Max Weber Lecture Series

"NOT EXCEPTING THE IROQUOIS THEMSELVES..."

Machiavelli, Pufendorf and the Prehistory of International Law

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"Die Souveränität des früneuzeitlichen Staates is zwar ans Recht gebunden, aber sie steht über den Gesetzen. Staatraison war eine der Begründungen, mittels derer sich die frühneuzeitlichen Herrscher von traditionellen Bindungen dispensierten, doch gleichzeitig verpflichteten sie sich darin auf eine neu Bindung; auf die Intressen des Staates, und die waren keinesweges immer identisch mit den ihren».[1]

INTRODUCTION
International law has always been a predominantly intellectual discipline. Its doctrines and theories, its rules and institutions, have been conceived in abstract terms, by reflection and literary commentary rather than painstaking analyses of the international social world. True, like all modern lawyers, international lawyers subscribe to the adage *ubi societas, ibi jus*, hoping to convey by this that their law is not merely utopian speculation about immutable norms but a real thing; to use the standard metaphor, a "reflection" of the (international) society it is supposed to govern.

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[1] Herfried Münkler, *Im Namen des Staates. Die Begründung der Staatsraison in der frühen Neuzeit* (Hamburg, S. Fischer, 1987), 167.

But although international law developed since the late-19th century as part of what Duncan Kennedy has called the "second globalization of legal thought", the world-wide spread of the critique of legal form and an emphasis on the law's "social" basis and "function",[2] the suspicion among other lawyers, and indeed international relations experts, has been that international law is particularly remote from the social world and that, perhaps, recourse to the Latin adage has been a merely formal nod in the direction of reigning political theory, while the discipline itself has remained remarkably dependent on speculation about human nature and the universal good.

International lawyers have not done much to dispel this suspicion. They have not developed complex images of the "reflective" relationship between their rules and principles and the international society they presume as their background. And even where they have attempted this, this has taken place against humanist vocabularies that have claimed validity independently of time and place. The discipline of "international relations" was born, I suppose, to compensate for the absence from the older academic field of credible approaches to its sociological environment.[3] To be sure, as modern international law was born, around the *Institut de droit international* in the 1870s, its representatives were conscious of the need to link their craft with the economic, scientific and technical developments of the age. In France, Germany, and Switzerland and, to a lesser extent, Britain and the United States, international lawyers at the turn of the 20th century called for "new" rules and institutions to keep abreast with the plunge into a cosmopolitan modernity.[4] Some of them did this by expressly invoking sociological vocabularies of "solidarity" and "interdependence" and describing their craft in functional terms as a kind of international government.[5] The "move to institutions" after the First World War was accompanied by visions about the how the "social" was expanding beyond the state, and "sovereignty" was being replaced by international government.[6] Inter-war books on international law from France and Germany are full of sociological language, sometimes focusing on international organisations, sometimes on the internal dynamics of diplomacy, and increasingly often on structural developments in the international economy and in technology. In the 1950s avant-garde lawyers, especially in the United States, joined the teaching of legal realism with the political realism brought in by refugees from Europe. Realistic descriptions of international law as a social "process" alternated with liberal views about interdependence and individualism.[7] Today, international law is eagerly adopting political science vocabularies about effective regimes, legitimacy and compliance – and

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[2] Duncan Kennedy, 'Three Globalizations of Law and Legal Thought 1850-2000', David M. Trubek & Alvaro Santos (eds.), *The New Law and Development. A Critical Appraisal* (Cambridge University Press, 2006), 37-62.

[3] For one delightful early work attempting precisely this, see J. K. Stephen, *International Law and International Relations. An Attempt to Ascertain the Best Method of Discussing Topics of International Law* (London, Macmillan, 1884).

[4] I Have discussed this in *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001).

[5] Especially so in France, see Koskenniemi, *The Gentle Civilizer*, *supra* note 4, Ch. 4.

[6] See David Kennedy, 'The Move to Institutions', 8 Cardozo Law Review (1987), 841-988.

[7] Myres S. McDougal, 'International Law, Power and Policy. A Contemporary Conception', 82 RdC (1953), 113-259.

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is learning to speak the language of globalization – to buttress its sociological respectability.

Despite all this rhetoric, sociological studies of international law remain largely absent.[8] I suggest this is so because for lawyers, "the international" is not at all a sociological category. It is neither a place nor a structure, neither a function nor a process. Instead it is a political project, one that does not recognise itself as such.[9] Not willing to defend itself in political terms, however, it has had recourse to a social science vocabulary in a way that leads it into the impasse of idealism and realism, which is so frustrating for insiders and outsiders alike. The problem is this: The profession is committed to a "progressivist" reading of international law that makes it attractive for ambitious minds but is not defensible in sociological or historical terms. It consists of two related assumptions. One depicts the rules and principles of international law as *limits* to sovereign behaviour. States, so the assumption goes, may be provisionally necessary as instruments for human purposes. One must, however, be aware of the accompanying dangers. It is the task of law – and in particular international law – to limit state power so that it does not become an intolerable burden on natural human flourishing. This idea – the view of law as a limit to state power – is connected with another assumption, according to which progress means the gradual replacement of statehood with a universal federation. Kantians or not, international lawyers view international law as a path to a cosmopolitan world, a united humanity. Today's "international" contains the promise of tomorrow's "cosmopolitan".

These assumptions push into extreme positions: the world is either apprehended as an anarchy of dangerous sovereigns, or it is viewed under a universal teleology under which its problems have already been resolved. Neither works as plausible sociological history of law or as a basis for effective reform. The problem lies with the separation of two contexts of meaning – the state and the international – and the linkage of one with a negative and the other with a positive value. Yet no such separation can be maintained. On the one side, the international world can be grasped only by reference to the policies of states. To think otherwise appears "utopian". On the other, statehood can only be assessed from the perspective of principles outside it – that is "international" ones. Anything else will be an apology for the status quo. This dialectic of the state and the international, sovereignty and order, and the homologous disciplinary division into "international relations" and "international law" sets up the interminable circle of

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[8] Most of the works discussing international law in its social "environment", with special reference to "functions" and "effectiveness" come from a political science-oriented literature in the United States in the 1950 to 1970s. Aside from the work of Myres McDougal and his "policy-oriented school", examples include Michael Barkun, *Law without Sanctions* (Yale University Press, 1968); William Coplin, *The Functions of International Law. An Introduction to the Role of International Law in the Contemporary World* (Chicago University Press, 1966); Morton Kaplan & Nicholas Katzenbach, *The Political Foundations of International Law* (New York, Wiley 1961) and many of the essays in Karl Deutsch & Stanley Hoffmann, *The Relevance of International Law* (Cambridge, Mass. Schenkman, 1968).

[9] An argument somewhat analogous to mine has been made by David Saunders in 'Juridification and Religion in Early Modern Europe: The Challenge of a Contextual History of Law', 15 *Law and Critique* (2004), 99-118 where he highlights the merits of early modern 'juridification' in the development of democracy in the face of a partly anachronistic attack by social critics on the individualizing and alienating nature of its notion of statehood.

"utopia" and "apology", in which neither position can be plausibly held in view of the critiques produced by its counterpart.[10]

This lecture is about work in progress. I am interested in the play of idealism and realism, utopia and apology that characterises not only modern international law but our imagination of the limits and possibilities of political change. My sense is that the state and the world cannot be usefully separated from each other, and that above all, there is no reason to build upon a historical teleology leading inexorably from the former to the latter. If the critiques of "apology" and "utopia" are correct, then no positive change depends on whether we act at the level of the state or the international world. On the contrary, to stare at the *level* of government is to look at the wrong place. More important is how government operates and with what effect. Like cosmopolitan liberals generally, international lawyers tend to celebrate the move from the state to the world as a move from power to law. For them, "power" is the source of political evil and the right way to combat it is through "law". This cannot be right. "Power" is the source of good and evil and it is no less "power" by being channelled through law, domestic or international. To think otherwise is to isolate "legal" power from political critique and to limit contestation to formal channels of representation. Law is a limit to power but it is also a means of empowerment. Any meaningful political project must be about seizing power and using it though law.

The association of statehood with "power", and the international world with "law" may have been a useful move in the early 20th century when the gravest threats to freedom and human development came from totalitarian states. International law was then a form of progressive politics.[11] Statehood is no longer a privileged realm of power, however, and the "international" bears no intrinsically critical meaning. If "power", law and government are everywhere, as analyses of global governance suggest, then political critique must be everywhere too. A realistic analysis and critique of law cannot remain satisfied with identifying formal "levels" of governmental power. Instead, it must see power embedded in all interactions between human beings, close to and far away from each other, in normative structures and in vocabularies of truth. To examine these informal interactions, I would like to evoke the spirit of early modern natural law for which sovereign power and universal law, empirical facts and good rules were aspects of one *single* sociological reality, manifested in the emergence and government of modern states. If it is true that the "progressive" international law we know arose as a minor aspect of public law in the late-19th century, I would now like to examine its prehistory, the moment when international law was still spoken of as a beneficial aspect of the government of modern states, a technique for preserving and extending the security and welfare of populations, pointing to ways in which governmental authorities were both constrained and enabled by the new social conditions. I want to suggest that international law as natural law did not consist of the abstract and inflexible maxims

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[10] I have discussed this problem at length in my *From Apology to Utopia. The Structure of International Legal Argument* (Reissue with New Epilogue, Cambridge University Press, 2005).

[11] I have argued this in 'The Fate of International Law. Between Technique and Politics', 70 *The Modern Law Review* (2007) 1-32.

that later accounts have suggested, but formed a vocabulary through which new types of political power could be both justified and criticized in professionally plausible ways.

I cannot here attempt to produce a full prehistory of international law. Instead I will just make some observations about how the law of nations (*Droit des gens*, *Völkerrecht*, or *jus gentium* in its "modern" meaning) arose as the vocabulary of the government of modern states in their external relations in the period from approximately 1500 to 1800. This is an international law that is conscious of being part of the exercise of power, simultaneously authorising and limiting particular kinds of action. The first part will examine the setting aside of the ideal of universal monarchy by a vocabulary of *ragione di stato* in Florentine political debates in the early 16th century. The conditions of Northern Italy suggested a particular way to think about government that focused on the unchanging conditions of ruling states. In the second part, I will look at how the language of natural law in late-17th century Germany adopted and updated the teachings of the reason of states so as to enable the concentrated use of power over large populations in and beyond Europe. In the final, third part, I will draw some conclusions from the decline of Florentine republicanism in the 16th and the emergence of North European absolutism in the 17th and 18th centuries on the ways in which we speak today about globalization and its challenges to international government. International lawyers themselves trace their profession to the moment when new vocabularies sought to articulate statehood as the centre of a new world.[12] They spoke about universal laws of nations that, as later assumed by Montesquieu, would cover the whole of humankind "...not excepting the Iroquois themselves".[13] This may be true. And the fate of Iroquois tribes will have to be the measure with which we weigh our shared globalizing modernity.

I: ITALY

Medieval law operated without a concept of statehood embodying supreme secular value. Political community was articulated through feudal relationships of personal allegiance to which legal sense was given through the scholastic synthesis of Christian morality and Aristotelian politics. Secular statehood challenged that synthesis. Concentration of power in the hands of the territorial ruler was completely at odds with a legal theory that presupposed the Pope's or the Emperor's overlordship. In Northern Italy, for example, the gap between law and experience was illustrated in the 14th century in Bartolus' odd view that although the Emperor was *dominus mundi* – ruler of the whole – he was not ruler of its parts.[14] When statehood became the exclusive focus of political debates among the Italian civic humanists in the 15th and 16th centuries, the conceptual and physical worlds beyond it were reduced to a shadowy realm of (essentially non-political) fears and opportunities, instruments rather than purposes,

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[12] For a useful discussion of the emergence of "modern" international law from the transformation of the Roman law trichotomy of *jus naturale*, *jus gentium* and *jus civile* to the (modern) dualism of natural and positive law, and the emergence of a distinct notion of state as the subject of international law, see Jan Schröder, 'Die Entstehung des modernen Völkerrechtsbegriffs im Naturrecht der frühen Neuzeit', *Jahrbuch für Recht und Ethik* 1993, 47-71.

[13] Charles de Secondat Montesquieu, *The Spirit of The Laws*, (New York, Hafner, 1949), 5.

