The Advantage of Treaties: 
International Law in the Enlightenment

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A. DAVID HUME AND THE ADVANTAGE OF TREATIES

In A Treatise on Human Nature (1739) David Hume divides the law of nations into two types. First are laws having to do with specifically international matters such as the sacredness of ambassadors, declaration of war, abstention from poisoned weapons and others that “are evidently calculated for the commerce, that is peculiar to different societies”. Alongside these, there are rules of general natural law which he groups in three: stability of possession, its transference by consent, and the performance of promises. Such rules are applicable between states in the same way as they are applicable between individuals because the social context is essentially similar. As Hume says, “The same interest produces the same effect in both cases.”1

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

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

Hume wanted to focus on the real feelings people have about the justice or injustice of types of behaviour. These feelings could not be credited to natural benevolence (such as Hutcheson’s “moral sense”), to regard for the public interest, or even to simple self-love. Instead, they arose artificially.

2 Hume, Treatise 3.2.11 (618).
3 Hume, Treatise 3.2.11 (620).
4 D Forbes, Hume’s Philosophical Politics (1975) 17.
5 Hume, Treatise (n 1) 1.1.4 (57-60) and, e.g., 3.2.3 (554-557) (on the association of ideas in respect of property relations).
from what human beings learned about advantage or disadvantage ("utility") in particular social contexts. Such socialised feelings motivate individuals to behave in particular ways, and have in this sense concretely “binding force”. Where motivation is strong, the rules are strong, where it is weaker, the binding force diminishes likewise. None of this is to say that human beings could, for example, break contracts at will. Modern society develops a feeling of sympathy towards something like a public interest that will hold promises binding even when, in individual cases, this would be contrary to the advantage of a party. The social bond—and hence law—receives autonomously binding force. “Sympathy” matures into second nature, civilisation, and law starts to be felt as binding merely because it is “law”.6 All of this is “natural” inasmuch as these feelings develop through natural social processes. This makes natural law ideally an empirical science describing the workings of these psychological mechanisms, in particular individuals, their communities and states—something that had been the ambition of natural jurisprudence at least since Pufendorf and Montesquieu.

As Hume observes, the law of nations is, like any other law, based on feelings about advantage and disadvantage. But the feelings created by the association of ideas in the international world are not as strong as between individuals at home. Hence international law is a weak law. Princes are weakly motivated by it, and rather often follow the way of their immediate interest. Hume did not contemplate the possibility that the same socialising process that made law seem binding owing to “sympathy” towards a public interest at home might also apply internationally, but his avid reader, Immanuel Kant, did. In Kant’s political essays from the 1780s onwards, including his Rechtslehre, a cosmopolitan federation emerges as a necessary outcome of the pursuit of freedom and legality by individuals and communities, through the civilising process of “unsocial sociability”.7 Hume and Kant have a very negative view of the practice and theory of eighteenth century natural law, and their theories come about as critiques of the writings of Grotius, Pufendorf and Vattel, Kant’s “miserable comforters”. So they have recourse to intermediate notions such as “sympathy” and “civilisation”—social constructs whose very point is to act as counterparts to the utopian rationalism of the Grotians and the brutal realism of the Hobbesians.

This paper considers Hume’s “experimental method” as it resonates with approaches to international law dominating especially in the Anglo-American world, though by no means only there. There is a significant revival of Humean

7 I Kant, Political Writings, 2nd edn (ed H S Reiss, transl B Nisbet, 1991) 41-53 (“The idea for a universal history with a cosmopolitan purpose”), 93-130 (“Perpetual peace: a philosophical sketch”).
themes. Is international law a weak law and if so, why? Ought we to treat it in terms procuring advantages and, if so, to whom? Is there an international public interest and who might be its carrier? As such and equivalent questions proliferate, we might learn from the way seventeenth and eighteenth century jurisprudence understood the law of nations as a technique for producing “advantages” and disadvantages” to the sovereign and his people, usually in terms of their “security”, “wealth” or “happiness”.

I should begin by explaining why it seems important to revisit international law in the Enlightenment. A few years ago I published a study on international law’s “heroic period” from 1870 to 1960.8 The work was subtitled “the rise and fall of international law”, with the “rise” coinciding with the emergence of a professionally oriented liberal legal internationalism at and around the Institut de droit international during the last third of the nineteenth century, and “fall” with the centre of gravity of international thought moving from Europe to the United States and its ethos being reconstructed on political “realist” premises. Modern international lawyers have not usually dated their craft to 1870 but to the much earlier traditions of natural jurisprudence and Droit public de l’Europe between the sixteenth and eighteenth centuries. This, they argue, emerged against the political realist writings on the raison d’état. I am sceptical about that claim. If there did exist a pre-1870 tradition of international law, it was more about “interests” or “advantages” than about an international (moral) community. Hume’s political realism was not a deviation from but a completion of that older tradition – or really something less than a tradition, a scattered series of inferences drawn by political and legal writers from their general theories meant for domestic audiences.

I shall concentrate on the principal themes in the debates waged in France and Germany from the seventeenth to the late eighteenth centuries about rules governing the conduct of princes in their external relations. The debates are waged as an offshoot of the principles of modern government. There is either no world outside political statehood, or it appears as a set of logical or sociological constraints on the business of government. The participants do sometimes describe those constraints as “law” but always hesitantly and exposing them to criticisms well-known already to the contemporaries. It is only with arguments about the “advantage of treaties” that a stable and realistic sphere of the international seems to emerge. This in not be a sphere of law, however, but of economics.

B. INTERNATIONAL LAW IN ENLIGHTENMENT FRANCE

The search for international law in Enlightenment France points in two directions. One is the set of principles that emerged in the late sixteenth and early seventeenth centuries to rationalise the conduct of foreign policy by an absolutist state. The other lies in the critiques of the ancien régime by les philosophes in the eighteenth century.

(1) Rationalising the conduct of foreign policy

The effort to rationalise the conduct of foreign policy, inextricable from the emergence of principles of government in early modern France and often linked to the name of Cardinal Richelieu (1585-1642), harks back to the medieval Fürstenspiegel literature—the “mirror of princes”—that, since the thirteenth century, had produced advice for the Christian prince on how to preserve and enlarge his realm and to protect inherited religion. The genre had been thoroughly updated and revised by Machiavelli’s famous suggestion that there was one morality for ordinary humans and another for princes. Later writers in Italy and France translated this into more acceptable Christian language by making the distinction between “good” and “bad” reasons of state, softening their instrumentalist attitudes to politics by highlighting the virtuous purposes to which their techniques would be put. The most famous tract in this vein came from a Counter-Reformation writer, Giovanni Botero (1544-1617), whose Ragion di stato (1589) argued that exceptional measures to conserve the state were perfectly compatible with the ruler’s Christian duties. With his eyes firmly on the religious civil war that was tearing France, Botero also wanted to make the point that “…of all religions none is more favourable to rulers than the Christian law”, binding not only the hands but the consciences of the subjects and qualifying Catholic theologians as the prince’s best advisors.9 Botero and other Counter-Reformation writers, such as his friend the Savoyard diplomat René de Lucinge (1554-1615), were also frustrated by the failure of the leagues against the Turks and sought to put into words the real conditions under which early modern rulers could conserve, strengthen and enlarge their domain. Their emphasis, unlike Machiavelli’s, was not so much on enlargement as on conservation, and they did not speak of the glory of the prince (after all, theirs was an anti-Machiavellian vocabulary) but of that of Christianity, led by imperial

Spain. They were nervously opposing not only Protestant “monarchomachs” but also the Bodinian theory of sovereignty that, as Marcel Gauchet has pointed out, undermined the Catholic universalism that offered them the platform on which to distinguish “good” from “bad” statecraft in the first place.

Far from meaning that the prince would not be bound, reason of state bound him tightly to special truths, principles and techniques imposed on ruling by the social world itself. It highlighted the difficulty of ruling efficiently and insisted on the separation of the prince’s private desires from the long-term interests of both prince and state. Rather than being antithetical to legal thought, it gave articulation and force to legal ideas that would henceforth focus on the “state” as a political category distinct from the person of the king and the “good of the community” as well as from the interests of religious factions, social classes and the Estates. In this respect, the Catholic anti-Machiavellianism of Botero and other imperialists such as Tommaso Campanella (1568-1639), with their effort to bind the prince to a Christianity institutionally represented by the Pope (who had put Bodin’s works on the Index in 1593), was becoming an anachronism, especially in a France not only riddled by confessional strife but also by proliferating forms of scepticism and a political realism (Machiavellianism and Tacitism among others) that sought a neutral ground between the religious parties. Botero hated the balance of power that, in his view, would merely institutionalise the position of irredentist princes against Christian unity. Nevertheless, it was precisely “balance” that was needed to get rid of civil war in France and to set up a robust system of central authority—something that was attained momentarily by the spectacular conversion and crowning of Henry IV as king in 1594. Until then, French jurists had theorised endlessly about the relative powers of the king and the people as well as the various intermediate bodies, the parlements and the Estates-General, and the positions adopted by individual writers would often reflect their relative standpoint in the domestic confrontations. With the final

12 The argument about the emergence in France in the 1570s of the “state” as a “distinct entity from which supreme political authority was derived” is made in great detail and force in H E Lloyd, The State, France and the Sixteenth Century (1983) cxvi and in particular 146-168.
13 For a useful discussion of the climate of political ideas in late-16th century Europe, with emphasis on scepticism and the reason of state, see R Tuck, Philosophy and Government (n 9) 31-64 and (for France) 82-94.
14 The three basic positions being those of Catholics, Huguenots and (statist) politiques. For French constitutional debates before Bodin’s Six livres (1576), see W F Church, Constitutional Thought in
identification of the “state” as an independent political entity, the notion of “state interest” could emerge as an overruling political ratio – a confessionally neutral justification for governmental action, connoting the interest of the system of territorial government itself.\(^{15}\) This was attained by Jean Bodin’s *Six livres de la République* (1576) which cast the ruler as the “supreme magistrate who governed in conformance with the law and the best interests of the state” and described that rule in terms of a “sovereignty” that was “absolute, undivided, perpetual, and responsible only to God”.\(^{16}\)

Such sovereignty was, however, quite compatible with holding the ruler bound by fundamental laws governing succession and the inalienability of the realm as well as, in a general way, by divine and natural law.\(^{17}\) Even the rule that put the prince above custom and the fundamental laws of the realm arose from a concept of legislative sovereignty that was articulated by Bodin as a higher legal-constitutional principle.\(^{18}\) His great concern, like that of the whole group of *politique* jurists, was civil war and the good and unity of France. The jurists were Gallican nationalists, wary of Spanish political influence and what they understood as justifications for universal monarchy. They thus integrated the abstract maxims of Roman law with historical and philological studies of old Germanic customs, “Gallic freedoms” and theories about the “ancient constitution” in order to reconstruct a political order based on indigenous custom.\(^{19}\) Their notion of universal history was one that “ultimately consisted of the individual histories of many nations with different characters and different destinies”.\(^{20}\) The Pope’s meddling in the civil wars further strengthened their insistence on the independence of the king. Thus they had little to say about any law applicable in France’s external relations beyond what was said by Bodin about


\(^{16}\) Church, *Constitutional Thought* (n 14) 195, 226.

