totalisation of war in response to an enemy who appeared to be practising irregular patterns of combat. By contrast, in the case of irregular war, the exactly reverse process occurred in the perception of theorists: Resistance against allegedly legitimate rule and military occupation entailed, according to Decker, the proactive denial of the use of the tactics of regular warfare with the consequence that regular armies could categorise entire population groups as combatants.[348] Decker's argumentation was one-sided, limited to the conceptualisation of the strategy applied by French occupation forces in Algiers. Decker did not take into consideration perceptions of the Algerian population.

The Concept of War in International Legal Theory

The theory of international law reflected this process of the incremental separation of the concept of colonial war from the contemporaneous specification of the law of war as a set of norms relating to military conflicts among states only. Still in the first half of the nineteenth century, handbooks on international law did not contain references to colonial war. For one, the Bavarian publicist Julius Schmelzing defined war in general terms, even though he was familiar with the concept of settler colonies and constructed the acquisition of such colonies as a legal title for Europeans.[349] According to Schmelzing, who focused his analysis of international law upon Europe, war "even against wandering nomads, unpredictable hunters and horde-tribes" (die unsteten Nomaden, die unsicheren Jäger und Horden-Stämme) was "a state of public hostilities among free, self-governing and independent nations" (der Zustand der öffentlichen Feindseligkeiten zwischen freien, selbständigen und unabhängigen Völkern), drawing on the theory of the law of nature.[350] In accordance with seventeenth- and eighteenth-century legal theory, Schmelzing conventionally juxtaposed his thus defined "public" wars merely against "private wars", which he allocated in the statue of nature according to Hobbes, but contrary to Grotius and Pufendorf.[351] Consequently, Schmelzing's "private

[347] Carl von Decker, *Der Kleine Krieg im Geist der neueren Kriegsführung*, fourth edn (Berlin, 1844), pp. 1-3 [first published (Berlin, 1822)].

[348] Bugeaud, *Épée* (note 343), p. 125. Bugeaud, 'Discours du 24 Janvier 1845', in: Bugeaud, *Le peuplement français d'Algérie*, edited by Jean Saurin (Tunis, 1934), pp. 161-165, at p. 163. Decker, *Algerien* (note 342), vol. 1, p. 269.

[349] Julius Schmelzing, *Systematischer Grundriß des praktischen europäischen Völker-Rechtes*, § 216, vol. 2 (Rudolstadt, 1820), pp. 5-6.

[350] Ibid., vol. 3, § 448, pp. 110-111; 209, Schmalz, *Völkerrecht* (note 207), pp. 16-17, 227.

[351] Ibid., vol. 3, § 448, pp. 110-111.

wars" were "a condition of hostility among humans independent of one another in the state of nature" (feindseliger Zustand der von einander unabhängigen Menschen im Naturzustand) and were a matter of the past, while in his own time, wars everywhere in the world were military conflicts among states.

The type of war featured as "public war" in Schmelzing's terminology, appeared as "war among nations, when both belligerents are states" (Völkerkrieg [*bellum inter gentes*] wenn beide kriegführende Theile Staaten sind) in the international law textbook by Johann Ludwig Klüber (1762–1837), Professor of Law at the University of Heidelberg. Klüber thus explicitly equated states with nations and, like Schmelzing, took for granted that all belligerents had the freedom of the choice of military means. In the latter respect, Klüber noted that no "kind of the use of force" could be excluded among warring parties.[352] Moreover, according to Klüber, every war was just that was conducted in pursuit of the "preservation of external rights" (Erhaltung äußerer Rechte) of states.[353] In other words, Klüber followed seventeenth- and eighteenth-century doctrinal conventions in identifying the restitution of previously inflicted injustice as the sole legitimate cause of war.