[14] F.H. Hinsley *Sovereignty* (2nd edn., Cambridge University Press, 1986), 81-82; Anthony Pagden, *Lords of All the World. Ideologies of Empire in Spain, Britain and France c. 1500-1800* (Yale University Press, 1995), 27-28.

economics and civil religion on the one side, the *respublica universalis* on the other. Although diplomats had been travelling across Europe since the 13th century and treaties – especially treaties of alliance and peace – were routinely concluded by European princes, none of this was understood in terms of the regular management of an independent "international" realm. As Joseph Strayer notes, "[i]n Europe without States and without boundaries, the concept of foreign affairs had no meaning, and so no machinery for dealing with foreign affairs was needed".[15]

This is not to say that there would not have existed governmental techniques before the writings of the humanists. On the contrary, there was a vigorous literature that gave advice to princes on how to govern so as to attain the *bonum commune* or *utilitas publica*.[16] The special contribution of this novel literature was to abstract from moral or theological views about the common good, and to encourage a "situational" analysis of secular statehood where the defence and strengthening of the state itself became the focal point of politics. This is radically different from the medieval articulation of the political community as a "corpus mysticum" that united the prince and his subjects as the "head" and the "body", between which any tension was excluded a priori by the definition of the prince in terms of his representative capacity.[17] The prince's action was always also the action of the community, and the point of that action was to assure not only the continuity but the perpetuity of the rule that it embodies. This presumed an a-historical and unitary concept of political rule, part of what Walter Ullmann has termed a "descending" theme of government that would ultimately derive itself from God.[18] The North Italian humanists set it aside precisely because it could not integrate the experience of historical states collapsing and emerging as a result of the political choices of their rulers.

A *sociological* and historical understanding of political power, in contrast to philosophical derivation of rational conclusions from moral premises, emerges in the vocabularies of reason of state (*ragione de stato*, *ratio status*) that seek to grapple with the precarious conditions in Northern Italy in the early renaissance. Contrary to the theocratic kingdoms of Britain or France, the Italian cities could not make claims about their eternal existence.[19] Instead of speculating about good government in the abstract,

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[15] Joseph Strayer, *On the Medieval Origins of the Modern State* (Princeton University Press, 1969/2005), 27.

[16] For a discussion of this literature in Italy as part of the Aristotelian "politics" of striving for the "common good" before the Florentine renaissance, see Maurizio Viroli, *From Politics to Reason of State. The Acquisition and Transformation of the Language of Politics 1250-1600* (Cambridge University Press, 1992), 11-125.

[17] The classic is, of course, Ernst Kantorowicz, *The King's Two Bodies. Study in Medieval Political Theology* (Princeton University Press, 1957/1995). A very useful discussion of the contrast between the legitimation of medieval government by the "bonum commune" in which the *status régis* and the *status régni* are inextricable aspects of the whole and the "reason of states" as it emerged in Florentine civic humanism is Christian Lazzeri, Introduction, Henri de Rohan, *De l'intérêt des princes et des États de la Chrétienté* (Paris, PUF, 1995), 24-57.

[18] Walter Ullmann, *Law and Politics in the Middle Ages. An Introduction into the Sources of Medieval Political Ideas* (Cornell Universaity Press, 1957), 31 and passim. I have used this previously in my *From Apology to Utopia, supra* note 10, 76-89

[19] Lazzeri, *supra* note 17, 58-59.

political analysis now begins to focus on the actual conditions in which political communities existed, directing attention on what, in view of the situation of each community, was "necessary" to secure it against internal and external threats. The point of Machiavelli's (1469-1527) *The Prince* (1513) was to speak of the business of ruling not as it was imagined but as it was in historical time, focusing on what experience suggested was needed to maintain and strengthen the state.[20]

Machiavelli's work is notoriously ambivalent.[21] In particular, he uses the notion of "state" – a term with many etymologies[22] – to denote both a particular regime or rule and the political community, the republic or the city-state itself. This duality supports contrasting views of Machiavelli as an advocate of princely authoritarianism and a republican patriot. Nevertheless, key to his work is the articulation of the social in terms of "*fortuna*", which is juxtaposed with "*virtù*", two much-debated technical notions that connote succession of unpredictable contingencies that cannot be brought under human control but for which it is still possible to prepare by adopting the right attitude or frame of mind. The latter is the nucleus of successful statecraft and what distinguishes the pursuit of republican *vita activa* in Machiavelli's ideal world from the search for an ethically or theologically coloured "common good" in medieval rhetoric.[23] The counsel Machiavelli offers Lorenzo de' Medici on what is required for the purpose of maintaining and strengthening the liberty of Florence (and Lorenzo's own position) are of course not those of conventional morality. "You must realize this: that a prince, and especially a new prince, cannot observe all those things which give men a reputation of virtue, because in order to maintain his state he is often forced to act in defiance of good faith, of charity, of kindness, of religion".[24] Fully emancipated from morality and abstract justice, *virtù* looks single-mindedly into the real conditions faced by the government. Machiavelli was not alone in seeking a political language that would, instead of moral education, provide an autonomous discipline of effective rule. *Dialoggo del Reggimento di Firenze* (1524) by Francesco Guicciardini (1483 – 1540), set at the outset of the brief period of republican rule in Florence (1494-1512), is even more explicit. Here the Medici loyalist Bernardo del Nero – Guicciardini's mouthpiece – not only identifies good government with effective government but assumes that this is what everybody does:

> "For I believe that to know which government is better or less good, one ought to consider only its effects, and that an illegitimate government is

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[20] "I have thought it proper to represent things as they are in a real truth, rather than as they are imagined". Niccolò Machiavelli, *The Prince* (London, Penguin, 2003), 50.

[21] A complainrt made by practically all his students. See e.g. Viroli, *supra* note16, 126-128; Boucher, *Political Theories*, supra note 12, 90-91. See also the delightful introduction by Bernard Crick in Niccolò Machiavelli, *The Discourses* (London, Penguin, 2003).

[22] See e.g. Münkler, *Im Namen des Staates*, *supra* note 1, 171-173; Lazzeri, *supra* note 17, 47-50.

[23] Machiavelli compares *fortuna* with "violent rivers" that tear down everything in their way and which cannot be stopped but can still be diverted or controlled. In the end, he writes, "it is probably true that fortune is the arbiter of half the things we do, leaving the other half or so to be controlled by ourselves", *The Prince*, *supra* note 20, 79.

[24] Machiavelli, *The Prince, supra* note 20, 57

usually judged bad because in the ordinary course of events it usually produces bad effects". [25]

And to drive the point home, he concludes that although it would be preferable to rule by mercy and kindness, in fact there are times when one "must use cruelty and unscrupulousness". In speaking thus, and in advocating, for example, murder and imprisonment, Guicciardini was ready to admit that he "didn't perhaps talk like a Christian; [but that instead he] talked according to the reason and practice of states". [26] His vocabulary had emancipated itself from morality and theology, and focused simply on the techniques needed to maintain and strengthen efficient, and thus beneficial, rule in a complex world.

Yet one ought not to exaggerate the degree to which the Florentine authors think cruelty or treachery is needed in the regular government of states. [27] True, it is better to be feared than loved. But it is worst of all to be hated. [28] The soundest foundations of any state are good laws and good arms; but it is only the latter that apply to the conduct of external affairs. Success in foreign policy was simply a function of "being well armed and having good allies". [29] In *The Prince* and elsewhere, Machiavelli speaks of the international world – the world beyond Florence – as a function of the ambition of princes and the growth and decline of states. This was an immensely important world, of course, for control of foreign affairs was a precondition of domestic order and liberty. But such control could not be attained by permanent arrangements or thinking of the international in terms of autonomous principles or an independent teleology. Neither neutrality nor balance of power could compensate for the need for the ruler to remain a "lion and a fox" in the conduct of his foreign policy. Here, *fortuna* cannot be chained by permanent arrangements or promises: "a prudent ruler cannot, and must not, honour his word when it places him at a disadvantage and when the reasons for which he made his promise no longer exist". [30]

Also there are no absolute rules for governing wisely. As Machiavelli puts it, sometimes the nobles should be embraced, sometimes alienated, sometimes fortresses should be built, sometimes razed to the ground. Sometimes one has to speak for war, sometimes for peace, as circumstances require. [31] "It is impossible to give a final verdict on any of these policies, unless one examines the particular circumstances of the state in which such decisions have to be taken". [32] Machiavelli's understanding of the social conditions in which states act in their relations with each other draws on an extremely pessimistic view of human nature. "[M]en are wretched creatures who would not keep their word to

[25] Francisco Guicciardini, *Dialogue on the Government of Florence* (Alison Brown ed., Cambridge University Press, 1994), 13.

[26] Guicciardini, *Dialogue*, *supra* note 25, 159.

[27] *The Prince* was written to give counsel to a *new* prince whose rule was still uncertain and who had to consolidate his position against previously powerful families.

[28] Machiavelli, *The Prince*, *supra* note 20, 54.

[29] Machiavelli, *The Prince*, *supra* note 20, 59.

[30] Machiavelli, *The Prince*, *supra* note 20, 57.

[31] Münkler, *Im Namen des Staates*, *supra* note 1, 228-321.

[32] Machiavelli, *The Prince*, *supra* note 20, p. 67; *Discourses*, supra note, 21, Bk III, Ch 7-9 (425-432).

you, you need not keep your word to them".[33] In view of the constant warfare and external intervention in Northern Italy through the 15th century, this was certainly understandable. Machiavelli's history of Florence, for example, is full of stories of the doing and undoing of pacts between princes, and of greed, treachery and violence in the relations between the city-states.[34]

It would be wrong to think that under such a view there can be no international law in the sense of instruments of (prudent) statecraft – treaties of alliance and peace for example. But those instruments enjoy no transcendental or normative validity beyond the force of the reasons that brought them about. They are what *virtù* requires in its nervous attempt to chain *fortuna*. Machiavelli and Guicciardini differ on how this can best come about. Machiavelli admires the *vita activa* of Republican Rome. Although in *The Prince* he accepts the return of the Medici as a fact, and hopes to be enlisted as an adviser, elsewhere he celebrates Roman citizenship in which *virtù* was generalised and conflict of opinions was not a danger to the republic but a manifestation of its vigour.[35] Only a combative civil life can prepare a people to face up to internal and external enemies with the required determination. This is why Machiavelli was critical of the use of mercenaries and saw citizen participation in the army as an essential part of training in *virtù*.[36] By contrast, Guicciardini's hero is the Medici loyalist who was executed during the Republic and in whose view effective statecraft was not a preserve of the masses. The people were unfit to rule: they "make ready and rough judgements, they don't distinguish and weigh things carefully, so that they are easily deceived by someone who attempts to appear good".[37] Both authors insist that there are no *general rules* for governing wisely but where Machiavelli sees this as the basis of the need for an active citizenry, Guicciardini believes that the required practical wisdom must remain limited to select individuals, the law-givers, assisted by the best advisers, experts and professionals.[38] Guiccardini's ideal is Venice – an oligarchic government ready to have recourse to *condottieri* and, especially, to an extensive and professionalised practice of diplomacy.[39]

Machiavelli and Guicciardini were developing two alternative approaches to how to think about government that was limited in space and time and did not seek a justification from transcendental principles. Those approaches were applicable in the conduct of internal as well as external affairs of the state, and diverge in their logical manner. For Machiavelli, the "international" did not have any specific identity as a field of politics or a set of problems; it was either a potential target of imperial policy or it was a source of threat – that is to say, the imperial policies of other States.[40] Even

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[33] Machiavelli, *The Prince*, *supra* note 20, 57.

[34] Niccolo Machiavelli, *History of Florence and the Affairs of Italy* (The Echo Library, 2006).

[35] Machiavelli, *Discourses*, *supra* note 21, Bk. I Ch 4 (113-115); *History of Florence*, *supra* note 34, 82.

[36] Machiavelli, *The Prince*, *supra* note 20,

[37] Guicciardini, *Dialogue*, supra note 25, 42.

[38] This is why Guicciardini thinks of the constitution of Venice as "excellent": "The Doge, the Pregadi, and the select principal magistracies exercise the care and vigilance that a prince or an optimum regime enjoys, by the concentration of activities in the hands of experts", Dialogue, *supra* note 25, at 134. See also Lazzeri, *supra* note 17, 62.

[39] Guicciardini, *Dialogue*, *supra* note 25, 102-103, passim; Viroli, *From Politics*, supra note 16, 196-200.

[40] This meant that only a belligerent imperial power could look with some tranquillity into the future. In Machiavelli, the only thinkable life outside the city that was anything but unfreedom was life in a brilliant

though Machiavelli had extensive experience of diplomatic practice, he did not believe external relations could be subsumed under permanent structures of rule such as balance of power. War was an endemic aspect of the policies of ambitious rulers and the only question to be asked about it concerned the wisdom of the princes – something that had been absent in the petty wars of Italy in 1434-1494 when "the practice of war fell into such a state of decay that war was commenced without fear, continued without danger, and concluded without loss" – thus contributing to Italy's ending up under barbarian rule.[41] Guicciardini's international world looks different. He admired the Venetians' advanced diplomatic practices that had enabled Venice to concentrate on trade and to avoid war for such a long time. Diplomacy is needed to create alliances and assess realistically the threats that one is faced with, and to operate systems of common or reciprocal interests, especially trade. Here there is an "international" realm – a realm of cooperation, sometimes conflict – that states can use in order to bring about their objectives. Guicciardini praises Lorenzo de' Medici's ability to manage the balance of power in Italy in such a way as to produce conditions of prosperity and growth.[42] Machiavelli's strong view of *fortuna* does not allow him to canvass even a relatively steady system of international "rule", as distinct from the rule over the state; for Guicciardini, a specific diplomatic craft can be operated so as to manage "international" affairs to the attainment of the *utile* that is the point of rule. Where Guicciardini sees a manageable system, Machiavelli sees only a field for inspired activity. In the one as well as in the other case, however, the point and purpose of government was now wholly immanent to statehood: to strengthen and maintain the state, and present rule over the state, conceptualised sometimes under an old view of the "liberty" of its people, but increasingly often as its *securitas*.