\(^{17}\) See J Franklin, *Jean Bodin et la naissance de la théorie absolutiste* (1993) 115-150, 130-131. With treaties, as with other promises, the *rebus sic stantibus* rule applies. As is observed in Church, *Constitutional Thought* (n 14) 197, despite the increasing arguments on divine right at the turn of the 17th century, all jurists held the king bound by divine and natural law.


there being no real universal empire and that only a kind of *jus fetiale* regulated
the relations between sovereigns, providing a limited right of enforcement in
cases of outrages against natural law.²¹

By contrast, the *raison d’État* writers, building on the Italian literature, held
it self-evident that the same principles and techniques that would ensure the
strength of the prince’s rule inside his realm would also be applicable in his
external relations. With the significant exception of Alberico Gentili in Britain,
none of these writers saw law as an important ingredient in those relations.
Instead of law, they spoke incessantly about “interest and the power of security.” ²²
Their views were laid out with clarity and force by writers such as Henri de
Rohan, Duke of Rohan (1579-1638), who began his instructions for the early
modern prince (1638) with the famous statement: “Les Princes commandent aux
peuples et l’intérêt commande aux Princes”.²³ The distinction between the “real”
interest of the prince and his merely “imagined” interest laid out the programme
for a scientific examination of the conduct of foreign policy that looked for close
understanding of the resources of one’s own state – its climate, its population,
its economy, its history and so on, principles on which Montesquieu would later
base his sociological brand of natural law.²⁴ Like Montesquieu, Rohan assumed
that intelligent policy required such data to be compared with the resources and
the relative power of other states so as to produce a situational analysis of the
real interests of the state at any one moment. Success in foreign affairs became
a function of the ability of the prince to manoeuvre his state in this network
of “objective” interests by taking advantage of the state’s strengths while never
exposing its relative weaknesses.²⁵

During the Thirty Years War (1618-1648), books such as Rohan’s gave literary
expression to attitudes and policies that became self-evident parts of the statecraft
of Richelieu and his followers.²⁶ The imperative need for a strong sovereign
had been based on internal reasons, as articulated through the legal humanist
tradition of the sixteenth century. But the French jurists left the consequences

²² Tuck, *Philosophy and Government* (n 9) 80, and more generally 65-82.
²³ Rohan, *De l’intérêt* (n 15) 161.
²⁴ Even Bodin had stressed the importance of analysing the environmental conditions of states in order
to understand their constitutional systems; see Church, *Constitutional Thought* (n 14) 216-217.
²⁵ 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 state interests. These Rohan summarises in
terms of the “maxims” of foreign policy appropriate for each state. For, “en matière d’État 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* (n 15) 187.
of “sovereignty” as to foreign policy to be drawn by the diplomacy of the *raison d’état*, as spectacularly illustrated by Richelieu’s manoeuvring between Catholic Spain and the Habsburgs on the one hand, and alliances with “heretical” Protestants and even the Turks on the other. Alliances, he once quipped, were “un fait d’État et non un fait de religion.”\(^{27}\) Nevertheless, works by Botero, Rohan and other *raison d’état* writers were fully compatible with religion; nor is there any reason to doubt Richelieu’s Catholic faith. For they could be taken to suggest a more complex or sophisticated sociological awareness of the conditions of the external world behind moral abstractions or treaties of peace or alliance which could be invoked so as to fight the cause of religion in the most efficient way: “ce qui est fait pour l’État est fait pour Dieu qui en est la base et le fondement”.\(^{28}\) Introduced as an impartial “third party”, to overcome religious conflict, statehood suggested the existence of a special type of knowledge that religious faith or moral virtue lacked but that could always be enlisted for the furtherance of religious or moral purposes.\(^{29}\)

That the knowledge of statehood could be articulated in the legal language of sovereignty showed that *raison d’état* was by no means an intrinsically anti-legal move, and in Germany natural lawyers such as Samuel Pufendorf would in due course integrate such techniques into the naturalist frame. Richelieu, too, was careful to formulate the French arguments concerning boundaries on legal principles about the inalienability of the royal domain, and in his despatches he made frequent use of natural law and the theory of the just war.\(^{30}\) In France, however, an express turn against law and lawyers as possessors of the knowledge of statehood, and thus as counsels of kings, took place when the *raison d’état* was understood as above all a derogation from the common law in extraordinary situations and—*contra* Bodin and the constitutional tradition—incapable of articulation under regular principles of government. In his powerful work on the *Considérations politiques sur les coups d’État* (1639), Gabriel Naudé (1600-1653), secretary of Roman cardinals, later Mazarin’s librarian, attacked efforts to integrate into principles of public law and government the high politics of the “*arcana*”, under which he included not only secret diplomacy but above all such extraordinary measures as *coups d’état* by the ruler and assassinations of political opponents. To attempt this was to commit a

\(^{27}\) A J du P de Richelieu, “La Ligue nécessaire” (1625), quoted in Gauchet (n 11) at 218.

\(^{28}\) [what is done for the state is done for God, who is its basis and its foundation.] A J du P Richelieu, “Testament politique”, quoted in Gauchet (n 11) at 220.

\(^{29}\) Gauchet (n 11) at 235-237.

fundamental category mistake. Such extraordinary measures could never be made subject of parliamentary debates or scholarly reasoning. The logic of statecraft from which they emerged could only be contemplated by princes and their closest advisors outside moral or legal categories. Their secrecy was a precondition of their success. In this specifically French view, matters of state are so extremely complicated, even mysterious, that there is a re-sacralisation of what began as secular statehood, removing important matters of policy, especially foreign policy, from the realm of common law and jurisprudence. It is perhaps a paradox that the generation of lawyers following Bodin contributed to this by combining his theory of legislative sovereignty with their notion of divine right, thus “enhanc[ing] to the fullest extent the miraculous and quasi-divine qualities of kingship”. Even as the distinction between the king’s ordinary and extraordinary powers came about as a juristic construction, often by recourse to the doctrine of necessity (“that knows no law”), it pointed to a special knowledge that was needed to grasp the mysteries of ruling. This was then taken over by the minuscule class of political theologians around the prince while lawyers were relegated in the role of lesser magistrates with little or no access to the court.

By the beginning of the period of personal rule by Louis XIV in 1661, French jurists had lost what remained of their sixteenth century role as the leading political theorists of the realm. The distinction between private and public law was used so as to vacate the latter from jurisprudential developments as the newly appointed royal professors “devoted their efforts to analysing the almost endless intricacies of private law”. Of the small number of jurists who wrote extensively of public law during the reign of Louis XIV, none made important contributions to the nature of sovereignty, still less to its consequences for the external world. They reaffirmed the divine right in a way that did away with their ability to articulate serious limits to royal authority. Even as they followed Bodin in limiting absolute authority by reference to its function – the sovereign’s duty was to God and to his office – they rejected any institutional oversight as incompatible with it. For example, the period’s most significant natural lawyer – one of the very

32 Church, *Constitutional Thought* (n 14) 250.
33 On the divinisation of absolutist rule in France, see Cosandey & Descimon, *L’absolutisme en France* (n 19) 84-93 and, on the ordinary/extraordinary powers distinction, 47-49.
34 W F Church, “The decline of French jurists as political theorists 1660-1789” (1967) 5 *French Historical Studies* 6, and generally 1-40.
35 See the analysis of the writings of Claude Fleury and Jean Domat in Church (n 34) at 10-23.
36 Throughout the period of absolutism, French jurists insisted that “there existed final justice over and above all men, including the prince, and that he was bound by such principles”: Church, *Constitutional
few in France – Jean Domat (1625-1695) had no doubt about the presence of universally valid principles of divine and natural law that bound all human beings, including the king. Yet he saw this as perfectly compatible with the absolute superiority of the French king over any secular authority.\footnote{See e.g. S Goyard-Fabre, “César a besoin de Dieu. La loi naturelle selon Jean Domat”, in H Méchoulan and J Cornette (eds), L’État classique 1652-1715 (1996) 153-160.} No wonder that external observers such as Leibniz were convinced that the policy of the “Most Christian King” was devoted to the establishment of a universal monarchy which, unless directed against common enemies such as the Turks, would lead to Europe’s destruction.\footnote{See e.g. G W Leibniz, Political Writings, 2nd edn (ed and transl P Riley, 1988) 121-145 (“Mars Christianissimus”).}

In practice, the doctrine of divine right was never articulated in such specific legal maxims as would call for the integration of legal experts as royal counsel. Not that official maxims would have been lacking. On the contrary, Louis’ principal ideologist, Jacques-Bénigne Bossuet (1627-1704), elaborated at length on the rights and obligations attached to the sovereign position. The prince was a servant to his subjects and accountable to his conscience for complying with natural and divine laws. Thus the just causes of war were limited to unjust denial of passage, unprovoked aggression or violations of the privileges and immunities of ambassadors, and the list of unjust causes included a litany of vices such as ambition, greed, jealousy, search for glory, and so on.\footnote{Bossuet, Politique tirée des propres paroles de l’Écriture sainte (n 36) L. X. I-II (303-318).} All of this came in the form of commentary on passages in the Bible and indicated that the proper perspective for debates on the rights and duties between princes was given not by law but by theology. In Bossuet’s extensive discussion of the proper training or virtues of counsel for princes, there is not a single mention of lawyers.\footnote{Bossuet, Politique tirée des propres paroles de l’Écriture sainte (n 36) L. X. II-III (376-404).}

Notoriously, a concentration on extraordinary moments of great policy, linked with utmost secrecy in diplomacy and political decision-making, prevented the emergence of any coherent French foreign policy for most the seventeenth century. For example, it was only in 1688 that the French Foreign Ministry set up an archive, and it was the last foreign minister of Louis, Marquise de Torcy, who began organising French diplomacy with a view to professionalism and continuity. The training of diplomats began in 1712 at an Académie politique at the Louvre.
in Paris. Yet even this was felt too great an encroachment on tradition, and it was closed after seven years of operation. France, of course, was engaged in a very wide network of sending and receiving ambassadors and other envoys, and while this practice was acknowledged to be part of *jus gentium*, there was still a wide variety of views about the scope of their privileges and immunities.

