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Leibniz's Theory of Relative Sovereignty and  
International Legal Personality: Justice and  
Stability or the Last Great Defence of the Holy  
Roman Empire

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## **Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability *or* the Last Great Defence of the Holy Roman Empire**

J.E. Nijman\*

### ***1.1. INTRODUCTION***

In the late 17<sup>th</sup> century, “new” actors were forcefully knocking on the door of the “old” European political order determined to get in. Almost half a century after the Westphalian Peace of 1648, which is so often presented as the instant starting point of the “modern” European order of absolutely sovereign states, the processes of change fuelled by the claims and activities of these “new” actors aimed at their participation in the political system were still unfolding. Rather than to characterise the situation as a stable status quo, it is fair to say that it was still a time of transition. On the one hand, the political structures of the Holy Roman Empire headed by the Emperor and Pope are still in place, although the signs of weakening are starting to show. On the other hand, new actors, i.e., the German princes who sought increased power and independence, wanted to be part of the European political order at the highest level. These circumstances put a strain on the political structures and challenged them to change. The reality of the changing structure of the European political order created the need for a theory that could make the accommodation of these new actors possible. Or, in even clearer terms, how to manage (imperial) political change without stimulating instability and injustice?

In an attempt to facilitate the changes that seemed necessary, i.e., stretching the political order to include new actors yet preventing it from breaking down altogether, Leibniz developed a theory of the law of nature and nations or, as he preferred to call it, a universal jurisprudence, that was politically realistic and normative at the same time. He introduced two rather pragmatic concepts – relative sovereignty and international legal personality – embedded in a theory of (universal) justice. With these conceptions, Leibniz made a fundamental contribution to international law (thinking) which is important to take note of especially today. If only because we are confronted with similar transitional questions, e.g., if and how to accommodate and adapt

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the international legal and political order to a wide range of non-state actors claiming international participation.

Knowledge of Leibniz's response to the political problems of his time challenges our contemporary perceptions in two ways. Firstly, we are invited to revise the misconception that the concept of International Legal Personality (hereinafter: ILP) has its origin in purely Westphalian or what is called "Modern State" thinking. In fact, the concept of ILP did not emerge in relation with the "Westphalian" concept of *absolute* sovereignty, but in relation with Leibniz's concept of *relative* sovereignty. As such, ILP emerged as a concept to accommodate change, a concept aimed at facilitating the international system's flexibility. Secondly, Leibniz's work gives further evidence that even long after the Peace of Westphalia prominent intellectuals were operating with concepts of sovereignty that were different from what we now identify as the Westphalian notion of (absolute) sovereignty. As such, Leibniz's (theoretical) defence of the Holy Roman Empire, which combines concerns for stability and justice, invites us to adjust the well-established narrative in international law historiography that with the Peace of Westphalia international law was grounded definitely in a European order of 'modern' absolutely sovereign states. The origin of international law is more diverse and less instant than that the traditional narrative suggests.

Gottfried Wilhelm Leibniz (1646-1716) was born in Leipzig, one of the main cities of the Electorate of Saxony, in the east central area of the Holy Roman Empire, two years before the end of the Thirty Years' War (1618-1648). He was the youngest son of jurist and Leipzig University professor of moral philosophy Friedrich Leibniz. In 1661, almost 15 years old he started his studies in law and philosophy at Leipzig University and later on in Jena. He received his doctorate from Altdorf University in 1666. In 1668, Leibniz started his almost 50-year-long career in governmental service at the Court of one of the most powerful rulers of the Empire, Prince-Bishop Johann Philipp von Schönborn, the Elector of Mainz. He left for Paris in 1672 and lived and studied there until 1676. In 1677, Leibniz resumed public service at the Court of the Duke of Brunswick-Lüneburg in Hanover – at the centre of the Empire – where he worked in various capacities for 40 years. The Duke was one of the prominent princes of the Empire (*Reichsfürsten*), although he was not an Elector (*Kurfürst*) like Leibniz' former employer, the Elector of Mainz. For most of his life, Leibniz served various German Principalities in various capacities: as an in-house philosopher, a jurist, a diplomat, a counsellor, and historian, a

librarian, etc.<sup>1</sup> However, his influence in mathematics seems to have exceeded his impact in any other field. Leibniz died in Hanover in 1716. His written legacy is vast; he wrote thousands of letters and published many writings on theology and (natural and political) philosophy. Leibniz was a skilled diplomat and he did not flinch from the problems at stake. In his capacity of advisor to the *Reichsfürsten*, he was directly confronted with the urgent need of reforming the Holy Roman Empire and of restoring and harmonizing the diplomatic and inter-religious channels of communication in Europe at large.

Leibniz was the first to use the term ‘international legal person’<sup>2</sup> - or rather ‘*persona jure gentium*’ - and he included it in the *Praefatio* to his *Codex Iuris Gentium diplomaticus* (1693).<sup>3</sup> This *Codex* is a collection of over 200 historical public acts and treaties dating from 1096 to 1497 with which Leibniz aimed to assist scholars as well as practising diplomats and their Sovereigns.<sup>4</sup> He intended this work to ‘serve the art of politics, that of history, that of erudition in general, but above all to [promote] understand[ing of] the law of nations.’<sup>5</sup> Leibniz considered it particularly necessary to contribute to the clarification of the law of nations and its relation to natural law: ‘the title *Codex Iuris Gentium* was adopted precisely because of this objective.’ In his opinion, ‘the notions of law and of justice, even after having been treated by so many illustrious authors, have not been made sufficiently clear.’<sup>6</sup> In the *Praefatio*, he explained his ideas on justice and the law of nations and thus came to introduce the concept of ILP.<sup>7</sup>

I intend to demonstrate that Leibniz’ introduction of the concept resulted from an original attempt to preserve the universal (medieval) structures propagated by the Pope and Emperor while accommodating the emergence and the inclusion of new participants in the diplomatic community and on the European stage. We will see how ILP’s introduction related to the rationalisation of international diplomacy and law in an attempt to restore stability and to prevent

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1 G. MacDonald Ross, Leibniz 23 (1984). In addition to the court of Brunswick-Lüneburg, Leibniz at some point served at the court of Berlin, where the Duke of Brandenburg resided, and at the court of the Holy Roman Emperor, as well as at Peter the Great’s court in St. Petersburg. See also, Riley’s Introduction to Leibniz Political Writings (1988), at 2.

2 ‘[T]he scholar who ... was the first to use the technical term of “international person” ... was Leibniz,’ J.H.W. Verzijl, *International Law in Historical Perspective. Part II: Persons*, at 2.

3 The fact that the term does not reappear in the *Praefatio* to a similar collection from 1700, i.e., the *Mantissa Codicis juris Gentium diplomatici*, does not mean that Leibniz’ first use of it was merely random. In the first edition of the *Codex Iuris Gentium*, it is already emphasised by the use of italic print.

4 G.W. Leibniz, *Codex Iuris Gentium diplomaticus*, Hanover, 1693; here, I will use the translation of P. Riley (Ed.), *Leibniz Political Writings* (1989) and refer to the first as *Codex* and the second as LPW.

5 *Codex*, at 170. At this stage in the development of the law of nations, the term “nations” was used to translate *gentium*, which the French translated more accurately by (*droit des gens*).

6 Id.; See also, Leibniz’ letter to Abbé Jean-Paul Bignon of October 1693: “Je n’ay rien de commun avec le celebre Grotius, que la qualité d’estranger, et peut estre la volonté de contribuer encor quelque chose à l’eclaircissement du droit des gens comme j’ay fait par l’essay d’un Code diplomatique d’Actes publics...” Acad. Ed., *Allg. Pol. und Hist. Briefwechsel*, Neunter Band, (N. 396), at 590.

7 A Letter to Wilhelm de Beyrie of April 7, 1693 (Hanover), in Acad. Ed., *Allg. Pol. und Hist. Briefwechsel*, Neunter Band, (N. 241), at 391: shows Leibniz’ original intention to publish another two volumes in addition to the *Codex*. The *Mantissa*, however, was never followed by a third volume.

the outbreak of another European war, in general, and to Leibniz' longing for mutual understanding and harmonious relations, in particular.

Leibniz' universal jurisprudence must be positioned in the natural law tradition. Since the 16<sup>th</sup> century, international jurisprudence had been gradually evolving from a branch of moral philosophy into an independent discipline. Spanish scholastic writers, like Francisco de Vitoria (1480-1546) and Francisco Suarez (1548-1617), were among the first to contribute to this evolution by their separate treatment of *ius gentium*. It took until 1661 for the first chair on *The Law of Nature and of Nations* to be created at Heidelberg University, where Samuel Pufendorf (1632-1694) was the first to hold it. He was initially mainly assigned to teach and comment on Grotius' *De Jure Belli ac Pacis* (1625), the book that became a cornerstone for the 'emancipation'<sup>8</sup> of international law theory from scholastic theology and the "identification" of the law of nations. In a prelude to the analysis of Leibniz' use of ILP we inevitably encounter Hugo Grotius (1583-1645) and Thomas Hobbes (1588-1679). Leibniz managed to reconcile their opposing psychological assumptions by incorporating both the altruism described in Grotius' work and the egoism alleged by Hobbes into the idea that it is in one's own interests to take account of and possibly even serve the interests of others. We will find that this is indeed a fundamental and leading element of his universal jurisprudence.

It may be tempting to read Leibniz' theory purely as political realism, but I wish to argue that such a reading would not do justice to his thinking. Leibniz' theory of justice animated his views on politics and his professional involvement in the political game substantially influenced his opinion on the *ius gentium*. Theological-political and practical-political influences have been crucial to the formulation of Leibniz' thinking in general and to the use of a relative concept of sovereignty and the coining of the concept of ILP in particular. By using such pragmatic concepts as relative sovereignty and ILP Leibniz served a functional as well as normative agenda, which served Leibniz in his defence of the unity of the Holy Roman Empire against the timely attacks. The present paper therefore places Leibniz' theory of relative sovereignty and ILP within the contemporary context rather than within the centuries-long tradition of natural law theory.

For this purpose, the next sections of this paper consider how Leibniz' theory of relative sovereignty and ILP fit in with the broader context of Leibniz' moral and political ideas and the political reality in Europe and the Holy Roman Empire. The first section therefore briefly outlines the political, intellectual and jurisprudential context that Leibniz worked – Which issues

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8 A Concise History, at 105-106.

are particularly at stake in his professional life as a political advisor. How, in his quest for harmony and stability, Leibniz made the idea of unity operational in many different ways; also, in his theory of universal justice. Subsequently, the coining of concept of ILP will be assessed in the light of both his theory of relative sovereignty and his theory of justice. This paper will conclude that the introduction of the concept of ILP was a timely event which served Leibniz' realist as well as normative project to secure stability and justice in the Holy Roman Empire and Europe at large. I suggest that Leibniz constructed a response to the challenged Empire that intended to accommodate change while preserving order and stability and that the concepts of relative sovereignty and ILP thereto introduced were equally supportive of his attempt to develop the law of nations and its grounding on natural law, which with its direction towards (universal) justice gives Leibniz' project a solid normative basis. As such we may learn that the emergence of ILP has its grounding in a realist, normative theory – a characterization which is perceived generally as contradictory or even mutually exclusive in today's international law thinking; for Leibniz it was not.

## ***1.2. THE POST-1648 EUROPEAN CONTEXT***<sup>9</sup>

### **1.2.1. 'Restoration of Communication: its historical context and intellectual impact'**<sup>11</sup>

For this general characterization I am greatly indebted to Toulmin's analysis in his work *Cosmopolis: the hidden agenda of modernity* (hereafter: *Cosmopolis*)(University of Chicago Press, 1992) esp. 45-137. First published in 1990..<sup>2.1.</sup> Restoration of Communication: its historical context and intellectual impact'<sup>11</sup>. For this general characterization I am greatly indebted to Toulmin's analysis in his work *Cosmopolis: the hidden agenda of modernity* (hereafter: *Cosmopolis*)(University of Chicago Press, 1992) esp. 45-137. First published in 1990..

The first half of the 17<sup>th</sup> century was not a time of localized skirmishes, but of widespread war and *general crisis*.<sup>10</sup> Social and economic conditions during this period were critical and highly uncertain.<sup>11</sup> The plague and other epidemic diseases struck frequently and agricultural decline and years of drought caused a food shortage that lasted for decades; population growth

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<sup>9</sup> For the general characterisation I am greatly indebted to Toulmin's analysis in his book, *Cosmopolis: The Hidden Agenda of Modernity* (1990), esp. at 45-137. Hereinafter: *Cosmopolis*.

<sup>10</sup> See also, G. Pagès, who regarded the War as a 'turning point between medieval and modern times.' He perceived this War as part of a 'larger crisis' consisting of the process of change from medieval to modern times. *In* Rabb (Ed.), *The Thirty Years' War* 33 (1972, 2nd ed.).

<sup>11</sup> *Cosmopolis*, at 17. Also, N. Davies, *Europe: A History 569* (1997), hereinafter: *Europe: A History*. See, more thoroughly on this subject, e.g., E.J. Hobsbawm, *The Crisis of the Seventeenth Century*, in T. Aston (Ed.), *Crisis in Europe (1560-1660): Essays from Past and Present* 5 (1965), on the general crisis in the European economy; see also, G. Parker, *Europe in Crisis 1598-1648* (1979); Parker and Smith (Eds.), *The General Crisis of the Seventeenth Century* (1978).

slowed down significantly and some populations even declined.<sup>12</sup> Europe increasingly slipped into a climate of religious intolerance resulting in the religious wars, the worst of which was the Thirty Years' War.<sup>13</sup> From 1618 onwards, war did not only shake what is now Germany but the whole of Europe to its foundations. The (medieval) Holy Roman Empire was in crisis and even though it managed to persist in name until 1806,<sup>14</sup> it was actually fragmenting into a new Europe of gradually ever more independent states during the 17<sup>th</sup> century. Since the war's heritage was one of ruin, the second half of the 17<sup>th</sup> century was characterized by a struggle for reconstruction, both politically and intellectually, and a search for social stability, renewed social solidarity and a precarious balance between (enforced) religious conformity and tolerance. The end of the Thirty Years' War marked the end of the general crises of the 17<sup>th</sup> century and indeed heralded the onset of a process leading to new equilibrium in Europe. After 1648, the European powers found a new *modus vivendi*.

The 1648 Peace Treaties of Münster and Osnabrück had to bring an end to the “religious” Thirty Years' War and prevent religion from ever becoming the international source of conflict again. The 1648 Treaties reaffirmed the principle *cuius regio, elius religio*, which had already been agreed upon in 1555 in the Treaty of Augsburg. It was determined that religion was an internal issue, outside the scope of the international realm. The Catholic and Protestant princes and towns had to live side by side within the Empire.<sup>15</sup>

The Westphalian Peace Treaties, traditionally identified as the beginning of the ‘new’ order, actually neither caused nor terminated but rather confirmed the process of political transformation which also continued after 1648. Lately, the Westphalian Treaties have been mostly referred to as the origin of the “modern,” i.e., inter-state, political and legal order in Europe. Indeed, the Treaties acknowledged and consolidated the process of the fragmentation of Christendom as well as of the formation of states in Europe. As such, they formed the trusted foundation for the emerging new European order, which had to prevent a repetition of chaotic

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12 J. de Vries, *Economy of Europe in an Age of Crisis (1600-1750)*, at 4-13 (1976). During the Thirty Years' War, 35 percent of the German population was killed. By contrast, the populations of both England and the Dutch Republic kept growing substantially until the 1660s. *Id.*, at 5. See also, Parker, *op.cit.*, at 17-28.

13 See, e.g., for the argument that the Thirty Years' War should be considered a religious war, as otherwise its occurrence is simply incomprehensible, C.J. Friedrich, *The Age of the Baroque 1610-1660* (1952), reprinted in Rabb (Ed.), at 53-57.

14 See also, on the crisis within the Empire, Pagès, at 34-38. Pagès mentions why in Germany, ‘modern Europe managed to establish itself only at the price of thirty years of war.’ He states: ‘One cannot understand the Germany of that period if one forgets that survivals from the middle ages lasted longer there than anywhere else and also that this country was in the middle of a Europe much further advanced than itself.’ Rabb (Ed.), at 33. During Leibniz' professional life, the Habsburg dynasty reigned: Leopold I (*reg.* 1658-1705), Joseph I (*reg.* 1705-11) and Charles VI (*reg.* 1711- 40) succeeded each other as Holy Roman Emperor. At the same time, moreover, the spiritual monarchs occupying the Holy See were Pope Innocent X (*reg.* 1644-55), Alexander VII (*reg.* 1655-1667), Clement IX (*reg.* 1667-9), Clement X (*reg.* 1670-6), Innocent XI (*reg.* 1676-89), Alexander VIII (*reg.* 1689-91), Innocent XII (*reg.* 1691-1700) and Clement XI (*reg.* 1700-21).

15 Article V, *Friedensvertrag des Kaisers mit Schweden/Osnabrück*, in W.G. Grewe (Ed.), *Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations*, vol. 2 (1988), at 193.



times and bloody conflicts and was meant to establish stability.<sup>16</sup> However, one should not pass over that this is true mainly because the Treaties of 24 October 1648, dealt with the ‘internal’ imperial problems and conflicts between the Emperor and the *Reichstände* (Estates)<sup>17</sup> and with those among the (religiously opposed) *Reichstände* themselves. As such, it laid down a new constitutional basis for the Holy Roman Empire.<sup>18</sup> Article VIII (1) of the Peace of Osnabrück, which determined the constitutional position of the *Reichstände*, re-established the *Reichstände* in their old rights.<sup>19</sup> Article VIII(2) recognised the international capacity or sovereignty of the *Reichstände* where it stipulated that ‘above all, each of the Estates of the Empire shall freely and for ever enjoy the Right of making Alliances among themselves, or with Foreigners, for the Preservation and Security of every one of them.’ However, the article continues, ‘provided nevertheless that these Alliances be neither against the Emperor nor the Empire, nor the public Peace, nor against this Transaction especially; and that they be made without prejudice in every respect to the Oath whereby every one of them is bound to the Emperor and the Empire.’<sup>20</sup> The right of making alliances and the right of warfare were thus not without limits. However, the sovereignty of the Emperor was further constrained by the necessary cooperation and consent of the Diet or *Reichstag* in the creation of law on a number of significant issues.<sup>21</sup> The constitutional controversy over the relationship between the Emperor and the Empire was thus stifled by a formal distribution of power.<sup>22</sup> Any claim to absolute sovereignty by the Emperor was from now on much more difficult to sustain legally. The ambivalence of the political situation is visible in

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16 Westphalia was an attempt to once and for all settle all Europe’s outstanding issues, Rabb: ‘whatever the reality, the people of the seventeenth century *believed* that that was what had been accomplished. It was now assumed that a new, permanent, settled situation had been established, and for more than a century all further treaties, however extensive, were regarded merely as a rounding out of what had been laid down at Westphalia.’ Rabb, Introduction to *The Thirty Years’ War*, at xvii.

17 After 1648, the three *Reichstände* are represented in the *Reichstag*, which consists of: (1) the *Kurfürstenrat*, i.e., the college of Imperial Electors; the rank of Elector conferred upon those bearing the title, the right to vote in case of Imperial succession and co-determine who should be elevated to the rank of new Emperor; (2) the *Fürstenrat*, i.e., the college of princes, and (3) the *Städte*, i.e., the conference of the free Cities and Towns. For the inclusion of the ‘*freien Reichstädte*’ as among the *Reichstände*: see, Art. V(29) of the *Peace Treaty between the Emperor and Sweden/ Osnabrück*, in W.G. Grewe (Ed.), *Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations*, vol. 2 (1988), at 194.

18 *Id.*, at 199-200: Art. XVII stipulated that the Peace treaty would serve as a perpetual law of the Empire.