For both Florentine authors, the old language of Christian republic and universal monarchy connoted abstractions behind which particular rulers – the French and Spanish kings, and of course Charles V – hid their designs on the resources of Northern Italy. To have a Medici as Pope was better than to have a Borgia, but only if one was Florentine oneself. Papal "tyranny" remained a constant source of concern. Machiavelli had little else to say about religion than what he said about the ambitions of Ecclesiastical Principalities in Chapter XI of *the Prince*. When the imperial army sacked Rome in 1527, the vocabulary of universal empire was still being offered by scholastic lawyers drawing upon Roman law and Dante's *Monarchia*.[43] But the world could hardly be ruled from Madrid (even if it might have seemed like that for a brief moment after 1494). Imperial rhetoric was out of touch with sociological reality. By contrast, neither Machiavelli nor Guicciardini has a view of the international as a single social space

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empire such as Rome that, as Pocock points out, seems for Machiavelli to have achieved subordination without conscious loss of freedom.
J.G.A. Pocock, *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1975), 216.
[41] Machiavelli, *History of Florence*, *supra* note 34, 151-2.
[42] Guicciardini, *History of Italy 1492-1534*, quoted in Dominic Gaurier, *Histoire de droit international. Auterurs, doctrines et développement de l'Antiquité à l'aube de la période contemporaine* (Presses universitaires de Rennes, 2005), 375-6.
[43] See Pagden, *Lords of All the World*, supra note 14, 29 *et seq*, and on Charles V and Gattinara, 41-46.

("universal"), detachable from the ambition or fear of this or that ruler. But their political projects differ: for Machiavelli's popular republics, the world outside the City is either that of fear or empire; for Guicciardini's commercial oligarchy, it could always be manipulated into a reasonable balance. For both, however, just war is that war which is "necessary",[44] and this necessity links back to the preservation and advancement of the state itself.

By the time Florentine republicanism was over, the language of reason of states (*ragione di stato, ratio status)* had begun its ascent as part of the novel "Machiavellian" approach to statecraft (although the term itself is found in Guicciardini, not Machiavelli) that focused exclusively on the secular conditions of the government of early modern states.[45] Political writers sought to preserve Machiavelli's sociological realism without provoking the moral indignation his name was associated with. They did this by making distinctions between "bad" and "good" reason of states or between *ragione dominationis* – reason serving the Prince in his private capacity – and *ragione di stato* under which the Prince's selfish interests were separated from those of his State.[46] The most famous tract in this vein came from a counter-reformation writer, Giovanni Botero (1544-1617). In his *Ragion di stato* (1589), exceptional measures to protect the state were argued as perfectly compatible with the Prince's Christian duties. For writers like Botero, the equation worked both ways; nothing was better for the Church than to have princes think of their professional tasks as part of religious duty, while at the same time whispering to them – as Botero did – that "...of all religions none is more favourable to rulers than the Christian law".[47] Botero and others had no regard for republican virtue; they spoke to kings and their counsel, and the Christian love they saw as compatible with the "good" reason of states, was an instrument of absolutist rule.[48]

In other words, reason of state did not mean that the prince *would not be bound*. It only put in words the real conditions under which the early modern ruler could preserve, strengthen and enlarge the state. It modernised and updated the medieval *Fürstenspiegel* that had, since the 13th century, taught Christian virtue as the cornerstone of political rule.[49] By contrast, governing was now depicted as a matter of applying *professional techniques* that could no longer rely on either mass politics or princely intuition. It became the language of authority for a small group of experts that could use it to discipline the subjects and the prince alike.[50]   The force of this literature was epistemological; it claimed to capture the real – "sociological" – conditions within which the prince had to act in order to preserve or extend his realm. The books usually

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[44] Boucher, *Political Theories supra* note 12, 133.

[45] For two useful histories, see Michael Stolleis, *Staat und Staatsräson in der frühen Neuzet* (Frankfurt, Suhrkamp, 1990*); Yves Charles Zarka (ed.), Raison et déraison d'état* (Paris, PUF, 1994).

[46] Sometimes concern with the exceptional was projected to a *ragione di guerra* that allowed deviation from a morality of peace. Münkler, *Im Namen des Staates, supra* note 1, 218.

[47] Giovanni Botero, *The Reason of State* (P.J. and D.P. Waley transl., London, Routledge, 1956), p. 66.

[48] In particular by buttressing the "reputation" of the prince. SeeViroli, *From Politics, supra* note 16, 252-7. On the instrumental view of authority in Botero, see also Cesare Vasoli, 'Machiavel inventeur de la raison d'Etat?', in Zarka, *Raison et déraison, supra* note 45, 54-57.

[49] Hans Meier, 'Die Lehre der Politik an den deutschen Universitäten. Vornehmlich von 16. Bis 18. Jahrhundert, in Dieter Oberdörfer (ed.), *Wissenschaftliche Politik,. Eine Einführung in Grundfragen ihrer Tradition und Theorie* (2. Aufl. Freiburg, Ronteck 1966), 68-70.

[50] Münkler, *Im Namen des Staates, supra* note 1, 148-158.

accepted the view that in human matters, nothing could be predicted with 100 per cent accuracy; *fortuna* was omnipresent. To deal with it, the prince had to develop the appropriate mindset, coolness and ability to reason.[51]   This was not at all against Christian virtues as taught by Erasmus, for example, to the young Charles V. But it highlighted the difficulty of the task of ruling with efficiency and the need of the prince to learn to separate his private desires from the long-term interests of himself and his state. Ruling could no longer be only about the piety of the prince, even less about his whims or enforcing his dictatorial *voluntas*. It was about acting in accordance with the objective conditions of the world as laid out by the *raison d'état* writers.

One of them was Henri de Rohan, Duke of Rohan (1579-1638), who began his instructions for the early modern prince (1638) with the famous lapidary statement: "Les Princes commandent aux peuples et l'intérêt commande aux Princes".[52]   The distinction between the "real" interest of the prince and his merely "imagined" subjective perceptions of interest laid out the programme for scientific examination of the conduct of foreign policy. In Rohan, this necessitated a close understanding of the resources of one's own state – its climate, its population, its economy, its history and so on. These had then to be compared with the resources and the relative power of other states so as to produce a situational analysis of the *real interests* of the state at any one moment. Success in foreign affairs became a function of the ability of the prince to manoeuvre his state in this network by taking advantage of the relative strengths of the state while avoiding exposing its relative weaknesses.[53]

At the time of Rohan's writing, the diplomatic profession had tied princes to the expert advice they received from ambassadors and their secretaries. The notion of "interest" and, in particular, that of "real interest", as opposed to fleeting passions, whims or superstitions, became the central category of the diplomacy of the period. It was conceived as a rational and even scientific technique for managing the affairs of the state in the external realm, in view of the resources and policies of other states. It was this view of the "real interest" of early modern states and their rulers that also became the gist of the novel vocabulary of natural law as it was used to reflect on the two ways in which princes communicate with each other – diplomacy and warfare.

The first such lawyer of note was Alberico Gentili (1552-1608), a protestant refugee from Italy who made his career in Britain as Regius professor of Roman Law (1586).[54]

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[51] Quentin Skinner, *The Foundations of Modern Political Thought I* (Cambridge University Press, 1978), 118-123.

[52] Rohan, *De l'intérêt*, *supra* note 17, 161.

[53] Consequently, in Rohan's work, the "international "does not appear as an autonomous sphere. It is simply the structure or network created by the interlocking real interests of each State. These, Rohan summarises in terms of the "maxims" of foreign policy appropriate for each State. For, "en matière d'Etat on ne doit se laisser conduire aux désirs déréglés qui nous emportent souvent à entreprendre des choses au-delà de nos forces, ni aux passions violentes...mais à notre propre intérêt, guidé par la seule raison, qui doit être la règle de nos actions... ». , Rohan, *De l'intérêt*, *supra* note 17, 187.

[54] For background on Gentili's life, see Gesina van der Molen, *Alberico Gentili and the Development of International Law* (Leyden, Sijthoff, 1968). It is true, of course, that since the energetic advocacy by Ernst Nys and James Brown Scott in the late-19th and early 20th century, the origin of international law

Gentili became known for his treatment in 1584 of the case of Mendoza, the Spanish ambassador accused of having conspired against Queen Elizabeth. On that basis Gentili published the following year a work on embassies (*De Legationibus Libri tres*) which, although it does not openly theorize the diplomatic function, embodies a fully *raison d'état* conception of the qualities needed in an ambassador. A few years later, Gentili called for the silencing of the theologians when secular matters such as just war were being debated.[55] But already in his work on diplomacy, he had discussed ambassadorial tasks in a fully secular spirit. Alongside linguistic and oratorical gifts, and a sizeable fortune, ambassadors ought to possess a training that combines history and philosophy. It should not consist of history alone, for without philosophy, the past is without a direction – nor indeed merely bookish philosophy that is "wholly useless in the government of the state".[56] The skill of the ambassador is a skill in modern government, examples being, Gentili writes, Charles V, Consalvi the Great and Sforza of Milan.[57] Above all, however, Gentili launches here into a celebration of "the most distinguished of [this] class", namely Machiavelli for his "remarkable insight" and his championship of democracy, but above all for his understanding of the dependence between history and philosophy.[58] It is this combination that is witnessed, for Gentili, by the best statesmen, and thus, too, the best of the ambassadors: "The same principle applies to ambassadors as to statesmen and princes, for the ambassador is a statesman and is invested with the personality of his prince".[59]

In the later work on the *Laws of War* Gentili, like Machiavelli, accepted that war must be waged when it is necessary.[60] The wide latitude he gave to princes to go to war against each other and against the infidel, to colonize barbarians' lands, and to break treaties with enemies emerges from admiration of republican glory. War is not a part of human nature, he writes, but arises nevertheless from the natural need to defend ourselves, if necessary, in a pre-emptive mode "through fear that we may ourselves be attacked".[61] Of course, not just any fear may justify one to strike first. The fear must be grounded. But it might be grounded, for example, by the emergence of "powerful and ambitious chiefs" that will threaten peace and order. For, writes Gentili, did not Lorenzo

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had been traced to the Spanish Dominican scholar Francisco Vitoria (1492-1546). The possession by Vitoria and Francisco Suarez (1548-1617) of a "modern" concept of ius gentium as a law "inter gentes" has also been recently argued by Jean-Francois Courtine, 'Vitoria, Suarez et la naissance de droit naturel moderne', in Alain Renaut, *Histoire de la philosopohie politique 2. Naissance de la modernité* (Paris, Calmann-Lévy, 1999), 140-147, 165-178. See however, the critical remarks in Schröder, 'Die Entstehung', supra note 12, especially 57-8 (pointing out the persistence of the older notion of "ius gentium" in their work).
[55] Alberico Gentili, *De jure belli libri tres, Volume II, The Translation of the Edition of 1612* (John Rolfe Transl, Coleman Phillipson ed., Carnegie Endowment for International Peace, Oxford, Clarendon, 1933), Bk I, Ch. XII (p. 57). For the view that not too much should be made of this, however, see Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, PUF, 1983), 354-5 (n 1725).
[56] Alberico Gentili, *De Legationibus Libri Tres, Volume Two. The Translation* (Gordon J. Laing transl., Oxford University Press, 1924), 157.
[57] Gentili, *De Legationibus*, supra note 56, 158.
[58] Gentili, *De Legationibus*, supra note 56, 156-7.
[59] Gentili, *De Legationibus*, supra note 56, 158. Thus, Gentili writes, "I want our ambassador, therefore, to be a legal, ethical and from a Peripatetic point of view, political philosopher", 161.
[60] Alberico Gentili, *De jure belli libri tres, Volume II, The Translation of the Edition of 1612* (John Rolfe Transl, Coleman Phillipson ed., Carnegie Endowment for International Peace, Oxford, Clarendon 1933), 20, 58-60.
[61] Gentili, *De jure belli*, supra note 60, 61.

de' Medici "that wise man, friend of peace and father of peace" see to it "that the balance of power should be maintained among the princes of Italy"?[62] Gentili wrote in the humanistic mode and drew upon Roman ideas about the glory of imperial war so as to argue against Spanish predominance.[63] He also accepted that a war could be just (i.e. necessary) on both sides – that is to say, that there was no overriding standpoint from which these matters could be assessed.[64] Gentili completely rejected the view that religion might have offered a just cause for war – indeed, where this had been invoked it had been merely a pretext. War was not a religious but a social phenomenon.[65] The necessity that makes it just is one that calls for the defence of the realm – pre-emptively if that seems needed, or in vengeance for a wrong one has suffered.[66] But it may also be waged in order to protect "some privilege of nature which is denied us by man" – that is to say, to protect trade routes and the continuation of commercial practices.[67]

The basis of Gentili's argument was Roman law and Bartolist jurisprudence. His international law remains as defined by Gaius – that is to say, a law applicable to human beings everywhere, in contrast to the *jus civile* that concerned members of particular communities.[68] Gentili argued about "gentes" (that is to say "peoples" or "nations") but had no developed concept of the state as a legal subject, or of the "international" as limited to inter-state relations. "Gentes" are bound as *jus gentium* obligates their members as human beings.[69] But his international law is sociologically founded: evidence for it is received from converging practices around the world. This also made it possible for Gentili to presume the presence of a wider, natural society of the whole human race, and a duty of solidarity of individual States towards its weaker members.[70] In this universal society, nations were always entitled to wage war "for the sake of honour" against men "who clearly sin against the laws of nature and of mankind" such as, for example, Indians and pirates.[71] Again, however, this is not because they refuse to hear the gospel or because they engage in idolatry but because their practices violate natural law.[72] It was through this idea of a universal law, based on stoic and humanist themes, that it later became possible to speculate about foreign policy in terms of the "natural" social norms that would govern the interactions of independent nations.