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

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

The best-known efforts to argue for consistency, rules and even law among the nations in the French realm come from Gabriel Bonnot de Mably’s *Droit public de l’Europe fondé sur les traits*, published in 1747 and containing a historical overview of the contents and conditions of the most important treaties since Westphalia. In the preface to his 3-volume treatise, Mably aligns his perspective firmly with that of Botero and Rohan. The purpose of this long-neglected exercise (of collecting treaties) is to “faire connaître les interest et la situation des
Puissances lorsqu’ils ont entracté”. A decade later, Mably published an extended introduction that tried to synthesise, in the tradition of Botero and Rohan, the principles that went into the negotiation of these treaties. The most important thing was for a nation to have a clear view of its interests and of its relative position in Europe. Rules about negotiation could never determine how to act in individual cases, but were indispensable as a foundation for the coherent foreign policy that was a precondition for the attainment of a nation’s real interests.

This meant that different rules would apply to dominant and rival powers, to powers of second and third order, and so on. All in all, Mably’s Droit public de l’Europe offers a structure of sovereign relationships firmly based on the history of European nations and in a belief in the realisation of everyone’s real interests by a skillfully negotiated set of treaty arrangements. Strikingly, not a word is said about binding force or Notrecht – pacta sunt servanda or rebus sic stantibus. In the French tradition, such legalism is out of place in a world where sovereigns are, as Mably repeatedly writes, moved by passion and greed.

For Mably the worst thing is not violations of treaties but, as for Talleyrand somewhat later, the irrationality of politics. But Mably does assume that the two often go together. The main rule is “Toutes les négociations d’une puissance doivent être entrepris et conduits relativement à son intérêt fundamental”. And after the real interest is found, it must be pursued with consistency and coherence, even when that might go against an immediate advantage. This is the foundation of the science of politics that Mably hoped to construct as a basis for his Droit public de l’Europe.

45 [make known the interests and the situation of the Powers when they interacted.] G B de Mably, Le droit public de l’Europe, fondé sur les Traité (Tôme I, Nouvelle édition, Amsterdam & Leipzig, Arlestec & Merlan, 1741)

46 G B de Mably, Les principes des négociations pour servir à l’introduction au droit public de l’Europe fondé sur les traités (La Haie, 1757) 29. “Chaque puissance de l’Europe doit donc, suivant les différences des ses forces, de ses lois politiques, et de la position de ses provinces, se faire une manière différente de négocier, ou de traités avec les étrangers.”

47 [It is passion, greed and fear which have forced all nations to seek each other out and to ask, refuse or grant assistance to each other, and it is once more the same passions that guide their commerce and cause them to exchange ambassadors.] Mably, Les principes des négociations (n 46) 15.

48 [All the negotiations by a particular power must be undertaken and conducted relative to its fundamental interests.] Mably, Les principes des négociations (n 46) 22-23.

50 Within a few years Mably was to abandon this type of commentary in favour of the tracts for which he is sometimes remembered, as the world’s first communist.
De Callières and Mably were perceptive describers of the diplomatic practices of the early Enlightenment as seen from a French perspective. Their public law of Europe was less a fixed corpus of treaties or other official state acts than a process of constant negotiation and re-negotiation punctured by more or less intensive periods of warfare. Although their views were much more “liberal” than those of Naudé and the representatives of the *raison d'état*, they did not provide law or indeed lawyers with a significant role in the determination of foreign policy. Mably identified a type of political jurisprudence in which the natural rights of European sovereigns were based on their real long-term interests formulated in view of what history, geography, resources and constitutions suggested as effective policy. Realistic, even cynical, on the surface, his brand of public law was exhausted in the search for a reasonable equilibrium between nations in which all would receive their due if only rational principles of negotiation were employed.

The fact is that no significant international law tradition can be found in pre-Revolutionary France. In part, this was due to the powerful centralism of the absolutist French state and to the prevalence of the *raison d'état* that was hostile to law and lawyers meddling with foreign policy. In part, this must have followed also from the legal academy's predominantly historical and Gallicist orientation. If the French law faculties of the sixteenth and seventeenth centuries were the heartland of the humanist movement, this meant that they oriented themselves to linguistic and historical studies that focused on the development of the intensely French *droit commun*.51 The most significant writing on the law of nations in the French language came not from France but from the Huguenot diaspora, particularly from Jean Barbeyrac who spent most of his life as a professor in Berlin and whose fame is due to his translation of Grotius and Pufendorf into the French language, with long commentaries by himself. Both he and his colleague Jean Burlamaqui came from and wrote in the Protestant political tradition of natural law to which I will turn later when I come to Germany. In this world, Emmerich de Vattel from Switzerland emerges as by far the most accomplished writer on the application of natural law to the relations between nations and sovereigns. His influence in the France in the eighteenth century was, however, limited.

(2) **Critiques of the ancien régime**

The opposite of the tradition just described was the pacifist federalism and critique of the European diplomatic system by the *philosophes*. The most important publication was the Abbé de Saint-Pierre’s *Project for Settling an Everlasting Peace in Europe* (1713), which carried forward the European peace

51 On this tradition see Kelley, *Foundations of Modern Historical Scholarship* (n 20).
proposals manifested in the previous century in works such as Eméric Crucé’s *Nouveu Cynée* (1623) and the *Grand Design* written by Henri IV’s foreign minister, Duc de Sully, and credited to his sovereign (1638, published 1662). On the basis of natural reason, the former work rejected the values of war and aristocracy and highlighted the pacifist qualities of trade and production. It proposed the setting up of a “permanent and perpetual union” between European sovereigns, including Russia and Turkey “to make peace unalterable in Europe”. The latter work, several times amended and based in part on forged documents, was essentially a proposal to limit Habsburg pretensions by moving the centre of the Empire from Vienna to Paris. It also suggested the reorganisation of the European political order by expelling Turkey and Russia and by coordinating European colonial conquest.52

Saint Pierre’s famous proposal sought to freeze the territorial and constitutional order of Europe and to provide a system of reactions against change. Europe was to be ruled by a senate of twenty four deputies, acting usually through majority vote. As a proposal, this had no prospect of realisation but, perhaps surprisingly, it provided a basis for almost a century of debates about what to do with the ills of the old regime. Montesquieu, Voltaire, Diderot, and in particular Rousseau invoked it in turn in their polemics against war, diplomacy and European treaties.53 All were convinced of the rational beauty of the Abbé’s proposal while deeply sceptical about the possibilities of its realisation. In the article on “Treaty” in the Encyclopaedia of Diderot and D’Alembert, Joucourt observed that it was not treaties but necessity by which sovereigns were bound. Nevertheless, he continued:54

> puisque les traités publics sont une partie considérable de droit des gens, nous en considérons les principes et les règles, comme si c’étaient des choses permanentes.55

> “Comme si…” In this as in other matters, the philosophers were ambiguous. They rejected war out for ideological reasons but were unable to agree whether the spirit of commerce should take its place or would merely incite passions that would lead to further wars.56 They insisted on the strict equality of nations

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52 For a discussion of the content and context of the proposals, see F H Hinsley, *Ponor and the Pursuit of Peace* (1963) 20-29.
54 Bélissa, *Fraternité universelle* 93.
55 [Since public treaties are a major part of the law of peoples, we consider their principles and rules as if they were things of permanence.]
56 For as Rousseau wrote, “abundance arouses greed; the more one gets, the more one desires”: see “The state of war”, in C Brown, T Nardin and N Rengger (eds), *International Relations in Political Thought: from the Ancient Greeks to the First World War* (2002) 425.
but also that a stable international order would require constitutional change in most of them. They hated the old diplomacy of the balance of power but – like Rousseau – preached that equilibrium was the only firm basis of European order. They agreed on the barbarism of European war, especially war waged outside Europe, and held the just war theory as an apology for it. While they allowed defensive wars, they were naively ignorant of their problems. Montesquieu wrote:

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

Neither Montesquieu nor Rousseau came up with anything like a stable international law. They attacked the existing practices of diplomacy, warfare and treaty-making yet offered only half-hearted abstractions in their place. Montesquieu’s natural law of nations was quickly stated: “Different nations ought in time of peace to do to one another all the good they can, and in times of war as little injury as possible, without prejudicing their real interests.” In his more serious work he concentrated on a sociologically based law in which that which was “natural” was not universal but local, in accordance with the history and situation of each nation – a continuation, in other words, of Mably and Rohan.

Rousseau was pessimistic. Like Mably, he attacked the present international system as dependent on the whims of sovereigns. Any serious international reform would have to begin with an internal transformation. Yet this would leave hostile nations juxtaposed in a way that would foment further conflict and war. For Rousseau, the price of internal peace, attained through though the social contract, was the externalisation of aggression – that is to say, endemic, structurally determined warfare between nations. In his commentary on the proposals of the Abbé de Saint-Pierre, Rousseau seems to argue that peace can

59 Montesquieu, Spirit of the Laws 5.
60 J-J Rousseau, A Discourse on Inequality (transl M Cranston, 1984) 122-123. See also Rousseau (n 56) at 418-421 where the “relational” analysis of state power and fear as well as the insistence that no state can remain passive as the wealth or power of those around it changes resembles the raison d’état views of Rohan, Mably and others. Rousseau was, however, a notoriously ambiguous writer. For a plausible challenge to the (standard) reading of Rousseau, see M C Williams, The Realist Tradition and the Limits of International Relations (2004) 52-81.
only exist for a state that withdraws wholly from international contacts.\textsuperscript{61} In such a situation, international law can hardly have any reality.\textsuperscript{62}

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

In short, this was the same position as adopted by Hume, albeit in a different key. Whereas Hume derived the effect of treaties from the advantage they produce, and assumed for them a limited reality, Rousseau appeared to regard them as without practical significance.

