Looking Beyond the Tip of the Iceberg: Diplomatic Praxis and Legal Culture in the History of Public International Law

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The present contribution outlines the scope of my doctoral dissertation[1] in terms of theoretical, conceptual, methodological and empirical choices. Although my research treated two specific case studies, its theoretical and methodological premises are of interest for the history of public international law in general. My research builds further on traditional, doctrine- or treaty-focused legal history, tackling diplomatic correspondence. Legal argumentation between states and their representatives ought to be read within the framework of legal culture. Norms guiding behaviour are often implicit. Moreover, the effect of formal sources of the law is often situated at the symbolic level, rather than in purely textual or explicit terms. I chose the uneasily calm three decades following the Peace of Utrecht (1713, ending the War of the Spanish Succession) as main case-study[2]. Building on the typology drawn from primary-source analysis, I looked at a test-case for the universality of my hypothesis. Although more than two centuries separated the former from the latter, French contestation of the vertical world order after 1945 appealed to a similar rhetorical set of arguments[3]. Consequently, anti-hegemonic discourse, referring to the material legitimacy of a formal criterion (state consent) appears as an evergreen of legal argumentation between states.

First (Section 1), I treat the theoretical approach, or the conceptual framing of my research. The central question, which will serve throughout the next chapters in the analysis of primary material, will thus be shown to challenge the present *acquis* in three disciplines: legal history, diplomatic history and international law. Moreover, I will expound the inspiration from neighbouring disciplines or sub-disciplines in the broader humanities, that have devoted considerable attention to similar social phenomena. Secondly (Section 2), I propose the methodological approach best suited to the material brought forward.

Section 1: Theoretical premises

> "Law (and social order in general) is concerned with relationships, and not with separate individuals or groups of individuals. Therefore the standards of legal order ought to be derived from the idea of interrelated and coordinated activities, and not from the idea of the independent existence of persons."
>
> Gerhart Niemeyer, *Law Without Force. The Function of Politics in International Law*[4]

This theoretical part serves to inform the reader on the existing preconceptions of my approach to the sources of public international law. How to make sense out of a tantalizing amount of material ? How to relate findings to principles of a sufficiently general nature, recognized by the scholars active in the field ? Research is rarely fully original, in the sense that it only develops new theoretical assumptions from the study of previously unknown sources. Essentially, the theoretical approach chosen places the subject matter at the intersection of various disciplines, namely legal history, public international law and history of international relations. The following questions have guided my empirical research.

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[1] F. Dhondt, Balance of Power and International Law. European Diplomacy and the Elaboration of International Order (18 Century and Post 1945) (diss.doc.), Ghent, UGent Faculty of Law, 2013, 552 p. Supervisor: Prof. dr. D. Heirbaut.

[2] Dhondt, Balance of Power, 36-379.

[3] Dhondt, Balance of Power, 380-428.

[4] G. Niemeyer, Law without force: the functions of politics in internationl law, Princeton, Princeton UP, 1941, vii (our underlining).

I. Practical legal argumentation: a research gap ?

> "Das juristische Sachwissen, das terminologische Gewand und die entsprechende Rhetorik waren universell einsetzbar, und als die stärksten politischen Kräfte der Epoche zur Intensivierung der Territorialherrschaft tendierten, standen auch genügend Juristen bereit, diese Tendenz juristisch zu untermauern."
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> Michael Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland*[5]

> "International Law is not made solely by the Court. Rather, it is centrally a matter of explicit or implicit agreement by states."
>
> John Norton Moore, "*Jus ad Bellum* before the International Court of Justice", Virginia Journal of International Law 2012[6]

My work was concerned with diplomatic practice (i.e. the elaboration of legal norms through social interaction between the representatives of governments of sovereign states[7]) and legal culture[8]. In other words, it did not have the ambition to cover natural law or even law of nations doctrine, or to restate authoritative syntheses on the law of war[9]. Certainly, much remains to be done in this vast and challenging field[10]. Yet, legal history stands before vaster challenges as far the study of the political use of legal argumentation is concerned. Contemporary international law theory saw Martti Koskenniemi's masterpiece *From Apology to Utopia*[11], a far-reaching systematic interpretation of the structure of legal argumentation. The schools of thought or intellectual categories recognized by Koskenniemi are a useful starting point to structure international law as a field in permanent tension. However, certainly for the 18th century, doctrine presents us more than often with *de lege feranda* material than *de lege lata*[12]. My dissertation, a work of legal history, taking diplomatic practice and legal culture into account, aimed to go further, and focused on the interactions between legal discourse and context.