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[62] Gentili, *De jure belli,* supra note 60, 65

[63] See Richard Tuck, *The Rights and War and Peace* (Oxford University Press, 1999), 18-31.

[64] Gentili, *De jure belli*, supra note 60, 32-33 ; Tuck, *The Rights and War and Peace, supra* note 63*,* 31-34.

[65] "Since the laws of religion do not properly exist between man and man, therefore no man's rights are violated by a difference in religion", Gentili, *De jure belli* supra note 60, 41.

[66] Gentili, *De jure belli,* supra note 60, 83-85.

[67] Gentili, *De jure belli*, supra note 60, 86-92.

[68] Therefore, he is not "modern" in the sense used by Schröder, "Die Entstehung", *supra* note 12. For me, his "modernity" is in fact more a matter of spirit, style and sensibility – orientation to the government of new ("modern") societies.

[69] Haggenmacher, *Grotius*, *supra* note 55, 355-357.

[70] Gentili, *De jure belli*, supra note 60, 67-73.

[71] Gentili, *De jure belli*, supra note 60, 122, 124.

[72] War against atheists is just because atheism is against nature. Gentili, *De jure belli*, supra note 60, 125.

14

II GERMANY

The demise of the authority of religious vocabularies in public life raised questions about the origin of the social world and the basis on which it could be regulated. If social life was not established by God – then where did it come from? And how, once it was there, ought it to be operated? The only realistic responses to these questions referred back to society itself: social life was to be described as somehow self-instituted, and it was to be regulated by principles that were immanent in it.[73] Machiavelli, Guicciardini and *raison d'état* had provided one set of answers to questions about political order that were pressing upon Europe. But however persuasive as languages of practical rule and criticism of conventional theories,[74] they did not provide a sustained explanation or response to the spiritual crisis epitomised in the Thirty Years' War.[75] This crisis was felt most acutely in Germany. The war had done away with up to 50 per cent of the rural, and around one-third of the urban population.[76] The cultural life of local communities was wiped out, its economic base destroyed. The peace of 1648 consolidated the fragmentation of the Holy Roman Empire into a patchwork of estates – larger and smaller territorial units enjoying de facto independence from the imperial centre. It located the confessions – Lutheran, Calvinist and Catholic – within particular territorial regimes, thus fostering "doctrinal distinctiveness, distrust and misunderstanding".[77] As the historian Rudolf Vierhaus concludes: "it forced a search for meaning and created profound anxieties about the meaninglessness of existence".[78]

One of the novel vocabularies that offered a more comprehensive promise of a better life was natural law, introduced in Germany by Hugo Grotius and Thomas Hobbes.[79] For the former, emerging forms of state power were to be analysed by reference to a sociability existing naturally in the human heart. The quest for peace and order coalesced with the pursuit of the good. The natural law proposed by Hobbes, again, was a mechanism through which human beings – and by extension, their states – were moved by passion, desire and self-love and thus could be tamed only by fear. In the one case love, in the other overwhelming force was suggested as the origin of human society and the appropriate vocabulary for its government. Neither was in evidence in the Holy Roman Empire of the German Nation, the largest piece of organised authority on the continent. The Empire had been weakened in the peace of Westphalia by the right given to the territorial estates to form alliances with outside powers and by the position of

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[73] Pierre Rosanvallon, *Le libéralisme économique. Histoire de l'idée de marché* (Paris, Seil, 1979, 1989), 11-15.

[74] For an overview of the sceptical, *raison d'état* and "Tacitist" streams of the critique of Aristotelian "constitutionalism" in late-16th "new humanism", see Richard Tuck, *Philosophy and Government 1572-165,* (Cambridge University press, 1993), 31-119.

[75] For a classical analysis of the late-17th century crisis, see Paul Hazard, *La crise de la conscience européenne (1680-1715)* (Paris, Boivin, 1935).

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

[77] Id. 62.

[78] Id. p. 6.

[79] Ernst Reibstein, 'Deutsche Grotius-Kommentarien bis zu Christian Wolff', 15 ZaöRV (1953-54), 76-102 and Horst Dreitzel, 'The Reception of Hobbes in the Political Theory of the Early German Enlightenment', 29 History of European Ideas (2003), 255-289.

France and Sweden as guarantors of the agreement. But the *Landeshoheit* of territorial rulers was also limited by imperial law and institutions.[80] Neither Grotius nor Hobbes could quite be used to capture the complex political and constitutional reality or, *a fortiori*, to guide the German princes out from the long period of crisis. Instead, this was offered by an eclectic and sociologically-oriented natural law that integrated the perspective of the *ragion di stato* in a way that provides the appropriate context for understanding not only German law but also the law of nations that we have inherited from these debates.

Towards the end of the Thirty Years' War, a flood of reason of state literature – often under the banner of *arcana imperii* – emerged in Germany.[81] Perhaps the most important participant in this debate was Hermann Conring (1606-1681) from Helmstedt who argued that each of the three Aristotelian constitutional forms – monarchic, aristocratic and democratic – had its proper reason of state, understood as its *telos*.[82] Like Botero and most of his contemporaries, Conring made the distinction between good and bad *Staatsräson* in a way that led him to discuss the constitutional situation in Germany by seeking moderate compromises between constitutional alternatives – a technique that had already figured in the Florentine debates. Conring's oeuvre marks a turning-point in German law to history and context, away from abstract principles of Roman law, including the old theory of imperial translation.[83] It now becomes a scientific vocabulary for debating the proper way to govern particular types of states.[84] Conring's training as a political scientist (he was also a medical doctor) pushed him towards analyses of statehood in terms of health or sickness in view of the welfare and happiness – *Glückseeligkeit* – of the population.[85] Perhaps the same background prompted him to view the practice of government not as a theoretical science but as a practical craft, *Staatskunst* or *Staatsklugheit*.[86] To put this practice on firm ground, he suggested the development of empirically based analyses of particular states – *notitia*

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[80] For general analysis, see Albrecht Randelzhofer, *Völkerrechtliche Aspekte des Heiligen Römischen Reiches nach 1648* (Berlin, Duncker & Humblot, 1967).

[81] See Stolleis, *Staat und Staatsräson supra* note 45; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band 1600-1800* (Munich, Beck, 1988), 197-211 and also many of the essays in Roman Schnur (ed.), *Staatsräson. Studien zur Geschicte eines politischen Begriffs* (Berlin, Duncker & Humblot, 1975). A good overview of the German situation is also H. Dreitzel, 'Reason of State and the Crisis of Political Aristotelianism: An Essay on 17th Century Political Philosophy', 20 *History of European Ideas* (2002), 163-187.

[82] For Conring as a reason of state theorist , see Stolleis, *Staat und Staatsräson*, *supra* note 45, 73-105. On Conring as the founder of the modern theory of state, see Arno Leifert, 'Conring und die Begründung der Staatenkunst', in Michael Stolleis, *Hermann Conring (1606-1681). Beiträge zu Leben und Werk* (Berlin, Duncker & Humblot, 1983), 201-214.

[83] For Conring's critique of the "fable" that the *Corpus juris* was applied in Germany at the order of Emperor Lothar III, see Hermann Conring, *Der Ursprung des Deutschen Rechts* (Ilse Hoffmann-Meckenstock, trans., Frankfurt, Insel, 1994), Ch XXI-XXV (131-168).

[84] See Dietmar Willoweit, 'Hermann Conring', in Michael Stolleis (ed.), *Staatsdenker in der frühen Neuzeit* (Munich, beck, 1994), 134-140. Stolleis, Staat und Staatsräson, supra note 45, 82-3.

[85] See e.g. the concluding chapter in Conring's analysis of the origins of the German constitution, Conring, *Der Ursprung*, supra note 83, 237-249.

[86] Willoweit, 'Hermann Conring', *supra* note, 84 132. For Conring, it was not for the universities to guide States but for States to order what shall be taught at universities. Die Ursprung, supra note 83, 249.

rerumpublicarum – on the basis of which each state could be governed in a scientific way.

Soon after the mid-17th century, the vocabulary of reason of state – though not the idea – began to disappear. With the growth of absolutism, political culture changed. Territorial states with powerful rulers were in place and it no longer seemed useful or politically advisable to speculate on *arcana*. Also, as noted above, it could not produce a meaningful substitute for religion as a comprehensive explanation of social life. By contrast, natural law would promote clarity and order, peace and security, and it would do this in an intellectually impeccable manner. The legal ideal was constructed in a scientific way, even *more geometrico*.[87] The states now appeared as instruments for the well-being of their populations. Reason of state became ancillary, and was referred to in exceptional moments where normal means no longer sufficed.[88] At the same time, Machiavelli's republican awareness was lost as European populations started to become governed through the national idea, above all in France and Britain. In Germany, however, arguments from *raison d'état* continued in the constitutional debates waged in the vocabulary of natural law about the division of authority between the imperial centre and the territorial estates.[89]

The key person in this respect is Samuel Pufendorf (1632-1694), son of a Lutheran Minister from Saxony. In his writings, natural law developed into "the first important modification of the Italian theory of Reason of State"[90] – that is to say, an explanation of the secular origins of civil society and a repository of universal principles to regulate all social life. Pufendorf was aware that he was treading in the footsteps of Grotius and Hobbes. He found a middle position in a sociologically-expressed reason of state that united the pursuit of individual interests and the interests of civil society, and provided a solid and often empirically-argued basis for the government of the latter that was oblivious to confessional division. For Pufendorf, the old university metaphysics was a "major intellectual obstacle and institutional enemy".[91] In an often hostile academic environment, he found support for his pragmatically oriented natural law not only from Conring but from Karl Ludwig, the Electoral Prince of the Palatinate who appointed him to the Chair of the Law of Nature and of Nations in Heidelberg in 1661.[92] Like Pufendorf, most German public lawyers were employed as professional advisers to a territorial ruler, or as university professors who received their salaries from the prince. Understandably, they were expected to reciprocate by teaching their princes about how to rule so as to preserve the security of their states and extend their government over their territories. In this, they, like Machiavelli, continued the medieval tradition of the *Fürstenspiegel* but now with a new scientific vocabulary that ensured them epistemic authority over princely rule.[93]

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[87] Stolleis, *Staat und Staatsräson*, supra note 45, , 71.

[88] Münkler, *Im Namen*, supra note 1, 299.

[89] For a useful description of the emergence of natural law as the leading political science vocabulary at German universities, see Meier, 'Die Lehre der Politik', *supra* note 49, 88-92.

[90] Alfred Dufour, 'Pufendorf', in H.J. Burns & Mark Goldie, *The Cambridge History of Political Theory 1450-1700* (Cambridge University Press 1991/2004), 584.

[91] Ian Hunter, *Rival Enlightenments* (Cambridge University Press, 2003), 148 and generally 148-196.

[92] For background on Pufendorf's life and career, see e.g. Leonard Krieger, *The Politics of Discretion. Pufendorf and the Acceptance of Natural Law* (Chicago university Press, 1965), 11-33.

[93] See also Stolleis, *Staat und Staatsräson*, *supra* note 45, 45-49.