19 Art. VIII(1): ‘And in order to prevent for the future all Differences in the Political State, all and every the Electors, Princes, and States of the *Roman* Empire shall be so establish’d and confirm’d in their antient Rights, Prerogatives, Liberties, Privileges, free Exercise of their Territorial Right, as well in Spirituals and Temporals, Seigeuries, Regalian Rights, and in the possession of all these things, by virtue of the present Transaction, that they may not be molested at any time in any manner, under any pretext whatsoever.’ *Id.*, at 197.

20 *Id.*

21 *Id.* First part of Art. VIII(2) read: ‘That they enjoy without contradiction the Right of Suffrage in all Deliberations touching the Affairs of the Empire, especially in the matter of interpreting Laws, resolving upon a War, imposing Taxes, ordering Levies and quartering of Soldiers, building for the public Use new Fortresses in the Lands of the States, and reinforcing old Garrisons, making of Peace and Alliances, and treating of other such-like Affairs; so that none of those or the like things shall be done or receiv’d afterwards, without the Advice and Consent of a free Assembly [i.e., the Diet or *Reichstag*] of all the Estates of the Empire...’ Article VIII(4) provided the Free Towns of the Empire with the right to political representation in the *Reichstag* and the right to vote. *Id.*, at 198.

22 See also, M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Vol. 1 *Reichspublizistik und Policywissenschaft 1600-1800* (1988), at 225-226. Hereinafter: *Geschichte des öffentlichen Rechts*.

the position and nature of the *Reichstag*. The Reichstag resided permanently in Regensburg from 1663 onwards. On the one hand this permanency contributed to the further consolidation of the institution in the constitutional order as well as its gradual ‘parliamentalisierung,’ i.e., the representative body of the *Reichsstände* (rather than the subjects) which operated quite effectively as imperial legislature. On the other hand, however, this permanency also resulted in the loss of flexibility, pace, and political significance that are unavoidable disadvantages of ‘Gesandtenkongresses.’ Its slow pace was indeed also due to the many conflicts over ceremonial issues.<sup>23</sup> In other words, it wasn’t a done deal yet.

The popular historiographical narrative of modern international law, which dates back to ‘1648’ when the European order of modern sovereign states came into being and the Treaties put an end to the “statehood” of the Holy Roman Empire, is thus severely undermined if we take the ‘internal’ imperial political reality into account.<sup>24</sup> In fact, the struggle for sovereignty had not yet been resolved; the dualism between the Emperor and the Princes continued to dominate imperial (and thus European) politics during the decades that followed. The interpretation of the Peace of Westphalia as guaranteeing the Empire’s fall may well be coloured by hindsight.

If the 1648 Treaties were to stand a fair chance of establishing ‘a Christian and Universal Peace, and a perpetual, true, and sincere Amity’<sup>25</sup> between all the former enemies, a climate of tolerance and mutual respect and at the very least of open (diplomatic and inter-religious) communication would be essential. Only open *communication* would lead the way out of the quagmire of theological disputes and political conflicts. Since the beginning of the 15<sup>th</sup> century, diplomatic communication had become increasingly important and permanent missions had gradually been established. By the time of the Westphalian peace talks, diplomatic practice had developed from a temporary missionary approach into a system of more permanent postings. The religious division among European princes and monarchs caused diplomatic immunity to be a pure necessity: embassies and diplomats had to be protected regularly against religious riots in protest of their confessional denomination. But the timely significance of *Gesandtschaftsrecht* goes further than that. The European princes and monarchs, who wished visibly to express their prestige and autonomy, considered their ability to dispatch permanent ambassadors as proof of

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23 Id., at 227 ; see also, at 229.

24 See also, id., at 228 : ‘Die völkerrechtlich inspirierte These, das Reich sei 1648 als «Staat» untergegangen und habe als Verein souveräner Staaten forexistiert, ist weitgehend als unhistorisch abgelehnt worden. Die Zeitgenossen, an denen sich des Historiker zu orientieren hat, waren sich über die Forexistenz des Reichs als «Staat» einig, so mangelbehaftet dieser auch sein mochte ; sie haben «die Möglichkeit der völkerrechtlichen Beurteilung des Reiches meist nicht einmal erwogen».’ Footnotes omitted.

25 Article I, *Peace Treaty between the Emperor and France/ Munster*, in W.G. Grewe (Ed.), *Fontes Historiae Iuris Gentium: Sources Relating to the History of the Law of Nations*, vol. 2 (1988), at 184; see also, *Peace Treaty between the Emperor and Sweden/ Osnabrück*, id., at 189-190.

these attainments. As such, the changing European diplomatic life reflected the process of political modernization and of its needs and problems. The controversy with regard to the status of the Dutch delegates – whether they were permitted to use the title of “Excellency” – during the peace negotiations in Westphalia is a point in case. The permission to use the title would ‘have been an expression of the sovereign status of their country.’<sup>26</sup> In other words, the diplomatic ceremonial controversies were indicative of a changing political order in which new actors claimed sovereignty. Nonetheless, it was still too early to speak of an inter-state order. Moreover, the transitory nature of international relations was clearly reflected by the fact that the sovereigns who concluded the treaties did so in their “*personal capacity*,”<sup>27</sup> and the treaty obligations they took upon themselves were assumed as *personal obligations*.<sup>28</sup>

In brief, the post-1648 European and imperial political structures, which were based on the Westphalian Treaties, continued to develop. The dual nature of the Treaties made the internal politics of the Empire susceptible to external influences. The inclusion of France (Treaty of Munster) and Sweden (Treaty of Osnabrück) in imperial politics was intended to prevent the Emperor from expanding his power and claiming absolute sovereignty. Thereby, the fragmentation of sovereignty in the Empire was preserved and diplomatic controversy was consequently guaranteed.

Leibniz’ position at the prominent Court of the House of Brunswick-Lüneburg perfectly placed him to witness the confusion over diplomatic and ceremonial practices which were symptomatic of the changing political constellation both in and outside Germany.<sup>29</sup> The ambitions of the *Reichsfürsten*, who were pushing to expand their power and rights and who continually claimed sovereignty, furthered the process of state building and political modernization. Although they opposed the principle of absolute sovereignty when it came to the position of the Emperor, their actions were initially driven by the desire to consolidate their own power and (absolute) sovereignty. This claim to international participation and sovereignty

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26 The Epochs, at 185. Grewe reports that the French and the Spanish - after initially denying the Dutch delegates’ right to the title - later accepted its conditional use, after the Emperor had given the Dutch his permission on the condition that they reached a peace agreement with Spain, which they did on 30 January 1648.

27 Id., at 196, 361: “[Only] [i]n the course of the eighteenth century, treaties gradually ceased to be considered as personal obligations of the sovereign. This was the case even though, as before, it was the monarchs themselves who appeared as the contracting parties. However, the monarchs began to be listed – in the text of a treaty and in its preamble – not by their names, but only by their most important titles. By this practice it was expressed, significantly, that the contracting parties did not only engage themselves personally, but also the State which they represented and embodied.”

28 See also, J. Ray, *La Communauté Internationale d’après les Traités du XVIIe Siècle à nos Jours*, 3 *Annales Sociologiques*, Ser. C, (1938), at 18-20.

29 The following remark suggests that Leibniz moreover enjoyed this task. Codex, at 170: ‘It is pleasant then to be admitted to solemn events, to observe ceremonies, to know the changes in things, in rules, in customs and in legal norms, over several centuries; and to wonder at the changes of human genius and of languages amidst the very simplicity of our old people and their *naïvetés*.’

obviously required an alternative back-up that was rooted outside the imperial system of feudal rights. Indeed the power of his employer, the Duke of Brunswick-Lüneburg, was territorially based, rather than exclusively determined by old feudal rights.

As a result of his position, Leibniz was called upon to address the *Gesandtenfrage* – the issue of diplomatic representation and ceremonial. At the Nijmegen peace negotiations (1677-1679) between the Emperor and France, the Duke claimed explicitly his equality to the *Kurfürsten* (Electors) and argued that he had a right to participate and be represented by his ambassadors during the international negotiations. Leibniz discussed the issue in many of his works, often anonymously, as in the case of the ‘*Entretien de Philarète et d’Eugène Sur la question du temps agitée à Nimwegue touchant le droit d’ambassade des Electeurs et Princes de l’Empire* (1677).’<sup>30</sup> The treatise is written as a fictional dialogue between a representative of a prominent German Prince (not an Elector) and an ambassador of the Elector of Brandenburg and makes it poignantly clear what the question was, namely: ‘si les Princes de l’Empire ont droit d’envoyer des Ambassadeurs à Nimwegue, et si ces Ambassadeurs y doivent être traités comme ceux des Roys et Electeurs, ou Princes d’Italie.’<sup>31</sup> This question is answered with an unequivocal “yes.” The (propagandistic) treatise also provides evidence of the fact that the issue had already stirred controversy before Nijmegen.<sup>32</sup> The debate on the right to diplomatic representation was of course a debate on and a claim to (the right to) sovereignty and Leibniz had to formulate a legal argument to support the legitimacy of his employer’s (controversial) claims. To further this cause, Leibniz also published a more theoretical legal work on the sovereignty of the Princes, *Caesarinus Fürstenerius* (1677),<sup>33</sup> which became the subject of much debate at the universities and to which we will return later.

The controversy surrounding Ernst-August, the Duke of Brunswick, is evidence of the fact that the (legal) status of the newly participating representatives needed further clarification.<sup>34</sup> In spite of the participation of (the delegates of) the leading German Princes in the diplomatic conference for the preparation of the 1648 Treaties and the subsequent recognition of their

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30 In the preface to the 2nd edition, the title is slightly different: ‘Entretien de Philarete et d’Eugène sur la question du temps agitée à Nimwegue touchant le droit de Souveraineté et d’Ambassade des Electeurs et Princes de l’Empire,’ see, Acad. Ed., IV, 2, at 289 and 293.

31 Id., at 296-297.

32 See, e.g., at 316-317.

33 *Caesarini Fürstenerii de Jure Suprematus ac Legationis Principum Germaniae* (1677), Acad. Ed. IV, 2, at 3. Here, in an English transl.: *Caesarinus Fürstenerius* (1677), in LPW, at 111 *et seq.*

34 See also, J. Walter Jones, Leibniz as International Lawyer, 22 *BYIL* 3 (1945): ‘The Duke had not yet attained the rank of an Elector, and at the opening of the negotiations which ended in the Treaty of Nijmegen, 1679, there had been much dispute as to the ceremonial honours and precedence to be shown to those free princes of Germany who were not Electors and who complained that their representatives were accorded a lower place than those of such Italian rulers as the dukes of Modena and Mantua.’

capacity to conclude the treaties and Alliances, which granted them the new status of independent actors on the international plane, the legal status of the Electors and leading German Princes as well as the status of their delegates was neither equal nor unequivocally determined yet. This was the reason why tension mounted at the Nijmegen Conference over Ernst-August's claim of equality to Kings and Electors. The French, however, wished to continue to discriminate between Electors and Princes and refused to recognise the Duke's representatives as ambassadors. Consequently, Ernst-August assigned Leibniz to the task of assuring his elevation to the imperial rank of Elector. The Electorate was a privilege which was originally granted to only a few Houses. Despite the changing political situation, the Duke evidently considered the rank of *Reichkurfürst* to be preferable to the rank of *Reichsfürst*. Eventually, the campaign on Ernst-August's behalf was successful and in 1632, the Duke was designated the 9<sup>th</sup> Elector of the Holy Empire, of the Electorate of Hanover.<sup>35</sup>

In brief, the controversy surrounding ceremonial practices was a symptom of the prevailing confusion over the rules of political *representation* at and *participation* in international conferences and diplomatic life which had resulted from the political modernization of Europe. The diplomatic practice had to adapt to newcomers and reestablish mutual respect and international understanding and thereby contribute to the establishment of European and Imperial stability and to the prevention of conflict. But at the same time, the constitutional structure of the Empire was at stake. The power and (legal) status of the German princes, their relationship with the Emperor and the Electors (in terms of sovereignty) and the relationship between the Emperor and the Electors itself featured prominently on the political agenda. Leibniz was well aware of the urgent need for clarification of these issues and devoted much of his time to this. In the next section we will discuss the conceptual world and intellectual conventions among which his work was carried out.

### **1.2.2. At the Crossroads to Modernity: Rationalism and the Cosmopolis**

Rationalists like Leibniz and Descartes (1596-1650) before him, lived in troubled times rather than amidst tranquility.<sup>36</sup> The uncertainty ruling the 17<sup>th</sup> century was in fact one of the major contributing factors to, first, the rise of rationalism and, second, the unification of the

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<sup>35</sup> See also, Riley's Introduction to LPW.

<sup>36</sup> See, for a revision of the traditional interpretation of Modernity as a purely "rational" enterprise, which goes back to the (erroneous) historical assumption that Modernity came about at a time of social comfort and prosperity, with merely "rationalist" origins (as such negating modernity's humanist origins), Cosmopolis, at 30-44 and 45-87. See also, Europe: A History, at 471.

natural and moral-political order into one stable *cosmopolis*. We will briefly outline these two developments and indicate their relevance to Leibniz' work.<sup>37</sup>

First, it would be difficult to overestimate the influence of the Thirty Years' War on the development of Modern Thinking. The rise to supremacy of the human faculty of reason was a natural and necessary response to the general crisis and religious wars. The exposure to – social, economic and political – insecurity and the prevailing uncertainty over religious matters as well as over the foundations of human knowledge fuelled the objectives and intellectual programmes of rationalists like Descartes and Leibniz.<sup>38</sup> In order to prevail in the fight for theological supremacy the most effective weapons would be independent, general and universal truths that would ring true to all opposing camps and could serve as a starting point for all reasoning. This was also the objective of Descartes' 'reflections [namely, to] ope[n] up for people in his generation a real hope of *reasoning* their way out of political and theological chaos, at a time when no one else saw anything to do but continue an interminable war.'<sup>39</sup> The 17th-century philosophical '*Quest for Certainty*'<sup>40</sup> – as Toulmin termed it – was an attempt to escape *uncertainty*: Rationalist theories had to *replace* the more practical, skeptical humanist approach that was rooted in tolerance, diversity and the acceptance of uncertainty. In the eyes of the rationalists, the humanist approach had failed. They now turned to Universal Reason to guide them to certainty and stability:

the 17th-century triumph of rationalism, and the Quest for Certainty to which it gave rise, did not happen out of a clear blue sky, but were intelligible responses to a specific historical crisis. Viewed in context, that is, the rationalist move of de-contextualizing the problems of science and philosophy, and using the methods of formal logic and geometry as a basis for rational resolution of physical and epistemological problems, was more than a worthwhile experiment in philosophical method. It was also a smart political move: a rhetorically timely response to the general crisis of the 17th-century politics.<sup>41</sup>

A rational method was considered one that unfolded like mathematical reasoning. It did not cite tradition, theological or mythological elements, or Church authority as building blocks.

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37 See also, S. Brown, *The Seventeenth-century intellectual background*, in N. Jolley (Ed.), *The Cambridge Companion to Leibniz* 43-66 (1995).

38 Following Toulmin's analysis of the 17th century here I will leave aside the content of the underlying philosophical debates among Cartesians, anti-Cartesians, Newtonians, Spinozists, etc., like the one on "substance" or the idea of a (providential) God, and will describe Leibniz' intellectual context in necessarily more general terms which may to some extent fail to satisfy the philosophically trained reader, but will also keep the text accessible for readers with a legal background.

39 *Cosmopolis*, at 71.

40 *Id.*, at 10. This central phrase in Toulmin's analysis is actually the title of the 1929 Gifford Lectures by John Dewey in which it was 'claimed that the debate in philosophy had rested, ever since the 1630s, on too passive a view of the human mind, and on inappropriate demands for geometrical certainty.'

41 *Id.*, at 80.

Descartes hoped that the Euclid's geometrical model or axiomatic system would overcome all conflict. After Descartes it became the dominant model for scientific reasoning.<sup>42</sup> This switch of method was part of the broader intellectual counterpart of the 17th-century crisis: rationalism and de-contextualization were necessary in order to re-establish a *dialogue* which was detached from the political and religious controversies of the time. The rationalist pursuit of 'the light of reason' would uncover certainty, uniformity and order.

Just as Descartes dreamed of 'an ideal *method*' to establish theological and epistemological certainty and indisputable truths, so – against a background of reconstruction and the restoration of diplomatic communication and amidst the dynamics of European and Imperial politics – Leibniz searched for *unity* and *universal harmony*. He presented a number of concrete proposals for tackling the contemporary practical problems and for (re-)establishing open diplomatic and inter-religious communication. For instance, Leibniz wrote many essays which attempted to establish some common theological ground, which all religious opponents could agree to, with the aim of reuniting the Christian churches under one Papacy.<sup>43</sup> Moreover, himself a Lutheran in practice, Leibniz was in continuous dialogue with Catholicism and as such he was well placed to take on the task of bridging the gap. His determination to restore the dialogue between Protestants and the Catholic Church, and his plea for the foundation of ecumenical Councils,<sup>44</sup> bear witness to his life-long ideal of Christian reunification as well as to his concern for and involvement in the restoration of European unity in general, for which aim inter-religious dialogue was a bare necessity.

Another of Leibniz' concrete endeavours was his search for 'an ideal *universal language*' which could restore communication and overcome conflict and misunderstandings.<sup>45</sup> Leibniz realised that as many issues as possible should actually be kept outside the delicate realm of religion. Therefore, he considered it necessary to put together a *universal encyclopaedia*, one single system of all knowledge, and to create a *universal language – characteristica universalis* – to serve as the means by which to communicate about the encyclopaedia and as a tool for finding common ground. In his analysis, the world's *diversity* of languages and cultures was the

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42 Id., at 72-80.

43 Riley's Introduction to LPW, at 1; See also, *Cosmopolis*, at 101: 'his longlife mission as a theological "ecumenist."' Also, G. MacDonald Ross, *Leibniz* 6 (1984), hereinafter: MacDonald Ross.

44 Leibniz mentioned these councils in, e.g., a *Letter to Bossuet*, in LPW, at 140. See, e.g., the Preface to *Caesarinus Fürstenerius*, where Leibniz considers that the Emperor should arrange the ecumenical Council's meetings, in LPW, at 111. See also, *Cosmopolis*, at 98-105.

45 *Cosmopolis*, at 98-105. Toulmin explained that '[in] reading the philosophical response to the disasters of the early 17th century, the crucial figures were Descartes and Donne: for the period after the Thirty Years' War, it is helpful to consider, rather the life of Gottfried Wilhelm, Freiherr von Leibniz.' Id., 99-100.

primary source of misunderstanding, and therefore of conflict and mistrust.<sup>46</sup> Since the universal language would be an *exact* language, it would be *neutral*, i.e., unaffected by theological, cultural or political opposites, and therefore *authoritative*.

[The system] will constitute a new language which can be written and spoken. This language will be very difficult to construct, but very easy to learn. It will be quickly accepted by everybody on account of its great utility and its surprising facility, and *it will serve wonderfully in communication among various peoples*.<sup>47</sup>

On top of that Leibniz developed a calculator. By attributing not only characters, but also numbers to every possible idea or concept, reasoning became a relatively simple calculus exercise which would result in *true understanding*. People could now *calculate* rather than *fight* their way out of their differences by means of an instrument that would help them find identical answers and that would thus prevent or even end all conflicts.<sup>48</sup> Leibniz had a vision of homogeneity in human reasoning and intended to provide ‘the greatest instrument of reason’ by his unification of mathematics and philosophy.<sup>49</sup> The whole programme was a supremely *rationalist* project. It required making the best analysis and arriving at the soundest judgment guided by *reason*. By the faculty of reason, humanity would come closer to perfection, as Leibniz optimistically contended. The re-establishment of stability, however, depended equally upon the organisation of the domestic societies of the Empire and of Europe in general.