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[5] M. Stolleis, Geschichte des öffentlichen Rechts in Deutschland. Reichspublizistik und Polizeiwissenschaften 1600-1800, München, C.H. Beck, 1998, I, 68 (our underlining).

[6] VJIL, LII (2012), No. 4, 903-961 (our underlining).

[7] I. Roberts, Satow's diplomatic practice, Oxford, Oxford UP, 2009, 3.

[8] L. Friedman's definition goes as follows: "Ideas, values, expectations and attitudes towards law and legal institutions held by the public or part of it" ("The Concept of Legal Culture: A Reply", in: D. Nelken (ed.), Comparing Legal Cultures, Aldershot, Dartmouth, 1997, 34). For the purposes of this study, the relevant social group is limited to diplomats and leading politicians (see further). F. Dhondt, "La représentation du droit dans la communauté diplomatique européenne des Trente Heureuses, 1713-1740", Tijdschrift voor Rechtsgeschiedenis-Revue d'Histoire du Droit-The Legal History Review LXXXI (2013), No. 2 (forthcoming).

[9] E.g. S. C. Neff, War and the law of nations: a general history, Cambridge, Cambridge UP, 2005, XII + 443 p.

[10] S. Goyard-Fabre, Pufendorf et le droit naturel [Léviathan], Paris : PUF, 1994, 263 p. M. Mattei, Histoire du droit de la guerre, 1700-1819: introduction à l'histoire du droit international : avec une biographie des principaux auteurs de la doctrine internationaliste de l'Antiquité à nos jours [Collection d'histoire du droit. Thèses et travaux], Aix-en-Provence, PUAM, 2006, 1241 p.; A. Nussbaum, Geschichte des Völkerrechts in gedrängter Darstellung, München, Beck, 1960, 418 p. ; E. Reibstein, Völkerrecht. Eine Geschichte seiner Ideen in Lehren und Praxis. I: Vom Ausgang der Antike bis zur Aufklärung [Sammlung Orbis], Freiburg, Verlag Karl Alber, 1958, 640 p.; M.-H. Renaut, Histoire du droit international public [Mise au point], Paris, Ellipses, 2007, 190 p.; F.-S. Schmidt, Praktisches Naturrecht zwischen Thomasius und Wolff: Der Völkerrechtler Adam Friedrich Glafey (1692-1753) [Studien zur Geschichte des Völkerrechts; 12], Baden-Baden, Nomos Verlag, 2007, XII + 347 p; Stolleis, Geschichte des öffentlichen Rechts, I; T. Toyoda, Theory and Politics of the Law of Nations: Political Bias in International Law Discourse of Seven German Court Councillors in the Seventeenth and Eighteenth Centuries [Studies in the History of International Law; 2], Leiden, Brill, 2011, 220 p.

[11] M. Koskenniemi, From apology to utopia. The structure of international legal argument, Helsinki: Lakismiesliiton Kustannus, 1989, XXVI + 550 p. In this dissertation, the second edition (Cambridge UP, 2005, XIX + 683 p.), is used for quotation purposes.

[12] M. Troper, Le droit et la nécessité, 256: "On n'a pas prêté une attention suffisante au fait que le droit, d'une part, et la science ou la théorie du droit, de l'autre, emploient des concepts différents. À vrai dire, les auteurs présupposent parfois à tort qu'ils se confondent.". M. Schmoeckel, Auf der Suche nach der verlorenen Ordnung : 2000 Jahre Recht in Europa; ein Überblick, Köln, Böhlau, 2005, 297.

A. History of International Law

Most general works on the history of international law[13] either start from the idea that praxis is only important to study the origin of rules, or chop up history into arbitrary epochs of political domination. Notions as "the French era of public international law, 1648-1815" do not fit reality. If, to follow the example of the "French era", the majority of treaty drafts[14], or works of reference for international law in the 18th century, appear to be drawn up in Latin, rather than in French[15], or, if the French monarchy did not have a prominent doctrinal voice, research should rather focus on the *interaction*[16] between states[17], than on a particular national style, used for framing actions and goals of other parties. Or, to put it in David Armitage's words, the "stories actors told about themselves or their achievements" do not necessarily match "foundation myths retailed by later communities of historians and diplomats, international lawyers and proto-political scientists, seeking historical validation for their ideological projects and infant professions[18]." This research has been constructed out of the sources, and focuses on the treatment of legal arguments in international politics. To that respect, when it comes to a consistent treatment of authoritative texts, legal history recognizes a medieval *mos italicus*, or a renaissance *mos gallicus*, but –at least, until now- no *mos trajectensis* (a habitus based on the culture of the Treaty of Utrecht) in international law post 1713.