Pufendorf's most famous contemporary work was his analysis of the constitution of the German Empire under the Pseudonym of the Italian nobleman Severinus de Monzambano (1667).[94] This had been preceded by an extremely lively debate between German jurists in which some had taken the position that the Empire should be understood as an aristocracy, while others had defended the view of the Reich as a monarchy, with some of the Emperor's powers divided among the imperial estates.[95] For Pufendorf, none of these conceptualisations was historically credible. They all aimed to fit a complex reality into pre-existing abstract forms. The most famous sentence of that work – the one according to which the Reich was *monstrum simile*, 'resembled a monster' – may have been a purely polemical expression, and was not repeated in the second edition.[96] Pufendorf's point with the expression, however, as with the whole work, was to turn the analysis around, and to characterise the Empire in the light of the *real* relations that pertained between its different parts, the imperial centre and the different classes of estates. From this perspective, Germany appeared as a *systema communitatis*, a series of de facto relationships between moral persons that would not cease to develop, and for which the appropriate frame of analysis was not provided by abstract categories but empirical examinations of the strength and weakness of the different entities on which a workable balance could be constructed. Like Conring's analysis of the origins of the Empire, Pufendorf's discussion of its constitutional form ended with a series of proposals that would take into account the *Staatsräson* of the whole structure and provide "remedies" for its present "sicknesses", which were caused principally, in Pufendorf's view, by confessional struggles. Although it is very hard to know what to make of his view of the Reich as a "system of States", it seems clear that this took account of the "irregularity" of Germany while avoiding going as far as to see it broken up into a confederation. It was a way to recognise the heterogeneity of the Reich while still defending its unity against external dangers – particularly the one commonly identified as the pursuit of universal monarchy by Louis XIV.[97] In this respect, *Monzambano* reads like a model for later efforts to ground an "international law" that would both recognise the full sovereignty of its subjects, and accept the relativity of that sovereignty vis-à-vis binding law. In both cases, the circle is squared by a pragmatic reading of the (rightly understood) interests of the members as fundamentally compatible with, or even indispensable to, the realization of the interests of the whole.

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[94] Samuel von Pufendorf, *Severinus de Monzambano. Über die Verfassung des deutschen Reiches* (H. Breslau transl., Berlin, Hobbing 1922).

[95] For a recent overview of the debate, see e.g. Peter H. Wilson, 'Still a Monstrosity? Some Reflections on Early Modern German Statehood', 49 The Historical Journal (2006), 567-576. See also Randelzhofer, *Völkerrechtliche Aspekte*, *supra* note 80, 68-84.

[96] Pufendorf, *Severinus de Monzambano*, *supra* note 94, Ch. VI, § 9 (94).

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

In *Monzambano*, Pufendorf sought to give a sociologically-credible view of the Constitution of the German *Reich*. His *De jure naturae et gentium* (1672) universalised this effort, laying out a scientific way of speaking not only about the laws of particular periods or places but of law in general. He did this through his vocabulary of natural law that addressed what he called "moral entities", situated alongside physical entities and attached to particular situations, or "offices", forms of status and civil position.[98] The world of physical entities was governed by the laws of physics; the world of moral entities – the human world – was governed by natural law. This was a wholly secular law, created by human beings as they sought to realize their natural self-love in the actual conditions of human society. Moral entities – good and bad, right and wrong and so on – did not reside in things or actions themselves. They were projected ("imposed") on things by human beings.[99] People did not "know" the rules of natural law as babies, and then had come to forget them, as Pufendorf ironically put it against Grotius. They were learned from experience and taught by natural law.[100]

The world of moral entities was the social or cultural world constantly created and transformed by human beings.[101] In founding law on a study of how that world operated (instead of speculating about the paradisiacal state together with the followers of Melanchton), Pufendorf opened the way for early modern rulers of territorial states to extend and consolidate their power over their domestic rivals, the clergy and aristocracy. Law was to be a matter of commanding and obeying, and it peaked in the sovereign's power to exert punishment. Of course, law was derived ultimately from God.[102] But nothing about its substance depended on God: it was theologically neutral – hence also its universality. As Pufendorf put his methodological dictum:

> "For the nature of man has always been determined to sociality in general by the Creator, but the establishment of and entry into particular societies were left to men to decide in accordance to the guidance of reason...this discipline concerns not Christians alone but the race of all mortals".[103]

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[98] Hunter, *Rival Enlightenments*, *supra* note 91, 130-139. Pufendorf was deeply influenced by the early 17th century advances in mathematics and natural sciences and having first experimented with the former (in his *Elementorum jurisprudentia universalis*, 1660), turned to an analytic ("resolutive-composite") method like that used by Hobbes in *De cive*. The point was to draw conclusions about natural law that no reasonable human being would question. For this purpose, the construction of the "state of nature" allowed a fully de-contextualised notion of the human being as the centre of the analysis. See Theo Kobusch, 'Pufendorfs Lehre vom moralischen Sein', in Fiammetta Palladini & Gerald Hartung (eds.), *Samuel Pufendorf und die europäische Frühaufklärung* (Berlin, Akademie, 1996), 63-73.

[99] Pufendorf, *De jure naturae et gentium. Libri Octo, Vol II (Translation of the Edition of 1688)* (C.H. Oldfather transl., Oxford, Clarendon 1934) (Hereinafter "DJN"), Bk. I, Ch 1, § 4 (5-6).

[100] Pufendorf, DJN, Bk. II, Ch. 3 § 13 (2014-5). See also Kari Saastamoinen, *The Morality of the Fallen Man. Samuel Pufendorf on Natural Law* (Helsinki, SHS 1995), 130-139 and J.B. Schneewind, 'Pufendorf's Place in the History of Ethics', 72 *Synthese* (1987), 123-155.

[101] Pufendorf's role in foreshadowing the (Neo-Kantian) separation of *Naturwissenschaften* and *Geistewissenschaften* is emphasized in Dufour, 'Pufendorf', supra note 90, 564-5.

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

[103] Pufendorf, 'Preface to the First Edition of DJN', in Craig & Carr, *Political Writings*, *supra* note , 102, 97-98.

In Pufendorf, natural law received scientific independence that harked back to an empirical anthropology – observation of human beings as they are now – and a historical view of civil society developing from immaturity (the state of nature) to maturity (culture, including modern statehood).[104] Pufendorf built on Grotius and Hobbes without collapsing his law either to the innate and thus religious notion of sociality in the former or to the mechanistic naturalism of the latter. He was able to avoid Hobbes' extreme conclusions by agreeing with Grotius on the presence of what both called "sociality". True, as Hobbes had argued, human behaviour was governed by self-love. The Grotian view of natural human goodness and concern for one's neighbour did not stand up to empirical examination. But if humans were drawn (by nature) to be essentially selfish, their self-love was not independent from their capacity to reason. And reason showed that self-love in a world of pathetically weak human beings can only be realised by cultivating sociality.[105] In this way the realms of the "social" and of "civil society" emerge from human reason outside of, and independently from, either nature or faith. While they provide for the institution of social life in fully immanent – social – terms, they do this without giving up the principle of self-love. On the contrary, and as Adam Smith was later to elaborate at much greater length, self-love would be realized by sociality itself:

> "For nature has not commanded us to be sociable, to the extent that we neglect to take care of ourselves. Rather, the sociable attitude is cultivated by man in order that by the mutual exchange among many of assistance and property, we may be enabled to take care of our own concerns to greater advantage".[106]

This is crucial. Natural law is not only a *limit* to human pursuits. It is also, and in this construction above all, an *empowerment*. By providing knowledge of the laws of sociality, natural law lays out the conditions for the realisation of self-love. Following its commands we are able to fulfil our own desires. To produce a universally-applicable account of these conditions, Pufendorf used the intellectual device of the "state of nature" on the basis of observation of human behaviour he witnessed around himself.[107] This allowed him to construct something like a natural history of human society as a learning process in which the inconveniences of the state of nature persuade rational humans to create *entia moralia,* social and cultural institutions, including public power to provide peace and order, and to direct generalised self-love to the generation of common welfare. That power is called sovereignty. It is distinguished by its capacity to command and by the obligation among citizens to obey. That obligation, again, emerges from nature understood in both a factual and a normative way: on the one hand, the duty to obey signifies the capacity of the sovereign to exert punishment in case of non-

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[104] See Hans Medick, *Naturzustand und Naturgeschichte der bürgerlichen Gesellschaft* (Göttingen, Vandenhoeck & Ruprecht 1973), 40-63.

[105] Pufendorf, DJN, Bk II, Ch. 3 § 14-15. On Pufendorf's notion of "sociality" not as an innate property but a rational conclusion, see also Krieger, *Politics of Discretion*, *supra* note 92 , 92-94 and Saastamoinen, *Fallen Man*, *supra* note 100, 62-72.

[106] Pufendorf, *DJN*, Bk. II, Ch. 3 § 18

[107] Pufendorf, *DJN*, Bk. II, Ch. 2, 154-178.

obedience; on the other, it emerges from the natural gratitude citizens have towards the one that provides peace and welfare.[108] This two-sidedness reflects Pufendorf's eclecticism, his often noted wish to combine apparently opposite things and to arrive at ambiguous or open-ended results.[109] Whatever its weaknesses – attacked by Leibniz among others – this combined approach is absolutely crucial in an effort to found an autonomous legal discipline that would become neither a branch of natural science (pure factuality) nor (Christian) morality (independent normativity). Like Machiavelli, Pufendorf drove a wedge between morality and politics; physical power would persuade human beings to use their reason for their own good.

This is law understood as the practice of wise government. "Let the welfare of the people be the supreme law", Pufendorf writes,[110] and thereby lays out a functionalistic notion of law, submerged in a *raison d'état* world.[111] Here the sovereign is both completely free and completely bound at the same time. He is free to choose any course of action that seems necessary for the protection of citizens and providing for their welfare.[112] This is why he is not bound by positive law. How could he be? After all "human laws are nothing else than decrees of the supreme sovereignty about those things which subjects must observe for the welfare of the state".[113] On the other hand, he is completely bound by natural law, including the fundamental obligation, inscribed in the very definition of "sovereignty", to advance the good of the people by creating the social conditions within which their individual pursuits may be realized: "A King cannot by right order more things than are consistent with, or are judged to be consistent with, the end for which civil society was instituted".[114]

This construction was not invented by Pufendorf. It was included in medieval Aristotelianism and had received a modern articulation in Bodin's notion of sovereignty that may have meant absolute power, freed from the constraint of "laws "(*loix*) but not

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[108] Pufendorf, *DJN*, Bk. I,Ch.6, § 9-12 (where Pufendorf tried to show that obligation does not arise from the strength of the sovereign only).

[109] See e.g. Craig L. Carr & Michael J. Seidler, 'Pufendorf's Sociality and the Modern State', XVII *History of Political Theory* (1996), 354-6. Also Ian Hunter stresses the way this duality – the construction of "obligation" on superior force and "just reasons" for obeying – come together with "security" as the key notion that is both a fact and a norm simultaneously, *Rival Enlightenments*, *supra* note 91, 154-163. See also Simone Goyard-Fabre, *Pufendorf et le droit naturel* (Paris, PUF 1994), 43-44.

[110] Pufendorf, *DJN* Bk. VII, Ch 9 § 3 (1118)

[111] See Dufour, 'Pufendorf', *supra* note 90, 562, 584-5. Likewise (with special regard for 'Monzambano'), Stolleis, 'Textor und Pufendorf über die Ration Status Imperii im Jahre 1667', in *Staat und Staatsräson*, *supra* note 45, 107-133.

[112] Pufendorf's doctrine of the purpose of the State (*Staatszwecklehre*) is sometimes associated with the Hobbesian view of "security" while the other main purpose –"welfare" – is regarded as a product of later public law. That "welfare" was indeed among Pufendorf's postulated objectives of government is, however, pointed out in Peter Preu, *Polizeibegriff und Staatszwecklehre. Die Entwicklung des Polizeibegriffs durch die Rechts- und Staatswissenschaften des 18. Jahrhunderts* (Göttingen, Schwartz, 1983), 116.

[113] Pufendorf, *DJN* Bk. VII, Ch 6 § 3. Thus Pufendorf "did not shirk from advocating the disarming of citizens, the disempowerment of '*potentes*', forbidding the formation of parties, and proscribing any innovation, using trade policy to disadvantage other states and cancelling treaties according to changes in the political situation", Dreitzel, 'Reason of State and the Crisis of Political Aristotelianism', *supra* note,81 171n18.