A little later, August Wilhelm Heffter (1796 – 1880), Professor of Law at the University of Berlin, seconded. Like Schmelzing, Klüber and further contemporary jurists, Heffter assumed that war in general could "only come into place among parties among which the extreme degree of self-help was permitted and possible, hence in the main among completely free, independent parties not subject to any common higher power, specifically a war among states among sovereigns, a war against stateless persons such as freebooters, filibusters, pirates and the like" (nur unter Parteien eintreten, unter welchen der äußerste Grad der Selbsthilfe erlaubt und möglich ist, hauptsächlich also unter völlig freien, von einander unabhängigen, keiner gemeinsamen höheren Gewalt unterworfenen Parteien, insbesondere ein Staatenkrieg unter souveränen Staaten, sowie gegen staatenlose Personen, z. B. Freibeutern, Filibustier, Seeräuber und dergl[eichen]).[354] No special types of wars could find a place in Heffter's definition, no matter where in the world they might occur. Instead, Heffter excluded from his definition of war solely armed conflicts among parties that were subject to a higher institution of rule and thus not states. Yet according to Heffter, "protectorates" remained sovereign states, although their sovereignty might have been restricted by the terms of the relations to the "protectorate" holder.[355] Heffter's handbook went through eight editions in the course of the nineteenth century, the last appearing in 1888.

Moreover, US diplomat Henry Wheaton, author of the international law textbook with the widest circulation in English-speaking areas to the 1860s, did not display familiarity with the concept of colonial war either. Like Schmelzing, Klüber and Heffter, he provided a definition of war in general terms as an armed conflict among states in accordance with the general law of war.[356] However, Wheaton specified degrees of applicability of the law of war by various levels of "civilisation" he postulated for warring parties. Wheaton limited the full applicability of the law of war to the highest power holders in the allegedly most 'civilised' states. Further narrowing Heffter's definition of war, he categorised 'semi-sovereign states' as well as "tributary and vassal states" as political communities whose *ius ad bellum* had become limited by their "protectorate" status, giving the "Free City" of Cracow, the British "Protectorate" of the Ionian Islands, the nominal Italian "Protectorate" over monaco, the Oldenburg "Protectorate" of Kniphausen as examples of "semi-sovereign states" and the Ottoman "Protectorate" of Egypt, the French "Protectorate" of the "Barbary States" and the states of the Native Americans under US "Protectorate" as examples for "tributary and vassal states".[357] Yet neither word nor concept of colonial war featured in Wheaton's text. Consequently, military conflicts regulated by the law of war could occur as wars among states everywhere in the world. Wheaton's handbook reappeared in revised editions throughout the

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[352] Johann Ludwig Klüber, *Europäisches Völkerrecht*, § 235 (Stuttgart, 1821) [second edn, edited by Carl Eduard Morstadt (Schaffhausen, 1851)], p. 383.

[353] Ibid., § 237, p. 386.

[354] Heffter, *Völkerrecht* (note 137), § 114, p. 247. Bello, *Principios* (note 191), p. 100. Saalfeld, *Handbuch* (note 116), p. 188.

[355] Heffter, *Völkerrecht* (note 137), p. 196.

[356] Wheaton, *Elements* (note 173), edn by Boyd, § 296, p. 314.

[357] Ibid., edn by Boyd, §§ 37-38, pp. 48-51.

nineteenth and the early twentieth century.