(3) After the Revolution

At the outset of the Revolution, “international law” in France meant the positive law of war as outlined by Grotius and the practice of sending and receiving ambassadors.\textsuperscript{63} The revolutionaries, however, preached in the name of a more ambitious law of nations. In April 1795 the Abbé Grégoire – the defender of the Jews as well as the initiator of the abolition of slavery in the French colonies – submitted to the French National Convention a proposal for the adoption of a déclaration du droit des gens. In 21 articles, the declaration sought to do to the world what the déclaration des droits de l’homme et du citoyen had done to the ancien régime at home. The basis of the new order would be the right of “independence and sovereignty” of every European nation (article 2). Every nation was to treat every other nation as it would itself wish to be treated (article 3). Normally it would be required to maintain peace but, if at war, it was to harm its adversary as little as possible (article 4). There would be no distinction between representatives of nations, and ambassadors would enjoy immunity only insofar as was necessary for the accomplishment of their mission (articles 19 and 20).\textsuperscript{64}

The Assembly did not adopt the declaration, for the reality of the wars of the Revolution could not be accommodated with its principles. Otherwise

\textsuperscript{61} See D Boucher, Political Theories of International Relations: from Thucydides to the Present (1998) 295.
\textsuperscript{62} Rousseau (n 56) at 423-4.
\textsuperscript{63} Bélissa, Fraternité universelle (n 53) 48.
\textsuperscript{64} For the proposal, see B Mirzina-Guetszewitch, “L’influence de la révolution française sur le développement du droit international dans l’Europe orientale” (1928-II) 22 Recueil des Cours de l’Académie de Droit International de la Haye 309-316; W Grewe, The Epochs of International Law (2000) 416.
forgotten, it survives perhaps most conspicuously as the object of the foreword by Georg-Friedrich von Martens (1756-1821) from Göttingen – soon to be occupied by Napoleon's forces – to the 1796 German edition of his widely read Introduction to Modern International Law, repeated in the book's 1820 and 1864 French editions.\textsuperscript{65} There is no lack of aspects of international law, he wrote, where agreement between European powers would not be desirable. But to believe that they would suddenly adopt a general codex of positive international law was unrealistic. Abbé Grégoire’s proposal was only a warmed-up version of projects for eternal peace that must, as long as men remain men, holding their fate in their own hands and seeking their own good, remain a pure chimera.\textsuperscript{66} To declare principles of morality is pointless: they can be realised only under conditions which, if they were present, would make their declaration unnecessary.\textsuperscript{67}

\textbf{(4) Some conclusions}

The dominant strand in the French debates from the end of the Wars of Religion to the Revolution was an effort to give an instrumentally useful, and if possible “scientific”, account of the conditions in France in comparison to other states so as to provide a realistic basis for the government of the country in both its internal and external arrangements. From Bodin and the \textit{raison d'état} writers down to Mably, Montesquieu and Rousseau, the writers on public law attempted to explain the state in terms of its relative wealth and power – its territory, resources, climate, and the character and condition of its population. The policy of mercantilism or “Colbertism” was a typical offshoot of such thinking as it assumed that economic wealth was a zero-sum game about the possession of precious metals, and thus encouraged laws to maximise the accumulation of such metals at home.

By the middle of the eighteenth century, however, national wealth and power were seen much more broadly in terms of the productive uses of national resources and of exchanges with the outside world, including through war and conquest. The doctrine of legislative sovereignty and the policy of the \textit{raison d'état} both supported a substantial degree of governmental intervention that, again, required the development of specialised knowledge of the state as a collective phenomenon – of its resources, industries, its production and trading patterns and so on. But it was one thing to argue that the state was to advance its own interests and advantage and another to know what was

\textsuperscript{65} G-F von Martens, \textit{Einleitung in das positive europäische Völkerrecht} (Dieterich, Göttingen, 1796) Vorbericht.
\textsuperscript{66} Martens, \textit{Einleitung} vii.
\textsuperscript{67} Martens, \textit{Einleitung} viii-ix.
needed for this purpose: “Récolter exploiter, classer, diffuser l’information, voilà la fonction et les révélations essentielles de l’Etat moderne”. The collection of data, and the compilation of statistics and archives, became necessary for the effective government of the state. This was no different in foreign affairs. If economic interests became a casus belli, as they did in the eighteenth century, this meant that economic advisors would also have to attend the diplomatic councils.

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

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

By this time it was held evident that national power resulted from an enormously complex set of variables not only of a military but of an economic, industrial, demographic, geographical, cultural and political character. The way nations interacted with each other was described in terms of a “system” of balance of power which was understood to be “self-sustaining, essentially a product of nature and morally neutral”. Like the laws of the domestic market, those of foreign policy were seen in almost physical terms. Gradually, however, the analogy between the principles that governed physical or biological nature and those that governed the international world moved beyond metaphor. The assumption that the princes existed among themselves in a “state of nature” was interpreted to

68 [To collect, use, classify and distribute information—these were the essential functions and the discoveries of the modern state.] J Cornette, “La tente de Darius”, in Méchoulan & Cornette (eds), L’Etat classique (n 37) 22-23.
69 [The task was to evaluate international relations in terms of commercial and economic power: only a collection of facts could ensure that the sovereign was able to manage his alliances well.] Cornette (n 68) at 25.
70 [This expresses what was and would remain the basis of economic liberalism: the free realisation of individual interests as the way to satisfy the general interest.] J Valier, Brèche histoire de la pensée économiste d’Aristote à nos jours (2005) 43.
mean that their actions were conditioned by the natural laws of the balance of power which they could not change but could use more or less wisely so as to enhance national power, wealth and “happiness”.

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

But this required that such reactions were integrated in the social processes themselves, that they would be made a spontaneous and seemingly natural aspect of the “system”. In economic thought, it began to transpire that it was pointless or even counter-productive to oppose the spontaneous passions of people by prohibitive laws; such passions ought on the contrary to be channelled to valuable purposes so that the pursuit of private gain would ultimately be for the general benefit. Encouraging economic freedom and free trade was only one aspect of this new technique of power; it spread to governmental practices of health and welfare, education, agriculture and industrial production, under the general constitutional principle that it was the function of the state to act in regard to the interests and happiness of all.

In the field of foreign policy, balance of power thinking portrayed the external world—the international “system”—as another resource that could be exploited for that same purpose. But this required wholly different expertise from that possessed by the natural or international lawyer. It called for the perfection of the diplomatic machine as a technique for collecting all relevant data from different parts of the international “system”.

72 This transformation is best told in A O Hirschman, The Passions and the Interests: Political Arguments for Capitalism before its Triumph (20th anniversary edn, 1997).
73 The rise of such new types of technologies of power is the central argument in M Foucault, Security, Territory, Population: Cours au Collège de France 1977-1978 (2005).
Hence France's leading role in eighteenth century diplomacy. Further, it required a mixture of analytic expertise, secret deliberation, foresight, courage and rapidity at home in order to grasp at opportunities and to prevent threats as soon as they emerged. If there was in fact no “international law tradition” in France during the Enlightenment, this was precisely because its message seemed simplistic and useless for the wise government of the state. To the extent that lawyers such as Vattel accepted the “balance” as a legal principle (and thus the right to react to “disturbances” by any means necessary), they were re-conceiving law in raison d’État terms that may have appeared a plausible and even clever updating of their craft but which bore the heavy long-term cost of surrendering the reins of power to others – to military and economic advisors, diplomats and so on.

C. INTERNATIONAL LAW IN ENLIGHTENMENT GERMANY

(1) The natural law tradition

To examine international law in Germany (or in the Holy Roman Empire of the German nation) in the period leading up to and including the Enlightenment is to study the tradition of ius naturae et gentium – of the early modern law of nature and nations – from the reception of Grotius in the middle of the seventeenth century to the publication of the first manuals of “positive” international law in the last decades of the eighteenth.\textsuperscript{74} The works of this tradition were more about the right legal method and the universal principles of law and government than about international legal relations or a universal legal system. While they touch upon international matters such as treaties, war and diplomacy, they do so not as elements of an independent legal system outside the state but as external aspects of the state's government.

That the role of natural lawyers in Germany is very different from that in France has to do in great part with the fact that, after 1648, they were often employed in the service of princes claiming Landeshoheit and having a need of experts who could teach them in the autonomous practices of internal government and foreign policy. In this they often leaned on principles of Roman law which “exercised their influence... through the administrative practices of

\textsuperscript{74} On the reception of Grotius in Germany, and opposition to it, see W Schneider, Naturrecht und Liebeschthik: Zur Geschichte der praktischen Philosophie im Hinblick auf Christian Thomasius (1971) 66-70; E Redstein, Die Anfänge des neueren Natur- und Völkerrechts: Studien zu den "Controversiae illustres" des Fernandus Vasquius (1949) 62-66. The first two manuals with a “positivist” orientation are K G Günther, Europäisches Völkerrecht in Friedenszeiten nach Vernunft, Verträgen und Herkommen mit anwendung zum deutschen Reichsstände, 2 vols (1787, 1792) and G-F von Martens, Précis du droit des gens moderne de l’Europe fondé sur les traités et l’usage (Dieterich, Gottingen 1785, 1789, 1790, 1801 etc).
the many individuals who had studied Roman law at Italian universities and who
were later hired as advisers and officials by the territorial princes”.75

In Germany, unlike in France, the most important developments in legal
thought took place at universities and other institutions of law teaching of which
in the sixteenth century there were about twenty. By the end of the century, civil
(Roman) law had overtaken canon law and, with theology and medicine, was one
of the three “higher faculties” designed for practical intervention in the world.76 A
fourth faculty – arts, or philosophy – carried the ideas about science and method
that prepared the teaching in the other three; it was there that “modern” natural
law began its impressive career. Even after the Reformation, the philosophy
faculty had retained its Aristotelian foundation, and lawyers were taught Christian
Aristotelianism which had at its core an ethics of individual virtue.77 Applied to
the business of ruling, it had been manifested in the so-called Fürstenspiegel
literature that taught the prince to rule as a good Christian.78 Aristotelian
economics was about how to run a household, and its politics about the pros
and cons of the three constitutional forms (monarchy/aristocracy/democracy).
Law teaching proper was in the Bartolist mode, focusing on Roman law
as an expression of universal principles of reason (*ratio scripta*) and as
applicable, more or less, as in the sixth century when the Justinianic code was
complied.79

It was against the “Pedanterey and scholastic obscurantism” of this curriculum
that the project of natural jurisprudence and the related “eclectic philosophy”
was conceived.80 That it succeeded and that academic leadership moved in the
seventeenth century from theology to law was attributable to three factors. The
first was the continued and in some respects strengthened confessional divide
after the Peace of Westphalia in 1648, which created a momentum for natural
theology – for the effort to lay out scientifically the minimal principles of religion
that would apply across religious boundaries. That work could be undertaken by