[114] Pufendorf, *DJN* Bk. VII, Ch 2 § 11

from divine or natural law (*droit*) or indeed from *jus gentium*.[115] In France and Germany, various limits or directives were commonly understood as inherent attributes of the sovereign that could be rationalised as derivatives of his function to provide for the *bonum commune*: in the 17th century, "the monarch existed for the sake of the state, not the state for his sake".[116] From within the German Aristotelianism, Althusius wrote in 1614 that "for an emperor to be unable and forbidden to do prohibited and wicked things does not take from his power or his liberty, but defines the ends and deeds in which his true power and liberty consists".[117] Even at the height of absolutism in France, the power of Louis XIV was limited by "fundamental laws" that came from many sources, but in their minimal form governed the laws of royal succession and the inalienability of the realm, sometimes however extending to a whole range of "constitutional" principles. [118]

To think of Pufendorf as an apologist for tyranny, inasmuch as his natural law contained no efficient jurisdiction over the secular prince, would anachronistically assume that legal constraint can only mean being under the jurisdiction of secular magistrates educated at law schools in the dictates of positive law. But for Pufendorf and his colleagues, wise government cannot possibly fall into the purview of secular magistrates. Magistrates rule on matters having to do with relations between citizens as well as between citizen and sovereign under positive law because that is what they are competent in doing. They cannot rule on the duties of princes under natural law because they have no special access to its complex demands.[119] For the latter purpose, other kinds of experts are needed – experts in statecraft and *raison d'état*, that is to say, experts in natural law. For it is natural law alone that has "society" as its object – that is to say, the normative meanings projected on things that can be reduced neither to morality (this is the departure from Grotius and scholasticism) nor to natural science (this is the departure from Hobbes).

For Machiavelli, and Pufendorf, and the whole system of reason of state, positive law cannot possibly constrain the ruler in his pursuit of the *salus populi.* It is part of the definition of positive law to be an assessment by the sovereign of what is needed to

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

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

[117] Johannes Althusius, *Politica* (Abridged transl. by F.S. Curry, Liberty Fund, Indianapolis, 1995), XXXIX § 8 (202).

[118] Fanny Cosandey & Robert Descimon, *L'absolutisme en France. Histoire et historiographie* (Paris, Seil 2002), 52-75.

[119] Pufendorf, DJN 1301 § 10. For the rare cases where the citizens do have a right to resist as the sovereign has broken his pact with them, see e.g. Michael Seidler, 'Turkish Judgment and the English Revolution. Pufendorf on the Right to Resistance, in Palladini & Hartung, *Samuel Pufendorf*, supra note 98, 89-98.

bring it about.[120] The potential danger of princely arbitrariness is met in different ways by the two authors. Where Machiavelli used a medieval vocabulary that looks into the character that the prince ought to possess (i.e. *virtù*), Pufendorf made the (modern) distinction between the prince's private and his public will, and read the latter as normative because it is representative of the (enlightened) will of the population. This allowed the state to emerge as the manifestation of sociality in political life.[121] To quote Pufendorf again, "it seems most suitable to define the state as a composite moral person whose will, a single strand woven out of many people's pacts, is considered the will of all, so that it can use the strength and faculties of individuals for the common peace and security".[122]

However, Machiavelli and Pufendorf are equally adamant that in times of tranquil normality, the prince ought to set an example, and not cause the envy of his people by breaking the law.[123] The relationship between normality, when the prince is expected to follow positive law, and his occasional need to reach beyond the law in crisis, may change in time. This was debated in 14th century Bolognese jurisprudence in terms of the distinction between "*potestas ordinaria*" and "*potestas absoluta*" with commentators varying in their assessment of the costs and benefits attending to each alternative.[124] The distinction has later been captured in political theories of necessity and the state of exception and the contemporary distinction between "idealism" and "realism" reflects different positions. But the important point is that the distinction follows from a sociological reading of the world, the sense of being sometimes subjected to the overwhelming power of circumstance. Already Aquinas had argued that "one should not observe a law if a case happens to arise in which observance of the law would be harmful to the commonweal" – adding immediately, however, that it is not for ordinary citizens to assess this. "Rather, only rulers are competent to make such interpretations, and they have authority in such cases to dispense citizens from laws"[125]

Now liberal legal theory has sought to push this problem to the margin – this is after all what the expression "state of exception" literally means. Yet it has also refrained from relegating this into a state of pure lawlessness but, in one way or another, derived or authorized it from within the law itself, its "spirit", function, its underlying *telos*.[126] Whether one is a theorist of normality or crisis is a question of taste or sensibility, but Hobbes, Schmitt and Rumsfeld can never be fully exorcised from the stage of modern law, emphasising, as they do, the need to go "deeper" than the mere words of what may have been legislated. In early modernity, it was precisely the point of sociologically-oriented natural law to grasp this "deeper" realm of law and thereby also to discipline those who were authorized to operate in that realm – namely the sovereigns – through technical vocabularies such as "*practica politica*" and *raison d'état* as part of modern law and government.

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[120] A point highlighted in Goyard-Fabre, *Pufendorf*, *supra* note 109, 146-7, 207.

[121] Carr & Seidler, *Political Writings*, *supra* note 102 , 373, 375-6.

[122] Pufendorf, DJN Bk VII, Ch 2 § 13.

[123] Pufendorf, DJN Bk VII Ch 6 § 2.

[124] Cosandey & Descimon, *L'absolutisme*, *supra* note 118, 45-49.

[125] Aquinas, *Treatise on Law* (Richard J. Regan transl. with introduction, Indianapolis, Hackett, 2000) Q.96, VI Articlle (61).

[126] For a recent discussion of the ambivalent position of the state of exception between law and "fact", see Giorgio Agamben, *État d'exception. Homo Sacer* (Paris, Seuil, 2003).

Antigone's position in the mythology of modern liberalism suggests a persistent effort to see natural law and positive law as distinct, even opposed. But for a truly sociological view, they are never so. For Pufendorf and his colleagues, positive law is merely an adaptation of natural law to a particular situation and the business of "adaptation" defines, as we have seen, legislative sovereignty in terms of its function to realize the *salus populi*. For this reason, too, it would be inconceivable to have secular magistrates rule on the princes. For the prince is not only *entitled* to break positive law, natural law positively *obligates* him to do so when that is necessary for the general good. As soon as one says the words "welfare and happiness of the people", one has already produced a complete justification for looking beyond positive law to its "spirit".

The same applies to external relations. Contrary to Hobbes, Pufendorf never thought that the fact that the prince's duties were grounded in the provision of protection and welfare for the population, instead of wishes about universal justice, led to a constant state of war. The same principles of *socialitas* and scientific government applied to the prince's behaviour in the world outside as to the world inside his realm.[127] This is why the law of nations could only exist as natural law, being the only truly universal (and scientific) law. There were no positive international law obligations because there was no such superior to whom other princes would have been obligated. As for Machiavelli, for Pufendorf the international world did not exist as an independent realm of historical factuality, even less as an autonomous repository of moral demands. Instead, it appeared exclusively as a structure of interactions between sovereigns – diplomacy, treaty-making and war, all of this governed by rational sociability. In practice, this meant that states – now described as "moral entities" – moved about in the world in a commercial spirit.[128] The argument from self-love and weakness portrayed Europe as egoistic but with interdependent sovereigns whose interest was to cooperate, not to fight. Thus, generally speaking, treaties had to be kept. On the one hand, this was so because treaties only laid out the practical way of how to realize what was already commanded by natural law. On the other hand, making treaties was a condition of one's trustworthiness; and without trustworthiness, one could not engage in profitable transactions so as to realise the *salus populi*.[129] But if this were the fundamental rule of the prince's external behaviour – as it was not only in Pufendorf but the whole of the 18th century naturalist idiom, peaking in Vattel – then of course treaties could also be broken when their underlying condition was no longer present. This is something Pufendorf specifically suggested to the King of Sweden in 1680 as his alliance with

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[127] Goyard-Fabre *Pufendorf*, *supra* note 109, 207.

[128] This was acutely perceived by Adam Smith who saw his own project as a continuation of a natural jurisprudence that had been started by Pufendorf. See Istvan Hont, 'The Languages of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the "Four Stages Theory"', in *Jealousy of Trade. International Competition and the Nation-State in Historical Perspective* (Harvard University Press, 2005), 164-184.

[129] Pufendorf, *DJN* Bk VIII, Ch. 9 (1329-1341). See also the discussion of the keeping of "pacts" in the natural state (which is also that of the international world), in Bk VII, Ch 1 § 9 (963-4).

France had begun to conflict with Swedish interests.[130] This did not mean that the prince could leave a treaty whenever he deemed it fit; on the contrary, intricate calculations had to be undertaken to measure the advantages of leaving a treaty against the disadvantage of undermining one's trustworthiness. This brings Pufendorfs *Staatsintressenlehre* in line with his general view on society. It is, he writes, after all well understood that states may promise to assist each other only to the extent their own good permits.[131] But I think that when Dufour notes that this shows "that it is not sociability but *Staatsräson,* as formulated in his doctrine of State interests, that forms the fundamental principle of international law",[132] he fails to see how the two come together in a structure where – ultimately – keeping the (vital) interests is conducive to the long-term good of the whole society.

Like treaties, the rights of war and peace are also a function of calculations of enlightened self-interest and the just cases of war come down to (and are limited by the consideration of) "preservation and protection of our lives and property against unjust attack, or the collection of what is due to us from others but has been denied, or the procurement of reparations for wrong inflicted and of assurance for the future".[133] It follows that, for example, unlike Grotius, Pufendorf rejected the view that anybody had the authority to enforce natural law if no direct injury was involved.[134] No war was to be waged on the American Indians on the basis of their alleged cannibalism – only if they actually caused injury.[135] Wars were not punishment – "since they neither proceed from a superior as such, nor have as their direct object the reform of the guilty party but the defence and assertion of my safety, my property, and my rights".[136] And the evils we do in war must be compatible with future peace and security.

All of this meant that ruling in peace and war, internally and externally, became a truly daunting task. As Pufendorf writes, "the science of government is so difficult that it requires all of men's ability…"[137] This is why sovereigns should "make friends of wise men and such as are skilled in human affairs, and hold at distance flatterers, useless fellows, and all who have learned nothing but folly".[138] Although the people may have some intuitive knowledge of natural law, and they can be educated to some extent, they can never have the kind of detailed knowledge about it that is needed to govern. Were this not so, no *pactum subjectionis* would be needed in the natural state.[139] Pufendorf's ideal is Venice, not Florence. Lawyers now emerge as the experts to the elites governing European affairs in a predominantly commercial spirit. In German universities, for example, natural law began to be understood as a propaedeutic to other civil sciences at

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[130] Alfred Dufour, 'Pufendorfs föderalistisches Denken und die Staatsräsonlehre', in Palladini & Hartung, *Samuel Pufendorf*, supra note 98 , 122.

[131] Pufendorf, DJN VIII, Ch IX, § 5.

[132] Dufour, 'Pufendorfs föderlistisches Denken', *supra* note 130, 122.

[133] Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (James Tully ed., Cambridge University Press 1991), Ch 16.1 (168).

[134] Pufendorf *DJN* Bk. VIII, Ch VI, § 2 (1293-4).

[135] Pufendorf *DJN* Bk. VIII, Ch VI § 5 (1297). See also Tuck, *Rights of War and Peace, supra* note 63, 159-160

[136] Pufendorf *DJN* Bk. VIII, Ch VI § 7 (1298).

[137] Pufendorf, *DJN* Bk. VII, Ch IX § 2 (1118).

[138] *Id.*

[139] See also Hunter, *Rival Enlightenments*, supra note 91 p. 192-3.

approximately the time that it moved from philosophy to law faculties. [140] Studies on modern government were conducted on a comparative basis under such subject-headings as "ius publicum universalis" and *Statistik* that helped to produce situational analyses of the condition of particular states, thus paving the way for realistic analyses of political strategy as well as laying the foundations for the kind of legal sociology that emerged in Montesquieu's *De l'esprit des lois* (1748).

In other words, precisely at the moment when the prince is freed from the formal supremacy of the church and the empire – when his power is articulated as sovereignty – he becomes completely dependent on the discipline and experts on natural law and *Staatsklugheit*. The more the absolutist monarch centralised his rule, the more he needed – at least ideally – to draw upon his advisers' views on what might be needed for the preservation, strengthening and expansion of this or that aspect of the state. When Pufendorf and later naturalists say that the prince is bound by natural law – including the law of nations – what they intend is that he cannot ignore the epistemic conditions for the attainment of the welfare of the population, *salus populi*, as elaborated by the new juridical science. It is hardly coincidental that his late writings – "the high point of Pufendorf's political thinking" – are devoted to the histories of Sweden and Prussia, and the way their rulers sought to realise the "interest" of their States. [141] Already in the mid-17th century, Conring had based the scientific nature of public law on comparative studies, collecting and analysing data on territorial, economic, demographic, historical and other aspects of particular states. [142] In Pufendorf, natural law turned into a science of legislation and policy-making that in Germany later crystallised as *Polizeywissenschaft*.