The Reformulation of the Law of Peace

The conceptualisation of international law along positivist legal theory concurred with an abrupt change of regulations relating to the status of diplomatic emissaries as part of the law of peace, as an increasing number or rulers and governments began to place not merely foreign ministry staff but also diplomatic emissaries on their payrolls. Henceforth, foreign ministry staff, jointly with the permanently employed emissaries, have formed the diplomatic service. Transfers of staff between ministerial headquarters and diplomatic representations abroad became frequent, if not the rule. That did not mean that every diplomat had to be a regularly employed member of the diplomatic service, for whom the technic term career diplomat came in use, but it did imply that emissaries were no longer mouthpieces of dispatching rulers and governments but state representatives. Consequently, the long-established practices of the giving and taking of gifts, together with the exploitation of personal networks among emissaries for private benefits, petered out and could become subject to criminal prosecution where they continued.[358] The inviolability of diplomatic emissaries and their property continued as an element of customary international law, and the serious violation of the personal integrity of emissaries counted as a just cause of war. The Congress of Vienna confirmed the legal norm of the inviolability of diplomatic emissaries and, in addition, passed a convention that established the point of time of accreditation as the criterion for determining the rank of envoys representing different states towards the same ruler or government. This regulation, repeated in the Protocol of Aix-la-Chapelle of 21 November 1818, remained in force as a customary legal norm until 1961.[359] Both agreements surrendered questions of precedence to the chance events of the arrival and the formal accreditation of an emissary at the destination, thereby separating questions of the rank of diplomatic envoys from questions of the hierarchy of states. Henceforth, the rank of a state was determined, not in terms of titles but of power as the seeming property of a state.[360] Scholars rationalised the process by gleaning a positive "European law of diplomacy" mainly from treaties between states and sought to condense it into codes.[361]

By contrast, there were hardly any changes with regard to the practical conduct of relations among states. Diplomats continued to negotiate mainly at the bilateral level, while multilateral congresses remained rare that had been convened neither for the purpose of ending a war nor for the setting of new international law nor for the foundation of international organisations.[362] The composite procedure of treaty conclusion turned into customary law, ratifications of previously signed treaties becoming the rule. European emissaries travelling ad hoc on specific missions outside the reach of permanent diplomatic agencies were often no career diplomats but naval officers or specially appointed government commissioners, most frequently if their assignment was the conclusion of peace treaties with states in Africa, Asia and the South Pacific and even when these peace treaties did not end a war but served the tasks of setting peace and establishing diplomatic

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[358] L. Alt, *Handbuch des europäischen Gesandtschafts-Rechtes* (Berlin, 1870), pp. 165-169. Hillard von Thiessen and Christan Windler, eds, *Akteure der Außenbeziehungen. Netzwerke und Interkulturalität im historischen Wandel* (Externa, 1) (Cologne, Weimar and Vienna, 2010).

[359] Règlement sur le rang entre les agens diplomatiques, Vienna, 19 March 1815, in: *CTS*, vol. 64, pp. 2-3. Protocoll of Aix-la-Chapelle, 21 November 1818, in: *CTS*, vol. 69, p. 386. Replaced by the 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.

[360] Christian Heinrich von Römer, *Versuch einer Einleitung in die rechtlichen, moralischen und politischen Grundsätze über die Gesandtschaften und die ihnen zukommenden Rechte* (Gotha, 1788). Franz Xavier von Moshamm, *Europäisches Gesandtschaftsrecht* (Landshut, 1805).

[361] Pölitz, *Staatswissenschaft* (note 126), vol. 3, pp. 18-19.

[362] Charles Kingsley Webster, 'The Council of Europe in the Nineteenth Century', in: Webster, *The Art and Practice of Diplomacy* (New York, 1961), pp. 59-67, at pp. 59, 66-67. Matthias Schulz, *Normen und Praxis. Das Europäische Konzert der Grossmächte als Sicherheitsrat 1815-60* (Studien zur internationalen Geschichte, 21) (Munich, 2009), pp. 36-46.

relations. The treaties negotiated through these ad-hoc missions usually received validity in European perception through ratification by the dispatching governments. The requirement for ratification could be stated in the text of a treaty, including the fixing of a deadline within which the ratification was bound to become enacted. There might also be included a stipulation declaring applicable certain articles of a treaty prior to the ratification of the entire treaty. Moreover, preliminary peace agreements continued to be made and were then expected to be replaced by definitive agreements at a later point of time. Whereas Jeremy Bentham had advocated a ban on the practice of secret diplomacy already in 1789,[363] secret treaties remained common in the standard repertory of diplomatic business. The treaties themselves disseminated the composite procedure of treaty-making to Africa, Asia and the South Pacific.

