



Institute for International Law  
and Justice

## IILJ International Legal Theory Colloquium Interpretation and Judgment in International Law

NYU Law School

Professors Benedict Kingsbury and Joseph Weiler  
Pollack Colloquium Room, FH 9th Floor, 245 Sullivan St.  
Thursdays 4.00pm-5.50pm

*Provisional Semester Program - Attached Paper is shown in Bold*

- January 17 – Jeremy Waldron, NYU Law School  
Topic: *"Partly Laws Common To All Mankind": Foreign Law In American Courts*
- January 24 - Catharine MacKinnon, University of Michigan Law School  
Topic: *Women's Status, Men's States*
- January 31 - Beth Simmons, Harvard University Government Department  
Topic: *Explaining Variation in State Commitment to and Compliance with International Human Rights Treaties*
- February 7 - Richard Stewart, NYU Law School  
Topic: *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance*
- February 14 - Joseph Weiler, NYU Law School  
Topic: *Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century*
- February 21 - NO COLLOQUIUM
- February 28 - Sungjoon Cho, Chicago-Kent College of Law  
Topic: *Constitutional Adjudication in the WTO*
- March 6 - Robert Howse, University of Michigan Law School  
Topic: *Beyond Compliance: Rethinking Why International Law Really Matters*  
(paper co-authored with Ruti Teitel)
- March 13 - Martti Koskenniemi, University of Helsinki/NYU Law School**  
**Topic: *International Law and Raison D'état; Rethinking the Prehistory of International Law***

Note: March 14 and 15, the Program in the History and Theory of International Law convenes in the same room a conference on Roman Law and Imperialism in the Foundations of Modern International Law (all welcome – see [iilj.org](http://iilj.org))

- March 20 - NO COLLOQUIUM – Spring Break
- March 27 - Jose Alvarez, Columbia University Law School  
Topic: *Interpretive Problems in International Investment Law*
- April 3 - Ryan Goodman, Harvard Law School  
Topic: *Sociological Theory Insights into International Human Rights Law*
- April 10 - Sally Engle Merry, NYU Anthropology Dept & Law and Society Institute  
Topic: *Indicators in Global Governance*
- April 17 - Christopher McCrudden, Oxford University/U. of Michigan Law School  
Topic: *Human Dignity in Human Rights Interpretation*
- April 24 - Stephen Gardbaum, University of California at Los Angeles Law School  
Topic: *Is U.S. Constitutional Rights Jurisprudence Exceptional?*

Program and papers available at: <http://iilj.org/courses/2008IILJColloquium.asp>

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**INTERNATIONAL LAW AND RAISON D'ÉTAT;  
RETHINKING THE PREHISTORY OF INTERNATIONAL LAW**

Martti Koskenniemi

NYU March 2008

Let me begin with a few words about what I mean by the “prehistory of international law”. A few years ago I published a study on the “rise and fall of international law” in 1870 to 1960.<sup>1</sup> In this work, “fall” coincided with the centre of gravity of international legal thought moving from Europe to the United States and its ethos being reconstructed on political “realist” premises. Since then, international law has been understood principally as an instrument for the attainment of State interests in terms remarkably similar to those invoked by the early modern *raison d'état* tradition, with focus on “security”, “wealth” and “happiness”. Now modern international lawyers usually do not usually understand their craft as beginning in 1870. In the standard view, whatever began then was merely a *continuation* or an updating of a much earlier tradition, namely that of natural jurisprudence that is usually linked with the Spanish “second scholastic” in the 16<sup>th</sup> and 17<sup>th</sup> centuries, Hugo Grotius, Samuel Pufendorf and the protestant natural lawyers of the 17<sup>th</sup> and 18<sup>th</sup> century, as well as, perhaps, the *Droit public de l'Europe* in 18<sup>th</sup> century France. This, the argument goes, was a tradition that sought to do in the early modern world pretty much what “modern” international lawyers had been doing since 1870, namely to bind European sovereigns to a universal rule of law. In the standard argument, international law arose with modern statehood as a position and a craft that was opposed to the *raison d'état*. For it, the newly acquired sovereignty of European nations was an ultimately destructive force that was to be tamed by a legally circumscribed idea of a universal community of humankind.

I am sceptical about that argument. For me, it seems true that the period 1870-1960 indeed manifested the consolidation and slow erosion of something like the above view – of which, as

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<sup>1</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International law 1870-1960* (Cambridge University Press 2001).

things go, significant survivals persist in today's academic and diplomatic world. But I do *not* think that it existed as a powerful, and even less as the principal current of thinking about statehood and the international legal world much before 1870. Whatever existed in terms of legal thought about the "international" world (the expression "international" being somewhat of an anachronism here) in early modernity, could only exist as a *pre-history* of international law.

In other words, my thesis is this: no continuous tradition of international legal thought existed from early modernity – Gentili, Vitoria, Grotius, Pufendorf, Vattel, however one wants to date the moment of inception – to the 20<sup>th</sup> century. What we read in standard histories, is a myth. Nineteenth century international lawyers imagined a history to what they were doing because that was the habit of a historical age. What we have, instead, is a literature on the government of modern states that occasionally deals with the external aspects of that government – war, treaties and diplomacy. But these are not understood as a legal "system" somewhere outside statehood, with the point and purpose of limiting the negative effects of State policy. Instead, they are part of a functional notion of territorial rule the point of which varied over time from "conservation" of the realm to the "perfection" of its people. The "functional" notion of sovereign power implied the presence of epistemic limits to State policy that provided ample room for debates about wise policy. But it did not presuppose (but rather rejected) the existence of an international normative order from which those principles could be deduced. In this sense, the period of international law in 1870-1960 was unprecedented and we are not entitled to assume that it will rise again – for example, after the Bush government is over. Perhaps it was simply a blip on the screen of history; and that whatever will emerge as a way to govern the world will be something new, even as it will be likely to describe itself as part of some enlightenment narrative, because that is what most people in powerful positions want to hear.

This paper is a report of some aspects of my on-going study into this "prehistory". It will concentrate on principal themes in the debates waged in France and Germany from the 17<sup>th</sup> to the early 19<sup>th</sup> centuries about rules governing the conduct of princes in their external relations. The debate is waged in terms of reflection on the principles and techniques of the government of territorial states. There is either no world outside political statehood at all, or then it appears as a set of logical or sociological constraints on the business of government. The participants do sometimes describe those constraints as "law" but always hesitantly and exposing them to criticisms well-known already to the contemporaries. It is only when this tradition becomes seriously professional

that it is able to canvass these constraints as a stable and realistic sphere of the international world. This is not a sphere of law, however, but of economics.

## 1. INTERNATIONAL LAW IN PRE-REVOLUTIONARY FRANCE

The search for international law in early modern France points in two directions. One is the set of principles that emerged in the late 16<sup>th</sup> and early 17<sup>th</sup> centuries to rationalise the conduct of foreign policy of an absolutist State. The other direction lies in the critiques of the *ancien régime* by *les philosophes* in the 18<sup>th</sup> century.

The effort to rationalise the conduct of foreign policy, inextricable from the emergence of principles of government of early modern France and often linked to the name of Cardinal Richelieu (1585 – 1642), harks back to the medieval *Fürstenspiegel* literature – the “mirror of princes” – that had since the 13<sup>th</sup> century produced advice for the Christian prince on how to preserve and enlarge his realm and to protect inherited religion.<sup>2</sup> The genre had been thoroughly updated and revised by Machiavelli’s famous suggestion that there was one morality for ordinary humans and another for princes. Later writers in Italy and France translated this into more acceptable Christian language by making the distinction between “good” and “bad” reason of States, softening their instrumentalist attitudes to politics by highlighting the virtuous purposes to which their techniques would be put. . The most famous tract in this vein came from a counter-reformation writer, Giovanni Botero (1544-1617) whose *Ragion di stato* (1589) argued that exceptional measures to conserve the state were perfectly compatible with the ruler’s Christian duties. With his eyes firmly on the religious civil war that was tearing France, Botero also wanted to make the point that “...of all religions none is more favourable to rulers than the Christian law”, binding not only the hands but the consciences of the subjects and qualifying Catholic theologians as the prince’s best advisors.<sup>3</sup> Botero and other counter-reformation writers such as his friend the Savoyard diplomat René de Lucinge (1554-1615) were also frustrated by the failure of the leagues against the Turks and sought to put into words the *real conditions* under which early modern rulers could conserve, strengthen and enlarge their

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<sup>2</sup> On this literature, see e.g.

<sup>3</sup> Giovanni Botero, *The Reason of State* (P.J. and D.P. Waley transl., London, Routledge 1956), p. 66. On Botero’s views generally, see Maurizio Viroli, *From Politics to Reason of State. The Acquisition and Transformation of the Language of Politics 1250-1600* (Cambridge University Press, 1992), 252-7. For the context of his writings, see also Richard Tuck, *Philosophy and Government 1527-1651* (Cambridge University Press, 1993), 65-67.

domain. Their emphasis, unlike Machiavelli's, was not, however, so much on enlargement as on *conservation* and they did not speak of the glory of the prince (after all, theirs was an *anti-machivellian* vocabulary) but of that of Christianity, led by imperial Spain.<sup>4</sup> They were nervously opposing not only Protestant "monarchomachs" but also the Bodinian theory of sovereignty that, as Marcel Gauchet has pointed out, undermined the Catholic universalism that offered them the platform on which to distinguish "good" from "bad" statecraft in the first place.<sup>5</sup>

Reason of state never meant that the prince *would not be bound*. Instead, it bound him tightly to special truths, principles and techniques imposed on ruling by the social world itself. It highlighted the difficulty of ruling efficiently and insisted for this purpose on the imperative need to separate the prince's private desires from the long-term interests of himself and of his State. Far from being antithetical to legal thought, it gave articulation and force to legal ideas that would henceforth focus on the "State" as a political category distinct from the person of the King and the "good of the community" as well as from the interests of religious factions, social classes and the Estates.<sup>6</sup> In this respect, the Catholic anti-machivellianism of Botero and other imperialists such as Tommaso Campanella (1568-1639), with their effort to bind the prince to a Christianity institutionally represented by the Pope (who had put Bodin's works on the Index in 1593) was becoming an anachronism, especially in a France not only riddled by confessional strife but also by proliferating forms of scepticism and a political realism (Machiavellism and Tacitism among others) that sought a neutral ground between the religious parties.<sup>7</sup> Botero hated the balance of power that in his view would merely institutionalize the position of irredentist princes against Christian unity. Nevertheless, it was precisely "balance" that was needed to get rid of civil war in France and to set up a robust system of central authority – something that was attained momentarily by the spectacular conversion and crowning of Henry IV as the King of France in 1594. Until then, French jurists had theorised endlessly about the relative powers of the King and the people as well as the various intermediate bodies, the *parlements* and the Estates-General and positions of individual

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<sup>4</sup> See A. Enzo Baldini, 'Botero et Lucinge : Les racines de la Raison d'État', in Yves Charles Zarka, *Raison et déraison d'État* (Paris, PUF 1994), 67-99.

<sup>5</sup> Marcel Gauchet, 'L'État au miroir de la raison d'État : La France et la chrétienté', in Zarka, *Raison et déraison*, *supra* note 4, 198-205.

<sup>6</sup> The argument about the emergence in France in the 1570's of the "state" as a "distinct entity from which supreme political authority was derived" is made in great detail and force in Howell E. Lloyd, *The State, France and the Sixteenth Century* (London, Allen and Unwin 1983), cxvi and in particular 146-168.

<sup>7</sup> For a useful discussion of the climate of political ideas in late-16th century Europe, with emphasis on scepticism and the reason of state, see Tuck, *Philosophy*, *supra* note 3, 31-64 and (for France), 82-94.

writers would often reflect their relative standpoint in the domestic confrontations.<sup>8</sup> With the final identification of the “State” as an independent political entity, the notion of “State interest” could emerge as an overruling political *ratio* – a confessionally neutral justification for governmental action, connoting the interest of the system of territorial government itself.<sup>9</sup> This was attained by Jean Bodin’s *Six livres de la République* (1576) that both cast the ruler as the “supreme magistrate who governed in conformance with the law and the best interests of the state” and described that rule in terms of a “sovereignty” that was “absolute, undivided, perpetual, and responsible only to God”.<sup>10</sup>

Such sovereignty was, however, quite compatible with holding the ruler bound by fundamental laws governing succession and the inalienability of the realm as well as, in a general way, divine and natural law.<sup>11</sup> Even the rule that put the prince above custom and the fundamental laws of the realm arose from a concept of legislative sovereignty that was articulated by Bodin as a higher legal-constitutional principle.<sup>12</sup> His great concern, like that of the whole group of “*politique*” jurists, was civil war and the good and unity of France. They were Gallican nationalists, wary of Spanish political influence and what they understood as justifications for universal monarchy. They thus integrated the abstract maxims of Roman law in historical and philological studies of old Germanic customs, “Gallic freedoms” and theories about the “ancient constitution” in order to reconstruct the basis of political order on an indigenous custom.<sup>13</sup> Their notion of universal history was one that “ultimately consisted of the individual histories of many nations with different characters and different destinies”.<sup>14</sup> The Pope’s meddling in the civil wars further strengthened their insistence on the independence of the King from any external authority. They had therefore little to say about any

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<sup>8</sup> The three basic positions being those of Catholics, of Huguenots and of (statist) *politiques*. For the French constitutional debates before Bodin’s *Six livres* (1576), see W.F. Church, *Constitutional Thought in Sixteenth-Century France. A Study in the Evolution of Ideas* (Harvard University Press, 1941), 74-178. See also Lloyd, *The State*, *supra* note 6, 153-155.