Secondly, in the intellectual attitude to or view of the world in this age, nature and society were united in one harmonious structure, as, after all, both originated from (the laws of) Reason. Toulmin tried to express this vision by the notion of ‘*cosmopolis*,’ which turned on the conviction that humanity had to copy the Divine order given by Creation and had to re-create this order within society in order to establish stability. The hierarchy and stability apparent in the structure of the natural world set the example for the organisation of a human society aiming to achieve the same result. The aim of capturing the natural and the moral-political world in one single conceptual language and explanatory structure was a joint endeavour. Politics and mathematics were practised to serve theology and cosmo-political structuring. The Rationalists

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46 See also, D. Rutherford, *Philosophy and Language*, in N. Jolley (Ed.), *Cambridge Leibniz Companion*, at 230 (1995).

47 As cited in *Cosmopolis*, at 100. Emphasis added.

48 There is one obvious fundamental point of criticism of Leibniz’ universal language argument: what he set out to accomplish, i.e., a mutual understanding between languages and among cultures, is at the same time that which necessarily precedes the whole exercise.

49 The binary numbers (the system whereby every number is a combination of 0 and 1), which he invented to indicate the value (or degree of perfection) of concepts and perform calculations with, connected mathematics with metaphysics. *Cosmopolis*, at 101. Leibniz wrote: ‘I dare say that this is the highest effort of the human mind; and, when the project is accomplished, it will simply be up to humans to be happy, since they will have an instrument that exalts the reason no less than the telescope perfects our vision.’ As cited in *Cosmopolis*, at 104.



intended to ‘purify’ human reasoning<sup>50</sup> and sought a comprehensive approach to make the world rationally intelligible (although it was conceded that man might never reach the point where it would be). One overall rational logical structure, the macro-*cosmos*, which incorporates the micro-*cosmos* (i.e., the individual) and the *polis* (the in-between level of man-made society) would lay bare the harmony of creation and of the laws of nature.<sup>51</sup>

After 1655, the *cosmopolis* idea became part of the effort to construct new *stable* societies after the decline of feudality.<sup>52</sup> The Europe of nations and their sovereigns, which was horizontally organised, gradually replaced the medieval, vertical, organisation of society.<sup>53</sup> For the sake of stability and hierarchy, there had to be a “God on earth” to serve as the pinnacle of the national social structures. The development of the nation state benefited from the fact that the trans-national Church under the authority of the Pope lost influence to national churches.<sup>54</sup> Moral and religious authority passed from the Pope to the regional sovereign or prince. In the cosmopolitical world, the sovereign was thought to have been “appointed” by God. As God’s replacement on earth, he became the new centre of power: ‘the Sun around which the State’s motions turned: even the personal embodiment of the State itself.’<sup>55</sup> In the new structure, the sovereign was no longer the feudal landlord, but became the symbol of the people and the unity of the nation. This new role of the sovereign, combined with the centralisation of political and military authority, decided the development of the European states;<sup>56</sup> the age of absolutism was dawning.

With the intellectual mood or world view bringing the socio-political organisation and the natural order together inside analogous systems, the Sun, as the centre and binding force of the solar system, became the symbol of unifying power, the icon of supreme unity itself, the

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50 *Cosmopolis*, at 104. See, *Europe: A History*, at 507. ‘The Wars of Religion offered fertile soil for the fragile seeds of reason and science.’

51 *Europe: A History*, at 510. ‘Together with the fruits of the Scientific Revolution and the rational method of Descartes, it [the “natural light of reason”] formed the core of an ideology which held centre stage from the 1670s to the 1770s. It led to the conviction that reason could uncover the rules that underlay the apparent chaos of both the human and material world, and hence of natural religion, of natural morality, of natural law.’ *Id.*, at 597

52 *Cosmopolis*, at 98. Leibniz explained that: ‘Between 1660 and 1720, few thinkers were *only* interested in accounting for mechanical phenomena in the physical world. For most people, just as much intellectual underpinning was required for the new patterns of social practice, and associated ideas about the *polis*. As a result, enticing new analogies entered social and political thought: if, from now on, “stability” was the chief virtue of social organization, was it not possible to organize political ideas about *Society* along the same lines as scientific ideas about *Nature*?’ *Id.*, at 107. An illuminating analogy had it that God was “the Great Clockmaker” and the laws of nature, whose mysteries were slowly being unveiled, were expressions or prescriptions of God’s will. *Europe: A History*, at 510. Around 1650, the universe was also pictured as a ladder or a huge pipe organ. Kepler (1571-1630) described the cosmos by means of musical analogies, with planets as notes on the heavenly scale. According to his system, planet Earth’s tune was *mi fa mi*, which he explained (during the Thirty Years’ War) as follows: ‘this vale of tears is ruled by *misère* et *famine*.’ A. Rood, *Alchemie en Mystiek*, Het Hermetische Museum 90, 89-97 (1997).

53 *Cosmopolis*, at 96-97. See also, *Europe: A History*, at 516.

54 See, e.g., *Cosmopolis*, at 91-93. Also, *The Rise and Fall of the Great Powers*, at 70.

55 *Cosmopolis*, at 94-95.

56 See, e.g., *The Rise and Fall of the Great Powers*, at 70, 75.

legitimization of (the sovereign's) supreme power. Although absolutism differed throughout Europe, the cosmo-political connotation was, nevertheless, shared, as in France *le Roi-Soleil* (Louis XIV, 1643-1715) ruled and in Spain *el Rey de las Planetas* (Philip IV, 1621-1665). Nature was understood as an expression of God's Rationalism. The King was obliged to establish in his state the same stability and hierarchy which God had created in the *Cosmos*.<sup>57</sup> The *polis* therefore had to be modeled on the *Cosmos*; hierarchy became justifiable and God was the 'ultimate source of change in both Orders.'<sup>58</sup> Both the human and the natural order were ruled by a similar set of rational laws and so harmony was re-established in the idea that all was part of one rational order.

Similarly, in his quest for unity and harmony, Leibniz perceived the natural and moral-political world as one single system.<sup>59</sup> Although at first glance the world seemed to be in chaos, Leibniz believed in a universal system of "pre-established harmony" hidden in its depths.<sup>60</sup> His philosophical attitude is best summarized in the words of Jaspers: 'We can speak of a basic frame of mind that resides in the notion of harmony.' His 'trust in order, reasonableness, [and] the harmony of things' shaped every project he undertook.<sup>61</sup> The unity, coherence, and consistency that inspired his thinking – from the lowest level of the composition of the soul up to the structure or composition of the political organisation in Europe as a whole – is typical of this cosmo-political view. The cosmo-political 'pre-established' harmony Leibniz discerned sprang from the designation of God as the 'Architect' of the natural world and the 'Law-Giver' of the moral-political world: in God nature and humanity were united.<sup>62</sup>

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57 W. Shakespeare, *King Lear* Act IV, 3: 'It is the stars./ The stars above us, govern our conditions.'

58 *Cosmopolis*, at 127. 'Behind the inertness of matter, they saw in Nature, as in society, that the actions of 'lower' things were subordinate to oversight and command by 'higher' creatures, and ultimately by the Creator. The more confident one was about 'subordination and authority' in Nature, the less anxious one need accordingly be about social inequalities.' *Id.*, at 128.

59 This perception of cosmopolitical unity is also illustrated by Leibniz' drawing accompanying a poem he wrote on the occasion of the illness and recuperation of Louis XIV, *Devise sur la Reconvalence du Roy*. Drawing of April 1687, in *Acad. Ed.*, IV, 3er Band, N. 128, at 841-842.

60 'What is below is like what is above.' *Europe: A History*, at 530. E.g., Leibniz was also attracted to alchemy. See, MacDonald Ross, at 5, 15-6; also, R. Ariew, G.W. Leibniz, *Life and Works*, in N. Jolley (Ed.), at 21. He was mainly preoccupied with its theoretical aspects. Alchemy belonged to a time in which it was attempted to discover unity between the macro- and microcosmos, it 'is from the outset a theory of how the world is related to human life' rooted in the idea that both the human body and the universe 'are made of the same materials, or principles, or elements.' Bronowski, at 138.

61 K. Jaspers, Leibniz, in *The Great Philosophers* Vol. III (Engl. ed., 1993), at 173 and 183. More fully the quote reads: 'We can speak of a basic frame of mind that resides in the notion of harmony, in intrinsic accord with the will of God, in the trust that everything is in order; and we can say right away that this basic frame of mind is precisely the ineradicable certainty of the rationality of God and the universe and that, therefore, rational cognition is the only way into the ground, and that, therefore, from the beginning rational construction from logical premises was, for Leibniz, the form of his philosophy.' Moreover, once when making some observations concerning a number of schools of philosophy Leibniz concluded his remarks with the words: 'I flatter myself that I have discovered the harmony of the different systems.' *As cited in*, Sheldon, *Leibniz's message to us*, VII (4) *J. of the History of Ideas* 386 (1946).

62 Leibniz, *Monadology*, transl. G.R. Montgomery, *Discourse on Metaphysics and the Monadology*, §§ 80, 89. Hereinafter: *Monadology*.

This profound conviction of pre-established harmony between the natural and the moral-political realm constituted the deepest source and underlying principle of all Leibniz' constructional thinking. Riley rightly points out that '[s]ince ... Leibniz is a supremely architectonic thinker who wants to relate everything to "first philosophy," one cannot just cordon off his moral and political thought from his metaphysics and theology: that is precisely what he himself did not do.'<sup>63</sup> Riley demonstrates that Leibniz' theory of justice cannot be separated from his metaphysical speculations on the concept of substance and their consequences for the conception of the human soul as part of the entire (moral) universe. Riley placed Leibniz' theory of substance and the soul – eventually laid down in the *Monadology* (1714) – at the heart of his study of Leibniz' 'universal jurisprudence' and shows that the former sustains the latter.

Within Leibniz' philosophy, the 'monad' is the smallest possible unit of rational substance; monads exist in degrees and in a hierarchical order.<sup>64</sup> The rational human soul is a monad of the highest degree, a 'spirit,' not only capable of feeling and 'accompanied by memory,'<sup>65</sup> but by its reason able to discover the eternal and universal truths:

[T]he knowledge of eternal and necessary truths is that which distinguishes us from mere animals and gives us reason and the sciences, thus raising us to a knowledge of ourselves and of God. This is what is called in us the Rational Soul or the Mind.

The 'rational soul' is the 'image of the Deity himself ... [hence] capable of knowing the system of the universe.' In other words, the human 'mind' enables man to separate right from wrong, just from unjust, true from untrue, and to act upon this knowledge. These capacities to tell the difference and to act accordingly define man's humanity. They enable him to be 'self-conscious' and 'to enter into a sort of social relationship with God.'<sup>66</sup> With mankind, God has created spiritual bodies and although 'the soul follows its own laws, and the body has its own laws,' '[t]hey are fitted to each other in virtue of the pre-established harmony between all substances, since they are all representatives of one and the same universe.'<sup>67</sup> The final causes in the moral realm, like the efficient causes in the natural world, will "naturally" bring about 'progress' towards perfection, i.e., towards God: '[f]or he is not only the Architect and the efficient cause of

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63 P. Riley, *Leibniz' Universal Jurisprudence: Justice as the Charity of the Wise* 5 (1996). Hereinafter: *Leibniz' Universal Jurisprudence*. Metaphysics is referred to as first or pure philosophy.

64 By stating that the 'created Monads may be called Entelechies, because they have in themselves a certain perfection,' Leibniz links up with the Aristotelian tradition in which *entelechia* is a teleological force in nature, including human nature.

65 *Monadology*, §§ 1-19.

66 *Id.*, § 29 and §§ 83-4. These eternal and universal truths are fixed like the numbers in the arithmetic or geometric system, see, Leibniz, *Opinion on the Principles of Pufendorf* (1706), in LPW, at 71.

67 *Id.*, § 78. See also, §§ 86-87. § 79: The laws of the soul are 'the laws of final causes through their desires, purposes and means.'

our being, but he is also our Lord and the Final Cause, who ought to be the whole goal of our will, and who, alone, can make our happiness.’<sup>68</sup>

This rather optimistic idea of inevitable progress is related to the capacities of the human mind and its desire for perfection and justice. Since God was perfect, he created a world as close to perfection as it could possibly be,<sup>69</sup> and it was in the nature of all things and all beings to strive to perfect the perfection. In other words, Leibniz argued that it was human nature to try to perfect oneself and others. Justice, as we will see below, Leibniz defined as wise charity or the inclination to favour the good of others, “the general good.” Because of man’s moral capacity and his (social) direction towards God or the general good, he was a citizen of ‘the city of God.’ All human minds together, i.e., ‘the totality of the spirits,’ inhabited ‘the City of God, that is to say, the most perfect state under the most perfect monarch. This city of God, this truly universal monarchy, is a moral world within the natural world.’<sup>70</sup> Man inhabited this moral world and his desire for perfection led him in the direction of *universal justice*.

In brief, the cosmo-political designation of God as Architect and Monarch formed the foundation underlying the all-connectedness of the Leibnizian universal system. His theory of justice based on the human rational soul which was essentially directed at God cannot be separated from his metaphysical theory of substance. In this theory, the rational soul qualified man for citizenship of the Christian Republic. In Leibniz’ universal jurisprudence, each monad of the highest degree was a ‘person’ with moral and social awareness. The rational mind defined human nature, it made a person human. The (moral) concept of personality thus formed an essential link between the natural and the moral-political world. Or, to conclude in Riley’s words:

[Leibniz] is, to be sure, concerned as a metaphysician with substance as such, but always wants to show that without (naturally immortal) substances or persons there can be no moral concepts, no “subjects” of universal justice, no “citizens” of the divine monarchy or City of God.<sup>71</sup>

We will return to Leibniz’ concept of universal justice below. Here, it suffices to conclude that at a time when intellectual life was characterized by profound rationalism and a cosmo-political attitude including the wish to unite all things within one harmonious system, and at a time when sovereignty became *the rationale* of the socio-political realm, not unlike God in his capacity as *the foundation* of the moral realm, Leibniz’ theory of substance, which was also a theory of the

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68 Id., §§ 87-90

69 Id., §§ 53-55.

70 Id., §§ 85-86.

71 Leibniz’ Universal Jurisprudence, at 51, at 5: Riley summarized ‘in short the *Monadology* is a theory of personality.’

human soul, attained fundamental moral-political significance. Leibniz' famous "optimism" was moreover based on the idea that man was not only capable of knowing the system of the universe but that with this knowledge and by his nature man was also endowed with the ability 'to imitate it somewhat by means of architectonic patterns,' i.e., by his own *actions* within his own sphere of human society.<sup>72</sup> The responsibility to act justly is therefore part of man's moral personality.

Let us now turn to the jurisprudential context and in particular to Grotius, Hobbes and Samuel Pufendorf, so that afterwards we may evaluate Leibniz' argument on the desired European (and Imperial) order against this background.

### 1.2.3. Jurisprudential Context: Identifying International Legal Scholarship

#### 1.2.3.1. Prelude – Grotius and Hobbes

Both Grotius and Hobbes lived and worked amidst the chaos and insecurity of the Thirty Years' War, and Hobbes had fled Britain because of the Civil War there. Thus, almost naturally one could say, they raised the questions of how to create order and establish legitimate power and authority in order to bring about lasting peace. Leibniz generally referred to Grotius with approval and admiration.<sup>73</sup> Hobbes' views, however, he generally regarded as severely conflicting with his own, although he agreed with Hobbes on the subject of the state's duty to establish order and security for its people and also shared his belief that a tendency to be selfish was inherent in human nature.

In *De Jure Belli ac Pacis* (1625),<sup>74</sup> Grotius considered himself to be the first to approach the law of nations systematically.<sup>75</sup> With this systematic approach he intended to increase respect for the law of nations and heighten its authority as a proper branch of the law. However, Leibniz respect for Grotius stemmed from the substance of his than rather than from the way the book was written. The significance of Grotius for Leibniz' thinking, Riley explains, should be found in Grotius' contribution to the revival of the Platonic notion of justice to which Leibniz' frequent

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<sup>72</sup> Id., §83. Emphasis added.

<sup>73</sup> See, e.g., Leibniz in *Caesarinus Fürstenerius* : 'Hugo Grotius, that excellent man,' and in *Opinion on the principles of Pufendorf*: 'the discernment and erudition of the incomparable Grotius,' in LPW, at 113 and 65. Also, e.g., *Letter to Abbé Jean-Paul Bignon*, *op.cit.*, note 5. See, for Leibniz' *Caesarinus Fürstenerius* (1677), in Acad. Ed., IV, 2ter Band (1677-1687), N.1, at 3. Here, in Riley's LPW transl., at 111-120. Hereinafter: *Caesarinus Fürstenerius*.

<sup>74</sup> H. Grotius, *De Jure Belli ac Pacis* (1625), in J. Brown Scott (Ed.), *The Classics of International Law* ed. (1925-1927).

<sup>75</sup> 'Up to the present time no one has treated [that body of law which is concerned with the mutual relations among states or rulers of states, whether derived from nature, or established by divine ordinances, or having its origin in custom and tacit agreement] in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished.' ... 'Such a work is all the more necessary because in our day, as in former times, there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name.' H. Grotius, *De Jure Belli ac Pacis*, Prolegomena, § 1 and 3, at 9 and in § 58, at 30: 'With all truthfulness I aver that, just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact.'

citation of Grotius' words, i.e., 'measureless as is the power of God, nonetheless it can be said that there are certain things over which that power does not extend ... just as even God cannot cause that two times two should not make four, so he cannot cause that which is intrinsically evil, to be not evil,' seems to point. Indeed, Leibniz criticised consistently Hobbes and Pufendorf for their reasoning that justice is what is done by a supreme power, for it would mean that justice is based on will and power.<sup>76</sup> In brief, according to Leibniz what God wants is not good and just because he wants it, rather God wants that what is good and just. However, we also find more specific traces in Leibniz' universal jurisprudence of a number of crucial concepts of Grotius' theory, which therefore should be addressed here. The first of these is the fundamental concept of *appetitus societatis*, which is man's natural desire and need to live in a society. The second is the establishment of agreement among the free wills of man, the establishment, therefore, of common consent. In Grotius' view, the *ius gentium* was the entirety of legal norms that all nations have in common and that apply to the relations among political communities and their rulers. It stems from the two concepts mentioned: natural reason and free will. A third element of Grotius' theory concerns sovereignty. The individual human being was fully included in the Grotian system of the law of nations and sovereignty was considered a personal capacity of the ruler of the state rather than belonging to the state itself. Sovereignty conferred upon rulers full legal competence. In this scenario, the correlative right to good governance was merely an *aptitude*, but it was still conceptually indispensable to the establishment of another right, namely the right to rebel, which I will finally touch upon briefly.

Grotius considered social life as a *sine qua non* for human existence.<sup>77</sup> For this reason, man was naturally predisposed to pursuing a peaceful social order.<sup>78</sup> From this perspective, the source of natural law is human nature itself: the *appetitus societatis* together with the faculty of reason. These enable man to decide what would serve his own and his fellow man's interests, i.e., what would be in accordance with human nature, and, conversely, what would be contrary to

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<sup>76</sup> Leibniz' Universal Jurisprudence, at 33-34. See, e.g., for Leibniz' critical remarks on the way 'De Jure Belli ac Pacis' was written, *Caesarinus Fürstenerius*, LPW, at 114. See, e.g., for Leibniz' use of Grotian thought, i.e., that there is a natural obligation to take care of oneself and of others even in case God (Pufendorf's divine law-giver) does not exist, in his critique of Hobbes and Pufendorf, *The Principles of Pufendorf*, LPW, at 71. Leibniz expressed his 'astonish[ment]': 'will he who is invested with the supreme power do nothing against justice if he proceeds tyrannically against his subjects; who arbitrarily despoils his subjects, torments them, and kills them under torture; who makes war on others without cause?' *Id.*, at 70.

<sup>77</sup> Grotius recalled Seneca's warning against the solitary life: 'Take us *singly*, and what are we? The prey of all creatures, their victims ...' Man has 'no might of claws or of teeth [which] makes him a terror to others, naked and weak as he is, his safety lies in fellowship.' Seneca, *On Benefits* IV xiii para. 1, Loeb Classical Library, at 241. Emphasis added. Here, Seneca rejects the perception of individualism as atomism; man living outside human society loses his humanity and is a human being no longer, because he has lost an essential part of his nature. *De Jure Belli ac Pacis*, Prolegomena, § 16, at 15.