77 On Aristotelian politics at German universities until the late 16th century, see H Meier, “Die Lehre
der Politik an deutschen Universitäten, vornehmlich vom 16 bis 18 Jahrhundert”, in D Oberdörfer
60-72.
78 Meier (n 77) at 68-70; N Hammerstein, *Ius und Historie: Ein Beitrag zur Geschichte des historischen
example of this literature is D Erasmus, *The Education of a Christian Prince* (ed L Jardine, transl
N M Cheshire and M J Heath, 1997).
project for university reform, see 11-37, and on the later reforms initiated by Christian Thomasius, see
135-141.
non-theologians, too. For example, Grotius’ *De veritatis religionis Christianae*, published in 1617, was part of this ecumenical effort, but also an overtly anti-papist move inasmuch as it included among the prince’s powers the regulation of the relations between state and church.\(^81\) In the political and legal theory of Samuel Pufendorf (1632-1694) and his followers, natural religion was articulated in terms of the (natural) duties that all human beings owed to God.\(^82\) Although the *ius naturae et gentium* originated with Catholic scholars in Spain, it became in Germany a thoroughly Protestant discipline: Grotius, Pufendorf, and the latter’s most important follower, Christian Thomasius (1655-1728), used it as part of a politics of tolerance that struck directly against the political influence of the church and the leadership of theologians at universities. Originating in the philosophy faculty, where it soon formed the mainstay of what counted as political theory, natural law by the end of the seventeenth century had also expanded to the law faculty where it covered everything from legal method to governmental technique and policy and preparing a secularised professional elite for the service of royal administrations.\(^83\)

Secondly, the natural lawyers profited from advances in the natural sciences, and often conceived their teaching, as in the case of Grotius and Pufendorf expressly, *more geometrico*.\(^84\) Even as he abandoned the strict deductionism of his early work, Pufendorf insisted on the uniquely scientific character of the pursuit of natural law. The idea, as he put it in 1673, was to develop principles that would have validity irrespective of religious faith and particular civil law, and to respond only to the call of “reason” conceived as an understanding of the nature of human society – and especially of the role of “sociability.”\(^85\) “Nature” now rose to a position of moral and political authority so as to compensate for the vacuum left by the demise of traditional religious moralities and to respond to the challenge of scepticism and associated forms of political thinking.\(^86\)

81 Hammerstein, *Ius und Historie* (n 78) 70.
83 Hammerstein, *Ius und Historie* (n 78) 64-65; Meier (n 77) at 89-90; Hochstrasser, *Natural Law Theories* (n 80) 30-37, 127-129.
also right.87 This argument also made it possible to extend the authority of natural law and natural lawyers across and beyond the Empire.

Thirdly, and this is crucial, reason connoted a method rather than a metaphysical assumption about the world. And what seemed a reasonable method in law towards the end of the sixteenth century was to contextualise Roman law by philological and historical studies.88 German lawyers took over from France the humanist technique of reading Roman law historically and using its scientific form and vocabulary to organise indigenous laws for the purpose of effective territorial government.89 This was not in conflict with natural law: on the contrary, was not custom the best evidence of what was “natural” for a specific community? This point was forcefully made, and a real revolution in the study of public law achieved, by the Helmstedt Professor, medical doctor, Polyhistoriker and the “father” of modern historical study in Germany, Hermann Conring (1606-1681), by the “fable” that the Corpus Juris Civilis was applied in Germany at the order of Emperor Lothar III in the twelfth century.90 For Conring and for practically all the subsequent natural lawyers – including Pufendorf and Thomasius – German public law was an outgrowth of German practices as developed and articulated by university jurists, and if Roman law had been applied, it was applied through historical incorporation, not through its own, rational power.91 As Pufendorf put it in one of his most famous works, written under the pseudonym of an Italian nobleman in 1667, the constitution of the Roman-German Empire could not be usefully analysed through abstract categories such as monarchy, aristocracy or democracy but required a historical study of the relations between the various estates. From this perspective, the only realistic view was to hold Germany as a *systema communitatis* – a set of de facto relationships between moral persons that would not cease to develop, and for which the appropriate frame of analysis was a historical study that would aim at finding a workable balance between the powers of the empire and those properly with the territorial states.92

88 See e.g. D R Kelley, *The Human Measure* (n 20) 187-208.
89 Hammerstein, *Ius und Historie* (n 78) 33-36.
91 For the relationship between Conring and Pufendorf, see Hochstrasser, *Natural Law in the Early Enlightenment* (n 80) 46-51.
In other words, the German natural law tradition—\textit{ius naturae et gentium}—emerged as an outgrowth of Protestantism and humanism which was against the automatic applicability of Roman law and in search of rules that would be specific to the domestic community. It consolidated the authority of the domestic prince, laying out the foundations for the early modern absolutist state.\footnote{See Strauss, \textit{Law, Resistance and the State} (n 76) esp 136-166; K Haakonssen, “German natural law”, in M Goldie and R Wokler (eds), \textit{The Cambridge History of Eighteenth-Century Political Thought} (2006) 255-260. The absolutist implications of Pufendorf’s work are highlighted in L Krieger, \textit{The Politics of Discretion: Pufendorf and the Acceptance of Natural Law} (1965).} It legitimated the state through the social contract and depicted social history as a move away from “primitive” (and dangerous) nature into a sovereign order established to guarantee the security and well-being of the population. It undermined the authority of tradition, including not only the traditional rights of the estates but also any claims made in the name of an overarching normative order above individual sovereigns that had occasionally been made by reference to the Roman law idea of the emperor as \textit{dominus mundi};\footnote{For overviews, see A R Pagden, \textit{Lords of All the World: Ideologies of Empire in Spain, Britain and France c 1500-c 1800} (1995); D Armitage (ed), \textit{Theories of Empire 1450-1800} (1998).} Once the claim of “universal monarchy” was made to support ambitious Catholic rulers such as Charles V or Louis XIV, Protestant kings immediately interpreted it as a hegemonic move and insisted on their perfect independence from any alleged supranational authority. As Peter Haggenmacher has shown, Grotius did not intend to write a textbook on “the law of nations”. Instead, he was concerned to say a number of things about the legitimacy of war, in particular war waged by the United Provinces for access to the colonies.\footnote{P Haggenmacher, \textit{Grotius et la doctrine de la guerre juste} (1986).} Pufendorf’s \textit{De jure naturae et gentium} of 1672, and its abbreviated textbook version \textit{De officio hominis} of the following year, became the most important works of this tradition not only in Germany but in France and Britain.\footnote{For the reception of Pufendorf, see Krieger, \textit{The Politics of Discretion} (n 93) 255-266.} They were written from beginning to the end as scientific expositions of the lawful forms of secular state power—the foundation, purpose and limits of the authority of the prince. Out of the 1367 pages of the English translation of the former work, only 56 deal with war and treaties—the two international matters covered by it.

None of this amounted to anything resembling a legal system between nations; rather it was part of a late-humanist attack on the idea that such a system was embedded and discoverable in Roman law. For jurists trained in the humanist manner, it was anathema to think in terms of invariable and universal maxims of law. Their historical and philological orientation, aversion to abstraction, and their admiration of antique philosophy (especially the Stoics) would lead
them to emphasise national glory and, sometimes, republican virtue which was incompatible with projects of a universal law smacking of ambitions about “universal monarchy”. Of course, all jurists wrote about war and diplomacy and the rulers’ duty to keep faith with treaties. But this was not conceived in terms of an autonomous legal system separate from a prince’s duty to see to the salus populi – a duty which did of course occasionally require the prince to look beyond short-term gains and see to the orderly conduct of inter-sovereign relations when called for by the natural “sociability” among nations. Of all nations joined together in a civitas maxima as a functional equivalent to civil society. His contemporaries, and even his followers such as the Swiss diplomat Emer de Vattel, responded to it only as the target against they could prove their modernity.

We may have failed to see this owing to our anachronistic projection of one among many meanings of “nature” on the tradition of ius naturae et gentium. As pointed out above, in the seventeenth century “nature” began to enjoy moral power. For something to be “natural” was to say it was good, appropriate and so on. The idea that a reference to “nature” was to something that was everywhere the same arose only with natural rights in late eighteenth century. Before that, as the Lorraine Daston has observed, “nature” had two quite different senses: the Aristotelian sense of “natural” as that which is appropriate for one, or in accordance with one’s “nature”, and the conception of the natural as the local – manifested for example in Montesquieu’s speculations as to what was “natural” for a people of the north or a people of the south. When Pufendorf set out a “natural law” that was “common to all nations” he meant that “it is inferred by right reason to be essential to sociality among men”. But what is then inferred by “reason” will not bring about identical consequences; on the contrary, it is that which is historically particular. In his account of the constitution of the Roman-German Empire, for example, it is the very historicity of Germany

97 See e.g. Pufendorf, De jure naturae et gentium libri octo, 2 vols (transl C H Oldfather and W A Oldfather, 1934) vol II, 7.1.9 (963-4).
98 As suggested by S Toulmin, Cosmopolis: The Hidden Agenda of Modernity (1990) 69-87, 105-107. Toulmin’s main example, Leibniz, must be considered an exception.
99 C Wolff, Ius gentium methodo scientifica pertractatum (1934) vol 2, §9-21 (12-17).
100 E de Vatter, Droit des gens ou principes de la loi naturelle appliquées à la conduite et aux affaires des nations et des souverains (Londres 1758) preface, xvii.
102 Pufendorf, On the Duty of Man and Citizen (n 82) preface (7).
that founds the nature of its constitution; not universal scholastic categories. When Pufendorf concluded that Westphalian Germany was a *sui generis* “system of communities”, this was universal reason working on a particular historical case. A few years after Pufendorf, and some years ahead of Hume, Thomasius generalised this historical method as having to do with the elucidation of the work of “affects” (*Afketenlehre*) or passions on human nature, resulting in the different institutions that have emerged in different environments. The study of history, of languages and other humanities is needed precisely so as to learn the individual qualities of different states and nations, and to understand particular laws by the context in which they were adopted—something which is important not merely for its own sake but also for the practical tasks of administration and government.

**(2) *Ius gentium***

And what about *ius gentium*, the latter part of the discipline that had by 1700 come to be taught at practically all German law faculties? It is well-known that the notion comes from the threefold classification of the *Digest*: *ius naturale*, *ius gentium*, *ius civile*. In this scheme, *ius naturale* is applicable to all living beings while *ius gentium* is applicable to humans only and *ius civile* is the law of a particular commonwealth. *Ius gentium* covers the natural laws of human life, including such disparate items as one’s relationship to God, oneself, and one’s parents, rules relating to master/slave relations, limitation of properties, and the laws of obligation and war.