<sup>9</sup> See Christian Lazzari, ‘Introduction’, in Henri de Rohan, *De l’intérêt des princes et les Etats de la chrétienté* (Paris, PUF 1995), 120-128 and generally Lloyd, *The State, France and the Sixteenth Century*, *supra* note 6.

<sup>10</sup> Church, *Constitutional Thought in Sixteenth-Century France*, *supra* note 8, 195, 226.

<sup>11</sup> See Julian Franklin, *Jean Bodin et la naissance de la théorie absolutiste* (Paris, PUF 1993), 115-150, 130-131. With treaties, as with other promises, the *rebus sic stantibus* rule applies. <sup>11</sup> As Church observes, despite the increasing arguments on divine right at the turn of the 17<sup>th</sup> century all the jurists held the King bound by divine and natural law, *Constitutional Thought in Sixteenth-Century France*, *supra* note 8, 197.

<sup>12</sup> Luc Foisneau, ‘Efficacité et souveraineté dans la pensée politique moderne’, in Alain Renaut (dir.), *Histoire de la philosophie politique 2. Naissances de la modernité* (Paris, Calmann-Levy 1999), 239-246.

<sup>13</sup> Detached from its imperial-universalist background, Roman law offered handy maxims for many different purposes but perhaps above all to strengthening the legislative supremacy of the King. See Fanny Cosandey & Robert Descimon, *L’absolutisme en France. Histoire et historiographie* (Paris, Seuil 2002), 28-39.

<sup>14</sup> Donald R. Kelley, *Foundations of Modern Historical Scholarship. Language, Law and History in the French Renaissance* (Columbia University Press, 1970), 305. See also *idem*, *The Human measure. Social Thought in the Western Legal Tradition* (Harvard University Press, 1990), 187-208.

law applicable in France's external relations beyond what was said by Bodin about there being absolutely no real universal empire and that only a kind of *jus fetiale* regulated the relations between sovereigns, providing a limited right of enforcement in cases of outrages against natural law.<sup>15</sup>

By contrast, the *raison d'état* writers, building on the Italian literatures, held it self-evident that the same principles and techniques that would ensure the strength of the prince's rule inside his realm would also be applicable in his external relations.<sup>16</sup> Apart from the significant exception of Alberico Gentili in Britain, none of these writers saw law as an important ingredient in those relations. Instead of law, they spoke incessantly about "*interest* and the power of *security*".<sup>17</sup> Their views were laid out with clarity and force by writers such as Henri de Rohan, Duke of Rohan (1579-1638), who began his instructions for the early modern prince (1638) by the famous statement: "Les Princes commandent aux peuples et l'intérêt commande aux Princes".<sup>18</sup> The distinction between the "real" interest of the prince and his merely "imagined" interests laid out the programme for scientific examination of the conduct of foreign policy that looked for close understanding of the resources of one's own state – its climate, its population, its economy, its history and so on, principles on which Montesquieu would later base his sociological brand of natural law.<sup>19</sup> Like Montesquieu, Rohan assumed that intelligent policy required that such data were to be compared with the resources and the relative power of other States so as to produce a situational analysis of the *real interests* of the State at any one moment. Success in foreign affairs became a function of the ability of the prince to manoeuvre his State in this network of "objective" interests by taking advantage of the strengths of the State while never exposing its relative weaknesses.<sup>20</sup>

During the Thirty-Year's war, books such as Rohan's gave literary expression to attitudes and policies that became self-evident parts of the statecraft of Richelieu and his followers.<sup>21</sup> The

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<sup>15</sup> See F.H. Hinsley, *Sovereignty* (2<sup>nd</sup> edn. Cambridge University Press, 1986), 180-182.

<sup>16</sup> Zarka,

<sup>17</sup> Tuck, *Philosophy*, supra note 3, 80, 65-82.

<sup>18</sup> Rohan, *De l'intérêt*, 161.

<sup>19</sup> Even Bodin had stressed the importance of analysing the environmental conditions of States in order to understand their constitutional systems, Church, *Constitutional Thought*, supra note 8, 216-217.

<sup>20</sup> Consequently, in Rohan's work, the "international" does not appear as an autonomous sphere. It is simply the structure or network created by the interlocking real interests of each State. These, Rohan summarises in terms of the "maxims" of foreign policy appropriate for each State. For, "en matière d'Etat on ne doit se laisser conduire aux désirs déréglés qui nous emportent souvent à entreprendre des choses au-delà de nos forces, ni aux passions violentes...mais à notre propre intérêt, guidé par la seule raison, qui doit être la règle de nos actions... ». , Rohan, *De l'intérêt*, 187.

<sup>21</sup> See especially Etienne Thuau, *Raison d'état et pensée politique à l'époque de Richelieu* (Paris, Athènes, 1966).

imperative need for a strong sovereign had been based on *internal* reasons, as articulated through the legal humanist tradition in the 16<sup>th</sup> century. But the French jurists left the consequences of “sovereignty” as to foreign policy to be drawn by the diplomacy of the *raison d’état*, as spectacularly illustrated by Richelieu’s manoeuvring between Catholic Spain and the Habsburgs on the one hand, and alliances with “heretical” Protestants and even the Turks on the other. Alliances, he once quipped, were “un fait d’État et non un fait de religion”.<sup>22</sup> Nevertheless, the works by Botero, Rohan and other *raison d’état* writers were fully compatible with religion and there is no reason to doubt Richelieu’s Catholic faith either. For they could be taken to suggest the presence of a more complex or more sophisticated sociological awareness about the conditions of the external world behind moral abstractions or treaties of peace or alliance which could be invoked so as to fight the cause of religion in the most efficient way: “ce qui est fait pour l’Etat est fait pour Dieu qui en est la base et le fondement”.<sup>23</sup> Introduced as an impartial “third party”, to overcome religious conflict, statehood suggested the existence of a special type of knowledge that religious faith or moral virtue lacked but that could always be enlisted for the furtherance of religious or moral purposes.<sup>24</sup>

That the knowledge of statehood could be articulated in the legal language of sovereignty showed that *raison d’état* was by no means an intrinsically anti-legal move and in Germany natural lawyers such as Samuel Pufendorf would in due course integrate such techniques into the naturalist frame.<sup>25</sup> In France, however, an express turn against law and lawyers as possessors of the knowledge of statehood and thus as counsels of kings took place when the *raison d’état* was understood as above all *derogation* from the common law in extraordinary situations and – contra Bodin and the constitutional tradition – incapable of articulation under regular principles of government. In his powerful work on the *Considérations politiques sur les coups d’État* (1639), Gabriel Naudé (1600-1653), secretary of Roman cardinals, later Mazarin’s librarian, specifically attacked efforts to integrate the high politics of the “*arcana*”, to which he included not only secret diplomacy but above all such extraordinary measures such as coups d’état by the ruler and assassinations of political opponents, into principles of public law and government. To attempt this was to commit a fundamental category mistake. Such extraordinary measures could never be made subject of parliamentary debates or scholarly reasoning. The logic of statecraft from which they emerged could only be contemplated by princes and their closest advisors outside moral or legal categories.

<sup>22</sup> Richelieu, ‘La Ligue nécessaire’, 1625, quoted in Gauchet, ‘L’État au miroir de la raison d’État’ *supra* note 5, 218.

<sup>23</sup> Richelieu, ‘Testament politique’, quoted in Gauchet, ‘L’État au miroir de la raison d’État’ *supra* note 5, 220.

<sup>24</sup> Gauchet, ‘L’État au miroir de la raison d’État’ *supra* note 5, 235-7.

<sup>25</sup> See section III below.

Their secrecy was a precondition of their success.<sup>26</sup> In this specifically French view, matters of state are so extremely complicated, even mysterious, that it paradoxically re-sacralises what began as secular statehood and lifts important matters of policy, especially foreign policy, from the realm of common law and jurisprudence. It is perhaps a paradox that the generation of lawyers following Bodin contributed to this by combining his theory of legislative sovereignty with their notion of divine right, thus “enhanc[ing] to the fullest extent the miraculous and quasi-divine qualities of kingship”.<sup>27</sup> Even as the distinction between the King’s ordinary and extraordinary powers came about as a juristic construction, often by recourse to the doctrine of necessity (“that knows no law”), it pointed to a special knowledge that was needed to grasp the mysteries of ruling that was then taken over by the minuscule class of political theologians around the prince while lawyers were relegated in the role of lesser magistrates with little or no access to the court.<sup>28</sup>

By the beginning of the period of personal rule by Louis XIV in 1661, French jurists had lost what remained of their 16<sup>th</sup> century role as the leading political theorists of the realm. The distinction between private and public law was used so as to vacate the latter from jurisprudential developments as the newly appointed Royal Professors “devoted their efforts to analyzing the almost endless intricacies of private law”.<sup>29</sup> None of the few jurists who wrote extensively of public law during the reign of Louis XIV made important contributions to how one should think about the nature of sovereignty, and even less what one should say about its consequences to the external world.<sup>30</sup> They reaffirmed the divine right in a way that did away with their ability to articulate serious limits to Royal authority. Even as they followed Bodin by limiting absolute authority by reference to its *function* – the sovereign’s duty was to God and to his office – they rejected any institutional oversight as incompatible with it.<sup>31</sup> For example, the period’s most significant natural

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<sup>26</sup> Gabriel Naudé, *Considérations politiques sur les coups d’État*, (Lous Marin éd, Paris, Éditions de Paris, 1988). For a useful discussion, see Yves Charles Zarka, ‘Raison d’Etat, maximes d’Etat et coups d’Etat chez Gabriel Naudé’, in Zarka, *Raison et déraison*, *supra* note 4, 151- 169.

<sup>27</sup> Church, *Constitutional Thought*, *supra* note 8 , 250.

<sup>28</sup> On the divinisation of absolutist rule in France in the early 17<sup>th</sup> century, see Fanny Cosandey & Robert Descimon, *L’absolutisme en France. Histoire et historiographie* (Paris, Seuil, 2002), 84-93 and (on the ordinary/extraordinary powers distinction), 47-49.

<sup>29</sup> William F. Church, ‘The Decline of French Jurists as Political Theorists 1660-1789’, 5 *French Historical Studies* (1967), 6 and generally 1-40.

<sup>30</sup> See the analysis of the writings of Claude Fleury and Jean Domat in Church, ‘The Decline of French Jurists’, *supra* note 29, 10-23.