Since the 14th century, there had existed in Germany a wide network of policy-ordinances codifying the means for preserving peace and legal order in different parts of the territory. With the expansion of economic activities in the 16th century, the provision of "welfare" – "*Gemeinwohl*" – was added to the functions of the territorial "regiment" and, after reforms, became the central *Staatszweck* (objective) of the State. [143] After the Thirty Years' War, how to achieve this became an intensive topic of academic and professional discussion of which Conring's and Pufendorf's work is a part. A programmatic statement of the tasks of the new rulers is Veit Ludwig von Seckendorff's "*Teutsche Fürsten-Staat*" of 1656 that unites natural law, empirical "statistics" and administrative policy into a first exposé of something like modern *Staatswissenschaft*, a

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[140] See especially Michael Stolleis, , *Geschichte*, *supra* note 81, 126 *et seq*. Ian Hunter notes specifically of Pufendorf's *De jure naturae* that it "functions as a clearing-house for the other civil sciences – Lipsian political philosophy, Helmstedt political Aristotelianism, Hobbesian anti-clericalism, Bodinian sovereignty theory, positive Staatsrecht…", *Rival Enlightenments*, *supra* note 91, p. 150.

[141] See especially Pufendorf's *Einleitung zu der Historie der vornähmsten Reiche und Staaten, so jetziger Zeit in Europa sich Befinden* (1682/1709), quoted at length in Dufour, 'Pufendorfs föderalitische Denken', *supra* note 130, 117-121.

[142] Willoweit, 'Conring', *supra* note 84, 136; Jutta Brückner, *Staatswissenschaften, Kamelalism und Naturrecht. Ein Beitrag zu Geschichte der politischen Wissenschaft im Deutschland des späten 17. und frühen 18. Jahrhunderts* (Munich, Beck 1977), 33-42.

[143] See Brückner, *Staatswissenschaften,*, *supra* note 142, 6.

theory and practice of the total happiness of the state.[144] At this point, too, a gap begins to emerge between the empirically-oriented public and natural law on the one hand, and economic, policy and cameral sciences on the other. As the first chairs in economics and cameral science were set up in 1727 in Halle and Frankfurt, the University of Göttingen reacted by establishing in 1734 a law faculty specifically oriented to historical and empirical studies.[145] As the German academic world diverged into an economically-oriented *Polizeywissenschaft*, with a more traditional jurisprudential concern with formal rights, the lawyers at Göttingen sought to follow both paths by pushing natural law increasingly into a study of the effective government of modern states for the attainment of what they liked to call "*Glückseeligkeit*".[146]

Predominant among these were Johann Stephan Pütter and Gottfried Achenwall, who published in 1750 a joint textbook – *Elementa juris naturae* – where they laid out, among other things, the principles of *ius publicum universale*, and *ius gentium universale*.[147] The former later became known to us as the specifically German discipline of *Allgemeine Staatsrecht*, elsewhere known as public law; the latter turned into *Droit des gens*, *Völkerrecht* and our international law. The *Elementa* was an enormously ambitious effort to cover the whole ground of social life with natural norms that were deduced from the assumption of a state of nature that bases a contractual social order on the (Wolffian) principle of self-perfection. Achenwall was the author of the greater part of the treatise and published its subsequent editions alone. He combined it with empirical studies on *Staatskunst* and *Statstik* under which he collected and compared data that would determine the right principles of government of particular states. The intent of the larger work reflects the general project of which it was a part, namely providing *salus populi* as a philosophical foundation to the realisation of specific governmental policies, tailored to the circumstances of each state. The function of natural law here was twofold. On the one hand, it legitimised and rationalised the government of (enlightened) absolutist states by offering general maxims of human conduct (the search for security and welfare above all) that could be subjected to scientific treatment. On the other hand, it emphasized a theory of legislative will that suggested the practical predominance of voluntary (positive) law in the government of particular states. It thus executed a transformation from the abstract to the concrete, from political philosophy to empirical *Staatswissenschaft*. Although natural law was conceptually prior to positive law, it would now become practically secondary, inasmuch as its application was reduced to filling lacunae in positive law.

In 1750, Pütter and Achenwall imagined a law that is completely embedded in the social context, whose rules and principles are entirely tailored to realising the common good

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[144] Brückner, *Staatswissenschaften*,, *supra* note 142, 12-32.

[145] For a recent overview of international law teaching in Göttingen, see José Martinez & Florian Prill, 'Geschichte der Völkerrechtsforschung und –lehre an der Georg-August-Universität Göttingen, in Ch. Calliess, G. Nolte & P-S Stoll, *Von der Diplomatie zum kodifierten Völkerrecht. 75 Jahre Institut für Völkerrecht der Universität Göttingen (1930-2005)* (Köln etc. Heymanns, 2006), 51-67. See also generally Stolleis, *Geschichte*, *supra* note 81, 308-316.

[146] For the divergence of legal and economic thinking in German society towards mid-18th century generally, see Mack Walker, 'Rights and Functions: The Social Categories of Eighteenth-Century German Jurists and Cameralists', 50 *The Journal of Modern History* (1978), 234-251.

[147] Gottfried Achenwall & Johann Sebastian Pütter, *Anfangsgründe des Naturrechts (Elementa juris naturae)* (Jan Schröder ed., Frankfurt, Insel, 1995).

and authoritatively identified by the rule(s) under the social contract. The engine of the system is natural self-love, the search for self-perfection and the happiness of initially separate individuals, and the law's task is to direct this "ad salutem publicum".[148] In a parallel way, international law exists to enable each people ("*gens*") to lead a life in search of their own perfection and happiness – including the preservation of all that belongs to the territory, to subjects, internal societies and the form of government.[149] Because all people are "free and equal", this applies also to uncivilized peoples whose territories may not be taken from them.[150] Violation of rights gives rise to a duty of reparation, ultimately enforceable by war. However, *Notrecht* may entitle a state to violate even the perfect rights of others – but only in exceptional cases ("ex ratione status extraordinarii").[151] The relative brevity of the international law section of the treatise (25 pages, 81 paragraphs) takes away nothing from the completeness of its vision: besides, most of the treatise's rules on natural law are applicable to the relations between states, existing amongst themselves in the state of nature.[152] In practice, however, their rights and duties are exercised by the rulers who have in the social contract (the submission contract) received right of majesty extending beyond national frontiers. The ruler represents the people and thus exercises its rights: "Ergo summus imperans habet iura gentes".[153] This takes place through diplomacy and treaty-making and it extends to whatever is permitted to individuals in the state of nature.[154] In all essentials, the international law expounded by Achenwall and Pütter corresponds to that exposed in more detail in Emmerich de Vattel's *Droit des gens ou principes de la loi Naturelle appliquées à la conduite et aux affaires des Nations et des Souverains* (1758) in what became the most important international law book of the 18th century.

Achenwall's work was the most significant natural law construction of the 18th century and often referred to by Kant among others. Its merit lay above all in its successful combination of a vocabulary of philosophical politics (i.e. natural law) with pragmatic studies and directives on the government of modern states. In the internal realm this was epitomised in *Statistik* and *Staaskunst*, in the external realm in diplomacy, treaties and war. There was no independent international social realm that would be administered by international law. On the contrary, international law was simply the name for the pursuit of the *salus populi* in the nation's external dealings – buttressed with the (naturalist) assumption that was increasingly accepted in domestic politics as well, namely that the pursuit of private welfare by enlightened egoists would bring the best overall result as well.

In Göttingen, Achenwall was followed in 1783 by Georg Friedrich von Martens (1756-1821) who fully absorbed his predecessor's view of law as a practical craft, above all

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[148] Pütter-Achenwall, *Anfangsgründe*, *supra* note 147, 222

[149] Pütter-Achenwall, *Anfangsgründe, supra* note 147, 305 (§ 916-917).

[150] Pütter-Achenwall, *Anfangsgründe, supra* note 147, 305, 309 (§ 919-920, 939).

[151] Pütter-Achenwall, *Anfangsgründe, supra* note 147, 303 (§ 911).

[152] Pütter-Achenwall, *Anfangsgründe*, *supra* note 147, 229 (§ 897-898).

[153] Pütter-Achenwall, *Anfangsgründe*, *supra* note 147, 300 (§ 901).

[154] Pütter-Achenwall, Anfangsgründe, supra note 147, 309 (§ 927). Especially the rights of ambassadors are treated extensively, See 301, 307-9 (§ 902-6, § 923-27).

having to do with the administration of states. Martens – often regarded as the father of international legal positivism – wrote quite consciously in the Göttingen tradition, seeking to canvass the *Droit public de l'Europe* strictly in terms of the diplomatic and other official interactions between European sovereigns and their representatives.[155] He pursued his international law writings alongside studies on European diplomatic practices, and the organisation and publication of the *Recueil des Traités* (the "Martens Recueil") that became the most important collection of treaties and other diplomatic acts until the League of Nations Treaty series. Martens no longer felt any need to speculate about the "state of nature" or requirements of natural reason. The positive law available to him – the treaties and forms of diplomatic action on which he devoted his famous textbook – emanated from precisely the reality to which natural law was directed, constituted its outer surface and point of access.[156] In his polemic against the French Revolution and the projected "*Déclaration de droit des gens*", Martens specifically attacked its dangerous idealism and abstract rationalism, drawing on the facts of diplomatic history as the best information about what suited human nature – at least in its present state of development.[157]

Here finally is the moment at which a properly social – and thus "modern" – concept of international law emerges, namely against a revolutionary threat. This is a law that draws its background justification from a social and historical vocabulary for which sovereignty is the necessary (and beneficial) focus of human inclinations and, as practical craft, turns into the pure positivism of statehood, diplomacy, and the civilizing mission. The authority of the European states-system, together with the *Droit public de l'Europe*, is received from an argument that understands European statehood – and perhaps "Europe" *tout court* – as the unprecedented historical experiment of the slow working-out of the consequences of human societies leaving the state of nature ever further behind. As that explanation becomes part of the educated common sense, the stage may be taken over by princes and assemblies, laws and treaties, administrative and ceremonial forms that bear "modernity" on their face and so need no further justification for being authoritative.[158]

III CONCLUSION: FROM SOCIOLOGY TO LAW (AND THEN BACK?)

Pufendorf's natural law vocabulary was hugely ambitious in its coverage. It had a view of human beings as slaves of their passions, but nevertheless capable of reason. It spoke of states as mechanisms for governing passionate individuals through reasonable rules.

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[155] In much more detail, see my, *G.F. von Martens (1756-1821) and the Origins of Modern International law*, in Calliess-Nolte-Stoll, *Von der Diplomatie, supra* note 145, 13-29.

[156] Although the normative *basis* of international law did lie in natural law, it did not suffice to regulate the conditions of modern states with each other; for this purpose, a positive (particular) law of nations was needed. See G. F. de Martens, *Précis de droit des gens moderne de l'Europe, fondé sur les traités et l'usage* (2ème éd. Göttingen, Dieterich, 1801), 7-8 (§ 6).

[157] G.F. von Martens, *Einleitung in das positive europäische Völkerrecht* (Göttingen, Dieterich, 1796), Vorbericht (v-xvi)

[158] "Positivism" thus by no means emerges from a *rejection* of natural law. On the contrary, it stands on a naturalist theory that is so well integrated into educated common sense that it is pointless to make it explicit. See also Frank-Steffen Schmidt, *Praktisches Naturrecht zwischen Thomasius und Wolff: Der Völkerrechtler Adam Friedrich Glafey (1692-1753)* (Baden-Baden, Nomos, 2007), 212-213.

It saw the world as always already united through principles embedded in human relationships. It spoke to late-17th century concerns by being *de facto* secular and single-mindedly oriented towards order and effectiveness. Above all, it fulfilled the twin need created by the breakdown of a religious world-view. It explained the self-institution of social life by the figure of the state of nature and the self-willed pact among human beings to leave it in the interests of their security and welfare. And it provided instruction on the way social life could be regulated: protection and obedience, sovereign and subject – the two poles were locked in an indissoluble bond of reciprocal self-love realised in the modern state.

This view was also enormously successful. Pufendorf's Heidelberg chair was the first chair in *jus naturae et gentium* in Germany. By the end of the 17th century, natural law was taught at all German law faculties. *De jure naturae et gentium* and its abbreviation *De officio hominis* were reproduced in over 30 Latin and French editions each, in 14 English editions, and with "sporadic publication in German, Italian and Russian".[159] Most 18th century European princes received education from the shorter work.[160] Not surprisingly, Montesquieu celebrated his "genius" to which, he said, his own work was heavily in debt. It was praised by Locke and Rousseau, and Adam Smith saw it as a precursor to his own work. It is then no wonder that the entry on the "Law of Nations" in Diderot's *Grande encyclopaedie* observes that although Grotius had written of aspects of the laws of war in a useful way, it was really Pufendorf who ought to be seen as the father of the law of nations.[161] No doubt he thought this because Pufendorf represented precisely the kind of proto-scientific sociology that was the ideal of the *philosophes*, Montesquieu above all. To be able to say something about social life that was valid "not excepting the Iroquois themselves" was to speak in a universal vocabulary that combined the ideals of early enlightenment science and truth with the normative impulse for security and welfare.