Hobbes and Pufendorf now set this threefold division aside and began to work with a binary system that, juxtaposing natural and positive law, changed the meaning of both. Natural law was no longer that law which is “natural for humans” but law in accordance with reason—*Vernunftrecht* as the Germans like to call it. By contrast, positive law was created by command of a superior. All reasonable rules applicable to human relationships outside the frame of civil law were part of the law of nations: property, contracts, inheritance, family relations, master-slave relations. Also included were the rules of natural religion and duties towards oneself, such as prohibition of suicide, as well as those having to do with

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103 On the *Afketenlehre*, see Schneider, *Naturrecht und Liebeethik* (n 74) 201-225.
104 Hammerstein, *Ius und Historie* (n 78) 73-74, 130-133; and on Thomasius’ attack on the practical uselessness of scholastic science, Meier (n 77) at 94-95.
the establishment and conduct of sovereignty: the prince’s rights and obligations towards his subjects as well as his powers in making war and concluding treaties.

Let me take just two examples out of the wide array of textbooks and treatises on *ius naturae et gentium* at German universities in the middle of the eighteenth century. The work that became most widely known outside Germany (not least owing to an English translation from by Turnbull made in 1741) was *Elementa iuris naturae et gentium* (1738) by Johan Gottlieb Heineccius (1681-1741). Based on lectures given at the University of Halle, this is situated somewhere between a philosophical treatise and a student textbook. It consists of two parts: *ius naturae* and *ius gentium*. The two are not distinguished by their normative basis, for both are said to emerge from God’s will and are discoverable by natural reason. Instead they are differentiated by their object: whereas natural law deals with the rights and duties of an individual as such, *ius gentium* deals with individuals as members of social organisms. It is “natural law applied in the social lives of human beings and in the affairs of communities and whole peoples”. Heineccius then divides the *ius gentium* into a primary law of nations that applies to all nations (subject to change by *lex humana*) and a secondary law of nations that is closer to the general principles of public law and includes the laws of constitutions, relations between the ruler and his subjects, and the rules on treaties and ambassadors. What separates the law of nations from the law of nature is the way it treats of human beings as members of social communities.

It contains the laws of marriage and of relations between family members, and the laws applicable to humans as members of civil commonwealths, i.e. states. It includes rules on the establishment of states and on the sovereign rights of rulers, including legislative power, power in ecclesiastical and commercial affairs, as well as powers in regard to warfare, treaty-making and sending and receiving ambassadors. There are no special rules applicable in the international sphere, indeed no realm of the international that would emerge separately from the different spheres of governmental activity. Nor are there “international” legal sources independent of what reason dictates as the proper exercise of sovereignty.

Heineccius’ work is written from the perspective of a rather conservative absolutism and its basis in divine will puts it somewhat off the mainstream. By contrast, the 1750 textbook on *Elementa juris naturae* by two Göttingen

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109 The notion of obligation following civil “status” is elaborated in Heineccius, *Grundlagen* 2.1.2 (315-6) and resembles the corresponding two-part structure in Pufendorf’s *On the Duty of Man and Citizen* (n 82). See especially the discussion of “status” in bk 2 ch 1 (115).
110 The discussion of war, treaties and ambassadors in Heineccius, *Grundlagen* is contained in the next-to-last section (ch 9) of book 2, just before the section outlining the duties of subjects.
jurists, Gottfried Achenwall (1719-1772) and Johan Stephan Pütter (1725-1807), embodies an enlightenment spirit that is very close to that which would animate Emmerich de Vattel’s *Droit des gens* of 1758. Notable for its pragmatic orientation, *Elementa* is the work that Kant would use in his natural law teaching. It is divided into four books dealing respectively with “pure” natural law, the law of communities smaller than the state, general state/public law (*ius civitatis* and *ius civile universale*), and *ius gentium universale*. The engine of the system of natural law is natural human self-love, the search for self-perfection and happiness of initially separate individuals that it is the law’s task to direct *ad salutem publicum*. Likewise, *ius gentium* exists to enable each people (*gens*) to lead its life in search of its own perfection and happiness—including the preservation of all that belongs to the territory, to subjects, internal societies and the form of government.

For Achenwall and Pütter, the law of nations is part of natural law but distinguished by its subjects: “Take two or more peoples (*gentes*). There you have two or more persons living in a state of nature with each other.” To the extent that peoples and individuals find themselves in a comparable position, natural law applies to the former just as to the latter. In other words, “[t]he law of nations is social law (*ius societatis*) and in particular external public law (*ius civitatis externum*) of such peoples. In practice it is the sovereign who, having acquired the right of majesty in the social contract, thus also “has” the rights of nations. The basic norm of relations between peoples is that none may disturb the self-preservation of another, while each has the right to deter any violations. 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*). Diplomacy and treaty-making are part of the law by which peoples are entitled to do whatever is permitted to individuals in a state of nature. The principles of freedom and equality apply also to uncivilised peoples.

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112 Achenwall & Pütter, *Anfangsgründe* 222
116 “Ergo summus imperans habet iura gentes”: Achenwall & Pütter, *Anfangsgründe* 300 (§901). As in Vattel, there is clear statement here about the way the sovereign "represents" the people.
whose territories may not be taken from them.120 The relative brevity of the international law section of the treatise (25 pages, 81 paragraphs) takes away nothing from the completeness of its vision: the law of nations is the law of nature applied to a people’s conduct of its relations with the outside world.

A comparison of these works shows the breadth of meaning ascribed to *ius gentium* in Germany. On the one hand, it was simply what natural reason dictated to persons outside the frame of civil law. Some of the resulting rules may have been given form and content by civil laws, but many had not. In such cases, for Heineccius, it was left to the *ius gentium* to lay out the basic rules attached to the social “status” in question—with the assumption that the same status (e.g. “marriage” or “civil society” or “sovereignty”) would everywhere be subject to the same legal rules. Or again *ius gentium* may have been related to the way a (free and independent) “people” was entitled to look for its security and welfare, and seek self-preservation in its dealings with other “peoples”. But even in the latter case—considerably closer to our (and Vattel’s) understanding of “international law”—the law does not emerge from any structure or telos outside the domestic community, but from what natural reason dictates for “peoples” in pursuit of their self-preservation and self-perfection, the content of “reason” being authoritatively determined by the prince. What we would now call international law was a product of rational *Fürstenrecht* and *Fürstenethik*—law understood as the practice of wise government.121 “Let the safety of the people be the supreme law”, even Pufendorf had written.122 This made the sovereign both completely free and completely bound at the same time—free to choose any course of action that was necessary for the protection and welfare of citizens, and bound by what “reason” dictated that this would require. “A king cannot lawfully command anything more than agrees, or is supposed to agree, with the end of instituted civil society.”123

The fact that a prince’s duties were grounded in his people’s protection and welfare did not, however, transform the inter-sovereign world into a state of constant war. The same principles of reasonable government would apply to the prince’s behaviour in the world outside as to the world within his realm. The international world did not exist as an independent historical entity, still less as an autonomous repository of moral demands. War and diplomacy were just further fields of sovereign activity—like taxation or police—and were equally governed

122 Pufendorf, *De jure naturae* (n 97) 7.9.3 (1118).
123 Pufendorf, *De jure naturae* (n 97) 7.2.11 (980).
by the rational Staatszweck. In the two avant-garde Protestant universities of the time, Halle (1692) and Göttingen (1737),

124 Thomasius, Heineccius, Pütter, Achenwall and others were configuring public law as a historically and professionally oriented technique for the attainment of what they liked to call happiness (Glückseeligkeit) in the conditions of the modern state. With this aim in mind, they wrote on the different realms of sovereign activity, including also the “external public law” that dealt with treaties, diplomacy and warfare as part of the business of government and subjected to the same rational constraints as any other sovereign activity. Towards the end of the eighteenth century, ius gentium increasingly came to be understood as governing the relations between “peoples”, represented by their sovereigns. But the role of the office of sovereignty to look for the good of the community, including the internal and external security of the realm, remained unaltered. As Pütter and Achenwall remind their readers, it is, finally, the right of the sovereign to do all that is necessary for that purpose, so that if a duty of a people collides with its right of self-preservation, then it is for the former to yield.125

(3) The later development of natural law

There was no independent tradition of the law of nations in the Germany of the late seventeenth and eighteenth centuries. Once ius naturae et gentium had legitimated enlightened absolutism, it had expended its creative force, becoming a standard part of the law faculty curriculum, with peak years in 1730-1750 and then again, as its emphasis turned to natural rights, around 1800.126 At the beginning of the eighteenth century it had been divided methodologically into two strands: a voluntarist civil philosophy of the Pufendorf-Thomasius type that looked for practical effect by seeking to explain and direct the rule of territorial princes, often with a view to attaining “enlightenment from above”, and a more contemplative type of rationalism whose leading figure was Christian Wolff and which provided the moral and intellectual ethos for the Prussian Beamtenstaat.127 Towards the end of the century, they converged into an eclectic, historically

125 Achenwall & Pütter, _Anfangsgründe_ (n 111) 232 (§717), 302 (§911).  
127 For this division, see especially I Hunter, _Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany_ (2001).
oriented introduction to specialised law studies. Practically all law schools now taught *ius naturae et gentium* by using the textbooks provided by Pufendorf, Wolff or their followers.\(^{128}\) Much of their content was descriptive or taxonomic and geared to providing law students with training on legal method and reasoning on the basis of historical examples. Nevertheless, as observers already felt at the time, even as natural law could legitimate the modern state, it was rather empty in terms of practical directives for government.\(^{129}\) A modern history of European universities describes the situation as follows:\(^{130}\)

The theory of Christian natural law and the theory of sovereignty were fixed at the beginning of the eighteenth century. There was now a shift in the role of jurisprudence. It no longer legitimated the state from within by the presentation of social contracts, constitutional proposals, or global theological and political projects but, on the contrary, stabilised the state from within by means of the specific institutions with their historical legitimating role. By being commissioned in this way, jurisprudence in the universities forfeited its philosophical competence as legitimator and critic of the state. This task returned to the philosophers: in the 18th century…

Thereafter, natural law developed in three directions. In the 1780s and 1790s, liberal influences from France and Britain contributed to an increasing emphasis on natural rights as the core of *ius naturae et gentium*—rights which, no longer dependent on the social institutions, claimed instead to precede them and to provide the conditions of their acceptability.\(^{131}\) The new textbooks were constitutionally oriented, and elaborated on the relationship between sovereign and citizen and on the division of powers, drawing upon Locke and Montesquieu. This stream continued in the early nineteenth century, with a focus on the liberal *Vormärz* in Germany in the period up to the revolution of 1848. Before that time, however, its influence was already in decline, as the law of nature was transformed into “general jurisprudence” or marginalised as “legal philosophy” in a way that has continued ever since.\(^{132}\)