<sup>31</sup> Throughout the period of absolutism, French jurists insisted that “there existed final justice over and above all men, including the prince, and that he was bound by such principles”, Church, *Constitutional Thought*, *supra* note 8, 334. Nevertheless, institutional control would have violated the principle of undivided sovereignty. As Bossuet put it: « Les rois sont donc souimis comme les autres à l’équité des lois...mais ils sont pas souimis aux peines des lois : ou comme parle théologie, ils sont soumis aux lois , non nquant à la puissance coactive, mais quant à la puissance directive », Jacques-Bénigne Bossuet, *Politique tirée des propres paroles de l’Écriture sainte* (1684/1709, Préfacé par A. Philonenko, Paris, Dalloz 2003), L IV, I, 4th proposition (p ???).

lawyer – one of the very few in France – Jean Domat (1625-1695) had no doubt about the presence of universally valid principles of divine and natural law that bound all human beings, including the King. Yet he saw this perfectly compatible with the absolute superiority of the French King over any secular authority.<sup>32</sup> No wonder that external observers such as Leibniz, for example, were convinced that the policy of the “Most Christian King” was devoted to the establishment of universal monarchy but that would, unless directed against common enemies such as the Turks, lead to Europe’s destruction.<sup>33</sup> Also in practice, the doctrine of divine right was never articulated in terms of very specific legal maxims that would call for the integration of legal experts as royal counsel. Not that official maxims would have been lacking. On the contrary, Louis’ principal ideologist Jacques-Bénigne Bossuet (1627-1704) elaborated at length on the rights and obligations attached to the sovereign position. The prince was a servant to his subjects and accountable to his conscience for complying with natural and divine laws. Thus the just causes of war were limited to unjust denial of passage, unprovoked aggression or violations of the privileges and immunities of ambassadors and the list of unjust causes included a litany of vices such as ambition, greed, jealousy, search for glory, and so on.<sup>34</sup> All of this came about as commentary on passages in the Bible and indicated that the proper perspective for debates on the rights and duties between princes was given not by law but by theology. Among Bossuet’s extensive discussion of the proper training or virtues of counsel for princes, not a single mention is made of lawyers.<sup>35</sup> Concentration on the extraordinary moments of great policy, linked with utmost secrecy in diplomacy and political decision-making notoriously prevented the emergence of any coherent French foreign policy for most the 17<sup>th</sup> century. For example, it was only in 1688 that the French Foreign Ministry set up an archive and it was the last foreign minister of Louis, Marquise de Torcy who began organising French diplomacy with a view to professionalism and continuity. The training of diplomats was commenced in 1712 at an *Académie politique* at the Louvre in Paris.<sup>36</sup> Yet even this was felt too important an encroachment on the traditions so that it was closed after seven years of operation. France was, of course, engaged in a very wide network of sending and receiving ambassadors and

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<sup>32</sup> See e.g. Simone Goyard-Fabre, ‘César a besoin de Dieu. La loi naturelle ‘selon Jean Domat’, in Henry Méchoulan & Joël Cornette, *L’État classique 1652-1715* (Paris, Vrin 1996), 153-160.

<sup>33</sup> See e.g. Gottfried Wilhelm Leibniz, ‘Mars Christianissimus’, *Political Writings* (2<sup>nd</sup> ed. P. Riley ed. Cambridge University Press, 1988), 121-145.

<sup>34</sup> Jacques-Bénigne Bossuet, *Politique tirée des propres paroles de l’Écriture sainte* (1684/1709, Préfacé par A. Philonenko, Paris, Dalloz 2003), L. X, Articles I-II (303-318).

<sup>35</sup> Id. L.X, Articles II-III (376-404)

<sup>36</sup> Lucien Bély, *L’art de la paix en Europe. Naissance de la diplomatie moderne XVIe-XVIIIe siècles* (Paris, PUF 2007), 295-6.

other envoys, and this practice was acknowledged to be part of *jus gentium*, there was still a wide variety of views about the scope of their privileges and immunities.<sup>37</sup>

The spirit of the time can be gleaned from Francois de Callières's (1645-1717) popular *L'Art de négocier sous Louis XIV* of 1716. De Callières was a member of the *Académie française*, and former secretary to the cabinet of Louis and his emissary in many countries as well as in the negotiations of the Peace of Ryswijk of 1697. His book was by far the most famous, and the most widely used piece in the literature of advice to ambassadors that emerged with permanent embassies in the late 17<sup>th</sup> century. De Callières was not at all one for deception or dishonesty. On the contrary, a good ambassador was to be a "honnête homme", characterised by civilised manners, an ability to listen, and of course to persuade. Negotiation was not just a technique but a way of life. De Caillière's view of jurists as negotiators was rather stereotypical. "Les gens de robe" he wrote, are often more diligent and hard-working and more organised than courtiers or military men but also less in possession of the subtlety needed in courts. They are useful in making peace or other treaties. But in general, other qualities are required in negotiations. For, he wrote:

« Cette habitude de juger lui fait prendre un air grave et de superiorité qui lui rend d'ordinaire l'esprit moins liant, d'abord plus difficile et les manières d'agir moins provenantes que celles de gens de la cour, accoutumés à vivre avec leurs supérieurs et avec leurs égaux ». <sup>38</sup>

The best-known efforts to argue for consistency, rules and even law among the nations in the French realm come from Gabriel Bonnot de Mably's (1709 – 1785) *Droit public de l'Europe fondé sur les traités* that came out in 1747 and contained a historical overview of the contents and conditions of the most important treaties since Westphalia. In the preface to his 3-volume treatise, Mably aligns his perspective firmly with that of Botero and Rohan: The purpose of this long-neglected exercise (of collecting treaties) is to "faire connaître les interest et la situation des Puissances lorsqu'ils ont entracté".<sup>39</sup> A decade later, Mably published an almost 300-page introduction to this work that tried to synthesise the principles that went into the negotiation of these treaties perfectly in the tradition of Botero and Rohan. The most important thing was for a nation to have a clear view of where its interests lay and what its relative position in Europe was.

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<sup>37</sup> As noted by one 17th century diplomat, David Géný de Prézac, "chacun prend son parti et s'efface de l'appuyer de raisons et d'exemples qui toutefois ne concluent rien définitivement », quoted in Bély *L'art de la paix en Europe*, *supra* note 36, 191.

<sup>38</sup> De Callières, 135.

<sup>39</sup> *Le droit public de l'Europe, fondé sur les Traités* (Tôme I, Nouvelle édition, Amsterdam & Leipzig, Arlestec & Merlan, 1741)

The rules about negotiation would never determine how to act in individual cases, but they were indispensable as a foundation for a coherent foreign policy that was a precondition for the attainment of a nation's real interests.<sup>40</sup> This meant that different rules would apply to dominant and rival powers, for powers of second and third order, and so on. All in all, Mably's *Droit public de l'Europe* is a structure of sovereign relationships that is firmly based on the history of European nations and a belief in the realization of everyone's real interests by a skilfully negotiated set of treaty arrangements. Strikingly, not a word is said by Mably anywhere about binding force or *Notrecht – pacta sunt servanda* or *rebus sic stantibus*. In the French tradition, such legalism is out of place in a world where sovereigns are, as Mably repeatedly writes, moved by passion and greed:

“C'est la passion, c'est l'avarice, c'est la crainte qui ont obligé toutes les nations à se rechercher mutuellement & à se demander, se refuser ou s'accorder des secours & ce sont encore les même passions qui dirigent leur commerce et leur portent à entretenir les unes chez les autres des Ambassadeurs ». <sup>41</sup>

The worst thing to Mably is not violation of treaty, but – like for Talleyrand somewhat later – the irrationality of politics. But he does assume that the two often go together. The main rule is this: « Toutes les négociations d'une puissance doivent être entrepris et conduits relativement à son intérêt fondamental ». <sup>42</sup> And after the real interest is found, it must be pursued with consistency and coherence, even when that might go against an immediate advantage. This is the foundation of the science of politics that Mably still – a few years before abandoning this type of commentary and beginning to write tracts for which he is sometimes remembered as the world's first communist – hope to construct to provide a foundation for his *Droit public de l'Europe*.

De Callières and Mably were perceptive describers of the diplomatic practices of the early Enlightenment from a French perspective. Their public law of Europe was less a fixed corpus of treaties or other official state acts than a process of constant negotiation and re-negotiation punctured by more or less intensive periods of warfare. Although their views were much more “liberal” than those of Naudé and the representatives of the *raison d'état*, they did not provide law or indeed lawyers with any important role in the determination of foreign policy, rather the contrary. Mably did represent something like a political jurisprudence in which the natural rights of European sovereigns were based on their real long-term interests formulated in view of what

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<sup>40</sup> “Chaque puissance de l'Europe doit donc, suivant les différences des ses forces, de ses lois politiques, et de la position de ses provinces, se faire une manière différente de n'gocier, ou de traités avec les étrangers. », Mably, 29.

<sup>41</sup> Mably, 15 ?

<sup>42</sup> Mably, 22-23.

history, geography, resources and constitutions suggested as effective policy. Realistic, even cynical on the surface, his brand of law public law was exhausted in the search for a reasonable equilibrium between nations in which all would receive their due if only rational principles of negotiation were being employed.

The fact is that no significant international law tradition arose at all in pre-revolutionary France. In part, as I have presented it here, this is due to the powerful centralism of the absolutist French State and the prevalence of the *raison d'état* that was hostile to law and lawyers meddling with foreign policy. In part, this must have followed also from the legal academy's predominantly historical and Gallicist orientation. If the French law faculties were in the 16<sup>th</sup> and 17<sup>th</sup> centuries the heartland of the humanist movement, this meant that they did not orient themselves towards universal principles but to linguistic and historical studies that focused on the development of the intensely French *droit commun*.<sup>43</sup> The most significant writing on the law of nations in the French language came not from France but from the Huguenot Diaspora, particularly Jean Barbeyrac who spent most of his life as a professor in Berlin and whose fame is due to his translation of Grotius and Pufendorf into the French language, with long commentaries by himself. Both he and his colleague Jean Burlamaqui came from and wrote in the Protestant political tradition of natural law to which I will turn later as I come to Germany. In this world, Emer de Vattel from Switzerland emerges as by far the most accomplished writer on the application of natural law in the relations between nations and sovereigns. His influence in France in the 18<sup>th</sup> century, however, remains quite limited.

Now the opposite of this tradition was the pacifist federalism and the critique of the European diplomatic system by the *philosophes*. The most famous piece of writing here is the Abbé de Saint-Pierre's *Project for Settling an Everlasting Peace in Europe* of 1713 that continued in the style of European peace proposals from the previous century manifested in works such as Eméric Crucé's *Nouveau Cynée* (1623) and the *Grand Design* written by Henri IV's foreign Minister Duc de Sully and credited to his former chief (1638/1662). The former work had come from the hand of a Parisian educator known for his advocacy of religious tolerance. It rejected the values of war and – foreshadowing Comte on its rejection of jurisprudence as socially worthless – highlighted the pacifist qualities of trade and production on the basis of natural reason. Crucé proposed the setting up of a “permanent and perpetual union” between European sovereigns, including Russia and Turkey “to make peace unalterable in Europe” and the setting up of a permanent assembly of

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<sup>43</sup> On this tradition see Donald R. Kelley, *Foundations of Modern Historical Scholarship. Language, Law and History in the French Renaissance* (Columbia University Press, 1970).

ambassadors of all sovereigns, including those of China, Japan and even the Mongol empire.<sup>44</sup> The latter, several times amended and in part based on forged documents was essentially a proposal to limit Habsburg pretensions by moving the centre of the Empire from Vienna to Paris. It also suggested the reorganization of European political order by expelling Turkey and Russia and by coordinating European colonial conquest.<sup>45</sup> The famous proposal by Saint-Pierre sought to freeze the territorial and constitutional order of Europe and to provide for a system of reactions against such change. It was to be ruled by Senate acting usually through majority vote. It was a proposal that had no chance whatever of being actually subjected to negotiation but it did provide a basis, perhaps surprisingly, for almost a century of debates about what to do with the ills of the old regime. All the philosophers – Montesquieu, Voltaire, Diderot – and in particular Rousseau in turn invoked it in their polemics against war, diplomacy and European treaties.<sup>46</sup> All of them were convinced of the rational beauty of the Abbé’s proposal while deeply sceptical about the possibilities of its realisation. In the article “Treaty” in the Encyclopaedia of Diderot and D’Alembert, Joucourt observes that it is not treaties but necessity that binds the sovereigns. Nevertheless he continues:

« puisque les traités publics sont une partie considérable de droit des gens, nous en considérons les principes et les règles, comme si c’étaient des choses permanentes ».<sup>47</sup>

“Comme si...” In this as in other matters, the philosophers were ambiguous. They rejected war out of ideological reasons but were unable to agree whether the spirit of commerce should take its place or would merely incite passions that would lead into further war.<sup>48</sup> They insisted on the strict equality of nations but also that a stable international order would require constitutional change in most of them. They hated the old diplomacy of the balance of power but – like Rousseau – preached that equilibrium was the only firm basis of European order.<sup>49</sup> They agreed on the barbarism of European war, especially was waged outside Europe, and held the just war theory as an apology for

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<sup>44</sup> Em. Crucé, *Le nouveau Cynée ou discussion d’occasions et de moyens d’établir la paix générale et la liberté de commerce par tout le monde* (Paris, Villerey, 1623), 60-77.

<sup>45</sup> For a discussion of the content and context of the proposals, see F.H. Hinsley, *Power and the Pursuit of Peace* (Cambridge University Press, 1963), 20-29; Jean-Pierre Blois, *L’Europe à l’Epoque moderne XVIe-XVIIIe siècles. Origines, utopies et réalités de l’Europe XVIe-XVIIIe siècle* (Paris, Colin 1999), 165-184.