Natural law was powerful because it overcame pervasive oppositions in 17th and 18th century thought between rationalism and empiricism, nominalism and materialism, deduction and induction, ideas and facts - by suggesting that each pole was merely an aspect of a single and coherent reality.[162] It was rationalist in producing inferences from the juxtaposition of human nature with its social environment. And it was empirical in deriving its idea of human nature from observation of human beings as they were. The significance of this structure – rationalist empiricism – was that by relying on either one of the poles, one could always answer objections derived from the opposite pole. In language that I have used elsewhere, it avoided the objection of being utopian by its

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[159] Leonard, Krieger, *The Politics of Discretion. Pufendorf and the Acceptance of Natural Law* (University of Chicago Press, 1965), 256.
[160] See Krieger, *Politics*, *supra* note 159, 256-258.
[161] The entry on "Droit des gens ", in *La Grande encyclopaedie raisonné...;* http://diderot.alembert.free.fr.
[162] For the influences from older Aristotelian and scholastic thought in the way Pufendorf turned his otherwise natural science–oriented approach in a normative direction, see Thomas Behme, 'Gegensätzliche Einflusse in Pufendorfs naturrecht', in Palladini & Hartung, *Samuel Pufendorf*, *supra* note 98, 74-82.

concern about human beings as they are now; but it did not fall into the trap of becoming an apology for princely power by binding rulers to the objectives of order and welfare. Reason becomes nature, and the argument leads into Hegel's famous (or notorious) dictum: "What is rational is real; And what is real is rational."[163] Whatever may have been Hegel's intention with this formulation,[164] it highlighted the interdependence of scientific studies of "society" ("real") and the construction of principles of government that would enjoy universal validity ("rational"). The nexus between facts and norms was thus inserted into the heart of modern international law, which even at its surface claimed to offer a vocabulary that would enjoy validity regardless of cultural or historical particularities – and, as such, independence from "politics".

And yet, this was an enormously problematic view. Its notion of the "real" was based on a particular historical experience and its "rationality" encapsulated the values of the educated elites of early European modernity. Kant's critique of the "miserable comforters" (Grotius, Pufendorf, Vattel) was surely correct in drawing attention to the awkwardness of the effort to draw universal principles from (assumed) empirical conditions.[165] But return to an openly normative path could not sustain the scientific pretensions of modern law. Indeed, the more natural law turned to be a pure *Vernunftsrecht,* the more old-fashioned its abstract rationalism seemed, especially towards the end of the 18th century. What was needed was to not to give up the new sociological vocabulary for the purpose of explaining the "foundation" of international law, but to concentrate increasingly on the production, interpretation and systematisation of the available "positive" materials (treaties, customs, later acts of intergovernmental institutions). This highlighted the practical craftsmanship aspect of the law, its being among the social techniques at the service of security and welfare. To the question about the normative authority of the available positive data, one could always answer that they were binding as they represented the will of the sovereign – not will understood as some arbitrary whim but an enlightened will that would be in accord with the *Staatszwecke.*

The best description of this was produced by Max Weber's friend and interlocutor, Georg Jellinek (1851-1911) professor of law at Heidelberg. In 1880 Jellinek hoped to give an explanation for the binding force of treaties. He started from a Pufendorfian premise – that treaties emerged from the sovereign, on the basis of *Selbstverpflichtung.* But then, did they not collapse when the sovereign changed his mind? No, Jellinek wrote, for state will is not arbitrary. The state is a community that seeks to fulfil human interests that may be realised only in collaboration. To break one's compacts would make social life impossible.[166] If a state can fulfil its purpose only by participating in international life, then it must keep its promises unless there is a reasonable motive - such as *Notrecht* - for disregarding them.[167] No state can be reasonably assumed to

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[163] G.W.F. Hegel, *Philosophy of Right* (S.W. Dyde transl. New York, Prometheus, 1996), xxvii.

[164] For exegesis of this passage, see e.g. Shlomo Avinieri, *Hegel's Theory of the Modern State* (Cambridge University Press, 1972), 123-130.

[165] Immanuel Kant, 'Perpetual Peace. A Philosophical Sketch', in *Political Writings* (´2nd edn.. Hans Reiss ed, Cambridge University Press, 1991), 103.

[166] Georg Jellinek, *Die rechtliche Natur der Staatenverträge. Ein Beitrag zur juristische Construktion des Völkerrechts* (Vienna, Hölder, 1880), 44.

[167] Jellinek, *Staatenverträge, supra* note 166, 62.

commit suicide! Ultimately, states are bound, owing to what Jellinek called the "living conditions of nations" ("*Natur der Lebensverältnisse*"), in the international world. In his 1880 book, Jellinek countered the weaknesses of voluntarism by a sociological rejoinder: law is based on will, but will is constrained by the environment, conceived in a rationalistic manner. The need for co-operation compelled states to project each other as legal subjects towards which they made promises that enabled co-operation for the attainment of reciprocal interests.[168] Although confederations and other inter-state compacts, he argued in 1882, were based on regular treaties, and as such on *Selbstverpflichtung*, they were also a socially-conditioned feature of modern life. Interdependence pushed (rational) states into co-operation: "Gemeinschaft ist überall da vorhanden, wo es Verkehr gibt".[169] This was a community of interests and purposes whose internal cohesion was constantly being strengthened by cultural development and the needs of international administration, and which was expressed in legislation but based, ultimately, on "nature".[170]

Little is to be said about sociological thinking in international law after Jellinek. The point is always that treaties have to be kept and law respected owing to the rightly understood ("real", "objective") interests of the state itself, understood as the representative of the community. There is no opposition between sovereignty and law; sovereignty *is* justified by the law understood in a functional vein, as instruments of security and welfare. After the Second World War these arguments have emerged in the idea of interdependence invoked to justify this or that institution as the best guarantor of the realisation of interests. Political realism shook hands with legal idealism in the re-conception of law as the truth of the social. But what is that truth? Is it really so that state interests are best realised in co-operation? What might "co-operation" mean in particular situations? The failure to examine seriously these and other questions about the social world follows, I believe, from the fact that the field's professional sensibility is closer to Martens than Pufendorf, and its competence is more about interpreting treaties, customs and other aspects of formal diplomacy than producing explanations of the causes or consequences of international action. The "social" has not become an object of painstaking study because international lawyers do not *really* understand themselves as "social scientists" engaged in a pursuit of "truth". Instead, they have in various ways understood themselves as engaged in a project about "civilization", "transformation", "freedom", "human rights" and such other notions that cannot be reduced to a search for social causality or the examination of "international relations". However, they have been clear that this project cannot plausibly be articulated in the pre-modern vocabularies of religion or morality. This is why they have employed the technical language of sociology and political science, but have done this always in a way half-seriously, as brief cultural vignettes (which is why they are often made in Latin). All the important work is undertaken in terms of the systematisation and interpretation of (valid) formal rules.

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[168] Jellinek, *Staatenverträge*, *supra* note 166, 48-50.
[169] Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Vienna, Hölder, 1882). 94.
[170] Jellinek, *Staatenverbindungen*, *supra* note 169, 95, 109-13.

Ever since the late-18th century, mainstream international law has been formalist and positivist and carried a mildly progressive liberal agenda. This is not to say that it has not invoked moral or sociological language. But when it has done so, it has been at its weakest and most vulnerable to criticism from professional sociologists, political theorists and colleagues from different parts of the political spectrum. But sociological or moral arguments have always been secondary to its effort to demonstrate its technical seriousness, on a par with that of domestic law. There have been ups and downs in the story of international law, of course; periods of confident elaboration of its formal doctrines, and moments when the call for "renewal" has practitioners re-examine its intellectual foundations. These stories have been told with great insight elsewhere.[171] My intention here has been to sketch a brief pre-history of international law in order to illustrate the way in which those foundations were assumed to lie in the realm of the "social" that early modern legal thought in Europe associated with the emergence of secular statehood. From that time, we have received the notion that "foundational" questions about law and legality are really questions about social causality because only those questions can be accompanied by *universally* valid answers. And providing such answers, it has been assumed, is the proper business of international law.

The heritage of early modernity in European legal and political thought has been both enormously important and politically ambivalent. Machiavelli and Pufendorf have cast long shadows. No doubt, questions about security and welfare must be central to the organization of the life of any human community. For that purpose, law must provide for the appropriate institutions, and empower political authorities and technical experts to do whatever might seem necessary to advance the *salus populi*. Likewise, co-ordinating arrangements are needed so as to channel the pursuits of separate communities for the attainment of beneficial (global) objectives. A million obstacles might hamper these objectives; the law must prepare for them, or at least help out in winning them. In our optimistic moods, we choose Pufendorf over Machiavelli, the utilitarian pursuit of our real interests, as determined by the best experts. As pessimism sets in, we are likely to choose Machiavelli as our house god, reminding us of the fickleness of *fortuna* and the dearth of *virtù* among those who rule us. It is perhaps significant that while Machiavelli still deliberated over whether the best form of government is that by one, many, or "all", Pufendorf took government as he found it, and simply sought to transform it into the best it could be. We tend to assume, conventionally, that no international law could have been born from Machiavellian promises, while in Pufendorf's intellectual world there is always a "natural" set of rules already governing the relations between our communities. If we see law in terms of stable authorities exercising power in inherited institutions, this is clearly the case (besides, Machiavelli would not have disagreed – the extraordinary morality of the "lion and fox" applies only to the "new prince" who has just conquered his realm). But if law is more reacting to indeterminate situations, or re-describing institutions in terms of their vulnerability, then this may not be so. It is extraordinary the extent to which Machiavelli is a "Kantian" in his turn inwards in search of the principle (*virtù*), against

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[171] See David Kennedy, 'When Renewal Repeats. Thinking against the Box' 32 NYU J. of Int'l L & Pol (2000), 335-498.

which something like freedom (freedom of the republic and freedom of the individual, the two being inextricable in both) may be a reality.[172]

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Let me finish with a parallel. I see a struggle for new international legal vocabularies today, making reference, once again, to inexorable social laws (globalization) that law and political theory should seize in order to preserve their "relevance". A managerial mindset is taking over that is reflected in a transformation of vocabularies of power. The language of law is replaced by an idiolect of transnational regimes that enforce the most varied kinds of guidelines, directives, de facto standards and expectations so as to guarantee an optimal effect. Formal rules yield to amorphous "regulation" emerging from a heterogeneous variety of sources and actors while "government" becomes "governance" and legal "responsibility" is transformed into assessments of "compliance". "Disputes" become "management problems" and the question of lawfulness is replaced by that of "legitimacy", situated uncertainly between legal formality and political justice, but reducible to neither - existing principally as a *feeling* of legitimacy, a warm sense of contentment looking for no further justification.[173]

With new languages come new experts that speak them. The managerial jargon of "legitimate governance" sets up an *Ersatz* normativity that replaces the conservatism of law and the radical arbitrariness of justice. Two things become highlighted: the instrumental role of law and public institutions in fulfilling desired objectives, and the testing of authoritative decisions by reference to what target populations might "accept". The result is the imposition of empirical political science, thoroughly instrumental and committed to assisting whomever is in charge, as world tribunal. Pufendorf was, of course, a theorist of absolutism. So are the speakers of globalisation – namely the absolutism of this or that special knowledge: economics, security, rights, environment, entertainment - whatever.

I began by observing that international lawyers have never been strong as sociologists. This is because international law is not really a sociological but a political project. It is not about the epistemological constraints on the way to realising interests. Instead, it is about freedom – as were the Florentine debates in the 16th century. The vocabulary of freedom, however, is a vocabulary of struggle and conflict in a world where *fortuna* lifts some people to powerful positions to rule others. Of course, freedom is a contested word. The "global governance" debate harks back to the view of freedom as absence of coercion by the state. It is ignorant of the coercion that comes from *beyond the state* and against which we may need the protection and assistance of the state. But even more importantly, it is ignorant of the way in which self-determination and participation in political decision-making are *in themselves* forms of freedom. This is why I think the distinction between Machiavelli and Guicciardini – and his legal alter ego, Pufendorf –

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[172] For an extension of these thoughts, see my 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', 8 *Theoretician Inquiries in Law* (2007), 9-36.

[173] On this, see further my 'Legitimacy, Rights and Ideology. Notes towards a Critique of the New Moral Internationalism', 7 ASSOCIATIONS (2003), p. 349-374.

is being played out in today's globalization debate: Is the right way to combat *fortuna* the management of human beings by an oligarchy in possession of the secret language of the global social? A natural history of the human species in which today's power is legitimated by a political theology of secular progress? Or might that oligarchy be the problem and its language the novel scholasticism against which *virtù* would reside in imagining the political republic, and then bringing it about?