A second strand led into positivism. After concluding that the state existed in order to guarantee the happiness (*Glückseeligkeit*) of the population, natural lawyers found themselves unable to say much about it. It was, after all, for

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128 Schröder & Piehlmeyer (n 126) at 261.
129 E.g. G Turnbull in his preface to the English translation of Heineccius’ natural law treatise, quoted in Hochstrasser, *Natural Law Theories* (n 80) 35.
131 This was, of course, the point of Kant’s renewal of the natural law tradition. See e.g. Haakonssen (n 93) at 279-290.
the legislator to bring about that happiness by enacting domestic law. This had been obvious to Hume. Even as natural law provides for a right of property, he wrote, “all questions of property are subordinate to the authority of civil laws which extend, contain, modify and alter the rules of natural justice according to the particular convenience of each community”.\footnote{D Hume, \textit{An Enquiry concerning the Principles of Morals} (ed T L Beauchamp, 2006) s \textit{3 pt 2} (22).} The German naturalists, too, may have thought that natural law possessed a higher metaphysical standing than positive law, but not that it would override the latter in case of conflict. Natural law, they held, following Pufendorf, receives form and substance through a positive law which may or may not enforce its prescriptions, and which makes such modifications as are needed to make it applicable in practice.\footnote{See in particular, J Schröder, “Naturrecht bricht positives Recht” in der Rechtstheorie des 18. Jahrhundert?”, in D Schwab, D Giesen, J Listl and H-W Strätz (eds), \textit{Staat, Kirche, Wissenschaft in einer pluralistische Gesellschaft} (1989) 419-433.} For Thomasius, in particular, the whole point of natural law was to serve as a foundation for positive legislation and for a legal practice oriented towards practical usefulness.\footnote{This is highlighted e.g. in C Bühler, \textit{Die Naturrechtslehre des Christian Thomasius} (1655-1728) (1991) 12-17 and passim.} Even when, later in the century, liberal natural rights sought to curtail state power, it was largely agreed that positive laws must still determine the manner of their exercise of rights, and make exceptions from them.

The role of positive law was emphasised through a natural law argument about legitimate rule which, in concrete terms, amounted to the need for legal assistance in the practice of government. This was implicit in Pufendorf and brought to fruition by Thomasius. In the field of \textit{ius gentium}, it had to wait until the publication of Johann Jakob Moser’s (1701-1785) compilation of the newest European state practice in 1777. In the preface to this massive 10-volume work, Moser, who was by far the most important representative of the “practical” school of imperial \textit{Staatsrecht}, explained programmatically that he intended to express, not international law as we would \textit{want} it to be, but as it had in fact been practised by European sovereigns and nations (“wie es unter den Souveränen und Nationen üblich ist”).\footnote{J J Moser, \textit{Grundsätze des Völkerrechts}. An extract from \textit{Versuch des neuesten Europäischen Völkerrechts in Friedens- und Kriegzeiten}, I Tl, I Bd, 1777 (1959) 7.} Moser admitted that there were different understandings of “international law” that sometimes included divine and natural law. The latter could be summed up in abstract and beautiful sentences which can be heard at universities and read in books. Nobody, however, had so far wanted to examine international law it had really been practised. This was now his purpose. Moser’s account of the treaty and customary relations was based on the conception of European nations as free and equal, and thus bound together by no general
law. Instead, behind their individual legal relations stood a balance of power that checked occasional efforts at “universal monarchy”. The balance may not be easy to justify in legal terms. But, Moser wrote, it was a part of the “European constitution” and thus amenable for explanation in his treatise.137

Moser remained an outsider to the university establishment and, although his massive treatise was widely used, few lawyers wanted to associate themselves with his unrelentingly anti-philosophical manifestoes.138 Even the man often credited as the father of German international law positivism, Georg Friedrich von Martens (1756-1821) from Göttingen – the compiler of the largest and most widely used repositories of diplomatic and treaty practice before the League of Nations treaty collection – criticised Moser for the way in which he separated international law from the kind of droit des gens universel that would have to form its basis.139 If Martens was a positivist, this did not prevent him seeing beyond treaties and state behaviour. In the absence of a positive European constitution, natural law provided the basis of the European political system. And its function remained what it had been since Pufendorf – to liberate sovereigns to seek to fulfill the salus populi by contracting with each other where possible and by resorting to violence where necessary.140

When natural law is positivised, law’s relations to politics retreat to the background and the legal method will claim autonomy from other forms of reflection.141 This also changes the social role of lawyers. It is hardly a surprise that, as he reorganised the teaching of ius gentium in Göttingen in the 1780s and 1790s, Martens began to provide practical exercises and to give his lessons in the French language, ending up as the founder of something like a diplomatic academy inside the law school to which noblemen from all over Europe would send their children.142 This is international law as the practice of diplomacy – a concept already present in Vattel and one which later generations have often

137 J Moser, Grundsätze 14-16.
138 For his biography, see M Walker, Johann Jakob Moser and the Holy Roman Empire of the German Nation (1981). On Moser’s late turn to international law see 337-346.
139 G-F von Martens, Précis de droit des gens de l’Europe fondé sur les traités et des usage (Göttingen, Dieteruch 1801) 23. This is the second French-language edition of a work which was first published in Latin in 1785. On Martens’ work and importance, see M Koskenniemi, Georg Friedrich von Martens (1756-1821) and the origins of modern international law”, in C Calliess, G Nolte and P-S Stoll (eds), Von der Diplomatie zum kodifizierten Völkerrecht: 75 Jahre Institut für Völkerrecht der Universität Göttingen (2006) 13.
140 Martens, Précis (n 139) 3: “le peuple a donc les mêmes droits à réclamer et les mêmes devoirs à observer qui ont lieu dans l’état naturel des individus.”
141 Cf Meier (n 77) at 105.
142 This was assisted by the fact that Göttingen was part of the state of Hannover ruled by King George III of Britain, whose Crown princes were among Martens’ students. See Koskenniemi (n 139) at 18-19, 23-24.
found unattractive. However, it is difficult to see what other direction natural law could have taken in order to demonstrate its practical usefulness. It is one thing to preach for legislation aimed at happiness, another to find out what this requires in practice. When in 1714 Frederick William I requested the law faculty at the University of Halle to prepare a new constitution for Prussia, the faculty responded with Thomasius’ voice that this could only be done by painstaking historical studies in order to elucidate the spirit, objectives and significance of particular laws. No result was attained until 1794, and even then in changed conditions. If the happiness of the people depends on civil laws, then of course the civil lawyers start to lead, as they did in the codification movement that began everywhere in continental Europe towards the end of the eighteenth century. Codes such as the Prussian Allgemeines Landrecht für die prussische Staaten of 1794 and the French Code civil of 1804 were examples of juridical nationalism, not internationalism, and the vocabulary of naturalism was the naturalism of the local, not the universal.

The third and most interesting direction taken by ius naturae et gentium was towards social and economic sciences. The story is long and complex and can be only hinted at here. With the expansion of economic activity in the sixteenth century, the provision of “welfare” (Gemeinwohl) became a new objective of ordinances issued by secular authorities. After the Thirty Years War, the question of how to conceive the regulatory tasks of territorial states became an intensive topic of academic discussion. A programmatic statement of the tasks of the new rulers is Veit Ludwig von Seckendorff’s (1626-1692) Teutsche Fürsten-Staat of 1656. This united natural law, empirical “statistics” and administrative policy into a first exposé of something like modern Staatswissenschaft, a theory and practice of the total happiness of the state. From now on, German lawyers would turn to history and comparative studies to examine the practical conditions for the realisation of the Staatszweck. This was how the Göttingen

143 See Koskenniemi, Gentle Civilizer (n 8) 19-24.
144 Hammerstein, Ius und Historie (n 78) 80.
146 See also H-E Bödeker and I Hont, “Naturrecht, politische Ökonomie und Geschichte der Menschheit”, in Dann & Klippel (eds), Naturrecht (n 126) 87-89; Meier (n 77) at 92 ff.
147 See J Brückner, Staatswissenschaften, Konventional und Naturrecht: ein Beitrag zu Geschichte der politischen Wissenschaft im Deutschland des späten 17 und frühen 18 Jahrhunderts (1977) 6. Until the 16th century, the ruler’s tasks were largely understood to consist of protecting citizens and providing justice. Securing (moral) order and welfare emerged in different parts of Europe at different times but were added to the Staatszweck in Germany and, for example, Sweden around the the 16th century. See also T Kotkas, “Hyvä järjsetys yhteiskuntapolitiikkaa ideaalina – esimerkki 1500-luvun Ruotsista” 2007 Lakimies 989.
148 Brückner, Staatswissenschaften (n 147) 12-32.
law faculty in particular saw itself. Achenwall, for instance, published in 1756 a comparative study of the constitutions of the major European states that he labelled “statistics”, a science of the empirical conditions of government. On the basis of this information, he proposed that each state ought to be ruled with the assistance of a “collegio” divided into domestic and foreign sections – a group of experts in governmental technique. He was preaching Staatsklugheit – elements of statecraft depicted, in true Enlightenment style, like operating machines or clocks, every part of which needs to work in harmony with every other part so as to produce the final objective – salus populi. The law of nations deals with the conduct of foreign affairs in a fully utilitarian vocabulary. If treaties should generally be kept, this is not out of moral considerations but out of self-interest, subject to the Notrecht.

With the increase in the social tasks of territorial states, it became increasingly important to ensure an adequate economic and financial apparatus within the state. It was not obvious how this could be achieved. University “economics” had been taught as that part of Aristotelian practical philosophy that was squeezed between ethics and politics, and dealt with the administration of the household (oikos). In the seventeenth and early eighteenth centuries, practical-minded lawyers such as Thomasius had integrated parts of cameral science and Polizeywissenschaft in their abstract compilations, and towards the middle of the century a specific Polizeyrecht was set up as an independent discipline. But this was insufficient to train the functionaries of the new bureaucracies. Besides, many lawyers were suspicious, holding such matters as unsuitable for universities and better conducted in connection with the training of inferior state officials. At the time when law faculties were split between abstract naturalism and formal studies of positive law, the first independent chairs on economics and cameral science were set up in 1727 in Halle and Frankfurt.