<sup>46</sup> For a thorough overview, see Marc Bélissa, Marc Belissa, *Fraternité universelle et intérêt national, 1713-1795. Les cosmopolitiques du droit des gens* (Paris, Kimé, 1998), 69-120.

<sup>47</sup> Bélissa, *Fraternité universelle* 46, 93.

<sup>48</sup> For as Rousseau wrote, “abundance arouses greed ; the more one gets, the more one desires”, The State of War, Chris Brown, Terry Nardin & Nicholas Rengger, *International Relations in Political Theory. Texts from the Ancient Greeks to the First World War* (Cambridge University Press 2002), 425.

<sup>49</sup> Jean-Jacques Rousseau, ‘Extrait du projet de paix perpetuelle de M. l’Abbé de Saint-Pierre’, in *Oeuvres Complètes. Contrat Social* (Paris, Dalibon, 1826), 411.

it. They did allow defensive war, however, but were naively ignorant of its problems. Montesquieu writes:

“But with states the right of defence carries along with it sometimes the necessity of attacking; as for instance, when one nation sees that a continuation of peace will enable another to destroy her and that to attack that nation instantly is the only way to prevent her own destruction”.<sup>50</sup>

Neither Montesquieu nor Rousseau comes up with anything like a stable international law. They attack European practices of diplomacy, warfare and treaty-making but have only half-hearted abstractions to replace them with. Montesquieu’s natural law of nations is quickly stated: “Different nations ought in time of peace to do to one another all the good they can, and in times of war as little injury as possible, without prejudicing their real interests”.<sup>51</sup> His more serious work then concentrates on a sociologically based natural in which that which is “natural” is precisely what is not universal but local, in accordance with the history and situation of each nation – a continuation of Mably and Rohan, in other words. Rousseau is plainly pessimistic. Like Mably, he attacks the present international system as completely dependent on the whims of sovereigns. Any serious international reform would have to begin with a prior internal transformation. Yet this would still leave hostile nations juxtaposed against each other in a way that will foment further conflict and war. For Rousseau, the price of internal peace attained through though the social contract is the externalisation of aggression – that is endemic, structurally determined warfare between nations.<sup>52</sup> In his commentary to the proposals of the Abbé de Saint-Pierre, Rousseau seems to argue that peace can only exist for a state that withdraws wholly from international contacts.<sup>53</sup> In such a situation, international law can hardly have any reality:

“As for what is commonly called international law, however, its laws lack any sanction, they are unquestionably mere illusions, even feebler than the laws of nature. The latter at least speak in the heart of individual men; whereas the decisions of international law, having no other guarantee than their usefulness to the power who submits them, are only respected in so far as interest accords with them”.<sup>54</sup>

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<sup>50</sup> Baron de Montesquieu, *The Spirit of the Laws* (T. Nugent transl. F. Neumann intr. New York, Hafner, 1949), 133.

<sup>51</sup> Montesquieu, *Spirit of the Laws*, *supra* note 50, 5.

<sup>52</sup> Jean-Jacques Rousseau, *A Discourse on Inequality* (M. Cranston transl & intr, London, Penguin 1984), 122-123. See also *idem*, ‘The State of War’, *supra* note 48, 418-421 where the “relational” analysis of State power and fear as well as the insistence that no State can remain passive as the wealth or power of those around it changes resembles the *raison d’état* views of Rohan, Mably and others. Rousseau was, however, a notoriously ambiguous writer and many passages especially from his *Discourse on the* For a plausible challenge the (standard) reading of Rousseau, see Michael C. Williams, *The Realist Tradition and the Limits of International Relations* (Cambridge University Press, 2005), 52-81.

<sup>53</sup> See David Boucher, *Political Theories of International Relations* (Oxford University Press, 1998), 295.

<sup>54</sup> Rousseau, ‘The State of War’, *supra* note 48, 423-4.

At the outset of the revolution, “international law” meant in France the positive law of war as outlined by Grotius and the practice of sending and receiving ambassadors.<sup>55</sup> The revolutionaries did preach in the name of a more ambitious the law of nations. In April 1795 the Abbé Grégoire – the defender of the Jews, the initiator of the abolition of slavery in the French colonies - submitted to the French *National Convention* a proposal for the adoption of a *déclaration du droit des gens*. In 21 Articles, the declaration sought to do to the world what the *déclaration des droits de l’homme et du citoyen* had done to the *ancien régime* at home. The basis of the new order would be the right of “independence and sovereignty” of every European nation (Article 2). Every nation was to treat every other nation as it would wish itself to be treated (Article 3). It would have an obligation to peace, and if at war, it was to harm its adversary as little as possible (Article 4). There would be no distinction between representatives of nations and ambassadors would enjoy immunity only inasmuch as that would be necessary for the accomplishment of their mission (Articles 19 and 20).<sup>56</sup>

The Assembly never adopted the declaration. The reality of the wars of the revolution could not be accommodated with its principles. Otherwise forgotten, it survives perhaps most conspicuously as the object of the new foreword written by Georg-Friedrich von Martens (1756-1821) from Göttingen – soon to be occupied by Napoleon’s forces – to the 1796 German edition of his widely read German-language *Introduction to modern international law*, repeated in the book’s 1820 and 1864 French editions.<sup>57</sup> There is no lack of aspects of international law, he wrote, where agreement between European powers would not be desirable. But to believe that they would suddenly adopt a general codex of positive international law was devoid of any likelihood. The proposal was only warmed-up version of projects for eternal peace that must, as long as men remain men, holding their fate in their own hands and seeking their own good, remain a pure chimera.<sup>58</sup>

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The dominant strand in the French debates from the end of the Wars of Religion to the revolution is an effort to give an instrumentally useful and if possible “scientific” account of the conditions (the “state”) of France in comparison to other States so as to provide a realistic basis for the government of the country in its internal and external matters. From Bodin and the *raison d’état* writers down to

<sup>55</sup> Bélissa, *Fraternité universelle*, *supra note* 46, 48.

<sup>56</sup> For the proposal, see Boris Mirkine-Guetzewitch, 'L'influence de la révolution française sur le développement du droit international dans l'Europe orientale', 22 RdC (1928-II), p. 309-316; Wilhelm Grewe, *The Epochs of International Law* (Berlin, de Gruyter 2000), p. 416,

<sup>57</sup> G-F von Martens, *Einleitung in das positive europäische Völkerrecht* (Dieterich, Göttingen, 1796), "Vorbericht"

<sup>58</sup> Martens, *Einleitung*, 1796 p. vii.

Mably, Montesquieu and Rousseau, the writers on public law try to grasp the State in terms of its relative wealth and power – its territory, resources, climate, the character and state of its population. The policy of mercantilism or “Colbertism” was a typical offshoot of such thinking as it assumed that economic wealth was a zero-sum game about the possession of precious metals and encouraged laws to maximise the accumulation of such metals at home. By the middle of the 18<sup>th</sup> century, however, national wealth and power were seen much more broadly in terms of the productive uses of national resources and exchanges with the outside world, including through war and conquest. The doctrine of legislative sovereignty and the policy of the *raison d'état* both supported wide governmental interventions that, again, required the development of specialised knowledges of the state as a collective phenomenon – of its resources, industries, its production and trading patterns and so on. But it was one thing to state that the State was to advance the “interests”, “advantages or “happiness” of itself and another to know what was needed for this purpose: “Récolter exploiter, classer, diffuser l’information, voilà la fonction et les révélations essentielles de l’Etat moderne”.<sup>59</sup> The collection of data, and the compilation of statistics and archives became routine aspects of the government of the State. This was no different extended in foreign affairs. If economic interests became a *casus belli*, as they did in the 18<sup>th</sup> century, this meant that economic advisors would also have to attend the diplomatic councils:

« Il s’agissait d’évaluer les relations internationales en terme de puissance commerciale et économique : seule une banque de données pouvait permettre au souverain d’assurer la bonne gestion de ses alliances ». <sup>60</sup>

On this, at least, members in the old and the new regimes agreed. They shared the calculating spirit of naturalist philosophy and the new natural sciences as well as of the new economy that taught that wealth (and hence power) could be articulated in terms of natural laws. Towards the middle of the 18<sup>th</sup> century the Physiocrats taught that society’s economic organisation ought to follow the natural order manifested in economic (and thus non-political) laws two of the most important of which were the right of property and economic freedom: “Ainsi est exprimé ce qui sera et demeure encore la base du libéralisme économique: la libre recherche des intérêts individuels comme moyen de satisfaction de l’intérêt général”.<sup>61</sup> Exactly the same point would be made with that great 18<sup>th</sup> century obsession, the balance of power.

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<sup>59</sup> Joël Cornette, ‘La tente de Darius’, in Méchoulan & Cornette, *L’Etat classique*, supra note 32, 22-23.

<sup>60</sup> Cornette, ‘La tente de Darius’, supra note 59, 25.

<sup>61</sup> Jacques Valier, *Brève histoire de la pensée économique d’Aristote à nos jours* (Paris, Flammarion 2005), 43.

By this time it was held evident that national power resulted from an enormously complex set of variables not only of a military but of an economic, industrial, demographic, geographical, cultural and political character. The way nations interacted with each other was described in terms of a “system” of the balance of power understood to be “self-sustaining, essentially a product of nature and morally neutral”.<sup>62</sup> Like the laws of the domestic market, those of foreign policy were seen in almost physical terms. Gradually, however, the analogy between the principles that governed physical or biological nature and those that governed the international world moved beyond metaphor. The assumption that the princes existed between themselves in a “state of nature” was interpreted to mean that their actions were conditioned by the natural laws of the balance of power that they could not change but they could use more or less wisely so as to enhance national power, wealth and “happiness”.

The management of the balance, however, was an enormously complex undertaking, precisely because national “power” was seen as a function of so many disparate factors. Above all, it seemed antithetical to the application of fixed legal rules and principles. The binary code legal/illegal would only strike at individual events in their specific, individual quality – particular military or diplomatic actions, changes of alliance or policy. This was deeply unsatisfactory, as the whole tradition from Rohan to Rousseau had tried to explain. One needed to develop a *systemic* view of the international world, to see it as an interrelated whole. And one needed to assume a liberty to act not only against formally “illegal” activities or direct threats but also, and perhaps above all, to apparently insignificant, barely visible changes in any of the elements of national power that might have an impact on the equilibrium, and thus to one’s own position. And such action might need to be taken in some *other* area that might be wholly remote from where the original event took place. When Rousseau or other 18<sup>th</sup> century French thinkers wrote that Europe was a “system”, they were not only addressing the perceived or desired cultural homogeneity of the continent but employing a scientific vocabulary that hooked on the determinism of Machiavellian *fortuna* but suggested that with modern means of analysis and experiment, one could channel its course to one’s favour or at least the detriment of one’s adversary.

But this required that such reactions were be integrated in the social processes themselves, that they would be made a spontaneous and seemingly natural aspects of the “system” itself. In economic thought, it began to transpire that it was pointless or even counter-productive to try to oppose the

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<sup>62</sup> Michael Sheehan, *The Balance of Power. History & Theory* (London, Routledge 1996), 105. For an example, see e.g. Rousseau, *Extrait*, supra note 49, 400.

spontaneous passions people have by prohibitive laws; such passions ought on contrary to be channelled to valuable purposes so that the pursuit of private gain would ultimately be for the general benefit.<sup>63</sup> Encouraging economic freedom and free trade was only one aspect of this new technique of power; it spread to governmental practices of health and welfare, education, agriculture and industrial production, under the general constitutional principle that it was the State's function to act in view of the interests and happiness of all.<sup>64</sup> In the field of foreign policy, balance of power thinking portrayed the external world – the international “system” – as another *resource* that could be exploited for that same purpose. But this required wholly different expertise from that possessed by the natural or international lawyer. It did call for the perfection of the diplomatic machine as a technique for collecting all relevant data from different parts of the international “system”. Hence France's leading role in 18<sup>th</sup> century diplomacy. And it required a mixture of analytic expertise, secret deliberation, foresight, courage and rapidity at home to grasp at opportunities and to prevent threats as soon as they emerged. If there was in fact no “international law tradition” in France during the Enlightenment, this was precisely because its message seemed simplistic and useless for the wise government of the State. To the extent that lawyers such as Vattel did accept the “balance” as a legal principle (and thus the right to react to “disturbances” by any means necessary),<sup>65</sup> those lawyers were reconceiving law in *raison d'état* terms that may have appeared a plausible and even clever updating of their craft but which bore the heavy long-term cost of surrendering the reins of power to others – to military and economic advisors, diplomats and so on.<sup>66</sup>

### III GERMANY

The search for new political languages thrives in periods of crisis and what Paul Hazard calls the “crisis of the late-17<sup>th</sup> century” was felt most acutely in Germany. The Thirty-Year's war had done away with up to 50 per cent of the rural and around one third of the urban population.<sup>67</sup> Cultural life of local communities was wiped out, its economic base destroyed. The peace of 1648 consolidated

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<sup>63</sup> This transformation is best told in Albert O. Hirschman, *The Passions and the Interests. Political Arguments for Capitalism before its Triumph* (Twentieth Anniversary Edition, Princeton University Press, 1997).