Many treaties featured non-reciprocal articles from the early nineteenth century, specifically relating to concessions of trading privileges, extraterritoriality of diplomatic emissaries and consular justice over foreign nationals. As a rule, only nationals of states in Europe and North America received these privileges which were usually denied to nationals of states in Africa, Asia and the South Pacific. European and the US governments claimed these privileges for their sides with the concocted argument that their treaty partners in Africa, Asia and the South Pacific were seemingly "uncivilised" and appeared to be ignorant of the norms of international law. Whereas eighteenth-century international legal theorists had taken for granted that consensus among the law among states existed by nature and without positive legislative human action, nineteenth-century international legal theorists and practicing diplomatic emissaries revoked that consensus existed and raised the recognition of positive international law, specifically the European law of treaties among states and the European law of war, to the prime condition for the admission of states into the exclusive club of self-proclaimed "civilised" states. The denial of the application of a general law of war, together with the implementation of the European law of treaties among states in processes of the enforcement of non-reciprocal agreements with partners in Africa, Asia and the South Pacific, turned into the most effective strategies for the discrimination of states in these parts of the world. The secular discourse about the alleged "civilisation" of states thereby replaced the previous religious discourse about the purportedly Christian values enshrined in the law among states. Both discourses were imited in their geographical scope to states in Europe and states under the control of European settler colonists in America. European diplomatic practitioners, jointly with international legal theorists, would only exempt Turkey from that limitation and that only at the price of Turkish recognition of European international legal norms.[364]

Diplomatic emissaries thereby turned into willing executioners of the European law of treaties among states and, as treaties with rulers and governments in Africa, Asia and the South Pacific rarely came into existence under the conditions of voluntariness, they also converted into agents of diplomatic pressure as the application of non-military force. When a war began, terminating peace according to nineteenth-century international legal theory, diplomats left the terrain to military people and resumed their activities only in the context of negotiations aimed at temporarily ending a war. When 'new' states were emerging, their formal recognition could be expressed through the exchange of diplomats alone, without need for treaties.[365]

Summary

The first half of the nineteenth century witnessed a thorough change of the conceptualisation and the modalities of the implementation of the law among states into international law of the "external state law". In consequence of the change, which emerged from Europe and America, legal theorists and practitioners of international relations rejected the law of nature as the ultimate "source" of international legal norms and, instead, postulated that international legal norms could only result from human action condensed into the presumed wills of states. Governments in America and

[363] Bentham, 'Plan' , chap. XIV, p. 547.
[364] Heffter, *Völkerrecht* (note 137), § 6, p. 11. Wheaton, *Elements* (note 173), edn by Dana, § 71, p. 99.
[365] MacKintosh, 'Address' (note 68), p. 414.

Europe took it to be their task to foster the application the newly conceived international law in other parts of the world and assumed that other international legal norms that were deemed incompatible with European legal norms should give way to the perceived American and European standard. The most commonly applied means for the dissemination of international legal norms out from America and Europe were legal instruments made out in accordance with the European law of treaties among states.