But cameralism built on policy-ordinances and financial regulations of a mercantilistic system of government. It fitted poorly with an emerging

149 Hammerstein, Ius und Historie (n 78) 304-331.
150 G Achenwall, Staatsverfassung der Europäischen Reiche im Grundrisse (Göttingen 1756).
151 For the story of cameralism between 1727 and the 1790s, see K Tribe, Governing Economy: The Reformation of German Economic Discourse 1750-1840 (1988) 35-54; K Tribe “Cameralism and the sciences of the state”, in Goldie & Wokler (eds), Cambridge History of Eighteenth-Century Political Thought (n 93) 525.
153 For the divergence of legal and economic thinking in German society towards the mid-18th century, see generally M Walker, “Rights and functions: the social categories of eighteenth-century German jurists and cameralists” (1978) 50 Journal of Modern History 234.
154 Meier (n 77) at 96-99.
bourgeois economy ruled by contractual principles governing private economic operations.\textsuperscript{155} In 1758 Francois Quesnay published in Paris his \textit{Tableau Économique} that formalised the laws of economics, demonstrating the interdependence of national production, circulation and income. The Physiocrats suggested that there was a natural flow of economic activity that, if allowed to expand freely, would contribute to the greatest happiness of all. Where jurisprudence, public law and \textit{Polizeywissenschaft} had looked for happiness within the structures of the territorial state, the new economics taught natural laws that would operate irrespectively of state activity, following the spontaneous developments in civil society. Of course, some legal regulation was needed to facilitate economic operations. But otherwise it would be a matter for private law arrangements providing for the right of property, the enforcement of contracts, and freedom to seek advantage by economic activity.\textsuperscript{156}

These theories spread in German universities in a belated fashion. Territorial rulers had a firm grip on the universities and an interest in the way cameralism and \textit{Polizeywissenschaft} could assist their paternalistic regimes.\textsuperscript{157} When the new theories finally managed to penetrate the German realm, they did so by transformation into \textit{Volkswirtschaftspolitik} – the study of the national economy as a whole.\textsuperscript{158} This left the question of the state’s external relations unresolved, and on this topic cameralism and \textit{Polizeiwissenschaft} had never had much to say. Around 1800 theories of the \textit{Machtstaat} and \textit{raison d’état} began increasingly to find room in German political thought.\textsuperscript{159} This did not augur well for what was left of \textit{ius gentium} as the practice of training diplomats in European treaty-law, as Martens had conceived it. On the other hand, economists now began to situate the national economy in an international context, and the call for lowering or abolishing taxes and customs between nations started to became the most important rallying-cry of pacifists and cosmopolitans. It was not the law of nations that the liberals looked towards; it was the laws of economics. Even Kant wrote in his “Perpetual Peace” about the pacifying and civilising effects of trade practically in the same breath as he condemned Grotius, Pufendorf and Vattel as miserable comforters.\textsuperscript{160} Naturalism and humanity still went together. Their union, however, was celebrated not in the court of law but in the palace of economics.

\textsuperscript{155} Meier (n 77) at 106-107.  
\textsuperscript{156} Cf e.g. Valier, \textit{Brève histoire} (n 70) 41-54.  
\textsuperscript{157} C Dipper, “Naturrecht und wirtschaftliche Reform”, in Dann & Klippel (eds), \textit{Naturrecht} (n 126) 164-5.  
\textsuperscript{158} Meier (n 77) at 106-7; Tribe, \textit{Governing Economy} (n 150) 149-181.  
\textsuperscript{159} Meier (n 77) at 102-3  
\textsuperscript{160} See I Kant, \textit{Political Writings} (n 7) 103, 114.
D. Conclusion: From Natural Law to Economics

Neither in France nor in Germany was there anything resembling an effort to ground a system of laws among nations that looked further than the strength or the welfare of the nation—“advantage” as Hume would have put it. What the traditions of the droit public de l’Europe and ius naturae et gentium tried to do was to introduce a vocabulary, a technique, and a profession that could speak authoritatively about ruling a territorial community. The little that was said about war, treaties or diplomacy was often linked with sweeping references to mutual advantage, long-term interest and reciprocal self-love crystallised in the balance of power. The rules were always characterised as “imperfect”, “arbitrary” or “voluntary”, indicating that in one way or another they lacked the hardness of domestic legislation. This made them indistinguishable from prudential maxims of practical statecraft that would, by the eighteenth century, rest upon the categories of “advantage” or “interest” that posited an economic calculation as underlying the legal fabric and providing its interpretative context.

This is the perspective from which David Hume wrote about the law of nations in 1739. As pointed out above, Hume aimed to bring to a conclusion the natural law project of speaking about human society in a purely empirical or historical fashion, avoiding that invisible but fateful slide of previous thinkers from “is” to “ought”. To speak of the “advantage of treaties” was to bring naturalism down from its rationalist heights to the psychology of real human societies in which law’s “oughtness” was a function of the way the mind learned to associate ideas about virtue in a particular context. The natural law tradition had sought to counter the dangers of scepticism and egoism by making self-interest appear consistent with life in society. This was also the problem to which Hume’s friend, Adam Smith, responded in his famous comment that it was not from “the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves not to their humanity, but their self-love”. Before publishing the Wealth of Nations in 1776, Smith had, in his Theory of Moral Sentiments, developed the view of the “impartial spectator” out of Hume’s analysis of “sympathy”, which aimed to provide a response to the question about the possibility of altruism in a society of self-centred individuals. Like Pufendorf and Hume, Smith assumed the existence of a kind of secondary sociability that would uphold virtuous behaviour in terms of practical inferences.
from what appeared necessary or useful for long-term happiness. At the end of that work he declared it to be his intention in his next book to "endeavour to give an account of the general principles of law and government".

Although Smith lectured on jurisprudence at Glasgow University through the 1760s he never produced that other book. In his lectures, his views on the position of international law were similar to those of Hume. Here, if anywhere, it seemed impossible to find those impartial spectators who could guarantee the orderly operation of a legal system: "where there is no supreme legislative power nor judge to settle differences, we may always expect uncertainty and irregularity." Smith was writing self-consciously in the tradition of Pufendorf. Both authors built on a subjective theory of value which, as Pufendorf had already remarked, linked price formation to the perceived need for goods and thus also to their relative scarcity. If it was the task of public law to coordinate the "imposition" of subjective values so as to contribute to the general good, and if that good was increasingly understood in terms of welfare, then, as the Physiocrats had argued, and Frederick II of Prussia largely agreed, the proper language for modern salus populi would have to be that of political economy.

The consolidation of the nation-state had been accompanied by the political economics of mercantilism for which the creation of national wealth was a zero-sum game. This supported the complete direction of the economy by the state through protective tariffs, trade monopolies and regulation of economic activity. Now the discovery of the natural laws of economics undermined this view by producing an analytical standpoint that examined the creation of happiness from outside the state treasury, indeed from a proper attention to the national economy as a whole. However, even this was insufficient. As Hume wrote, national wealth could not be guaranteed by securing the inflow of gold or money. This will raise prices, hamper exports and make imports more profitable. In the eighteenth century, the balance of power began to be increasingly thought of in terms of the relative wealth of the nations. But the increase of wealth, that is to say, the management of the balance to one's advantage, could no longer be undertaken

167 Pufendorf, *De jure naturae* (n 97) 5.1.6 (680).
by regulatory means. Instead, economic operators were to be liberated to seek
capital gains anywhere in the world.

This was the message of the famous chapter in the Wealth of Nations in which
Smith argued that restraints upon imports were detrimental to the nation:\(^\text{170}\)

Every individual is continually exerting himself to find out the most advantageous
employment for whatever capital he can command. It is his own advantage, indeed,
and not that of the society, which he has in view. But the study of his own advantage
naturally, or rather necessarily, leads him to prefer that employment which is most
advantageous to society.

The argument is completely consistent with natural jurisprudence. Indeed,
Pufendorf could have written it. Smith notes how prudent masters of households
never attempt to manufacture at home what it would cost more to manufacture
than to buy, invoking the early modern image of the Hausvater.\(^\text{171}\) “What is
prudence in the conduct of every private family can scarce be folly in that of a
great kingdom”.\(^\text{172}\) If we can buy cheaper from abroad than by making at home,
then we may invest the saved part of our capital for other profitable purposes.
Any regulation that directs capital to where it would not be invested otherwise is,
as Smith points out, either useless or, more commonly, hurtful. The argument is
structurally identical to the way political theory had justified modern statehood.
In both, the starting-point is the egoism of the private individual, and the outcome
is general happiness, as mediated in the one case through the laws of politics and
in the other through the laws of economics. It is precisely the difference between
those realms – between politics and economics – that explains why past efforts to
come up with a concept of universal law through political means had failed. In
the political realm, more is at issue than the simple advantage of the individual; it
is the realm of irrational, negative passions or, as Smith says, vanity and style. Our
preferences are opaque to each other, and fear of the stranger is justified.

By contrast, in the economic realm our passions turn into and can always be
expressed in terms of beneficial and calculable interests – “advantages” – that can
be subjected to a universal system of rational exchanges. Already Pufendorf had
noted that were we only interested in fulfilling our needs, no political society
would have arisen. After all, he wrote, there were many states today “which seek
abroad the means to supply their needs or pleasure, and yet they do not feel
it necessary to combine with those with whom they trade into one state”.\(^\text{173}\) This
view is reflected in Smith’s four-stage theory of human societies where the highest

\(^{170}\) Smith, Wealth of Nations (n 163) 2.2 (397).

\(^{171}\) Tribe, “Cameralism” (n 151) at 530.

\(^{172}\) Smith, Wealth of Nations (n 163) 400.

\(^{173}\) Pufendorf, De jure naturae (n 97) 7.1.6 (958).
level—the one attained in the late-eighteenth century—is that of commercial society: highest because in it people were only interested in fulfilling their needs, and in which accordingly free economic activity had been given free reign in the production of welfare and happiness.

The argument from the “advantage of treaties”, made by Hume and by a very large part of professional international lawyers in the past half-century, emerges from viewing the international world in terms not of politics but of economics. This presupposes that the laws of economics are universal in a way that the laws of politics are not; and it inaugurates international law as a law of a universal commercial society in which progress will mean the slow retreat of the state and the political to a local idiosyncrasy, like folk dancing and exotic meals. Or like the parade in New York every September when heads of state and government from a proliferating number of increasingly insignificant political communities take the floor in the General Assembly of the United Nations to speak on whatever it is that is the day’s fashion, to be forgotten as soon as the crowd retreats to drinks in the adjoining lounge.