<sup>64</sup> The rise of such new types of technologies of power is the central argument in Michel Foucault, *Security, Territory, Population. Cours au Collège de France 1977-1978* (Paris, Gallimard/Seuil 2005).

<sup>65</sup> Emer de Vattel, *Droit des gens ou principes de la loi naturelle appliquées à la conduite et aux affaires des nations et des souverains* (Londres 1758), T II, L III, § 42-44 (32-37)

<sup>66</sup> See e.g. Vattel's stress on the need that the sovereign as “Père tendre et sage” knows the relative position and resources of his nation as compared to those of others in *id.* TI, LI, Ch IV, § 41 (43).

<sup>67</sup> The number of inhabitants in Germany declined from 15-16 million in 1620 to 10 million in 1650. Rudolf Vierhaus, *Germany in the Age of Absolutism* (Cambridge University Press, 1988), p. 3. It took more than 100 years, until the 1720s for the population levels to reach pre-war status, *id.* p. 14.

the fragmentation of the Holy Roman Empire into a patchwork of estates – larger and smaller territorial units enjoying de facto independence from the imperial centre. It located the confessions – Lutheran, Calvinist and Catholic – within particular territorial regimes, thus fostering “doctrinal distinctiveness, distrust and misunderstanding”.<sup>68</sup> As the historian Rudolf Vierhaus concludes: “it forced a search for meaning and created profound anxieties about the meaninglessness of existence”.<sup>69</sup>

One of the novel vocabularies that offered promise of a better life was natural law, introduced in Germany by Hugo Grotius and Thomas Hobbes.<sup>70</sup> For the former, emerging forms of State power were to be analysed by reference to a sociability existing naturally in the human heart. The quest for peace and order coalesced with the pursuit of the good. The natural law proposed by Hobbes, again, was a mechanism through which human beings – by extension, their states – were moved by passion, desire and self-love and thus could be tamed only by fear.<sup>71</sup> In the one case love, in the other overwhelming force were suggested as the origin of human society and the vocabulary of its government. Neither was in evidence in the Holy Roman Empire of the German Nation, the largest chunk of organised authority on the continent. The Empire had been weakened in the peace of Westphalia by the right given to the territorial estates to form alliances with outside powers and by the position of France and Sweden as guarantors of the agreement. But the *Landeshoheit* of territorial rulers was also limited by imperial law and institutions.<sup>72</sup> Neither Grotius nor Hobbes could quite be used to capture the complex political and constitutional reality of the old Empire or, *a fortiori*, to guide the German princes and their estates out from the long period of crisis. Instead, this was offered by an eclectic and sociologically oriented natural law that amalgamated the perspective of the *ragion di stato* in a way that provides the appropriate context for understanding not only German law but also the law of nations that we have inherited from these debates.

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<sup>68</sup> Id. 62.

<sup>69</sup> Id. p. 6.

<sup>70</sup> Ernst Reibstein, ‘Deutsche Grotius-Kommentarien bis zu Christian Wolff’, 15 *ZaöRV* (1953-54), 76-102 and Horst Dreitzel, ‘The Reception of Hobbes in the Political theory of the early German Enlightenment’, 29 *History of European Ideas* (2003), 255-289. .

<sup>71</sup> For the limited role of inter-state relations in Hobbes, see however, David Armitage, ‘Hobbes and the Foundations of Modern International Thought’, in Annabel Brett & James Tully, with Holly Hamilton-Blakeley, *Rethinking the Foundations of Modern Political Theory* (Cambridge University Press, 2007), 219-235.

<sup>72</sup> For general analysis, see Albrecht Randelzhofer, *Völkerrechtliche Aspekte des Heiligen Römischen Reiches nach 1648* (Berlin, Duncker & Humblot, 1967).

Towards the end of the Thirty-Years' war, a real flood of reason of states literature – often under the banner of *arcana imperii* – emerged in Germany.<sup>73</sup> Perhaps the most important participant in this debate was Hermann Conring from Helmstedt who argued that each of the three Aristotelian constitutional forms – monarchic, aristocratic and democratic – had its proper reason of state, understood as its *telos*.<sup>74</sup> Like Botero and almost all of his contemporaries, Conring made the distinction between good and bad *Staatsräson* in a way that led him to discuss the constitutional situation in Germany by seeking moderate compromises between constitutional alternatives. Conring's oeuvre marks a turning-point in German law to history and context, away from abstract principles of Roman law, including the old theory of imperial translation.<sup>75</sup> It now becomes a scientific vocabulary for debating the proper way to govern particular types of States.<sup>76</sup> Conring's training as a political scientist – but he was also a medical doctor – pushed him towards analyses of statehood in terms of health or sickness in view of the welfare and happiness – *Glückseligkeit* – of the population.<sup>77</sup> Perhaps the same background suggested to him to view the practice of government not as a theoretical science but a practical craft, *Staatskunst* or *Staatskugheit*.<sup>78</sup> To put this practice on firm ground, he suggested the development of empirically based analyses of particular states – *notitia rerumpublicarum* – on the basis of which each State could be governed in a scientific way.

Soon after the middle of the 17<sup>th</sup> century, the vocabulary of reason of state – though not the idea – began to disappear. With the growth of absolutism, political culture changed. Territorial states with powerful rulers were in place and it no longer seemed useful or politically advisable to speculate on *arcana*. At this point, writes Münkler, “Die Macht schweigt”.<sup>79</sup> The new vocabulary or natural law would foreground clarity and order, peace and security. The legal ideal was constructed *more*

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<sup>73</sup> See Michael Stolleis, *Staat und Staatsräson in der frühen Neuzeit. Studien zur Geschichte des öffentlichen Rechts*, (Frankfurt, Suhrkamp, 1990); Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band 1600-1800* (Munich, Beck, 1988), 197-211 and also many of the essays in Roman Schnur (ed.), *Staatsräson. Studien zur Geschichte eines politischen Begriffs* (Berlin, Duncker & Humblot, 1975).

<sup>74</sup> For Conring as a reason of state theorist, see Stolleis, *Staat und Staatsräson*, *supra* note 73, 73-105. On Conring as the founder of the modern theory of state, see Arno Leifert, ‘Conring und die Begründung der Staatenkunst’, in Michael Stolleis, *Hermann Conring (1606-1681). Beiträge zu Leben und Werk* (Berlin, Duncker & Humblot, 1983), 201-214.

<sup>75</sup> For Conring's critique of the “fable” that the Corpus juris was applied in Germany at the order of emperor Lothar III, see Hermann Conring, *Der Ursprung des Deutschen Rechts* (Ilse Hoffmann-Meckenstock, trans., Frankfurt, Insel, 1994), Ch XXI-XXV (131-168).

<sup>76</sup> See Dietman Willoweit, ‘Hermann Conring’, in Michael Stolleis (ed.), *Staatsdenker in der frühen Neuzeit* (Munich, Beck, 1994), 134-140. Stolleis, *Staat und Staatsräson*, *supra* note 73, 82-3.

<sup>77</sup> See e.g. the concluding chapter in Conring's analysis of the origins of the German constitution, Conring, *Der Ursprung*, *supra* note 75, 237-249.

<sup>78</sup> Willoweit, ‘Hermann Conring’, *supra* note, 76 132. For Conring, it was not for the universities to guide States but for States to order what shall be taught at universities. *Die Ursprung*, *supra* note 75, 249.

<sup>79</sup> Herfried Münkler, *Im Namen des Staates. Die Begründung der Staatsraison in der frühen Neuzeit* (Hamburg, S. Fischer, 1987), 299.

*geometrico*.<sup>80</sup> The key person here is Samuel Pufendorf (1632–1694), son of a Lutheran Minister from Saxony. In his writings, natural law developed into an explanation of the secular origins of civil society and provided the universal principles regulating all social life. Pufendorf was aware that he was treading in the footsteps of Grotius and Hobbes. He found a middle-position in a sociologically expressed reason of states that united the pursuit of individual interests and the interests of civil society and provided a solid and often empirically argued basis for the government of the latter that was oblivious to confessional division. For Pufendorf, the old university metaphysics was a “major intellectual obstacle and institutional enemy”.<sup>81</sup> In an often hostile academic environment, he found support for his pragmatically oriented natural law not only from Conring but from Karl Ludwig, the Electoral prince of the Palatinate who appointed him to the chair of the law of nature and of nations in Heidelberg in 1660.<sup>82</sup> Like Pufendorf, most German public lawyers were employed as professional advisors to a territorial ruler or as university professors received their salary from the prince. Understandably, they were expected to reciprocate by teaching their princes about how to rule their states so as to preserve their security and extend their government over its whole territory. In this, they continued the medieval tradition of the *Fürstenspiegel* in a scientific vocabulary that ensured them epistemic authority over princely rule.<sup>83</sup>

Pufendorf’s most famous contemporary work was his analysis of the constitution of the German empire under the Pseudonym of the Italian nobleman Severinus de Monzambano (1667).<sup>84</sup> This had been preceded by an extremely lively debate between German jurists in which some had taken the position that the Empire should be understood as an aristocracy, while others had defended the view of the Reich as a monarchy, with some of the emperor’s powers divided among the imperial estates.<sup>85</sup> For Pufendorf, none of these conceptualisations were historically credible. They all aimed to fit a complex historical and sociological reality into pre-existing abstract forms. The most famous sentence of that work – the one according to which the Reich was *monstrum simile*, resembled a monster – was a purely polemical expression that was not repeated in the second edition.<sup>86</sup>

Pufendorf’s point with the expression, and with the whole work was to turn the analysis around, and

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<sup>80</sup> Stolleis, *Staat und Staatsräson*, supra note 73, 71.

<sup>81</sup> Ian Hunter, *Rival Enlightenments* (Cambridge University Press, 2003), 148 and generally 148-196.

<sup>82</sup> For background on Pufendorf’s life and career, see e.g. Leonard Krieger, *The Politics of Discretion. Pufendorf and the Acceptance of Natural Law* (Chicago university Press, 1965), 11-33.

<sup>83</sup> See also Stolleis, *Staat und Staatsräson*, 45-49.

<sup>84</sup> Samuel von Pufendorf, *Severinus de Monzambano. Über die Verfassung des deutschen Reiches* (H. Breslau transl., Berlin, Hobbing 1922).

<sup>85</sup> For a recent overview of the debate, see e.g. Peter H. Wilson, ‘Still a Monstrosity? Some Reflections on Early Modern German Statehood’, 49 *The Historical Journal* (2006), 567-576. See also Randelzhofer, *Völkerrechtliche Aspekte*, supra note 72, 68-84.

<sup>86</sup> Pufendorf, *Severinus de Monzambano*, Ch. VI, § 9 (94).

to characterise the nature of the Empire in view of the real relations that pertained between its different parts, the imperial centre and the different classes of estates. From this perspective, the only realistic view was to characterise Germany as a *systema communitatis*, series of de facto relationships between moral persons that would not cease to develop, and for which the appropriate frame of analysis was not provided by abstract categories but by finding a workable balance between the *raison d'état* in the empire and that properly with the territorial States. Like Conring's analysis of the origins of the empire, Pufendorf's discussion of its constitutional form ended with a series of proposals that would take into account of the *Staatsräson* of the whole empire and provide "remedies" to its present "sicknesses" caused principally, in Pufendorf's view, by the confessional struggles. Although it is very hard to know what to make of his view of the Reich as a "system of States", it seems clear that this was a way to recognise the persisting "irregularity" of Germany as a State while avoiding going as far as to see it broken up into a confederation between fully sovereign States. It was a way to recognise the heterogeneity of the Reich while still defending its unity against external dangers – particularly the one commonly identified as the pursuit of universal monarchy by Louis XIV.<sup>87</sup> In this respect, *Monzambano* reads like a model for later efforts to ground an "international law" that would both recognise the full sovereignty of its subjects, and accept the relativity of that sovereignty vis-à-vis binding law. In both cases, the circle is squared by a pragmatic reading of the (rightly understood) interests of the members as fundamentally compatible with, or even indispensable in, the realization of the interests of the whole.