<sup>78</sup> *Id.*, Prolegomena, § 6 and 7, at 11-12.

natural law. Grotius defined natural law as a ‘dictate of right reason.’<sup>79</sup> Human *nature* was able to distinguish between the just and the unjust through *right* reasoning: *just* was that which was in conformity with the nature of man and the public good, i.e., the good of the community to which he wished to belong.<sup>80</sup> Injustice was done if an act was committed which was contrary to the nature of the community of *rational* human beings and which consequently threatened peace and order.<sup>81</sup> Because of its ‘universal cause,’ this ‘common sense of mankind’<sup>82</sup> was indeed the law of the *Societas Humana*. Because the *capacity* of knowing the difference between just and unjust and the *capacity* of acting accordingly were attributed to the human *individual*, man was the moral and political actor of this world. The *ius gentium* ultimately spoke to the conscience of – and thus applied to – every member of humanity, whether sovereign or subject, whether individually or collectively organised; it was the law of the universal human society. As the primary source of the law of nations was natural law and the source of natural law was human nature, the individual took up a central position in Grotius’ theory of the law of nations. Besides providing its source, it was also its ultimate addressee.

Grotius recognised that the terms “natural law” and “the law of nations” were often confused, and went on to explain that his perception of *ius gentium* also included *voluntary* law.<sup>83</sup> The voluntary law of nations was no different from the natural law of nations in respect of the kind of relations they governed, as both applied to the relations between political communities (*civitas*) and to the relations between the rulers of these communities, the heads of state.<sup>84</sup> However, because voluntary law had a different source, a different method was required for finding its rules. The voluntary law of nations was the law that “almost” all political communities had in common and that originated in the *free will* of the people of these communities. “Almost” universal consensus was evidenced by enduring custom and tacit agreement as witnessed and described by experts.<sup>85</sup> If used separately from natural law, *ius gentium* consisted of this voluntary law of the universal community. At the time when Grotius expounded his theory, the universal community was shifting away from feudalism and towards the Westphalian order and as a result, so was the law of nations or *ius gentium*. Grotius still

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79 *Id.*, Book I, Ch. I, §10, at 38 *et seq.*

80 *Id.*, Prolegomena, § 44, at 25.

81 *Id.*, Book I, Ch. I, § 3, at 34-5.

82 *Id.*, Book I, Ch. I, § 12, at 42-44.

83 *Id.*, Book I, Ch. I, § 11 and 14 (1), at 41 and 44; Ch. II, § 4 (1), at 57. It is commonly accepted that Grotius’ use of the terms was sometimes confusing: ‘Grotius, like scholastics, has no single term for international law. ... [and] [a]gain like the scholastics, Grotius is more interested in natural law touching international relations than in the volitional *ius gentium*.’ A Concise History, at 104.

84 *Id.*, Prolegomena, § 1 and 17, and Book I, Ch. I, § 14 (1), at 44.

85 *Id.*, Book I, Ch. I, § 14.

perceived the universal community as populated with ‘persons’, as a society made up of sovereigns and their subjects, who were united in the natural bond of mankind. Treaty obligations were still entered into by sovereigns in their personal capacity, even though the modern state – *civitas* or political community – was already emerging.

Grotius’ concept of sovereignty was an indication of the *internal* situation: it indicated what was the highest power (*summa potestas*) within the ‘perfect association,’ i.e., the “state.”<sup>86</sup> The best state was the one aiming for perfection, which meant the attainment of the common good or the happiness of *all*. Grotius defined the ‘people’ as a composite artificial body - a *corpora artificialia* - in which separate members were united in ‘spirit.’ This way, ‘a single essential character’ existed among them. This essential character ‘is the full and perfect union of civic life, the first product of which is sovereign power; that is the bond which binds the state together.’<sup>87</sup> He distinguished between the *general* and the *specific* bearer or subject (‘*subiectum*’) of this highest or sovereign power: just as the human body was the subject of the sense of sight and the eye was its particular subject, so the *civitas* - the political community - was the general subject of the sovereign power and the sovereign its specific subject.<sup>88</sup> This distinction offered a framework for the recognition of a right to rebel under the law of nations, although Grotius was reluctant to acknowledge this right, and understandably so if we take the instability of the time into account. In principle, the *civitas* cannot “legitimately” rise up against the supreme power. This means that sovereignty did not reside with the people in such a manner that it included an absolute right to rebel.<sup>89</sup> The actual rights of sovereignty belonged to the ruler, but they were not unconditional.<sup>90</sup> Grotius considered rebellion legal under natural law if the sovereign ruler ‘transgress[ed] against the laws and the State,’ ‘manifestly abandoned his governmental authority’ or ‘showed himself [to be] the enemy of the whole people.’<sup>91</sup> Grotius had been appointed as the official historiographer of the States of Holland in 1601 and his particular assignment was to describe, or rather, to justify, the Dutch uprising against the Spanish government.<sup>92</sup> Unsurprisingly, he came to the conclusion that the Dutch Republic, which was the product of this rebellion, had resulted from a revolt against tyranny and was therefore based on legitimate (natural law) grounds.<sup>93</sup>

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86 *Id.*, Book I, Ch. III, § 7, at 102-103.

87 *Id.*, Book II, Ch. IX, § 3, at 310-311.

88 *Id.*, Book I, Ch. III, § 7, at 102-103. Also, Book II, Ch. IX, § 8(1), at 314.

89 *Id.*, Book I, Ch. IV, § 7 (15), at 156.

90 *Id.*, Book I, Ch. III, § 8, at 103 *et seq.*

91 *Id.*, Book I, Ch. IV, §§ 8-14, at 156-159.

92 This historical study partly found expression in Grotius’ *Annales et Historiae* (1657).

93 On the Prince of Orange’s initiative, the States General renounced the sovereignty of the Spanish King on the basis of *bad*



In the context of this study, it should be noted that in many instances Leibniz endorsed and developed Grotius' argument on the right to rebel. The right to rebel is relevant here in the sense that if it was indeed a recognised right under the positive law of nations and attributed to the governed as a group, this group could conceptually qualify for international legal personality. To understand how Grotius could, in principle, deny the existence of a right to resist, yet at the same time acknowledge its moral legitimacy on certain occasions it is useful to introduce the gradual distinction between *facultas* and *aptitudo*.<sup>94</sup> *Facultas* conveys an active quality in its most perfect form: a legal competence or right based on either natural or positive law. *Aptitudo* is a less perfect state of being, it concerns 'dignity' or 'worthiness', and legal claims cannot be based on it. It is the passive rather than the active quality of competence; it indicates the 'potential' to act. Having sovereignty has the legal meaning of having full competence, i.e., *facultas*, and as such provides the highest legal claim to the power to rule a political community, a right that is conferred upon the *ruler* by the people, or, in the case of the Dutch Republic, by the social classes which had naturally united to form the *civitas*. Both qualities relate to justice: *facultas* to 'corrective justice' and *aptitudo* to 'distributive justice.' Grotius claimed that the aptitude of the represented for being the recipients of 'good governance' fell within the category of distributive justice: it was a (passive, but nonetheless powerful) right that could not be legally enforced. However, in cases of gross injustice, it could turn into a (natural) *legal* right to revolt against tyrannical rule. This would happen as follows. If the head of state completely failed to live up to the standards of good governance, the aptitude would become a *facultas* and the represented would acquire the natural legal right to revolt. Aptitude therefore means having passive rights under natural law, but not the capacity to enforce them. In case of severe injustice, however, the moral (potential) quality may change into a proper natural right.

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*oppressive governance* and offered the rights, duties and privileges of (the constitutionally regulated) sovereignty over the Netherlands to a new sovereign, the duke of Anjou. In 1581, with the Act of Abjuration (*Plakkaat van Verlatinge*) the States General 'repudiat[ed] Philip II and his heirs in perpetuity.' J.I. Israel, *The Dutch Republic: Its Rise, Greatness, and Fall 1477-1806* (1995), at 209. It should moreover be noted that at the time the States General was the assembly composed of the representatives of the United Provinces, which was dominated by the province of Holland. This representation was organised on the basis of the Dutch social classes, i.e., the nobility and the regent class as representatives of the cities. J. Huizinga, *How Holland became a Nation* (1924), in *Verzamelde Werken* 2 (1948), at 278: 'Each province was governed by its States, which means Estates, composed of representatives of the towns and of nobles, the clergy having dropped out as an Estate by the Reformation.' The repudiation of the old and the adoption of the new sovereign was largely a personal affair: the personal ties of rights and privileges between the representatives of the classes and the lord of the land were first renounced and subsequently re-established between the representatives and the new lord whereby the latter swore an oath to abide by the rules and customs in force. The Dutch Republic, at 209: 'Furthermore, the Act of Abjuration required new oaths of allegiance to be taken from all office-holders and magistrates, as well as the civic militias, whereby holders of office had to swear that they no longer held themselves to be bound by their former oaths of loyalty to the Spanish king and "swear further to be true and obedient to the States against the king of Spain and his followers.'" Anjou's sovereignty and authority were merely formal and never really effective. After he left in 1583 and died in 1584, the States in 1585 offered the sovereignty over the Netherlands to the King of France, Henri III, who declined, and subsequently to the British Queen Elizabeth, who also refused. Consequently, the *rebellious* United Provinces – after spending a few years as an English protectorate – reluctantly transformed into a Republic. 94 *De Jure Belli ac Pacis*, Book I, Ch. I, §§ 4-8, at 35-37.

It can be concluded that Grotius did not formulate an explicit concept of international legal personality. However, every member of the *societas humanas*, whether sovereign or subject, was, in a *personal* capacity, subject to (the) natural law (of nations).

Personality is more expressly a significant element of Hobbes' political philosophy. In *Leviathan*, he dedicates a key chapter to the concept of personality, namely the final chapter of the first part, '*Of MAN*,' which is linked to the next part, '*Of COMMON-WEALTH*.' This may be considered an indication of the concept's function: it is the essential link between the natural world of chaos and the civil world of organised peace. The concept is necessary to be able to transcend the former and reach the latter. Hobbes gives the following definition of the concept of person:

A PERSON, is he *whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction.*

When they are considered as his owne, then is he called a *Naturall Person*: And when they are considered as representing the words and actions of an other, then is he a *Feigned or Artificiall person*.<sup>95</sup>

In Hobbes' theory, the concept of person plays an essential role in the creative process of the state. In the beginning there is chaos; an unorganised crowd of 'natural persons' live in a natural state of war.<sup>96</sup> However, as the crowd begins to realise that peace and order are the preconditions for the effective pursuit of their individual interests and the protection of their property, they surrender their liberty by concluding a covenant among themselves that creates a Sovereign Power, an 'artificial person,'<sup>97</sup> who has the authority to represent and command them.<sup>98</sup> The crowd thus transforms into a regulated group, which is subordinate to the Sovereign Person,

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95 Th. Hobbes, *Leviathan*, Ch. XVI, Penguin class ed, at 217.

96 *Leviathan*, Ch. XIII, at 185-6: the life of man in a state of nature is not social, but '*solitary*' and miserable. The state of nature is a state of total war: '[men] are in that condition which is called Warre; and such a warre, as is of every man, against every man.'

97 Ch. XVII, at 227: 'The only way to erect such a Common Power, ... .., is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgment. This is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such a manner, as if every man should say to every man, *I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.* This done, the Multitude so united in one Person, is called a COMMON-WEALTH, in latine CIVITAS. This is the Generation of that great LEVIATHAN, or rather (to speak more reverently) of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence.'

98 *Leviathan*, Ch. XVII, at 223: '[W]ithout the terrour of some Power ... without the Sword,' peace would not be possible and the state would collapse.

*ergo*: the generation of ‘that great LEVIATHAN called a COMMON-WEALTH, or STATE.’<sup>99</sup> The (artificial) personality of the Sovereign of the Common-wealth is an essential condition for the creation of the state, or, in Hobbes’ own words: ‘the Essence of the Common-wealth; which (to define it,) is *One Person*, ... And he that carryeth this Person, is called SOVERAIGNE, and said to have *Soveraign Power*; and every one besides, his SUBJECT.’ This definition suggests that the state is also a person, as the Sovereign Power is said to ‘carry the one person of the commonwealth’. However, in the next chapter Hobbes explains more clearly that the Sovereign Person has ‘the *Right to Present* the Person of them all, (that is to say, to be their *Representative*)’.<sup>100</sup> The multitude is transformed into one Commonwealth, but does not thereby become one Author. In fact, Hobbes expressly denies the personality of the state: ‘the Commonwealth is *no Person*, nor has capacity to doe any thing, but by the Representative, (that is the Sovereign;).’<sup>101</sup> The Sovereign is a *conditio sine qua non* in Hobbes’ theory of the creation of the state; without the Sovereign, there can be no state or civil society. For statehood, we need the artificial Person who is a covenanted Actor on behalf of the state which he creates by his existence.<sup>102</sup> The unity of the multitude depends on the multitude being united in the one person of the covenanted Actor, although the united multitude is not itself one Author, but ‘many Authors.’ In brief, Hobbes claimed that as a result of the creation of the Sovereign, the artificial person, by a group of natural persons, chaos and war would be transformed into the peace of a regulated group subject to absolute Sovereign power. The state was ‘instituted’ with the sole purpose of defending peace and order,<sup>103</sup> and it so happened that absolute sovereignty served this purpose best.

In addition to the use of personality in connection with the political notions of authority, representation and the capacity to act and take responsibility, Hobbes highlighted the theatrical model or image it is connected to:

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99 Id., Hobbes’ Introduction, at 81.

100 Id., Ch. XVII, at 228.

101 Emphasis added.

102 Ch. XVI: ‘A multitude of men, are made *One Person*, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*. And it is the Representer that beareth the Person, and but one Person: and *Unity*, cannot otherwise be understood in Multitude.’

103 Following this line of thinking, Hobbes came up with a negative definition of freedom as the ‘absence of external impediments’ as these ‘oft take away part of mans power to do what hee would.’ Id., Ch. XIV, at 189. His contractarian theory of the state is based on a rather atomistic concept of human nature. After all, man only became a social being by contract, solely to pursue his own ends. This became the canonical representation of the negative concept of political liberty. Id., Ch. XXI, at 261 *et seq.* The republican or positive concept of liberty as the inclusion of the people in the political processes and the creation of law is not one Hobbes embraced.

*Persona* in Latine signifies the *disguise*, or *outward appearance* of a man, counterfeited on the Stage; and sometimes more particularly that part of it, which disguiseth the face, as a Mask or Visard: And from the Stage, hath been translated to any Representer of Speech and action, as well in Tribunalls, as Theaters. So that a *Person*, is the same that an *Actor* is, both on the Stage and in common Conversation; and to *Personate*, is to *Act*, or *Represent* himselfe, or an other; and he that acteth another, is said to beare his *Person*, or act in his name;<sup>104</sup>

The connection of the concept of person with the image of the *mask* was thus once more brought to the fore. And *persona* was, indeed, a mask in this context: when worn by the Sovereign, it turned him into the artificial person in whom the crowd became a state. In summary, therefore, Hobbes claimed that a state was founded when natural persons by covenant authorised one central power to be their representative and “wear” the “mask” of the Sovereign Actor in whom the multitude was united.

In conclusion, however, Hobbes’ use of personality could not, of course, entail the concept of ILP,<sup>105</sup> as Hobbes did not recognise the law of nations.<sup>106</sup> Hobbes’ conception of absolute sovereignty<sup>107</sup> together with his negation of the separate existence of a legal order among and above sovereigns and their nations, foreshadowed the development of the international law discipline in the 19<sup>th</sup> century. The image of the *mask* would continue to be attached to the concept of personality and – by shifting from the Sovereign to the state and from the national to the international context – would remain linked with the concept of ILP.

Leibniz however challenged Hobbes on these issues, sometimes using Pufendorf as a straw-man, and presented a different concept of sovereignty which also supported rather than undermined the law of nations.

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104 Id., Ch. XVI, at 217. Hobbes refers to Cicero here.

105 In Hobbes’ theory, legal persons (or ‘*Persons in Law*’) ‘are made by authority from the Sovereign Power of the Commonwealth.’ Id., Ch. XXII, at 274-275. Legal persons are subordinate to the law, the authority of the representative they have established is limited by law, the Sovereign must recognise the legal persons and it is he who prescribes the limits of their representative’s power by law.

106 The law of nature is the liberty which both men and nations have to act in self-preservation when living in a state of nature. Law only exists if peace and security are guaranteed by the Common *Power*, the Sovereign who rules on the basis of the fictitiously concluded covenant. In Hobbes’ view, authoritative power makes law (as without sovereignty there can be no law) and thus he identified the law of nations with the law of nature: ‘the law of nations, and the law of nature, is the same thing.’ In his view on the law of nations, Right is equated with Power. *Leviathan*, Ch. XXX, at 394. This position of positive law theory foreshadowed Austin’s (19th-century) legal theory and doctrine on sovereignty.

107 See, e.g., Ch. XXII, at 275: In (national) legal persons, ‘the power of the Representative is always Limited: And that which prescribeth the Limits thereof, is the Power Sovereign. For Power Unlimited, is absolute Sovereignty. And the Sovereign, in every Commonwealth, is the absolute Representative of the subjects, and therefore no other, can be Representative of any part of them, but so far forth, as he shall give leave ...’ In the international context there is no sovereign and therefore no authority to create either international law or international legal persons.

1.2.3.2. The other German advisor – Samuel Pufendorf (1632-1694)  
 Leibniz and Samuel Pufendorf were two prominent representatives of the *Reichspublizistik*, which was a tradition of legal scholarship that dealt with Imperial constitutional and public law, also in relation with political philosophy, and which after 1648 mainly dealt with the question: “who is the Sovereign: the Emperor, the Electors or perhaps the *Reichstag* (i.e., the collectivity of the *Reichstände*)?”<sup>108</sup> The parallels between Pufendorf and Leibniz are many: both studied numerous subjects, among which Mathematics, Theology and Law, both attended, although not simultaneously, the Universities of Leipzig and Jena, and at the University of Jena both were pupils of Erhard Weigel (1625-1699), who combined two branches of science – natural law and mathematics – and who taught ethics by means of the Euclidean geometrical method.<sup>109</sup> Like Leibniz, who throughout his life acted as an advisor to various European rulers, Pufendorf was involved in the practical aspects of Imperial and European politics. In 1658, Pufendorf earned his living as a tutor in Denmark in the service of the Swedish ambassador. When war broke out between the two countries shortly after his arrival, he was imprisoned by the Danish authorities and recourse to diplomatic protection was denied him.<sup>110</sup> In 1670, Pufendorf ended a nine-year stay at the University of Heidelberg in order to take up residence at the University of Lund, in Lutheran Sweden. Two years later, he published *De Jure Naturae et Gentium*.<sup>111</sup> Leibniz and Pufendorf corresponded intermittently from 1674 - 1693.<sup>112</sup>

From 1677 until his death in 1694, Pufendorf dedicated his professional life to being a full-time advisor to several royal courts. First, he became the privy councillor and historiographer of Charles XI, the King of Sweden. In 1688, Frederick William, the Great Elector of Brandenburg, invited him to the Court in Berlin, where he served Frederick William’s son, Frederick III, until his death. From 1618 onwards, Brandenburg and Prussia were both governed by the same Sovereign.<sup>113</sup> In 1640, Frederick William (r. 1640-1688) succeeded to the title of Elector of Brandenburg and Duke of Prussia and while in the former capacity he was officially an imperial subject, in the latter he was not. Frederick William was a “modern,” “enlightened absolutist” protestant ruler who built his state at the expense of the ‘universal’

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108 See, e.g., *Geschichte des öffentlichen Rechts*, *op.cit.* note 20, at 230 *et seq.*

109 See, MacDonald Ross, at 4. ‘Throughout his life Pufendorf remained gratefully devoted to this eminent teacher.’ See also, W. Simons’ Introduction to *On the Law of Nature and Nations* (1688), transl. *De Jure Naturae et Gentium* (1672) in the *Classics of International Law* ed., at 12a (1934). Hereinafter: *JNG*. Although Pufendorf ‘formally’ broke with this method in *De Jure Naturae et Gentium* (1672), its structure is still present in the way he reasoned. *Id.*, at 14 a.