Thus, representatives from Austria, France, Russia, Sardinia and the UK forced the Turkish Foreign Minister in the course of the Paris Peace Conference of 1856 to concur with the "admission" of Turkey into the legal and political framework of the "European Concert" and to accept the indefinite validity of the treaty that was being concluded. This concession stood in stark opposition against the conventions of the Muslim law of war and peace, which had provided for no more than finite peace agreements between Muslim and non-Muslim states. Moreover, the concession could not put an end to noisy protestations through discriminating statements that European political activists had shouted into the world against the subjection of Turkey into the norms of international law. Among others, Richard Cobden, in his polemics against balance of power politics and the limitations of the freedom of trade apparently resulting from it, did not shy away from asserting with full conviction that Turkey would not be able to enter the "political system of Europe", because, according to Cobden, Turks were not Europeans, their habits were still as "Oriental" as they had been when they crossed the Bosporus. Although, already early in the nineteenth century, general public opinion had matter-of-factly included Turkey into the group of European states,[366] Cobden's works remained in print long after his death in 1865. His perception of the "Orient" as the construct of the non-European other quickly moved from political rhetoric into the diction of international law and has been retained by some historians even in the twenty-first century.[367] As a result, Turkey lost much of its legal tradition in consequence of the conclusion of the Paris treaty of 1856, but did not gain respect among public opinion makers in Europe. Even as a member of the "European Concert" by treaty, Turkey did not arrive in Europe. As late as in 1913, the Turkish government refused to grant the concession of an indefinite peace to the government of then newly established Bulgaria on the occasion of the conclusion of the Second Balkan War, then still acting in accordance with the conventions of the Muslim law of war and peace. However, the Turkish government did not declare its refusal explicitly but indirectly through the omission of a reference to peace in the indefinite treaty that merely proclaimed "friendship" between the two states.[368] By contrast, in the previous multilateral treaty on the formation of Bulgaria as a sovereign state, the Turkish government had agreed to the establishment of permanent "peace and friendship".[369] Hence, in 1913, the Turkish government could not retain the conventions of the Muslim law of war and peace in a multilateral treaty but could only in a bilateral agreement indirectly refuse to recognise the existence of the indefinite condition of peace between the signatory parties. Elsewhere in the world, the British government had obliged the Chinese governments to renounce its traditional position of superiority in East Asia through the Treaty of Nanjing of 1842.

The newly conceived international law tolerated only states as its "subjects", thereby excluding non-state actors such as long-distance trading companies from claiming and executing sovereign rights. Even though the EIC was allowed to continue making treaties with rulers and governments in South Asia, it no longer had the competence to do so at its own discretion and risk but only by mandate from and in the name of the British government. The EIC lost this miniaturised privilege eventually in 1858. International law continued to be based on the principle that all

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[366] Cobden, 'Balance' (note 47), pp. 128-136. Dominique Dufour de Pradt, 'Plan for Establishing a Balance of Power', in: *The Pamphleteer* 1 (1813), pp. 288-298, at p. 288.

[367] Bluntschli, *Statsrecht* (note 178), p. 279. Oliver Schulz, '"This Clumsy Fabric of Barbarous Power". Die europäische Außenpolitik und der außereuropäische Raum am Beispiel des Osmanischen Reiches', in: Wolfram Pyta, ed., *Das europäische Mächtekonzert. Friedens- und Sicherheitspolitik vom Wiener Kongress 1815 bis zum Krimkrieg 1853* (Stuttgarter Historische Forschungen. 9) (Cologne, 2009), pp. 273-298.

[368] Treaty Bulgaria – Turkey, 29 September 1913, Preamble, Art. VI, in: *CTS*, vol. 218, pp. 375-390, at pp. 375-376, 379.

[369] Treaty Bulgaria – Greece – Montenegro – Serbia – Turkey, London, 30 May 1913, in: *CTS*, vol. 218, pp. 159-161, at p. 160.

sovereigns were legal equals. Yet comforming to this norm did not prevent a few European "actors", namely the governments of Austria, France, Prussia, Russia and the UK, from posing as "great powers" and intending to shape international relations in the world at large. Non-state sovereigns then could no longer exist under international law. The responsibility for colonial expansion during the first half of the nineteenth century, therefore, rests completely with governments of states, not only in Europe but also in the USA. The US government applied the practices of colonial rule against political communities and states of Native Americans and, in doing so, not only destroyed the state of the Cherokee but also numerous other political communities and states then existing in North America within and beyond US territory. Positive international law, as conceived and formulated in Europe and North America, began to split off from the great tradition of the unset law of war and peace and served as a readily available instrument of the discrimination of states in Africa, Asia and the South Pacific through the conduct of war and the making of treaties. The first half of the nineteenth century not only put on the agenda of legal theorists and practical political decision-makers the issue of the continuity of the legal order under pressure from revolutionary movements, [370] but it also documented the far-reaching political consequences of the reconceptualisation of legal systems.

[370] Fritz Sander, 'Das Faktum der Revolution und die Kontinuität der Rechtsordnung', in: *Zeitschrift für öffentliches Recht* 1 (1919/20), pp. 132-164.