In *Monzambano*, Pufendorf sought to give a sociologically credible view of the constitution of the German Reich. His *De jure naturae et gentium* (1672) in a way universalised this effort, laying out a scientific way to speak not only about the laws of particular periods or locations but of law in general. He did this through his vocabulary of natural law that addressed what he called "moral entities", situated alongside physical entities and attached to particular situations, "offices", forms of status and civil position.<sup>88</sup> The world of physical entities was governed by the laws of physics; the world of moral entities – the human world – was governed by natural law. This latter world was the social or cultural world constantly created and transformed by human beings.<sup>89</sup> In founding law

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<sup>87</sup> For the best analyses of Pufendorf's views in this respect, see Bernd Roeck, *Reichssystem und Reichsherkommen. Die Diskussion über die Staatlichkeit des Reiches in der politischen Publizistik des 17. und 18. Jahrhunderts* (Stuttgart, Steiner, 1984), 27-49; Peter Schröder, 'The Constitution of the Holy Roman Empire After 1648: Samuel Pufendorf's Assessment in his *Monzambano*', 42 *The Historical Journal* (1999), 961-983.

<sup>88</sup> Hunter, *Rival Enlightenments*, *supra* note 81, 130-139.

<sup>89</sup> Pufendorf's role in foreshadowing the (Neo-Kantian) separation of *Naturwissenschaften* and *Geisteswissenschaften* is emphasized in Alfred Dufour, 'Pufendorf', in J.H. Burns & Mark Goldie, *The Cambridge History of Political Theory 1450-1700* (Cambridge University Press, 1991/2004), 564-5.

on a study of how that world operated, Pufendorf opened the way for early modern rulers of territorial states to extend and consolidate their power over the rivals – the clergy and aristocracy. Law was to be a matter of commanding and obeying and it peaked in the sovereign’s power to exert punishment. Of course, law was derived ultimately from God.<sup>90</sup> But nothing about its substance depended on God: it was theologically neutral – hence also its universality. As Pufendorf put his methodological dictum:

“For the nature of man has always been determined to sociality in general by the Creator, but the establishment of and entry into particular societies were left to men to decide in accordance to the guidance of reason...this discipline concerns not Christians alone but the race of all mortals”.<sup>91</sup>

In Pufendorf, natural law received scientific independence that harked back to an empirical anthropology – observation of human beings as they are now – and a historical view of civil society developing from immaturity (the state of nature) to maturity (culture, including modern statehood).<sup>92</sup> Pufendorf built on Grotius and Hobbes without collapsing his law either to the innate and thus religious notion of sociality in the former or to the mechanistic naturalism of the latter. He was able to avoid Hobbes’ extreme conclusions by agreeing with Grotius on the presence of what both called “sociality”. True, as Hobbes had argued, human behaviour was governed by self-love. But their self-love was not independent from their capacity to reason. And reason showed that self-love in a world of pathetically weak human beings can only be realised by cultivating sociality:

“For nature has not commanded us to be sociable, to the extent that we neglect to take care of ourselves. Rather, the sociable attitude is cultivated by man in order that by the mutual exchange among many of assistance and property, we may be enabled to take care of our own concerns to greater advantage”.<sup>93</sup>

This is crucial. For natural law is no longer only a *limit* to human pursuits. It is also, and in this construction above all, an *empowerment*. By providing knowledge of the laws of sociality, natural law lays out the conditions that govern the realisation of self-love and social welfare. Following its commands we are able to fulfil our own desires. To produce a universally applicable account of these conditions, Pufendorf used the intellectual devise of the “state of nature” on the basis of

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<sup>90</sup> For God’s role in this argument, see Graig C. Carr & Michael J. Seidler (ed/transl), *The Political Writings of Samuel Pufendorf* (Oxford University Press, 1994), 369-372.

<sup>91</sup> Pufendorf, ‘Preface to the First Edition of DJN’, in Craig & Carr, *Political Writings*, *supra* note , 90, 97-98.

<sup>92</sup> See Hans Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft* (Göttingen, Vandenhoeck & Ruprecht 1973), 40-63.

<sup>93</sup> Pufendorf, *DJN*, Bk. II, Ch. 3 § 18

observation of human behaviour he witnessed around himself.<sup>94</sup> This allowed him to construct something like a natural history of human society as a learning process in which the inconveniences of nature persuade rational humans to create social and cultural institutions, including public power to provide peace and order, and to direct generalised self-love to the generation of common welfare. That power is called sovereignty. It is distinguished by its capacity to command and by the obligation among citizens to obey. That obligation, again, emerges from nature understood in a both factual and normative way: On the one hand, the duty to obey signifies is the capacity of the sovereign to exert punishment in case of non-obedience. On the other, it emerges from the natural gratitude citizens have towards the one that provides peace and welfare.<sup>95</sup> This two-sidedness reflects Pufendorf's eclecticism, his often noted wish to combine apparently opposite things and to arrive at ambiguous or open-ended results.<sup>96</sup> Whatever its weaknesses – attacked by Leibniz among others – this combinatory approach is absolutely crucial in an effort to found an autonomous legal discipline that would neither become branch of natural science (pure factuality) nor (Christian) morality (independent normativity). Like Machiavelli, Pufendorf drove a wedge between morality and politics: physical power would persuade human beings to use their reason for their own good.

This is law understood as the practice of wise government. “Let the welfare of the people be the supreme law”, Pufendorf writes,<sup>97</sup> and thereby lays out a functionalistic notion of law, submerged in a *raison d'état* world.<sup>98</sup> Here the sovereign is both completely free and completely bound at the same time. He is free to choose any course of action that seems necessary for the protection of citizens and providing for their welfare. This is highlighted in his not being bound by positive law. How could he be? After all “human laws are nothing else than decrees of the supreme sovereignty about those things which subjects must observe for the welfare of the state”.<sup>99</sup> On the other hand, he is completely bound by natural law, including the fundamental obligation, inscribed in the very definition of “sovereignty”, to advance the good of the people by creating the social conditions

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<sup>94</sup> Pufendorf, *DJN*, Bk. II, Ch. 2, 154-178.

<sup>95</sup> Pufendorf, *DJN*, Bk. I, Ch. 6, § 9-12 (where Pufendorf tried to show that obligation does not arise from the strength of the sovereign only).

<sup>96</sup> See e.g. Craig L. Carr & Michael J. Seidler, ‘Pufendorf’s Sociality and the Modern State’, *XVII History of Political Theory* (1996), 354-6. Also Ian Hunter stresses the way this duality – the construction of “obligation” on superior force and “just reasons” for obeying – come together with “security” as the key notion that is both a fact and a norm simultaneously, *Rival Enlightenments*, *supra* note 81, 154-163.

<sup>97</sup> Pufendorf, *DJN* Bk. VII, Ch 9 § 3 (1118)

<sup>98</sup> See Dufour, ‘Pufendorf’, *supra* note 89, 562, 584-5. Likewise (with special regard for ‘Monzambano’), Stolleis, ‘Textor und Pufendorf über die Ration Status Imperii im Jahre 1667, Staat und Staatsräson’, *supra* note, 107-133.

<sup>99</sup> Pufendorf, *DJN* Bk. VII, Ch 6 § 3. Thus Pufendorf “did not shirk from advocating the disarming of citizens, the disempowerment of ‘*potentes*’, forbidding the formation of parties, and proscribing any innovation, using trade policy to disadvantage other states and cancelling treaties according to changes in the political situation”, H. Dreitzel, *Reason of State and the Crisis of Political Aristotelianism: an Essay on the Development of 17<sup>th</sup> Century Political Philosophy*, 28 *History of European Ideas* (2002), 171n18.

within which their individual pursuits may be realized: “A King cannot by right order more things than are consistent with, or are judged to be consistent with, the end for which civil society was instituted”.<sup>100</sup>

This construction was not invented by Pufendorf. It was included in the medieval *Fürstenspiegel* literature and had received a modern articulation in the Bodinian notion of sovereignty that may have meant absolute power, freed from the constraint of “laws “(*loix*) but not from divine or natural law (*droit*) or indeed from *jus gentium*.<sup>101</sup> In France and Germany, various limits or directives were commonly understood as inherent attributes of the sovereign that could be rationalised as derivatives of his function to provide for the *bonum commune*: in the 17<sup>th</sup> century, “the monarch existed for the sake of the state, not the state for his sake”.<sup>102</sup> Even at the height of absolutism in France, the power of Louis XIV was limited by “fundamental laws” that came from many sources but in their minimal form governed the laws of royal succession and the inalienability of the realm but sometimes extended to a whole range of “constitutional” principles.<sup>103</sup>

To think of Pufendorf as an apologist of tyranny inasmuch his natural law contained no efficient jurisdiction over the secular prince would reflect an anachronistic assumption derived from the view that legal constraint can only mean being under the jurisdiction of secular magistrates, educated at law schools in the dictates of positive law. But for Pufendorf and his colleagues, wise government under natural law cannot possibly fall into the purview of secular magistrates. Magistrates rule on matters having to do with relations between citizens as well as between citizen and sovereign under positive law because that is what they are competent in doing. They cannot rule on the duties of princes under natural law because they have no special access to its complex demands.<sup>104</sup> For the latter purpose, other kinds of experts are needed – experts in statecraft and *raison d'état*, that is to say, experts in natural law. For it is natural law alone that has “society” as its object – that is to say, the normative meanings projected on things that can be reduced neither to morality (this is the

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<sup>100</sup> Pufendorf, *DJN* Bk. VII, Ch 2 § 11

<sup>101</sup> Christoph Link, ‘Anfänge des Staatsgedankens in der deutschen Staatsrechtslehre des 16. bis 18. Jahrhunderts, in Roman Schnur, *Die Rolle der Juristen bei der Entstehung des modernen Staates* (Berlin, Duncker & Humblot 1986), 781. On the limits of absolutism in Bodin, see Julian H. Franklin, *Jean Bodin et la naissance de la théorie absolutiste* (Paris, PUF, 1993), 115-150.

<sup>102</sup> Wolfgang Weber, “‘What a Good Ruler Should Not Do’: Theoretical Limits to Royal Power in European Theories of Absolutism, 1500-1700, 26 *Sixteenth Century Journal* (1995), 903. Weber’s account is a good, comparative summary of 17<sup>th</sup> century *topoi* that limited royal power in matters such as religion, seizure of private property, distribution of offices, education and the conduct of warfare, 905-912.

<sup>103</sup> Fanny Cosandey & Robert Descimon, *L’absolutisme en France. Histoire et historiographie* (Paris, Seil 2002), 52-75.

<sup>104</sup> Pufendorf, *DJN* 1301 § 10.

departure from Grotius and scholasticism) nor to natural science (this is the departure from Hobbes).

For Pufendorf and the whole system of reason of state, positive law cannot possibly constrain the ruler in his pursuit of the *salus populi*. It is part of the definition of positive law to be an assessment by the sovereign of what is needed to bring it about. The potential danger of princely arbitrariness is met by Pufendorf through the distinction he makes between the prince's private and his public will, and the way he reads the latter as normative because representative of the (enlightened) will of the population. This allows the social collectivity to emerge as the State at the centre of analysis, as the manifestation of sociality in political life.<sup>105</sup> To quote Pufendorf again, "it seems most suitable to define the state as a composite moral person whose will, a single strand woven out of many people's pacts, is considered the will of all, so that it can use the strength and faculties of individuals for the common peace and security".<sup>106</sup> In times of tranquil normality, the prince ought to set an example, and not raise the envy of his people by breaking the law.<sup>107</sup> The relationship between tranquil normality and the expectation that the prince will follow positive law like his subjects and the occasional need to reach beyond the law in crisis may change in time. These moments were already debated in 14<sup>th</sup> century Bolognese jurisprudence in terms of the distinction between "*potestas ordinaria*" and "*potestas absoluta*" and later commentators have varied in their assessment of their relative significance, the costs and benefits attending to each alternative.<sup>108</sup> The distinction has later been captured in political theories of necessity and the state of exception and the contemporary distinction between "idealism" and "realism" reflects different positions. But the important point is that the distinction between the two moments follows from a sociological reading of the world. This is embodied in the notion of an imperative necessity coming from the world, being subjected to the overwhelming power of the circumstances. Such necessity is not an extraneous intrusion from a world outside the law. It is implied in the view that law's point is to realise social purposes, call them welfare, *salus populi*, happiness. For as Aquinas already points out, some moments *are* more conducive to their realization than others, when exceptional measures are needed, so that "one should not observe a law if a case happens to arise in which observance of the law would be harmful to the commonweal" – adding immediately, however, that it is not for

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<sup>105</sup> Carr & Seidler, *Political Writings*, supra note , 373, 375-6.