110 During his eight months in captivity, he wrote *On the Elements of Universal Jurisprudence* (1660).

111 A second edition appeared in 1684, and a third in 1688, published in Amsterdam, of which *The Classics of International Law* edition is a photographic reproduction.

112 K. Müller and G.Krönert (Eds.), *Leben und Werk von G.W. Leibniz* (1969), at 37.

113 Until 1618, Prussia had *not* been part of the Holy Roman Empire. In the Middle Ages, Prussia was the land of the Teutonic Knights. *Europe: A History*, at 556 *et seq.* In 1701, Frederick Willem III crowned himself King of Prussia.

authoritative structures of the Emperor and Pope. The celebrated description of the imperial institution as a ‘monstrous’ political organisation however pre-dates Pufendorf’s service to both the King of Sweden and the Great Elector of Brandenburg: ‘l’Allemagne est un corps irregulier & confus & qu’il s’en faut de bien peu que ce ne soit un monstre en politique.’<sup>114</sup> As early as 1664 under his pseudonym *Monzambano*, Pufendorf analysed the (problematic) state of imperial politics in clear terms:

Ce qui cause des grands maux à l’Allemagne, & qui est une source de trouble & de malheurs pour elle ; c’est que Caesar [il] travaille incessamment à reduire l’Empire sous les véritable loix d’une Monarchie, au lieu que les Estats tout au contraire font ce qu’ils peuvent pour conserver & pour augmenter leur liberté. ... ‘les autres Princes de l’Allemagne, sont si fâchés de voir les Electeur si puissants & si riches que leur jalousie passe quelque fois jusques à la querelle & au bruit, & va si avant, qu’ils n’ont point de honte d’usurper, contre toute forte de justice, & de droit beaucoup de choses, qui ne leur appartiennent pas ; ...’<sup>115</sup>

Religious differences that tended to result in wars caused problems both within and outside the emerging states. Unlike Leibniz, Pufendorf did not strive to reconcile these differences by means of a single ecumenical programme or to reinforce the universal authoritative structure.<sup>116</sup>

Pufendorf never opposed the definitive break-up of the medieval universal political structures; he simply considered this break-up inevitable. In his opinion, a political constellation was either a united state with one sovereign or an alliance of states. Any division of sovereignty was impossible.<sup>117</sup> Moreover, to restore the Empire and turn it into a regular and unified state was, in his eyes, practically impossible as it would require a ‘complete turn-around and total revolution’ and would consequently result in horrible disorder: ‘on ne pourrit jamais remettre l’Allemagne dans son premier Estat, qu’avec des difficultés extremes qu’avec des travaux insurmontables, & qu’en causant des confusions & des desordres horribles.’<sup>118</sup> Pufendorf therefore did not expect that the re-unification and reinforcement of the Empire would promote peace and order among the Imperial and European powers. He did, however, subscribe to the view that religion as a potentially explosive and divisive element within the Empire and Europe at large should be brought under control. In order to serve as the guideline in politics among the rulers and to

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114 Pufendorf, *L’Estat de l’Empire d’Allemagne de Monzambane* (1669), at 310 and 348; this is a French transl. of Pufendorf’s work: Severinus de Monzambano, *De statu imperii Germanici* (1664). See also, id., at 277: ‘l’irregularité de cet Estat ;’ id., at 346: ‘L’Allemagne ne peut ester qu’un Estat bien infirme.’ Leibniz referred to Pufendorf’s qualifications of the Empire in, e.g., *Caesarius Fürstenerius*, at 119.

115 *L’Estat de l’Empire d’Allemagne*, at 310 and 352-353.

116 In 1679, Pufendorf under the pseudonym Basilii Hyperate, published a critical work on the Roman Catholic Church and its claim to sovereignty, ‘*Historische und Politische Beschreibung der geistlichen Monarchie des Stuhls zu Rom.*’

117 See also, *Geschichte des öffentlichen Rechts*, at 234.

118 *L’Estat de l’Empire d’Allemagne*, at 311 and 369.

transcend the religious differences between them and in order to preserve peace and order within the Westphalian system, international politics should operate on the basis of one (neutral) natural law system.

Starting from man's natural reason and his existential desire to associate ("sociability"), Pufendorf built a whole system of rights and duties of necessary natural law upon the obligation to support society, or at least upon the prohibition to harm one's fellow man. He followed Grotius in the idea that man was essentially sociable, although Pufendorf believed that man was sociable out of a concern for his own safety and well-being, instead of out of his love for society. It was true, he believed, that the Divine creator had established a state of fellowship among all men, but since by nature man loved himself more than society, 'it does not at once follow that man is led by nature to a civil society.'<sup>119</sup> On the contrary, man was not civil by nature: by nature, man needed law in order to be capable of being civil. Since man was thus both social and anti-social, he could not live without either society or law, for then he would be 'miserable' and 'degrade[d].'<sup>120</sup> The human condition made society necessary: man needed social life within a state to protect him from his fellow man. This is how the social contract became the origin of the domestic civil society. Man used to live in an insecure state of nature until the 'multitude' agreed, first, to unite and to form a state – an association of the people – and, second, by a subsequent covenant, to subject itself to a Sovereign, which made man into a citizen. The Sovereign to which the multitude subjected itself thereupon became the Commander of the law and, as such, was bound to complete the natural law already present within the societies.<sup>121</sup>

In Pufendorf's theory, the state was thus unequivocally defined as a 'moral person,'<sup>122</sup> distinct from both the sovereign ruler and those he rules, and with a will of its own directed at securing a common peace.<sup>123</sup> The state was the public composite moral person in whom

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119 *JNG*, Book VII.I.3, at 952.

120 *Id.*, Book II.I.8, at 153.

121 *Id.*, Book VII.II and III. Contrary to Hobbes' theory, Pufendorf claims that the creation of the state took *two* covenants. First the multitude united into an association designed to defend their security and after this association had chosen a form of government a second covenant was made which arranged for the Sovereignty of the ruler, monarch or assembly, and the subjection of what had then become 'citizens' to this supreme authority. Only the second pact completes the creation of the state and confers civil duties upon the subjects. However, this second pact is not a transfer of sovereignty from the united multitude to the sovereign, which would suggest a kind of popular sovereignty, it is in fact the *creation* of sovereignty.

122 To be precise, Pufendorf started the construction of his theory on the Law of Nature and of Nations with metaphysics and the formation of moral entities by the unification of individual men and 'by reason of that union, [whatever] they want or do, is considered as one will, one act, and no more.' *Id.*, Book I.I.13, at 13, the state being an example of a 'general,' 'public,' and 'civil' society.

123 'And as it is distinguished and marked off from all individual men by one name ... And so the most convenient definition of a state appears to be this: 'A state is a compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security.' *JNG*, Book VII.II.13, at 984.

‘supreme authority is found ... by which ... it lives and is animated,’ like man by his ‘*soul*.’<sup>124</sup> This supreme political authority or sovereignty indicated the capacity to use ‘natural strength, through which a subject can be coerced by the threat of some evil ... to obey its commands.’ In Pufendorf’s view, states were ‘unintelligible without supreme sovereignty’ and therefore ‘states ... and *supreme sovereignty came from God* as the author of natural law.’ His contribution to the emerging perception of sovereignty as a somehow sacred state of being is evident.<sup>125</sup> The analogy of the indivisible, single “soul” served Pufendorf in his criticism of the weakness of the Holy Roman Empire and in his legitimization of the authority and independence of the newly emerging states and their absolutist Sovereigns. The Empire lacked the required ‘single soul’ and undivided will to be a regular state and by the label of ‘irregularity’ the imperial political constellation could be discredited and undermined.<sup>126</sup> The imperial system was described as a weak, disintegrating political institution made up of regular states which each had a soul of their own. Pufendorf thus dealt quite a blow to the imperial structure of divided political authority and the excuses made used by the German princes to support their claim to absolute sovereignty and convince of the need to reinforce their states.

Although Pufendorf considered sovereignty to be ‘absolute,’ he rejected the idea that absolute Sovereigns were allowed to display ‘unjust or intolerable’ decision-making behaviour: ‘[f]or surely we do not establish states to the end that we may neglect natural law, and do everything according to our wicked lusts.’ On the contrary, the whole point of the state was ‘that the security and safety of every man may be better guarded by uniting the resources of many, and that therefore there may be opportunity for the safe exercise of natural law.’<sup>127</sup> The created Sovereign, whether ‘one simple person, or one council, composed of a few or all citizens,’<sup>128</sup> however, had a supreme authority in which his subjects did not share. His governance was not

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124 In natural law thinking, the ‘soul’ enabled man to relate to God and to know the eternal and universal truths emanating from reason. Having a soul was indeed a requirement for falling under God’s law, the law of nature. Pufendorf’s concept of sovereignty is therefore not detached from the moral realm, nor is it exclusively a political notion concerning power. See also, *supra*, on Leibniz and the rational soul which enables man to relate to God and Perfection. According to Leibniz, the soul was a simple rational substance, but with multiplicity within this simple unity. Similarly, the Emperor is sovereign, but the Princes he governs are also Sovereign; another example of division or ‘plurality’ within unity. Pufendorf’s concept of the soul is a single undivided unity and sovereignty - the ‘soul of the state’ - is therefore absolute. See, for ‘plurality’ within the imperial union, *Entretien de Philarete et d’Eugène*, see *supra* note 29, at 291: ‘conciliant la pluralité des souverainetés avec l’unité de la République de l’Empire.’

125 *JNG*, Book VII.III. 1 and 2, at 1000-1. Emphasis added.

126 ‘We hold that the *regularity* of states lies in this: that each and every one of them appears to be directed by a single soul, as it were, or, in other words, that the supreme sovereignty, without division and opposition, is exercised by one will in all the parts of a state, and in all its undertakings. From this it is not difficult to gather what an *irregular* state is.’ *JNG*, Book VII.V.2, at 1024. Emphasis added.

127 *Id.*, Book VII.VI.7, at 1064. It was the highest and most absolute liberty found within the state: ‘to decide by their own judgement about the means that look to the welfare of the state. ... [I]t is the right to prescribe such means for citizens, and to force them to obedience.’ *Id.*

128 *Id.*, Book VII.V.3 and 4, at 1024-1025.



subject to the approval of the people, the Sovereign was ‘not accountable’. In fact, he was ‘sacrosanct.’<sup>129</sup> However, although sovereignty did not always come with the corollary of accountability, as this, it was thought, would only contribute to disorder, the sovereign still had a duty under natural law to defend the internal and external safety of his subjects and a duty to act in a manner beneficial to the state and to promulgate laws to that end. Like Grotius, Pufendorf recognised that there was – if only in very rare cases – a moral right to rebel against *tyrannical* rule.<sup>130</sup> However, tyranny was defined so restrictively that the legitimacy of political rule was based upon the needs and happiness of the subjects in theory only. In politics, all depended on the enlightenment of the ruler. The “citizens” were obedient subjects who did not participate in their own governance, unlike in the ‘republican’ definition of citizenship.

Even in this perception of the state as a “person,” independent of both Sovereign and subjects, and with a will and “face” of its own, the state still did not have *personality* in *international* law, because Pufendorf denied the existence of a law of nations which was separate from natural law. He ‘fully subscribe[d]’ to the Hobbesian definition which stated that the law of nations was nothing more than the laws applicable among nations that lived in a “state of nature” and were fighting for self-preservation. As no supra-sovereign commander had as yet emerged onto the international scene, a (positive) law of nations could not exist.<sup>131</sup> States and their Sovereigns lived in a “state of nature,” which was therefore a non-“civic state”, i.e., a state in which there were no civic or legal duties towards others.

In conclusion, Pufendorf’s search for a moral and political philosophy of the Imperial system and his persevering perception and promotion of a new Europe of sovereign states lent his theory its strangely modern identity. His characterization of Sovereignty as the “sacred” soul of the state quite unintentionally foreshadowed the future glorification of the state. In the 19<sup>th</sup> century, the moral – natural law – dimension of the notion of sovereignty was abandoned in favour of its purely political meaning of unrestricted power. Pufendorf’s rejection of the Holy Roman Empire as a state may be considered an example of the linguistic or ideological context. Riley argued that: ‘a great many seventeenth-century theorists devoted their efforts to the (theoretical) destruction of all the medieval *collegia* existing below the level of the state, as well as the ‘universal’ authorities existing above the level of the state.’<sup>132</sup> Pufendorf’s description of the Empire as an organisation or system of sovereign states is recognised as reflecting the

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129 Id., Book VII.VI and VIII, at 1055 and 1103 *et seq.*

130 Id., Book VII.VIII, at 1106 *et seq.* A revolt against tyranny is legitimate when it springs from self-defence and self-preservation. Anything even slightly less than tyranny was not a legitimate cause for revolt against the ruler.

131 Id., Book II. III, at 226.

132 Riley’s introduction to LPW, at 29.

general view in a ‘brilliant and provocative’ manner.<sup>133</sup> His support of an absolute and undivided concept of sovereignty as well as his denial of the existence of a separate law of nations were conceptual impediments to the introduction of ILP in his theory. Put differently, for the purpose of Pufendorf’s (practical and theoretical) argument, ILP was not an appropriate or necessary concept. Against the background of this brief introduction to the conventions of the jurisprudential context – we may read Pufendorf’s concept of the indivisibility of sovereignty and his description and critique of the Holy Roman Empire as representative of his time – the originality of Leibniz’ defence of the Empire as a (federal) state and his argument on *relative* sovereignty and ILP stands out clearly: Leibniz’ defence may indeed be seen as the last great defence of the Holy Roman Empire.

### ***1.3. RELATIVE SOVEREIGNTY AND THE INTRODUCTION OF ILP IN LEIBNIZ’ UNIVERSAL JURISPRUDENCE***

Leibniz’ introduction and definition of ILP are inseparable from his conception of sovereignty.

The passage in which ILP features for the first time reads as follows:

He possesses a *personality in international law* who *represents the public liberty*, such that he is *not subject to* the tutelage or the power of anyone else, but has in himself the power of war and of alliances; although he may perhaps be *limited by the bonds of obligation* towards a superior and owe him homage, fidelity and obedience. If his authority, then, is *sufficiently extensive*, it is agreed to call him a potentate, and he will be called a *sovereign* or a sovereign power; ... Those are counted among sovereign powers, then, and are held to possess sovereignty, who can count on sufficient freedom and power to exercise some influence in international affairs, with armies or by treaties ...<sup>134</sup>

First, the words ‘personality in international law’ were a translation of *persona jure gentium*. Leibniz did not use *persona iuris inter gentes* here even though he did use the term *iuris inter gentes* to indicate international law. Likewise, in spite of the fact that the *Codex* was a collection of positive law, Leibniz chose the title *Codex Iuris Gentium* instead of *Codex Iuris inter gentes*, which would have been the obvious choice.<sup>135</sup> *Ius gentium*, the law of nations, and *iuris inter gentes*, the law between nations and their Sovereigns, were both in use but it could be said that they referred to different concepts of law.

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<sup>133</sup> See also, *Geschichte des öffentlichen Rechts*, at 235.

<sup>134</sup> *Codex*, at 175. Emphasis added.

<sup>135</sup> In 1651, Richard Zouche published a textbook with ‘*iuris inter gentes*’ in the title. See, *The Epochs*, at 25.

Second, this definition of ILP immediately brings to light the contemporary tension with regard to the concept of sovereignty in relation to which ILP here emerged. ILP depended on sovereignty, but according to Leibniz sovereignty was a relative concept. On the one hand, in order to possess international personality one had to ‘represent the public liberty’ and have supreme public power, which included ‘the power to exercise some influence in international affairs.’ On the other hand, one could be subjected to an even higher power and have obligations towards this power. Leibniz introduced the notion of ILP in direct relation to this *relative* concept of sovereignty.

To understand the emergence of ILP, we must first recall the political realism which Leibniz displayed by recognizing both the German Emperor’s and the German Princes’ claims to sovereignty. Leibniz’ relative conception of sovereignty was the perfect solution to this dilemma. At the same time it accommodated another political reality in Europe: the powerful and expansionist King of France.

Secondly, because we can only fully grasp the originality of Leibniz’ reasoning if we consider his moral ideology, we must examine Leibniz’ defence of the ideal of a unified *Respublica Christiana*, and of the Holy Roman Empire as the approximation of this ideal, and analyse his concept of the law of nations in relation to natural law and justice. He was the ‘last thinker of great stature to defend the Empire,’ but, since he also took account of political reality, he was at the same time the ‘apologist’ of the sovereignty of the German Princes.<sup>136</sup> It is from this balancing act between idealism and apology that the concept of ILP was born.

### **1.3.1. Political realism: the concept of relative sovereignty**

With the *Codex*, Leibniz continued the line of reasoning already set out in the *Caesarinus Fürstenerius* (‘Prince-as-Emperor,’ the pseudonym under which Leibniz published this work in 1677), which dealt with the sovereignty of the Princes.<sup>137</sup> In this work, Leibniz presented quite an original position. His objective, as Riley has pointed out, was ‘the redefinition of the concept of sovereignty in a way which would *allow the minor German princes to be treated as sovereigns* in international negotiations.’<sup>138</sup> This redefinition was refined in the *Codex*. The *Codex* was, however, also prompted by another practical political objective: the medieval documents brought together in the *Codex*, which were intended as authoritative precedents, were

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<sup>136</sup> Riley’s Introduction to LPW, at 1, 26.

<sup>137</sup> See supra note 73; the original title of this work is *De Jure Suprematus ac Legationis Principum Germaniae*.

<sup>138</sup> Riley, LPW, at 111. Emphasis added.

‘supporting the position of the Empire against the claims of the French.’<sup>139</sup> In other words, these two texts should be read against this practical-political background of the appearance of new actors on the international stage and French expansionist politics. In 1677, Leibniz observed that to write on sovereignty was a delicate and tricky endeavour:

In explaining the concept of sovereignty, I confess that I must enter into - and this is remarkable, dealing as it does with so important and common a concept - a field which is thorny and little-cultivated. The reason for this is that, because of a deplorable mania, those who undertake to write [on sovereignty] have eyes only for what is ancient, [and] of which vestiges scarcely survive, while they are not interested in more modern things.<sup>140</sup>

First, the words ‘more modern things’ at the end of this observation may be read to refer to the undeniable importance of the German Princes in international politics after the conclusion of the 1648 Treaties. Given the practical problems of ceremonial and diplomatic practices as well as the political instability as a result of the Princes’ struggle for sovereignty, political reality demanded the recognition of the supremacy of the Princes in their territories and the accommodation of their representation at and participation in international affairs. More concretely: the advocacy of the sovereignty and equality of the German Princes in general and of the Duke of Brunswick in particular required solid underpinning and legitimization. Both the *Entretien de Philarete et d’Eugène* and the more legal theoretical *Caesarinus Fürstenerius* serve this cause.<sup>141</sup>

Secondly, also relevant to the redefinition of sovereignty was the drawback involved in strengthening the position of the German princes, namely their (potentially) arbitrary use of power. Leibniz pointed out the possibility that the Princes ‘without regard of what is permitted and what is not, are disposed to sacrifice the blood of the innocent to their particular ambition, and often push [them] into criminal actions.’ To prevent such abuses from occurring, i.e., to secure order and peace among the Princes in the German political constellation, Leibniz favoured ‘constrain[ing] them, by a greater authority, ... by the authority which [he] believe[d] reside[d] somehow in the universal Church, and in the Holy Empire, and in its two heads, the Emperor and a legitimate Pope, using his power legitimately.’<sup>142</sup> In order to maintain this power and authority,

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139 Riley’s Introduction to the *Codex*, LPW, at 165. Emphasis added. See, for Leibniz’ objections to French foreign policy, *Codex*, at 166-169.

140 *Caesarinus Fürstenerius*, *op.cit.* note 73, at 113.

141 In *Entretien de Philarete et d’Eugène*, Leibniz examined what exactly distinguished the Electors from the prominent Princes and argued that the issue of diplomatic privileges actually belonged to the realm of the law of nations: it is related to what Electors and Princes have in common, i.e., their independence and sovereignty in/over their Estates, rather than to what sets them apart, i.e., the right to choose the Emperor. Moreover, it explains how the sovereignty of a Prince is compatible with the obligations he owes to his superior the Emperor.

142 *Id.*, at 112.

Leibniz strove to preserve the ‘two-headed’ structure of the Holy Roman Empire as this might counterbalance the drawback mentioned.

Thirdly, the Empire’s position was affected by France’s expansionist stance both within and outside Europe. This issue, which was given particular emphasis in the later publication of the *Codex*, is also relevant in the sense that it indirectly supports a second concept of sovereignty. Leibniz’ attachment to the continuation of the Holy Roman Empire and the position of the Emperor cannot be explained from his idealism alone – although this was indeed of *crucial* importance – but must also be considered against the background of the balance of power in Europe at the time, a balance which had formed the foundations of Europe’s stability since the Westphalian peace treaties. For this reason, Leibniz defended the Empire’s position against the absolutist French monarch Louis XIV. German rulers and peoples alike lived in fear of French domination and French expansionism. In this light, Riley explains, we should also read Leibniz’ suggestion to Louis XIV to conquer Egypt (in *Consilium Aegyptiacum* (1671)). Rather than attack a Christian power like the United Provinces, he advised France to attack the Ottomans in Egypt, which he hoped would spare Europe, i.e., the Christian “universal monarchy” from another devastating war. Egypt would sufficiently distract France to make it less of a threat to Europe.<sup>143</sup> The Thirty Years’ War had caused Germany’s position to weaken significantly. After the War had ended, France had still succeeded in annexing German territory, among which the city of Strasbourg in 1681, in spite of the Peace of Nijmegen (1678-1679). These acts had a profound effect on Leibniz and seemed to have roused his anger.<sup>144</sup> The balance of power was further disturbed by the fact that the German Princes were unable to keep up with France’s expanding colonial power outside Europe. To compensate for the negative impact on the European power balance, which jeopardised the hard-fought peace and stability, Leibniz came to the defence of the Holy Roman Empire and pleaded its resurrection. This was based on a realistic political calculation: a united Empire would be better capable of standing its ground against the French, because ‘there is strength in unity’, or so Leibniz must have thought.

These political factors must have encouraged Leibniz to redefine sovereignty and international participation. As Princes, Kings and the Emperor all claimed sovereignty and the (diplomatic) privileges that came with it, the clarification of the matter depended on a new concept of sovereignty, which would serve all parties and prevent further embarrassments, such

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143 Riley, Introduction to LPW, at 33 *et seq.*

144 *Codex*, at 166, ‘the almost ridiculous fact that a truce was established a little after a peace treaty.’ See also Leibniz as cited by Riley: ‘the king needed it for the security of his kingdom; that is to say, to better maintain what he had stolen from the Empire ...,’ *in*, Introduction to LPW, at 36.

as befell the Duke of Brunswick in 1676. Correspondence actually shows that Leibniz indeed received letters supporting his intention to advance the rationalisation of diplomacy and to offer clarity on the issue of (legal) status and diplomatic ceremonial by illustrating the need for further clarification with a recent anecdote or incident.<sup>145</sup>

Leibniz proceeded his quest for further clarification of the issue in the *Praefatio*, which built on and refined his 1677 exposé on the concepts of sovereignty and state in terms of the law of nature and of nations. His argument on the *sovereignty* of the Princes and the relations among the Imperial and European powers became increasingly connected with *justice*.

To start, Leibniz introduced a new theory of sovereignty in the *Caesarius Furstenerius*.<sup>146</sup> He distinguished between the ‘lord of the territory’ and the ‘lord of the jurisdiction,’ who has ‘the right of deciding cases or of handing down judgments,’ which generally includes the right and capacity to take mild coercive action against ‘obstinate private persons [*imperium*] ... by using a few officers of justice, or even, if necessary, by calling citizens together for help.’<sup>147</sup> Secondly, he explained that sovereignty consisted of a substantial and a gradual element. Sovereignty required: a) the right of territorial hegemony, i.e., being ‘lord of the territory,’ and b) a ‘large’ territory, as only ‘larger powers’ had the capacity to participate in international affairs.

Concerning the first, substantial, requirement, Leibniz defined the legal meaning of the notion of ‘territory:’

*Territory* is a name common to a state or a dominion or a tract of land. But in addition to its fundamental meaning, it *also expresses the aggregate of laws and rights*, so that just as inheritance and patrimony involve the whole of the things and rights in some family or dwelling, so territory signifies the whole of laws and

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145 In 1692 and 1693, Leibniz wrote many letters to collect pieces for the *Codex*. He also received many letters praising his project as ‘very useful’ and ‘promising’ and offers of assistance. Some of these letters pay express attention to the issue of diplomatic ceremonies and privileges. See, e.g., C.D. Findekeller, who, in a letter to Leibniz dated 30 December 1692 which he sent from Dresden, wrote: ‘Avant hier Monsieur d’Ilten apres avoir receu son creditif comme Ministre Electoral de vostre Serme Maistre, fut introduit à l’audience de S.A. Ele en conformité d’un Ministre d’une teste Couronné, car chez nous il n’y a pas de distinction dans l’introduction d’un Minisitre d’un Roy ou d’un Electeur. Le lendemain il depecha un Courier à vostre Cour. Le Gr. Escuiyer de Danemarc Mr Haxthausen, qui est icy, peut bien avoir eu en Commission de son Roy, de traverser cette Investiture, mais voyant à present, que c’est une affaire faite, il fait bien, de n’en plus parler, chez nous l’on me mande, que les autre Opposants ne reposent pas cela, et qu’ils viennent de conclure un *Foedus* avec Danemarc, sous pretexte du maintien des Droits des Princes de l’Empire.’ Excerpt from a letter by Findekeller as published in, Acad. Ed., I, 9er Band, at 225-226. On 21 May 1693, C.J. Nicholai von Greiffencrantz wrote the following in a letter to Leibniz: ‘Les Ceremonies passées à des solemnitez, seront sans doute le point le plus delicat et le plus émbarrasée de vostre ouvrage. Vous sçavez, que dans les siecles passés elles n’ont gueres été réglées, et nous trouvons, par exemple, encore au siecles passé des rencontres, où des Princes les Principaux de l’Empire, ont sans dispute cédé la place à des Plenipotenciaires des Electeurs, non point en actes de ceremonie, mais à des repas ou festins, Ce qui ne se feroit point au temps où nous sommes.’ Id., at 452-3. See also, von Greiffencrantz’ letters of July 1693 and February-March 1694, id., at 531-532, and Acad. Ed., I, 10er Band, at 272-274 and 324-327. See also Leibniz in a letter he wrote to P. Pellisson-Fontanier on 3 July 1692 which was published in Acad. Ed., I, 8er Band, at 127.

146 This new conceptual thinking on (the plurality of) supreme power and its basis did cause, *inter alia*, the Elector of Brandenburg to protest against the newfangled theory. See, e.g., Lotte Knabe’s Introduction, Acad. Ed., IV, 2er Band, at XXI.

147 *Caesarius Furstenerius*, at 115-116. See also, *Entretien de Philarete et d’Eugène*, at 305.

rights which can come to obtain in an inhabited portion of the earth.<sup>148</sup>

Within a territory, a variety of laws and rights may be applicable and these rights may be distributed over a number of ‘lords’ within this territory. The person who has the right of territorial hegemony is the ‘lord of the territory’ with a right to limited military power. The lord of the territory may lack the right of supreme jurisdiction and of judging capital crimes or the right to take mild enforcement action against private persons, he may even lack the right of taxes or coining, however, if he has ‘the right to assemble a military force which is sufficient for keeping the whole dominion in its duty’ – the right and power to maintain an army that is mighty enough to be employed ‘against an entire community’ and thus to secure domestic order and stability – he has what Leibniz called territorial hegemony:

It is *essential only* that he have in readiness the power to obtain from his subjects, either by his dignity or, when necessary, by *force majeure*, whatever rights do remain his. For even if all other rights or royalties are taken from him, it is enough that there remain sufficient jurisdiction to preserve his authority over his subjects, and enough revenue to sustain his household, in keeping with his rank, and to support the ministers of his power.<sup>149</sup>

Territorial hegemony was therefore the ‘highest right of *forcing* or *coercing*’ within a territory, higher than the right to use force against a few rebellious citizens or on certain ‘stubborn people.’ In Leibniz’ opinion, this highest right of force ‘can be retained even without soldiers, merely by men’s opinion, that is by their obedient reverence, by the *dignity* (of the ruler), which can accomplish just as much, and often more, than force itself – so long that the common opinion of the subjects is that one ought to *obey*.’

The second (gradual) requirement that only the lords ‘who hold a *larger* territory’ were sovereign and were thus, as ‘*larger powers*’, entitled to significant military power meant that only these lords had the right and capacity to conduct international relations. As such, sovereignty is a relative, gradual concept. Sovereign rulers differ from other ‘lords of territory’ only *by the degree*, not the nature, of their rank.<sup>150</sup>

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148 Id., at 114.

149 Id., at 115-116.

150 Id., at 114-117: ‘[A]lthough smaller territories of this kind are customarily called *souverainetés*, the term in its more usual sense is somewhat more narrowly restricted, and those persons only are called sovereigns or potentates who hold a *larger* territory and can lead out an army. And this it is, *finally*, which I call *supremacy*. The French too, I think, when they are discussing matters concerning the law of nations [*ius gentium*] – peace, war, treaties – and call some persons sovereign, are not speaking of lords of tiny territories which even a wealthy merchant might easily buy for himself, but of those *larger* powers which can wage war, sustain it, survive somehow by their own power, make treaties take part with authority in the affairs of other peoples: (in short), powers which are somehow exempt from the commerce of private persons and which, as human affairs now stand, cannot easily fall to lower persons, or persons of lesser standing (excepting the election of ecclesiastical princes). Thus it is that those who occupy this summit are honoured by the *other major* powers, and by the lords of lands and peoples and the

Leibniz stressed that this specific capacity of larger powers to participate in international (diplomatic) life and to handle issues ‘concerning the law of nations (*ius gentium*)’ was indeed the qualifying faculty.

Souverain ou Potentat est celui qui se peut faire considérer en Europe en temps de paix et en temps de guerre, par traitez, armes et alliances. ... c’est cette faculté qui fait prendre part aux privilèges du droit des gens, c’est à dire à l’égard des cérémonies, du rang, des Ambassades, des déclaration de guerre, des cartels, du respect qu’on doit aux Souverains, de l’inviolabilité de leur personne, et de tout ce qui est receu entre les Potentats par la raison reconnue généralement de tout temps, ou par la coustume introduite de nos temps entre les peuples civilisés et sur tout entre les Chrétiens de nostre Europe.<sup>151</sup>

Leibniz consistently argued that the German Princes fulfilled these requirements and thus qualified as sovereigns: ‘the German princes can do all these [things – they have all of the required capacities].’ With sovereignty as a relative concept, Leibniz nevertheless had to distinguish between the counts and the Princes of the Empire.<sup>152</sup> Neither the ‘counts’ nor the ‘lords of tiny territories’ – ‘of some village or burg’ – were “powerful enough” to be sovereign. And of course political stability would not be served by further political fragmentation, which could render diplomatic relations almost ineffective. Lords of small territories could therefore not qualify as sovereigns.

Here, it seems that Leibniz’ concept of state also came into play.<sup>153</sup> In 1677, he explained that ‘[a] state would seem to be a fairly *large* gathering of men, begun in the hope of mutual defense [*siq.*] against a large [external] force, such as is usually feared, with the intention of living together, including the foundation of some administration of common affairs.’<sup>154</sup> To qualify as a *respublica* or state, the gathering should therefore be *large*. In Leibniz’ view, smaller gatherings would sooner resemble the (‘Aristotelian’) *polis*, which he proceeded to name *civitas*. In other words, the size of the territory determined whether it was a city or a state, and whether the lord of the territory was powerful enough to be a *sovereign person*. Having enumerated the capacities one needed to possess in order to qualify for sovereignty (i.e., the right to territory and military power and (thus) the capacity to conduct international relations) and having ascertained

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masters of human affairs, as brothers and persons of equal condition (although, perhaps, of lesser power by a considerable degree), and are considered to differ from those men *by the degree*, not the nature, of their rank.’ Emphasis added.

151 *Entretien de Philarete et d’Eugène*, at 306.

152 *Id.*, at 115.

153 Leibniz located the origins of the state not so much in a pact or original contract, but in *nature*. As Leibniz did not consider man purely egoistic by nature, like Hobbes believed, he did not support the view that man could only become civilised by contract either. Instead, Leibniz argued that man was by nature a rational soul seeking perfection and the happiness of others and that society was born from nature, not from contract.

154 *Id.*, at 114.



that '[t]he German princes can do all these [things],' Leibniz concluded that 'the union notwithstanding' they are *sovereign*.<sup>155</sup>

This was the conception of sovereignty that underpinned Leibniz' argument in the *Praefatio*, where he repeated that if a ruler's 'authority, then, is *sufficiently extensive*, it is agreed to call him a potentate, and he will be called a *sovereign*.' ... '[T]hose are counted among sovereign powers, then, and are held to possess sovereignty, who can count on *sufficient* freedom and power to exercise *some* influence in international affairs, with armies or by treaties.' In the relative meaning that Leibniz contributed to the concept, a sovereign was he who had the capacity to wage war, the capacity to conclude treaties, in brief, he who had 'sufficient freedom' and was powerful enough to participate with at least 'some influence' in international affairs together with other major European powers.<sup>156</sup> Note that sovereignty was thus a capacity of *individual* rulers. It was the individual who was the lord of a territory and thereby the bearer of the right of sovereignty, *not* the State.

Leibniz balanced his advocacy of the sovereignty of the Princes with a defence of the imperial *majestas* and the unity of the Holy Roman Empire. He argued that the Emperor and the Empire had a 'très grand pouvoir sur les Electeurs et Princes'. Leibniz contended that the Empire qualified as a state and that the Emperor had imperial *majestas*. Here, *majestas* means superiority, which is different from sovereignty.<sup>157</sup> Sovereigns, i.e., rulers with sufficient military power, may be subordinate to rulers with *majestas*, which is the central *locus* of authority. '[L]a Majesté est le droit de commander sans pouvoir ester commandé,' Leibniz explained. It is a right to 'supreme jurisdiction.'<sup>158</sup> Because he had imperial *majestas*, the Emperor was able to ensure the unity of the Empire.

Contrary to the contemporary conventions, Leibniz regarded the Empire as a 'union' of regions, which each had a *sovereign* lord of the territory. 'For a union, it is necessary that a certain administration be formed, with some power over the members; which power obtains as a matter of ordinary right, in matters of great moment, and those which concern the public welfare. Here I say there exists a *state*.' Leibniz explained that a confederation of regions or Princes would not create a new and independent legal person. However, a *union* of territories which all recognised one administration and a coordinating power for the purpose of 'public welfare'

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155 Id., at 117. See also, Leibniz in A letter to P. Pellisson-Fontanier, *op.cit.* note 145, at 127.

156 See *supra*, citation to note 134.

157 In other words, Leibniz disagreed with Bodin, who regarded *majestas* as sovereignty, i.e., absolute power, when for Leibniz *majestas* and sovereignty were two distinct concepts.

158 *Entretien de Philarete et d'Eugène*, at 308. Here, *majestas* approaches the notion of 'lord of jurisdiction.' See, for *majestas* in Reichspublistik, *Geschichte des öffentlichen Rechts*,

would be a state. In a way similar to the founding of a ‘company, a new civil person is formed.’<sup>159</sup> And indeed in earlier writings, from around 1670, we find Leibniz describing the Empire in such terms: ‘das Reich soll eine *Persona Civilis* sehn’<sup>160</sup> and ‘*Respublica est persona civilis*.’<sup>161</sup> The *Caesarius Fürstenerius* continued this line of reasoning and also claimed that the Holy Roman Empire was a state with its own supreme ruler and an administration which, in the case of this union, had authority over its composing members, but whose superiority or *majestas* did not invalidate the sovereignty of the Princes, i.e., the union members. This theory concerning the Empire left the existing universal structure intact and gave the Emperor the following powers which the Princes lacked:

The position of the [Holy Roman] Emperor is a little more elevated than one commonly thinks; Caesar is the defender, or rather the chief, or if one prefers the secular arm of the universal Church. All Christendom forms a species of republic, in which Caesar has some authority - from which comes the name, Holy Empire, which should somehow extend as far as the Catholic Church. Caesar is the commander [*Imperator*], that is, the born leader of Christians against the infidels: it is mainly for him to destroy schisms, to bring about the meeting of [ecumenical] Councils, to maintain good order, in short to act through the authority of his position so that the Church and the Republic of Christendom suffer no harm.<sup>162</sup>

The Emperor stood at the head of an imperial administration which had a certain degree of authority over the Princes and was concerned with the public welfare of the Empire. He was expected to establish unity, to defend and command the Empire against external enemies, to preserve the ‘public peace’ and to ‘administer justice’ among the Princes and Dukes. As the secular arm of the Universal Church, the Emperor was the universal authority in the Christian Republic and this ‘elevated’ him to ‘greater’ authority over the members of this ‘Republic’. The Emperor enjoyed a ‘species of primacy analogous to the ecclesiastical primacy [of the Pope].’ He was the sovereign of the Holy Roman Empire, endowed with the highest legitimate power the Empire could bestow, and this made him a major power in Europe.<sup>163</sup> By calling the Empire a ‘union,’ a federal state *avant la lettre* as it were, Leibniz made a hugely original contribution to

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<sup>159</sup> *Caesarius Fürstenerius*, at 117. Emphasis added.

<sup>160</sup> *Securitas Publica* (1670), in Acad. Ed., IV, 1er Band (1667-1676) N.5, 133-214, at 135: ‘Denn das Reich soll eine *Persona Civilis* sehn. Gleich wie nun in einer *persona naturali* oder menschlichen Leibe sich die *Spiritus*, das Blut and die Glieder finden, also ist in der *persona civili* ein *perpetuum consilium*, welches den Verstand and die Spiritus, ein *perpetuum aerarium*, welches geblüht und adern, ein *perpetuus miles*, welcher die Glieder repraesentirt, von nöthen, und gleichwie die Glieder von dem Bluth sich nähren, das Blut nicht ohne der *spirituum* Bewegung sich reget, also kan der *perpetuum miles* ohne stetswerendes *aerarium* nicht verpfleget, das *aerarium* sowohl als *miles sine consilio perpetuo* in ordentlicher Bewegung nicht erhalten oder regiert werden.’

<sup>161</sup> Leibniz, *Georgius Ulicovius Lithuanus* (1669), Propos. XLII, in Acad. Ed., IV, 1er Band (1667-1676) N.1, 3-98, at 37. See also, e.g., Leibniz, *In Severinum de Monzambano* (1668-1672), in Acad. Ed., IV, 1er Band (1667-1676), N.32, at 500 *et seq.*: ‘*Civitas est una persona moralis*.’

<sup>162</sup> *Caesarius Fürstenerius*, at 111.

<sup>163</sup> *Id.*, at 111-112.

the debate, which was nothing less than the ‘Entwicklung einer ständisch orientierten Bundesstaatstheorie.’<sup>164</sup>

Leibniz’ theory of relative sovereignty enabled him to argue that the Emperor possessed the highest legitimate authority of the Empire and, at the same time, that the German Princes enjoyed (a certain level of) sovereignty in spite of the fact that they were united within the same Empire. It also enabled him to label both the Empire and the Princely Territories ‘states’. He thus managed to develop an original conceptual solution to the pressing political issues referred to earlier.