<sup>106</sup> Pufendorf, *DJN Bk VII, Ch 2 § 13*.

<sup>107</sup> Pufendorf, *DJN Bk VII Ch 6 § 2*.

<sup>108</sup> Cosandey & Descimon, *L'absolutisme*, supra note 103, 45-49.

ordinary citizens to assess this. “Rather, only rulers are competent to make such interpretations, and they have authority in such cases to dispense citizens from laws”<sup>109</sup>

The same applies to external relations. Pufendorf never thought that the fact that the prince’s duties were grounded in the provision of protection and welfare for the population, instead of wishes about universal justice, lead into a constant state of war. *Socialitas* and scientific government applied to the prince’s behaviour in the world outside his realm as inside it. This is why the law of nations could only exist as natural law as the only truly universal (and scientific) law. There were no positive international law obligations because there was no such superior to whom other princes would have been obligated. For Pufendorf, the international world does not exist as an independent realm of historical factuality, even less as an autonomous repository of moral demands. Instead, its nature is that a structure of interactions between sovereigns – diplomacy, treaty-making and war, all of this governed by rational sociability. In practice, this meant that States – now described as “moral entities” – moved about in the world in a commercial spirit.<sup>110</sup> The argument from self-love and weakness portrayed Europe as a conglomerate of egoistic but interdependent sovereigns whose interest was to cooperate, not to fight. Thus, generally speaking, treaties had to be kept. On the one hand, this was so because treaties only laid out the practical way of how to realize what was already commanded by natural law. On the other hand, making treaties was a condition of one’s trustworthiness; and without trustworthiness, one could not engage in profitable transactions so as to realise the *salus populi*.<sup>111</sup> But if this was the fundamental rule of the Prince’s external behaviour – as it was not only in Pufendorf but the whole of the 18<sup>th</sup> century naturalist idiom, peaking in Vattel – then of course treaties could also be broken when their underlying condition was no longer present. This did not mean that the prince could leave a treaty whenever he felt so. On the contrary, intricate calculations had to be undertaken to measure the advantages of leaving a treaty against the disadvantage of undermining one’s trustworthiness.

Like treaties, the rights of war and peace, too, are a function of calculations of enlightened self-interest and the just cases of war come down to (and are limited by the consideration) of

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<sup>109</sup> Aquinas, *Treatise on Law* (Richard J. Regan transl. with introduction, Indianapolis, Hackett, 2000) Q.96, VI Article (61).

<sup>110</sup> This was sharply perceived by Adam Smith who saw his own project as a continuation of a natural jurisprudence that had been started by Pufendorf. See Istvan Hont, ‘The Languages of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the “Four Stages Theory”’, in *Jealousy of Trade. International Competition and the Nation-State in Historical Perspective* (Harvard University Press, 2005), 164-184.

<sup>111</sup> Pufendorf, *DJN* Bk VIII, Ch. 9 (1329-1341). See also the discussion of the keeping of “pacts” in the natural state (which is also that of the international world), in Bk VII, Ch 1 § 9 (963-4).

“preservation and protection of our lives and property against unjust attack, or the collection of what is due to us from others but has been denied, or the procurement of reparations for wrong inflicted and of assurance for the future”.<sup>112</sup> It follows that for example, unlike Grotius, Pufendorf rejected the view that anybody had the authority to enforce natural law if no direct injury was involved.<sup>113</sup> No war was to be waged on the American Indians on the basis of their alleged cannibalism – only if they actually caused injury.<sup>114</sup> Wars were not punishment – “since they neither proceed from a superior as such, nor have their direct object the reform of the guilty party but the defence and assertion of my safety, my property, and my rights”.<sup>115</sup> And the evils we do in war must be compatible with future peace and security.

All of this meant that ruling in peace and war, internally and externally, became a truly daunting task. As Pufendorf writes, “the science of government is so difficult that it requires all of men’s ability...”<sup>116</sup> This is why sovereigns should “make friends of wise men and such as are skilled in human affairs, and hold at distance flatterers, useless fellows, and all who have learned nothing but folly”.<sup>117</sup> Although the people may have some intuitive knowledge of natural law, and they can be educated to some extent, they can never have the kind of detailed knowledge about it that is needed to govern. Were this not so, no *pactum subjectionis* would be needed in the natural state.<sup>118</sup> Lawyers now emerge as the experts to the oligarchies governing European affairs in a predominantly commercial spirit. This was manifested in Germany in the way the generations after 1648 worked on imperial public law beyond the categories of Roman law, through extrapolating from historical sources and considerations of security and *raison d’état*. Techniques of governing modern States were studied at law faculties on comparative basis: *ius publicum universale* and statistics, rationalised by a natural law that was moving from the philosophy faculties to law, increasingly understood as a propaedeutic to other civil sciences.<sup>119</sup>

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<sup>112</sup> Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (James Tully ed., Cambridge University Press 1991), Ch 16.1 (168).

<sup>113</sup> Pufendorf *DJN* Bk. VIII, Ch VI, § 2 (1293-4).

<sup>114</sup> Pufendorf *DJN* Bk. VIII, Ch VI § 5 (1297). See also Tuck, *Rights of War and Peace*, *supra* note p. 159-160

<sup>115</sup> Pufendorf *DJN* Bk. VIII, Ch VI § 7 (1298).

<sup>116</sup> Pufendorf, *DJN* Bk. VII, Ch IX § 2 (1118).

<sup>117</sup> *Id.*

<sup>118</sup> See also Hunter, *Rival Enlightenments*, *supra* note 81 p. 192-3.

<sup>119</sup> See especially Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band 1600-1800* (Munich, Beck 1988), 126 *et seq.* Ian Hunter notes specifically of Pufendorf’s *De jure naturae* that it “functions as a clearing-house for the other civil sciences – Lipsian political philosophy, Helmstedt political Aristotelianism, Hobbesian anti-clericalism, Bodinian sovereignty theory, positive Staatsrecht...”, *Rival Enlightenments*, *supra* note 81, p. 150.

In other words, precisely at the moment when the prince is freed from the formal supremacy of the church and the empire, and from the control of the estates – when his power is articulated as sovereignty – he becomes completely dependent on the discipline and experts on natural law and *Staatsklugheit*. The more the absolutist monarch centralised his rule, the more he became dependent on his advisors’ views on what might be needed for the preservation, strengthening and expansion of this or that aspect of the State. When Pufendorf and later naturalists say that the Prince is bound by natural law – including the law of nations as part of natural law – what they intend is that he cannot neglect or ignore the epistemic conditions for the attainment of the welfare of the population, *salus populi*, assumed to be the privileged real of expertise of the juridical science. Already in mid-17<sup>th</sup> century Conring had based public law’s scientific nature on comparative studies of how different types of state fulfilled their specific reason, the *salus* of their *populus*, collecting and analysing data on territorial, economic, demographic, historical and other aspects of particular States<sup>120</sup> Natural law turned into a science of legislation that in Germany crystallised as cameralism and *Polizeywissenschaft* in the course of the 18<sup>th</sup> century.

No independent tradition of the law of nations arose in Germany. *Jus naturae et gentium* arose originally to legitimate enlightened absolutism. Once that task had been carried out, it had expended its creative force and became a standard part of the law faculty curriculum where peak years of its teaching coincided with 1730-1750 and then again around 1800.<sup>121</sup> Natural law now developed into three directions.

In the 1780’s and 1790’s, liberal influences from France and Britain contributed to increasing emphasis on natural rights as the core of *jus naturae et gentium*. The new textbooks were oriented constitutionally and elaborated on the relationship between the sovereign and the citizen, and on the division of powers, drawing upon Locke and Montesquieu. This stream continued in the early 19<sup>th</sup> century, with focus on German internal developments in the liberal *Vormärz* up until the revolution of 1848. Already before that time, however, its influence had declined as the law of nature was transformed into “general jurisprudence” or legal philosophy.<sup>122</sup>

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<sup>120</sup> Willoweit, ‘Conring’, *supra* note 76, 136; Jutta Brückner, *Staatswissenschaften, Kameralismus und Naturrecht. Ein Beitrag zu Geschichte der politischen Wissenschaft im Deutschland des späten 17. und frühen 18. Jahrhunderts* (Munich, Beck 1977), 33-42.

<sup>121</sup> See Schröder & Piehlmeier, in Dann-Klippel, *Naturrecht*,

<sup>122</sup> See especially Diethelm Klippel, *Politische Freiheit und Freiheitsrechte in deutschen Naturrecht des 18. Jahrhunderts* (Paderborn, Schöningh, 1976) and idem, ‘Ideen zur Revision der Naturrecht. Die Diskussion der Neubegründung der deutschen Naturrecht vom 1780’, 8 *Jahrbuch für Recht u. Ethik* (2000), 73-90.

A second strand led into positivism. After the natural lawyers had concluded that the State existed in order to guarantee the happiness – *Glückseligkeit* – of the population, they found themselves unable to say much about it. It was, after all, the legislator to bring about that happiness through enacting domestic law. This is why the German naturalists would not think that natural law had a higher standing than positive law in the sense that it would override the latter in case of conflict. Natural law, they held following Pufendorf, is known and articulated, receives form and implementation through positive law that may or may not enforce its prescriptions, prohibit things it permits or permit things it prohibits and in general give form to it and modify it so as to make it applicable in practice. Even later in the century when the vocabulary of natural rights seeks to curtail State power, it is largely agreed that positive laws will still have to determine the manner of their exercise of rights or make exceptions from them.<sup>123</sup>

When natural law is positivised, the social role of lawyers changes; It is one thing to preach for legislation to make reality of happiness, another to find out what this requires in terms of actual laws. When William I in 1714 requested the law faculty at the University of Halle to prepare a new constitution, the faculty responded with Thomasius' voice that this could only be done by painstaking historical studies in order to elucidate the spirit, objectives and significance of particular laws.<sup>124</sup> With such a response, it is not a surprise that no result was attained until 1794, and even then in changed conditions. If the happiness of the people depends on civil laws, then of course the *civil lawyers* start to lead, as they did in the codification movement that began everywhere in continental Europe towards the end of the 18<sup>th</sup> century, with the leading examples of the Prussian *Allgemeines Landrecht für die prussische Staaten* (ALR) of 1794 and the French *Code Civil* of 1804.<sup>125</sup> These, as is well-known, are examples of juridical nationalism, not internationalism. Even as codification was sometimes defended by a rhetoric of naturalism, this was the naturalism of the particular and the local, not that of the universal.

The third and most interesting direction taken by *jus naturae et gentium* was to social and economic sciences. The story is long and complex and can be only hinted at here. With the expansion of economic activities in the 16<sup>th</sup> century, the provision of “welfare” – “*Gemeinwohl*” – became their

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<sup>123</sup> See in particular, Jan Schröder, “‘Naturrecht bricht Positives Recht’ in der Rechtstheorie des 18. Jahrhundert?”, D. Schwab, D. Giesen, J. Listl & H-W Strätz, *Staat, Kirche, Wissenschaft in einer pluralistische Gesellschaft* (Berlin, Duncker & Humblot 1989), 419-433.

<sup>124</sup> Notker Hammerstein, *Ius & Historie Ein beitrage zur geschichte des historischen denkens an deutschen Universitäten im späten 17. und im 18., Jahrhundert* (Göttingen, Vanderhoeck, 1972), 80.

<sup>125</sup> On the nationalist codification movement, see Jean-Louis Halpérin, *Entre nationalisme juridique et communauté de droit* (Paris, PUF 1999), 11-22.

key objective or policy-ordinances issued by secular authorities..<sup>126</sup> After the Thirty Years' war, how to conceive the regulatory tasks of the territorial states became an intensive topic of academic discussion. A programmatic statement of the tasks of the new rulers is Veit Ludwig von Seckendorff's "*Teutsche Fürsten-Staat*" of 1656 that united natural law, empirical "statistics" and administrative policy into a first exposé of something like modern *Staatswissenschaft*, a theory and practice of the total happiness of the State.<sup>127</sup>

From now on, German academics would turn to history and comparative studies to examine the limits and possibilities for the realisation of the *Staatszweck*. This was how the Göttingen law faculty, established in 1737, especially saw itself. One of its leading natural lawyers, Gottfried Achenwall, for instance, published in 1749 a comparative study of the constitutions of the major European States that he calls "statistics", a science of the empirical conditions of government. On the basis of this information, he proposed that each State ought to be ruled with the assistance of a "Collegio", usually divided into domestic and foreign sections – a group of experts in governmental technique.<sup>128</sup> He was preaching *Staatsklugheit* – elements of statecraft depicted in true enlightenment style, like operating machines, or clocks, every part of which needs to work in harmony with every other part so as to produce the final objective – *salus populi*. The law of nations turns into the conduct of foreign affairs, conceived in a fully utilitarian vocabulary. If treaties should generally be kept, this is not out of moral considerations but out of self-interest, subject to the *Notrecht*.