First, the concept of relative sovereignty provided a solid legal-political basis for the Princes’ claim that they should be included in international diplomatic life. Now diplomatic relations could be maintained between all rulers with sufficient power to influence peace and security in Europe and Germany. When the status of the various European powers was clarified, diplomatic confusion would most likely decrease and political stability increase. The princely claim to international *representation* and *participation* could now be firmly based on their sovereign status.

Secondly, the relative interpretation of sovereignty served to preserve the universal structure in which the Empire was a state and the Emperor a sovereign. Leibniz argued that this would benefit German “internal” *stability*. He believed that one of the values and functions of the Holy Roman Empire was to keep in check any Princes who failed to govern their people in such a manner that these could pursue happiness and were treated justly. As the imperial *majestas*, the Emperor had the authority to constrain the Princes and to administer justice among them. As will be explained below, in Leibniz’ system of universal jurisprudence the source of this authority was *justice*.

Last but not least, supporting the Empire’s position of strength also served to preserve “external” stability, which would benefit from a clear balance of power in Europe. After all, a “united” Holy Roman Empire would be in a stronger position to respond to French expansionism.

It may be argued that this Leibniz’ theory was the obvious conceptual response to the practical political issues of the time, but this would not do justice to the *originality* of his argument. We know that Leibniz’ concepts of state and sovereignty differed significantly from the ‘conventional’ definitions. Pufendorf in the same context had called the Empire ‘monstrous’, but Leibniz rejected any interpretation of sovereignty as an *undividable* and *absolute* highest power.

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<sup>164</sup> Schneider, as cited in, *Geschichte des öffentlichen Rechts*, at 237.

The learned men ... who have treated this subject, have exceeded the bounds in both directions: some admitting the unity of the state, have believed that liberty or supremacy are abrogated in the individual members; others, conceding the liberty of the individual members, have thought that there is constituted not one state, but an alliance.

Leibniz was aware of the fact that distributing sovereignty could also bring conflict and perhaps even the disintegration of the very structure his theory was intended to perpetuate. For this reason, he restricted the application of his theory to larger powers and territories only. This was further proof of his opposition to Pufendorf's and Hobbes' 'fallacy,' as in Leibniz' view, 'prudence and moderation' would prevail, not chaos and anarchy.<sup>165</sup> Leibniz' faith in prudence and moderation can only be understood when read in conjunction with his theory of justice and his concept of the law of nature and of nations, which I will now discuss, after the following brief summary of the above.

The fragmentation of power in the Holy Empire was evidently a fertile breeding ground for anarchy and chaos, the outbreak of which had to be avoided at all costs. However, keeping the Empire afloat was not widely considered to be the best approach. In fact, its dissolution was mainly considered to be more conducive to peace<sup>166</sup> and Leibniz seemed to be the only one who argued in favour of its continued existence. Leibniz' personal theological-political ideal of a reunified Republic of Christendom as set out below will help us to understand why he dissociated from the conventional attitude that the Empire had to be abolished.

### **1.3.2. Universal Justice: Natural law and the Law of Nations**

The refinement of Leibniz' argument on the position of the German and European powers from the *Caesarinus Fürstenerius* to the *Praefatio* (to the *Codex*) lies in its treatment of the subject in relation to his theory of justice and the law of nature and of nations. I have already stressed the significance of Leibniz' moral ideals for his introduction of the notion of ILP and for his views on sovereignty and the need to perpetuate the Holy Empire. These opinions can only be explained from Leibniz' theory of universal *justice*.

Earlier, where we recognised the moral-political significance of Leibniz' theory of substance for his universal jurisprudence, i.e., the system of law of the universal community of spirits (human and divine), it was concluded that for Leibniz every human mind or person was a 'subject' of universal justice or a citizen of the City of God. Throughout his lifetime, Leibniz'

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<sup>165</sup> Id., at 117-120. In the omitted footnote, Riley mentions other writers besides Pufendorf.

<sup>166</sup> See *supra*, section 1.2.3.

dedication to the ideal of the City of God made him favour the reinforcement of the Christian system in Europe, the *Respublica Christiana*. The Holy Roman Empire – which he considered to be a prime example of a *Respublica Christiana* – was the closest existing political approximation of the moral-theological ideal of the City of God.<sup>167</sup> For Leibniz, this ideal lay at the foundation of the legitimacy of the authority of the Pope and the Emperor. They were the defenders, one religious and one profane, of the *common good* of Christendom and their authority derived its legitimacy from their position or *responsibility* to defend the Church and the Republic of Christendom.<sup>168</sup> In the *Praefatio* to the *Codex*, Leibniz again emphasized the perpetual ‘common bond’ that linked the whole of Christendom and stated that it was ‘not without reason’ that prior to the schism that divided Catholics and Protestants it was ‘accepted’ to contemplate ‘a kind of common republic of Christian nations.’ For the ‘common good of Christendom,’ it was actually quite “reasonable” to strive for the reunion of Catholics and Protestants into a universal society based on justice.<sup>169</sup> Leibniz thus held on to the ideal of

a kind of common republic of Christian nations ..., the heads of which were the Pope in sacred matters, and the Emperor in temporal matters, who preserved as much of the power of the ancient Roman emperors as was necessary for the common good of Christendom, saving [without prejudicing] the rights of kings and the liberty of princes ...<sup>170</sup>

In spite of the religious schism, the Holy Empire was still the best structure to defend the common good of Christianity and as such a *just* political constellation on the basis of which the authority of the various Sovereigns was *legitimate*.

Leibniz envisioned a European system based on justice as ‘universal benevolence.’ In this political theory, *justice* was the source of legitimate power and authority. The argument that sovereign power was intended to conform to the demands of *justice* was supported by the fact that the suppression of the arbitrary use of power was generally a key element in Leibniz’ work, albeit that it only found elaboration in terms of international law in the *Codex*. Two years after his apologia for the sovereignty of the Princes, Leibniz, in a new work entitled *Portrait of the Prince* (1679), went on to describe the counterpart of sovereignty, so to speak, namely the duty to serve justice.

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<sup>167</sup> See, e.g., Leibniz, *Observations on the Abbé de St Pierre’s ‘Project for the Perpetual Peace’* (1715), in LPW, at 181. ‘I find that M. l’Abbé de St Pierre is right to consider the Empire as a model for the Christian society.’

<sup>168</sup> See *supra*, text to footnote 162.

<sup>169</sup> See, e.g., P. Schrecker, Leibniz’s Principles of International Justice, VII (4) *J. of the History of Ideas* 484-498 (1946). See also, Riley’s introduction to LPW.

<sup>170</sup> *Codex*, at 174-175.

Leibniz' theory of political order in the national sense and as between sovereigns relied upon the (Platonic) ideal that the wise should rule, since they were best placed to attain the necessary knowledge of the eternal natural truths and, therefore, better equipped to manage political and ethical life within society and to govern justly.<sup>171</sup> In *Portrait of the Prince*, Leibniz stressed the importance of the virtues of justice for the Princes and their rule. 'Since the order of states is founded on the authority of those who govern them,' their authority to command and to be obeyed was 'founded no less in nature than in law.' Leibniz therefore cautioned that 'princes must be above their subjects by their virtue, and by their natural qualities, as they are above them by the authority which the laws give them to reign according to natural law and civil law.' The Princes enjoyed a position of superiority over their subjects because nature had instilled in them great virtues; their authority was *legitimate* because they ruled virtuously and wisely and thus served *justice*, at least, in theory. Leibniz realised, however, that it was not necessarily the wise who ruled and that the civil law basis of power could run counter to the natural (law) basis of authority.<sup>172</sup> 'No one is unaware, either, of the force of laws which have caused so many bad princes to reign, without any other support than that of the laws.' It was therefore rather out of a concern for the possible rule of the corrupt that '[i]t is necessary that the dominance of princes be equally based on the advantages of nature, on virtue, and on the laws, to bring to an end the struggle of virtue and of merit against fortune, in order to ensure public tranquility,' and that a situation should be avoided where a power under civil law, which could go against natural law, would triumph.<sup>173</sup> Here, Leibniz' unceasing concern for stability – for *public tranquility* – makes itself felt as does the objective that the sovereign must rule not merely on the basis of civil law but also on that of natural law, all for the sake of stability, wise rule and the promotion of justice.

The idea, therefore, that politics should be based on natural law and that power should reign in accordance with natural law in order to secure stability and justice is the core of Leibniz' argument. The 'goal' of the Princes 'must always be the public good, the glory and repose of peoples.' Because of their task, they 'must not only have the virtues which perfect a man with

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171 See, e.g., *Letters to Th. Burnett*, in LPW, at 191 *et seq.*

172 *Portrait of the Prince* (1697), in LPW, at 85: 'It may happen, however, that though nature wishes that those to whom she has given many great qualities and who have the most virtue always rule over others, the laws of many states ordain, on the contrary, that children be the heirs of the goods and of the power of their fathers, because as a result of the prudence of legislators and of human weakness, the civil law is often contrary to natural law; but the empire of great princes has always been founded on the advantages of nature and of fortune, on the authority of virtue and on the power of law.'

173 Leibniz in this respect commended the double legitimacy of the ruler of Hanover, Johann Friedrich of Brunswick-Lüneburg, who he served and for whom this work was written: 'This is the advantage which is visible in the person of Your Most Serene Highness. His authority is doubly legitimate: it is based on the law of nature, which requires that the most perfect command the others, since he is above his subjects by his virtue and by his natural qualities; it is established by the civil law, since he was borne the son of a prince in a hereditary state; it is based on the divine law which commands peoples to obey their sovereigns.' *Id.*, at 86.

regard to himself, ... [but] also have those which dispose them to do, with respect to others and to the people, everything which pertains to the duty, the glory and the greatness of sovereigns, such as justice, clemency, liberality, magnificence and generosity. *Justice is, of all these virtues, the most necessary to princes.*' Leibniz placed further emphasis on its importance by stating that: '[t]he others are the ornaments of this glory, but [justice] is essential, being in states what reason is in nature.' He explained that:

For if reason, which is in God to direct his power, is the cause of the natural disposition of creatures, and if it conserves the admirable harmony of the universe, *justice establishes the political order*, and allows the union of men in monarchies and republics to subsist. It is *the social tie* which can only be established by these three political virtues: friendship, justice, and valour. If the first, which makes goods common, could be observed, the second would be useless; and if men did not always estrange from justice, valour would not be necessary to defend states. But the weakness of human nature not being able to suffer that civil life be founded solely on friendship, it was necessary to arrive at a division of goods, common by nature, and to conserve it through (legal) justice, which must be applied by force against those who dare to violate the laws.<sup>174</sup>

In Leibniz' political philosophy, it was neither power that established the political order nor a social contract that determined the legitimacy of the ruler. In his view, it was *justice* which was at the basis of a *political order* and of political power. *Legitimate* authority both within a political community and in its external relations could therefore only be based on *justice*: only power that was exercised justly was legitimate.

The constraint of power by natural law had always been a key element in Leibniz' political philosophy and as his universal jurisprudence envisioned an all-comprising universal structure and society these constraints also applied here, both internally and externally. The universal jurisprudence did not separate the internal order from the external inter-sovereign order in the sense that in both spheres the sovereign had to conduct his affairs *justly*. In their international conduct the Princes' were equally bound to observe the principles of justice:

sovereigns and peoples must be restrained by respect for the laws, and since the peace of states with neighbours is ordinarily maintained by the motive of mutual fear, it is necessary that princes rule equally by [justice] and by laws, like Your Most Serene Highness, who has so much solicitude for justice that he wishes that it be rendered without exception of persons and without drawing a distinction between subjects and foreigners.<sup>175</sup>

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174 Id., at 98. Emphasis added.

175 Id., at 98.

However, to count fully upon the enlightenment of the Princes and their virtuous observance of justice would have been naïve and to count exclusively on civil law to restrict their power would have been inadequate. Therefore Leibniz did neither. The recognition of the Princes' authority required a correlative moral responsibility (i.e., that their actions should be guided by wisdom and should be directed towards justice) which had to be strictly enforced. In the *Praefatio*, Leibniz transferred the moral-political idea of the correlative responsibility to the international *legal* realm. By the attribution of 'personality in the law of nations' Leibniz did not only put his faith in morality and justice, but also developed a universal *legal* system, which would contribute to *just* actions.

According to Leibniz' universal jurisprudence, *justice* was the source of *natural law*. Natural law that applied to sovereign rulers constituted the *ius naturae et gentium* and these rulers had to conduct their international affairs on the basis of the law of nature and of nations. Leibniz distinguished three degrees of natural law which followed from three degrees of justice: commutative, distributive and universal justice, of which the latter was the highest-ranking. To live in accordance with the virtues of justice meant to apply 'reason[ably]' or 'wisely' the command to 'love everybody.' Wisdom was the knowledge of perfection and of the eternal and necessary truths of nature and reason the appropriate tool to acquire this knowledge and to make it universally available to all mankind.<sup>176</sup> 'Wise love' was Leibniz' interpretation of (the activity of) justice: justice as 'universal benevolence' or 'charity guided by the dictates of wisdom.' This 'willing the good' for everybody came down to 'converting the happiness of another into one's own'; this was what Leibniz called 'disinterested love.'<sup>177</sup>

Underlying this concept of justice is the reconciliation of two psychological premises, namely of Grotius' perception of human nature as social and rational with Hobbes' view on man as primarily selfish and living a calculating life.<sup>178</sup> Leibniz brought these two opposing views together in the concept of *disinterested love*, which is a combination of altruism and egoism claiming that the interests of others are our own interests. Leibniz recognised the selfish tendency in human nature to which Hobbes had concluded. But he also recognised that the

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<sup>176</sup> See, for Leibniz' critique of Pufendorf's position that only through revelation man is able to know what justice is, *Opinion on the Principles of Pufendorf* (1706), in LPW, at 68-69. Pufendorf, unlike Leibniz, contended that justice came from the free employment of the divine will. Natural law is the commandment of the sovereign God. This type of 'despotism' and uncertainty was unacceptable to Leibniz, as he believed that the eternal and universal truths from which justice stems are accessible to every human being through reason. '[J]ustice follows certain rules of equality and of proportion (which are) no less founded in the immutable nature of things, and in divine ideas, than are the principles of arithmetic and of geometry.' Supreme justice and goodness are in (the essence of) God; they are not randomly deployed. Through the faculty of reason, man is capable of knowing and acting justly and truthfully. Id., at 70-71.

<sup>177</sup> *Codex*, at 171.

<sup>178</sup> See also, G. Brown, *Leibniz's moral philosophy*, in N. Jolley (Ed.), *Companion* 412-413 (1995).



rational soul enabled man to have a relationship with God and to acquire knowledge of the eternal and necessary truths, i.e., the dictates of nature, and to transcend his egoism, as essentially, by his very nature, he could only ultimately seek God.

Seeking God means seeking perfection, in the moral sense of the word. This natural desire for perfection consisted of ‘find[ing] pleasure in the perfection of another.’<sup>179</sup> Leibniz equated the love for God with loving the public good: ‘to contribute to the public good and to the glory of God is the same thing.’<sup>180</sup> To seek God by loving wisely and act upon it contributed to the common good: ‘when one is inclined to justice, one tries to procure good for everybody.’<sup>181</sup> This was an essential feature of Leibniz’ theory of justice: by identifying the religious with the socio-political in his notion of justice, he formed a system whereby theology, morality and politics were all part of a gradual continuum.

Justice in this sense was therefore an active and social concept: it involved the promotion of the common good and public happiness. Justice here included mutual respect for the interests of others as well as a commitment to society. To act *justly* was a social virtue, as Leibniz explained: ‘Justice is a *social* duty (*Tugend*), or a duty which preserves society.’<sup>182</sup> *Just* acts could only be social; they benefited society naturally. Natural law, which had justice as its source and was the law of natural societies, was thereby also the law which aimed to preserve or promote the common good and public happiness.<sup>183</sup> Each degree of justice was a source of (a principle of) the law of nature (and of nations).

First, Leibniz considered that universal justice ‘commands us to live honorably (or rather piously),’ which meant to live as a good citizen of the City of God. Universal justice and the natural law that flowed from it were concerned with man’s relations with God or perfection. But as offering God his due was the same as serving the (universal) common good, it also related to man’s relationship with humanity at large.<sup>184</sup> In the hierarchy of the natural societies ruled by

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179 *Felicity*, in LPW, at 83. ‘Pleasure’ is defined as ‘knowledge or feeling of perfection, not only in ourselves, but also in others, for in this way some further perfection is aroused in us.’

180 *Excerpts from three letters to Th. Burnett* (1699-1712), in LPW, at 191. Without God – without this characteristic of man to seek God by natural inclination – it is impossible to reconcile altruism with egoism. It is more convincing that man seeks God than that he is by nature inclined to aim for the happiness of others, as, after all, man is also a natural egoist, as Leibniz conceded. See also: *Memoir for Enlightened Persons* (mid 1690s), in LPW, at 105: ‘to contribute to the glory of God, or (what is the same thing) to the common good.’

181 *Felicity*, in LPW, at 83.

182 Leibniz, *On Natural Law*, in LPW, at 77.

183 *Id.*, at 77. ‘A society is a union of different men for a common purpose. A natural society is one which is demanded by nature. The signs by which one can conclude that nature demands something, are that nature has given us a desire and the powers or force to fulfil it: for nature does nothing in vain. Above all, when the matter involves a necessity or a permanent utility: for nature everywhere achieves the best. The most perfect society is that whose purpose is the general and supreme happiness. Natural law is that which preserves or promotes natural societies.’

184 ‘In this way we can think of all men living in the most perfect state, under a monarch who can neither be deceived in his wisdom nor eluded in his power; and who is also so worthy of love that it is happiness [itself] to serve such a master.’ *Codex*, at

God the universal monarchy was the highest natural society,<sup>185</sup> it ‘binds the whole human race together.’ It was higher than the natural societies of states: ‘all countries, finally, would stand under the Church of God.’ ‘[T]he whole human race ... constitutes a community under the rule of God:’<sup>186</sup> a *universal society of humanity*. The highest degree of natural law flowed from universal justice and it was ‘among things to be desired, that the law of nature and of nations [*ius naturae et gentium*] should follow the teachings of Christianity.’ For this reason, Leibniz interpreted the natural law principles springing from justice in the light of ‘the divine things of the wise,’ that is ‘according to the teachings of Christ.’ The highest universal laws of nature were the ‘eternal laws of the divine monarchy.’<sup>187</sup> Every person, Leibniz felt, was a subject of this law, whether Prince or subject, and thus morally obliged to be a good citizen of the City of God. The *law of nature and of nations* – as Leibniz explicitly pointed out – had universal justice as its highest source.

Secondly, the next (lower) source of the *law of nature and of nations* was distributive justice or “strict charity”: it ‘strives for ... that while each benefits others as much as he can, he may increase his own happiness in that of the other. [This] right tends toward happiness.’ Leibniz pointed out that Grotius called a right of this degree of law and justice ‘a moral claim [*aptitude*], not a legal claim [*facultas*];’ such a right gave ‘no ground for [legal] action in compelling us to fulfill them.’ The command of distributive justice ‘to give each his due’ was not a legal, but a moral duty. The concomitant claim was therefore an *aptitude*, unless positive law included obligations of a distributive kind.<sup>188</sup> In some cases, it might be necessary to ‘depart from [strict right]’ for the sake of the ‘greater good.’ To ‘distribute our own or public goods’ out of ‘respect of persons’ – as this second natural law principle ordered – underlined the social character of justice.<sup>189</sup>

The third source of the *law of nature and of nations* according to Leibniz’ was the lowest degree of justice, commutative justice. From it sprang the principle of ‘strict right [*ius strictum*]’

173. See also, for a summary of the *Monadology* argument even before appearance of the latter, *Memoir for Enlightened Persons*, §9, in LPW, at 105.

185 ‘The sixth natural society is the Church of God ... Its purpose is eternal happiness.’ *On Natural Law*, at 79. Besides natural law, Leibniz contended that there was also a ‘divine positive law’ governing the relations between the citizens of this perfect state. This law consisted of the ‘sacred Scriptures’ and ‘sacred canons accepted in the whole Church and, later, in the West, the pontifical legislation, to which kings and peoples must submit themselves.’ *Codex*, at 174.

186 *On Natural Law*, at 79-80.

187 *Codex*, at 174.

188 *Codex*, at 172-173. ‘[I]t is here that the political laws of a state belong, which assure the happiness of its subjects and make it possible that those who had a merely moral claim acquire a legal claim; that is, that they become able to demand what it is equitable for others to perform.’ This statement also reflects that Leibniz gave a much wider interpretation of state duties than Hobbes, who only considered the duty to provide security, whereas Leibniz included the ruler’s duty to act in accordance with the commands of distributive justice.

189 *Codex*, at 173. See also, *Portrait of the Prince*, at 99: ‘Princes must not only render to each that which belongs to him, by justice, and pardon sometimes by clemency: they must also distribute their riches by liberality.’

that ‘no one is to be injured, so that he will not be given a motive for a legal action within the state, nor outside the state the state of war.’ Strict natural law gave to those affected an enforceable legal claim. At the inter-sovereign plane, compliance with the strict natural law principle to injure no one would prevent other sovereigns from obtaining the legal claim (*facultas*) to warfare. If not injured, one had no legal right to start a war and peace was ‘conserv[ed].’ In other words, the law of nature and of nations springing from commutative justice was legally binding and the prohibition to inflict harm intended to prevent the emergence of a rightful claim to warfare and aimed to secure stability and peace.<sup>190</sup> Evidently, as only a strict right could be the origin of legal claims, distributive and universal justice were practically speaking less relevant in international relations. Nonetheless, the natural principles flowing from these degrees of justice were also taken into account when the notion *ius naturale et gentium* was used.

Having determined the three principles of the law of nature and of nations as they originate in the three sources of justice (universal, distributive, and commutative), Leibniz further established that these principles were ‘[t]he basis then of international law [*iuris fecialis inter gentes*].’<sup>191</sup> The *ius naturale et gentium* and the voluntary law of nations were not coordinate, but gradually different. The voluntary law of nations had to follow *ius naturae et gentium*, as it drew on the ‘eternal right [or law] of rational nature.’ From this distinction it is also clear that Leibniz used *ius naturae et gentium* for the law of nature and of nations and ‘*iuris fecialis inter gentes*’ for the positive or voluntary law *between* nations as created by sovereigns in their personal capacity and by mutual consent, as expressed through custom (*usus*) or (tacit) consensus. In the creation of this voluntary law, *iuris fecialis inter gentes*, the sovereign rulers had to follow or conform to the principles of the *ius naturae et gentium*. In other words, voluntary law created by sovereign rulers was to operate within the limits of the natural law system. Consequently, any arbitrary exercise of power would be contained by the law (of nature). Leibniz was always quite clear about his concern over the possible abuses of power, which included a healthy mistrust of positive inter-sovereign law.

Even though his *Codex Iuris Gentium* was a collection of positive legal acts, Leibniz still openly expressed his low opinion of positive law. In the *Praefatio*, he could not resist the opportunity to criticise its authority.<sup>192</sup> His scepticism is evident where he observed that ‘today,

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<sup>190</sup> *Codex*, at 172-173.

<sup>191</sup> *Codex*, at 175.

<sup>192</sup> *Id.*, at 167, Leibniz remarked: ‘Some will be surprised that an editor of acts and treaties should discourse in his preface on the weakness of paper chains; and will retort that esteem for public acts must diminish if it is recognized that sovereigns have secret

in truth, we would not be wrong in many cases to say that rulers play cards in private life and with treaties in public affairs.’ Natural law was eternally and universally the same and accessible to every individual, whereas positive law was not without the flaws of secrecy and arbitrariness, because, as Leibniz observed, ‘both the attractions of women and the splendor of gold often have more force than the laws and testimonies.’<sup>193</sup>

In spite of his loathing of the arbitrariness of legal and political acts, Leibniz recognised their relevance as the expression of power and politics and understood the need to edit and publish them. (International) positive law communicated historical facts to the future, bore witness to social changes and thereby increased certainty in history.<sup>194</sup> Besides its role in the provision of historical certainty, Leibniz pointed out another advantage of positive law. The principles of the law of nature were of eternal and universal value, but the voluntary law of nations ‘changes according to time and place.’<sup>195</sup> Natural law reflected the unity of mankind, while the voluntary law of nations could reflect ‘the diversity of the world of men.’<sup>196</sup> Consequently, its natural and positive law sources enabled the law of nations to combine the universality and certainty of natural law with the cultural plurality and historical development of humanity.

A brief summary of the above will conclude this section. Leibniz’ perceived the law of nations as a collection of natural law principles flowing from justice and the voluntary law of nations. The natural law ties of the law of nations prevented it from relying on the arbitrary use of the power of the state. Instead, in order to be “right” [not *Gesetz*, but *Recht*], it had to be just, or it had to at least be in accordance with the three principles of justice enumerated above. The general obligation to serve justice was incumbent upon every person within the pre-established harmonious cosmo-political order: because of his moral personality, every individual had the moral responsibility to act *justly*. For the sovereigns of Europe, this meant among other things that it was their responsibility to conform to the law of nature and nations. From this point of view, therefore, the law of nations was not the law of a society of absolutely sovereign states, but rather the law ‘among those who participate in the supreme power (of whom there may be more than one, even in the same state).’<sup>197</sup> The ‘international society’ was a personal and diverse society of *relative* sovereigns existing within the universal natural society of humanity. Because

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intentions quite different than those which are declared.’

193 Id., at 165-168.

194 Id., at 169: ‘Collections of public acts are thus the most trustworthy part of history, and they transmit to prosperity, as do coins and inscriptions, the certainty of facts.’

195 Id., at 174.

196 Id., at 170.

197 Id., at 174.

of the power and authority which sovereigns possessed, they were on the one hand well equipped to promote the general good of humanity, as this required power, but on the other hand, this power had to be used in accordance with the law. Those “powerful enough” to *participate* in international life were governed by the law of nations, which conferred upon them a certain *responsibility* to conduct their international affairs within the limits of the law.

#### ***1.4. CONCLUSIONS: LEIBNIZ’ THEORY OF RELATIVE SOVEREIGNTY AND ILP OR THE LAST GREAT DEFENCE OF (THE UNITY OF) AN EMPIRE IN DECLINE.***

In order to manage legal-political change within and without the Holy Roman Empire, Leibniz reconciled realism with idealism, sovereignty with justice, and participation with responsibility, in a theory of relative sovereignty and ILP.

Leibniz was a realist in his political assessment of (the distribution of power in) Germany and Europe, but rather more of an idealist in his thinking on morality and law. He is recognised for his concept of relative sovereignty among students of federalism, but his originality is only fully appreciated if his politically realistic concept of relative *sovereignty* is conjoined with his ideal of a *justice*-based German and European order and for which Leibniz introduced the notion of ‘*persona jure gentium*’ (ILP). This idealism of universal justice contrasted with his advocacy regarding the position of the German Princes, but he managed to resolve this apparent contradiction: the mainly morally motivated support for the “universal structure” of the Holy Roman Empire was brought into line with the practical political need to change the Imperial system and to open up the European society to the newly participating powers on the international stage and the need to clarify their position. The introduction of ILP was a refinement of Leibniz’ argument on the position of the Princes, their sovereignty and their responsibility to serve justice, in *legal* terms. Leibniz stipulated that ILP was the prerogative of those whose ‘authority, then, is sufficiently extensive,’ to be called sovereign.<sup>198</sup> ILP was thus attributed to (relative) sovereigns and by possessing ILP they were conceptually “connected” with or included in the system of *ius gentium*.

Now we are able to answer some key questions concerning the meaning and role of ILP in Leibniz’ thinking, such as “Why was the term ILP first used at the particular time that it was?” “Why did Leibniz need the term and how did it connect with his ideas in general and with his ideas on politics and international relations in particular?” “What was his objective when he

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<sup>198</sup> See *supra*, note 134.

made his argument concerning ILP?” In short, we can now come to understand the meaning Leibniz gave to the concept when he introduced it; in other words, we can now retrieve what he was *doing in* using ILP. In using ILP for the first time, Leibniz intended to *legitimise* the participation of the relatively sovereign Princes in international life and simultaneously to subject these (newly) sovereign powers to the rule of law and the responsibilities of justice.

The argument that Leibniz used relative sovereignty and ILP to subject sovereign power to the requirements of justice is supported by the fact that this fits in with his earlier work on sovereignty and justice, which we discussed above, and by the fact that the suppression of the arbitrary use of power was a significant theme in his (moral-political) writings. In the *Praefatio*, ILP it finally found its full and explicit legal conceptual form.

Leibniz’ intention to clarify the issue of international diplomatic communication and participation has been amply discussed: by attributing ILP to the (relative) sovereign he pursued the objective of regulating sovereign participation in terms of the law of nations. The military power of rulers may have formed the basis of their international influence and sovereignty, but it was ILP by which their participation on the international plane was finally recognised under the law of nations and thereby legitimised. However, this same ILP also brought duties under the law of nations.

ILP in this view was thus the legal counterpart of the more political notion of relative sovereignty. Sovereignty and ILP were not attributed to the state, but to its ruler. The state was considered a natural society in which rights and laws applied. The sovereign whose ‘authority is ... sufficiently extensive’ to represent public liberty, ‘who can count on sufficient freedom and power to exercise some influence in international affairs, with armies or by treaties,’ had ILP. The people did not have ILP either. Leibniz had no sympathy for democracy, as, in his view, democracy was a political order that was all too susceptible to chaos and instability and was incapable of serving justice well.<sup>199</sup> ILP was thus a *personal* attribute of the sovereign ruler. His wise and virtuous use of power would ensure that the public good was represented and considered, even on the international stage. All European sovereigns, regardless of rank, from

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199 We have seen that both Grotius and Leibniz, even Pufendorf, agreed that in very rare and exceptional cases the civil community had a right under the law of nations to revolt against tyranny. Leibniz actually referred to *De iure belli ac pacis* in this respect: ‘I ... remain in agreement with Grotius, that one can resist a tyrant in some circumstances, when he is a monster who seems to have vowed public ruin.’ This, however, did not give the civil community a legal claim to good governance, only a moral one, until some excessive misuse of power was committed against the community by the ruler, who would thereby violate natural law and change the aptitude into a *facultas*. Leibniz, *Letter to Landgraf Ernst of Hesse-Rheinfels*, in LPW, at 185. Footnote omitted. Considering the rather explosive political situation in Europe at the time, Leibniz’ subsequent comment is not without logic: ‘However, I hold that it is a greater perfection to be able to suffer without resistance, and it is this that one must advise as much as one can – men being only too much given to violence.’ Id., at 187-188.

Emperor to Prince, were obliged to observe the natural and voluntary law of nations if they were capable of exercising even the tiniest degree of international influence with arms or by treaties.

In other words, the recognition of the Princes' ILP meant that sovereign persons who were powerful enough to threaten the peace and overturn stability had to comply with the law of nature and of nations and that this was how inter-sovereign war could be prevented. After all, the first - strict - principle of the law of nations stipulated that unless the other party was the first to inflict harm, there was no right to wage war. In other words, even then, only war in self-defence was legitimate. It was never permitted to harm another sovereign or his state territory first. The right of sovereignty thus came to exclude the absolute right to wage war, because the (natural) law of nations placed this external constraint upon the sovereign. Earlier it has been pointed out that as sovereigns, the Emperor, King, Prince or other ruler had both a right and a responsibility to act as an enlightened sovereign, who dispensed charity wisely. He was morally responsible for the wise government of his people and for conducting his international affairs in accordance with the demands of justice. This is where the sovereign's responsibility for the promotion of justice became a legal responsibility to the extent that as an international legal person a sovereign ruler should conform to *ius gentium*.

Considering Leibniz' desire to limit the arbitrary use of power and his intention to encapsulate all power in the universal natural law system, ILP was used to confirm and capture in a legal notion the ruler's subjection to the law of nations. It was used to give *sovereignty* a counterpart in *responsibility*. Sovereignty was thus not only relative in the sense that it applied to those with a sufficient *degree* of force and related competences, but also in the sense that sovereign powers were externally restricted by the law of nations. By having ILP, rulers not only had powers or rights, but also the *legal* responsibility to use their authority in accordance with the law of nations as springing from justice. Those who possessed international personality had international powers, such as the right to wage war, the right to conclude treaties and the right to conduct international relations, but they also had the duty to use these rights in conformity with the law of nature and of nations. Consequently, the use of power was contained by law and any abusive, corrupt or arbitrary use of power was (in theory) prevented. By subjecting the sovereign powers to the *ius naturale et gentium* they were obliged to use their power and authority justly; it legitimised their power and authority.

By considering every person with relative sovereignty a *persona jure gentium*, Leibniz defined the concept in such a way that every ruler 'powerful enough' to influence international life and affairs was bound by the law of nations and obliged to act legitimately and justly. The

use of a personality *jure inter gentes* would not serve this purpose. Personality *jure gentium* created the capacity to establish *ius inter gentes* and to enter into treaty relations, on the condition that these capacities were used in accordance with *ius gentium*. In other words, because Leibniz used personality *jure gentium* instead of personality *jure inter gentes*, the concept did not merely validate the international capacity of the Princes to enter into treaty relations and alliances and the capacity to wage war in defence in terms of international law, but also implied that being a sovereign and having ILP included the responsibility to use power in accordance with the law and, given that power, authority and the law stem from justice, in accordance with the demands of justice. ILP was not merely a technical concept used to indicate formal subjection to the law of nations, but also, as was to be expected from Leibniz' universal jurisprudence with its natural-law based concept of international law, a substantial or material concept, which added to the capacity to act the capacity to act responsibility and justly.

Leibniz used the concept of ILP to serve the dual purpose of, first, recognizing the *legitimate participation* of the new actors and, secondly, subjecting all authority in Europe with some degree of military power to the rule of the law of nations. Leibniz' use of relative sovereignty and ILP provided a theoretical grounding for his defence of (the unity of) the gradually declining Empire.

By situating the *Praefatio* in the political, intellectual and jurisprudential context charted in this paper, it has been established that Leibniz intended to contribute to the rationalisation of international relations. His contribution was the redefinition of the supreme *rationale* of international life – sovereignty – in such a way that the status of the new actors could be clarified and diplomats would be spared further embarrassments. It has been demonstrated that Leibniz' relative concept of sovereignty served practical political considerations, but was also highly original at the time and that this originality was for the main part the result of the moral ideology that guided his (political) thinking. The originality of Leibniz' ideas on sovereignty and personality will become even more evident if we compare them to the ideas that prevailed before. Pufendorf, for example, denied the separate existence of the law of nations and supported the rise of the modern state and an absolutist or unitary conception of sovereignty. For this reason, he did not have to create a concept such as ILP and therefore the concept never emerged in the context of his work.

The concept of ILP thus on the one hand legally sanctioned the sovereign's power, but on the other hand also restricted it by the rule of law, which necessarily served the cause of justice. And so it has become clear that Leibniz used the notion of ILP as a response to new political



developments, a response which at the same time allowed him to hold on to his own convictions and the old universal structure. Therefore the ‘best meaning’ of Leibniz’ conception of the concept of personality in international law is *legitimate participation* which in his universal jurisprudence cannot be separated from justice: legitimate (i.e., including *just*) participation in international relations. As such, the concept of ILP in Leibniz’ work has – what Skinner calls a ‘descriptive’ as well as an ‘evaluative dimension.’<sup>200</sup> Certain descriptive terms may be used to either support or undermine social, political, moral or legal practices and when they are successful, they cease to be merely descriptive, but in addition obtain an ‘evaluative dimension’, which influences conventions and awareness. These ‘evaluative-descriptive terms’ evidently play an important role in language as they are the “locus” of change: ‘It is essentially by manipulating this set of terms that any society succeeds in establishing and altering its moral identity.’<sup>201</sup>

Here, the new term was used in order to describe the changing political and legal system and to provide for legitimization of the new participants while at the same time challenging political practice by urging all (old and new) sovereigns to conduct themselves “morally” and/or “legally”. In this sense, ILP emerged in an attempt to guide the German imperial society and the European inter-sovereign society towards a heightened ‘moral identity’ and the promotion of universal justice. Having ILP, to be or claiming to be a legitimate participant in international legal and political life involved the recognition of both rights and duties in a universal legal system. Since this universal legal system was grounded in natural law it was not merely a formalistic framework but highly normative as well. Leibniz is never treated as one of the canonical scholars of international law theory. However, his attempt to reconcile realist and normative thinking in his concept of the imperial and European society and in his concept of the law of nations gives his timely project a timeless, classical character that deserves a more prominent place in the historiography of international legal and political thought.

If we do so, Leibniz may be placed in what has come to be termed the ‘Grotian tradition.’<sup>202</sup> a tradition of international thought that is an alternative to Hobbesian realism on one end and what has become indicated as Kantian cosmopolitanism on the other. A tradition of international law in middle between the Hobbesian (-Pufendorfian) negation of a society of nations and the cosmopolitan conception of the *societas humana* or City of God. Although it is right to distinguish between Grotius’ own thought and the Grotian tradition of international

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200 Q. Skinner, *Some Problems in the Analysis of Political Thought and action*, in J. Tully (Ed.) at 110.

201 *Id.*, at 112.

202 See, e.g., B. Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 *QLR* 3-33 (1997).

thought, it is fair to say that Leibniz, in his attempt to clarify the law of nations and its theory, something he felt Grotius had done insufficiently, linked up with Grotius' ideas and used them in his quest to advance the (theory of the) law of nations further. While, as Kingsbury has pointed out, Grotius was insufficiently explicit and clear on 'at least five central concepts of modern international law,' i.e., a theory of sources of international law and its hierarchy, a clear concept of the state, a well-defined concept of sovereignty, a doctrine of its subjects, and finally the doctrine of sovereign equality,<sup>203</sup> in Leibniz' theory of international law we may discern an advancement on these issues. We have seen that Leibniz presented a theory of sources of the law of nations, defined the concept of sovereignty in relative terms (Grotius had also stated that sovereignty was divisible), and developed a clear doctrine of subjects: those entities that are able to influence international life by means of arms or treaties are international legal persons and thus have to conform to the law of nations and nature. The concept of ILP emerged in the work of a scholar who reconciled two alternative approaches to the international political order in a kind of pragmatism. As such, the two pragmatic concepts – relative sovereignty and ILP – which were used for the reconciliation necessary to defend the (unity of the) Empire in order to secure stability and justice in Europe, may have had a timely birth but they are also in their mediating structure and origin of a timeless significance.

In conclusion, Leibniz thus offered a theory of sovereignty and personality which responded to the challenge that had to be faced: how to accommodate new participants in the existing political and legal order and as such to manage political change without jeopardizing stability and justice. This question is not only a continuing one throughout the history of international law, it is also a central one today. Leibniz' theory cannot be read as a recipe for confronting contemporary problems however it demands a revision of the fundamental assumption about the origins of the concept of ILP and of modern international law in an absolute or unitary conception of state sovereignty. Leibniz offers a realist, normative theory of international law. For many international lawyers of today this is a variation of international law theory that incorporates two irreconcilable, even mutually exclusive approaches. However for Leibniz the reconciliation of realism with natural law in his approach to the law of nations enabled him also in defending the (unity of the) Holy Roman Empire.

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203 *Id.*, at 13-15. Also on the connection of theory and practice one could observe that Leibniz was a 'Grotian' in the sense that Leibniz combined a practitioner's view on international relations with the development of a full-fledged universal jurisprudence, which was also a theory committed to practical change. *Id.*, at 29-33.