With the increase of the social and other policy-tasks of the territorial states, it became increasingly important to ensure not only the availability of resources but also of an adequate financial apparatus within the territorial State. It was not obvious how this could be achieved. University "economics" had been taught as that part of Aristotelian practical philosophy that was squeezed between ethics and politics and dealt with the administration of the household, *oikos*.<sup>129</sup> In the 17<sup>th</sup> and early 18<sup>th</sup> centuries, natural lawyers had integrated parts of cameral sciences and *Polizeywissenschaft* in their abstract compilations. But this was insufficient for the purpose of training the functionaries of the new bureaucracies. As the law faculties turned to increasingly formal studies of positive law, the first chairs on economics and cameral science were set up in 1727 in Halle and Frankfurt. But

<sup>126</sup> See Jutta Brückner, *Staatswissenschaften, Kameralism und Naturrecht. Ein Beitrag zu Geschichte der politischen Wissenschaft im Deutschland des späten 17. und frühen 18. Jahrhunderts* (Munich, Beck 1977), 6.

<sup>127</sup> Brückner, *Staatswissenschaften*, supra note 126, 12-32.

<sup>128</sup> Gottfried Achenwall, *Staatsverfassung der heutigen Vornehmsten Europäischen Reiche...* 1749

<sup>129</sup> See Keith Tribe, 'Cameralism', in Mark Goldie & Robert Wokler (eds.) *Cambridge History of Eighteenth-Century Political Thought* (Cambridge University Press, 2006), 530-532.

cameralism still built on policy-ordinances and financial regulations of a mercantilistic society. With the increase of commerce and other economic activity in the 18th century, the Aristotelian basis of university economics – including its focus on the household – began to seem increasingly old-fashioned.<sup>130</sup> In 1758 Francois Quesnay published his *Tableau Economique* in France that sought to formalise the laws of the functioning of economics, demonstrating the interdependence of national production, circulation and income. The *Physiocrats* suggested that there was a natural flow of economic activity that, if allowed to expand freely, would contribute to the greatest *Glückseligkeit* of all. Where jurisprudence and public law had looked for happiness within the structures of the territorial State, the new economics taught natural laws that would operate irrespectively of State activity, following the spontaneous developments in the civil society. Of course, some legal regulation was needed to facilitate economic operations. But instead of providing for intervention through administrative policy, they were seen as private law arrangements providing for the right of property, the enforcement of contracts and freedom to seek advantage by economic activity.<sup>131</sup>

These theories spread in German universities, contributing to the transformation of cameralism into *Volkswirtschaftspolitik* – the study of the national economy as a whole.<sup>132</sup> But when the national economy was situated in an international context, the call for lowering or abolishing taxes and customs between nations became by far the most important rallying-cry of the pacifists and cosmopolitans in the early-19<sup>th</sup> century. It was not the law of nations that the liberals looked towards, it was the laws of economics. Even Kant wrote in his programmatic “Idea for a Universal History with Cosmopolitan Purpose” about the pacifying and civilizing effects of trade practically in the same breath as he condemned Grotius, Pufendorf and Vattel as miserable comforters. Naturalism and humanity still went together but their union was not celebrated in the court of law but in the palace of economics.

### 3. CONCLUSION: SCOTLAND

In *A Treatise on Human Nature* (1759) David Hume divides the law of nations into two types. First are laws having to do with specifically international matters such as the sacredness of ambassadors,

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<sup>130</sup> Tribe, ‘Cameralism’, *supra* note 129, 525-546.

<sup>131</sup> Cf. E.g. Valier, *Brève histoire*, *supra* note 61, 41-54.

<sup>132</sup> Meier, 106-107.

declaration of war, abstention from poisoned weapons and others that “are evidently calculated for the commerce, that is peculiar to different societies”. Alongside these, there are rules of general natural law which he groups in three: stability of possession, its transference by consent and the performance of promises”. Such rules are applicable between states just like they are applicable between individuals because the social context is essentially similar. As Hume says, “The same interest produces the same effect in both cases”.<sup>133</sup>

Hume derives international law from the benefit it produces: “The advantage of peace, commerce, and mutual succour, make us extend to different kingdoms the same notions of justice, which take place among individuals”.<sup>134</sup> Why are princes bound by their treaties? Because, he explains, “they must propose some advantage from the execution of them; and the prospect of such advantage for the future must engage them to perform their part”. Then comes an important qualifier. Although both individuals and nations do receive advantage from contracting, the felt intensity of that advantage is different in the two cases. Although the intercourse of princes is often useful, it is never necessary as between individuals who simply cannot exist without society. The weakness of the natural bond among nations leads to a corresponding weakness of the rules of natural justice when applied to them. And so, Hume concludes, “we must necessarily give a greater indulgence to a prince or a minister, who deceives another; than to a private gentleman, who breaks his word of honour”. This is taught to us by “the practice of the world”.<sup>135</sup>

In these sentences Hume aptly summarised and updated the teaching of natural jurisprudence – “the driest and the dustiest and the most completely forgotten [tradition], except for specialists”<sup>136</sup> – as it applied in the relations between princes. First, as between themselves, princes existed in a state of nature in which they were only bound by natural law. Second, natural law consisted in part of rules specific to the external relations of princes, in part of general maxims of law that applied to all human conduct. Third, and here he was updating, the content of natural law could be derived by the “experimental method” from the actual working of the human psychology reacting to the social context. Unlike prior writers in this genre who had speculated about innate human benevolence or had smuggled into their purportedly descriptive accounts of behaviour notions of “ought” usually reflecting unarticulated religious hypotheses, Hume saw natural law as part of the way the human imagination associated ideas in accordance with operative principles that could be empirically

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<sup>133</sup> David Hume, *A Treatise on Human Nature*, Bk III, Sect XI (p. 618).

<sup>134</sup> Hume, *Treatise*, Bk III, Sect XI (p. 618).

<sup>135</sup> Hume, *Treatise*, Bk III, Sect XI (p. 619).

<sup>136</sup> Duncan Forbes, *Hume's Philosophical Politics* (Cambridge University Press, 1975), 17.

verified. His ambition was to modernise natural law by recourse to principles of (Newtonian) empirical science so that it would be possible to ascertain realistically the rights and obligations that applied in particular social circumstances on the basis of the imaginative operations of the human mind, especially of the feeling of “sympathy”. For Hume, the law of nations is, like any other law, based on the ideas about advantage and disadvantage. But the feelings associated with those ideas in the international world are not as strong as those between individuals in the domestic society. In particular, the work of “sympathy” plays only a marginal role. *Ergo* international law is a weak law. Princes are weakly motivated by it, and rather often follow the way of their immediate interest.

Hume’s views were taken over and reshuffled by his friend Adam Smith who developed the view of “sympathy” into a more sociologically robust theory of the “impartial spectator” in his *Theory of Moral Sentiments* of 1759. This did not so much seek to answer the question about what is “right” or “wrong” in social life but how is it that we come to regard certain things as such. Notions of justice, Smith writes, emerges from the way we follow the activities of other humans and try to understand them and to imagine what it might feel to be like them. Thereafter we so to say internalise the feelings thus learned into ourselves in terms of a personal code of morality – in other words, we come to adopt the perspective of the “impartial spectator”.<sup>137</sup> At the end of his book, Smith promised that he would in due course “endeavour to give an account of the general principles of law and government”.<sup>138</sup>

As is well-known, Smith never published this book. In the lectures of jurisprudence given in Glasgow in the 1760’s he tried to develop his own “science of a legislator” that canvassed three types of law – private, domestic and public, and that dealt with international law as well: what kinds of rules would an “impartial spectator” wish to have in a society? As in Hume, in Smith, the starting-point of justice was their focus on the natural and “adventitious” (or acquired) *rights* of individuals and the technique of dealing with them concerned dealing with *injury* to them. Nevertheless, as has been highlighted by Knud Haakonssen, Smith oscillated uneasily in his construction of the point of view of the “impartial spectator” between a position that was historically determined within a particular society and a “universal” position that would also allow

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<sup>137</sup> For useful commentary, see D.D. Raphael, *The Impartial Spectator. Adam Smith’s Moral Philosophy* (Oxford University Press, 2007).

<sup>138</sup> Adam Smith, *The Theory of Moral Sentiments* (New York, Barnes and Noble, 2004), 466.

the critique of particular legal systems but which alone would be too abstract to provide a basis for the detailed rules required for the operation of any actual legal system.<sup>139</sup>

In particular, his construction of the law of nations had to remain both sketchy and weak.<sup>140</sup> Here, if anywhere, it seemed impossible to find actual impartial spectators that could guarantee the orderly operation of a legal system: “where there is no supreme legislative power nor judge to settle differences, we may always expect uncertainty and irregularity”.<sup>141</sup> True, for Smith it was clear that the principles regarding violations of rights lay at the basis of any law of nations, too. War was, as in classical jurisprudence, the ultimate sanction for uncompensated injury. But the lectures were never published. Smith did not really succeed in creating a bridge between his sociological and historical description of the emergence of moral and legal norms and his “critical jurisprudence”, his normative recommendations as to what kind of law ought to rule us. By contrast, as we know, he published in 1776 his *Wealth of Nations*. The objective of *salus populi* that had been aimed at by the various naturalist vocabularies could not be attained by law (or jurisprudence) but by economics. The weakness of Smith’s legal theory was the strength of his economic thinking. This gave up on the whole the idea of advancing the good and resisting evil by legal rules and regulations. The *Wealth of Nations* entered the world of our empirical desires directly and freed them to bring about the common good out of the spontaneous activities of individuals and their collectivities. What could not be attained by legal regulation could be attained by refraining from legal regulation. In this manner, one might hope, human beings could be ruled by the natural laws of human society directly, without the distorting effect of ambitious rulers and the schemes of their legal counsel.

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In France and Germany, the prehistory of international law is a story of the emergence of the *raison d'état* as the master vocabulary for addressing the government of modern states in their relations with each other. In France *raison d'état* led to complex situational analyses as the proper foundation for conducting foreign relations. This was sometimes formalised as a kind of international law in the *Droit public de l'Europe* constructed by Mably and others, and especially in Vattel’s *Droit des gens* of 1758. In Germany, it was integrated into an empirically oriented natural

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<sup>139</sup> Knud Haakonssen, *The Science of a Legislator. The Natural Jurisprudence of David Hume and Adam Smith*, (Cambridge University Press, 1989) 147-151.

<sup>140</sup> Adam Smith, *Lectures on jurisprudence*, 339-358 (545-554)

<sup>141</sup> Smith, *Lectures on jurisprudence*, 339 (545)

law theory especially by Pufendorf and later by a whole tradition of successors to him at the two leading law schools of Halle and Göttingen. There call for *salus populi* embedded in natural law lead to the emergence of increasingly specialised vocabularies such as *Polizeiwissenschaft*, *Kameralistik* and *Statistik*, each of which sought to provide techniques for more efficient assistance in the rational government of early modern States. Each, however, also lead to thinking of government in economic terms, as the calculation of the costs and benefits of particular types of State action within the expanding range of developing national economies. *Raison d'état* developed into economic nationalism which, in due course, filled the dream of universal humanity through the optimistic theory of free trade as more than a zero-sum game. This is the tradition inaugurated by Smith from the various natural law materials available to him. But whether this optimistic theory was true or not, the centre of gravity in international thought had moved away from (natural) law to economics, which had always been its natural resting-place. Of course, there remained a dwindling thread of positivist jurisprudence at some German universities that could not be fitted in the frame of these modern techniques but insisted as the proper legal task to collect, interpret and systematise positive legal materials.<sup>142</sup> In due course, however, that strand was seen as too closely associated with European sovereigns and the European diplomatic system to be acceptable as the foundation of a more liberal, and cosmopolitan approach to international law.<sup>143</sup>

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<sup>142</sup> I have discussed this in my "Georg Friedrich Von Martens (1756-1821) and the Origins of Modern International Law", in Calliess, C., Nolte G. & Stoll, P-S. (eds), *Von der Diplomatie zum kodifizierten Völkerrecht. 75 Jahre Institut für Völkerrecht der Universität Göttingen* (Köln etc. Heymanns, 2006), 13-30, also published as New York University School of Law, History and Theory of International Law Working Papers 2006/1

<sup>143</sup> As I have argued in my *Gentle Civilizer*, supra note 1, 19-24.