B. Political History

Looking at the eighteenth century from a historian's perspective, most can be explained on an evenemential basis. The lack of respect for alliance clauses or promises to renounce to lost territories could and can lead to a superficial conclusion on international law's ineffectiveness[19]. Frederick the Great's deriding commentaries on his lawyers' justifications for the invasion of Silesia in 1740 can give extra ammunition to this reductionist thesis.

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[13] Gaurier, Histoire du droit international public; A. Eyffinger, Compendium volkenrechtsgeschiedenis, Deventer, Kluwer, 1989, 219 p. W.G. Grewe, The Epochs of International Law, Berlin, De Gruyter, 2000, XXII + 780 p.; S. Laghmani, Histoire du droit des gens, du ius gentium imperial au jus publicum europaeum, Paris, Pedone, 2003, 249 p.; H. Legohérel, Histoire du droit international public [Que sais-je ?; 3090], Paris, PUF, 1996, 127 p.; M.-H. Ramaut, Histoire du droit international public [Mise au point], Paris: Ellipses, 2007, 190 p. J.H.W. Verzijl, International Law in Historical Perspective [Nova et Vetera Iuris Gentium; Publications of the Institute for International Law of the University of Utrecht; 4], Leyden, Sijthoff, 1968, 12 v; K.-H. Ziegler, Völkerrechtsgeschichte: ein Studienbuch [Juristische Kurz-Lehrbücher], München, Beck, 2007, XV + 267 p.

[14] E.g. Count Broglie to Morville, Hanover, 3 September (reports of the Hanover conference leading to the conclusion of a treaty of alliance between France, Britain and Prussia, directed against Spain and the Emperor; AMAE, M&D, Angleterre, 350, f. 133v°): "Comme le traité a esté dressé en françois et que l'Angleterre ne veut rien alterer a l'ancien usage estably entre la France et elle de les rediger en latin, Md Townshend a desire que je luy donnasse une declaration portant que si S.M. n'entend point que cette facilité de la part de S.M.B. puisse tirer a consequence, ny prejudicier a cet usage, n'y ayant consenti que pour eviter la perte du tems qu'on auroit employé a en faire une traduction latine, j'ay crû ne pouvoir la luy refuser." (our underlining).

[15] E.g. even in 1738, 25 years after the peace of Utrecht, Latin was still labeled the "common language", during the negotiations on a bilateral Franco-British commercial treaty of interpretation (Newcastle to Waldegrave, Whitehall, 13 November 1738 OS, NA, SP, 78, 219, f. 165r°).

[16] J. Brunnée & S. Toope, "Interactional International Law: An Introduction", International Theory, III (2011), No.2, 307-318.

[17] "Eine aus einer Anzahl von Menschen bestehende, von niemand ausser sich abhängende und zu einem stets fortdaurenden Zwecke vereinigte Gesellschaft nennet man in Volk oder einen Staat." (L. von Ompteda, Literatur des gesemmten sowohl natürlichen als positiven Völkerrechts, Regensburg, Montags, 1785, I, 5).

[18] D. Armitage, Foundations of modern international thought, Cambridge: Cambridge UP, 2013, 9-10. E.g. S. Beaulac, "The Westphalian legal orthodoxy. Myth or reality ?" Journal of the History of International Law-Revue d'histoire du droit international II (2000), 148-77; C. Gantet, "Le "tournant westphalien": Anatomie d'une construction historiographique", Critique internationale, 2000, No. 9, 52-58.

[19] E.g. F. Laurent, Histoire du droit des gens, T 11: la politique royale, Paris, Lacroix, 1865, 150: "Au fond c'est toujours la politique de Louis XIV, le despotisme à l'intérieur, et la force dans les relations internationales. Le mépris du droit paraît même plus brutal, parce qu'il n'a plus ce prestige qu'il empruntait aux grands airs de Louis XIV. Plus la force est brutale, plus elle apprendra aux peuples qu'il n'y a que le droit qui puisse sauvegarder leur liberté et garantir leur indépendance."

Yet, an evenemential, short-term or "particularist[20]" political reading of sources fails to explain why Europe, for an unparalleled period of thirty years, did not have an all-out continental war, any sooner than around 1742-1743. At least one hypothesis is to be found in a shared *legal culture* that tied Europe's sovereigns together, expressed through diplomacy, or the conduct of foreign policy[21]. This phenomenon has been overlooked. In part due to the sheer mass of the available sources. E.g. in 1713, vast diplomatic dispatches left the French embassy in London on a daily basis[22]. Mining for legal arguments, intertwined with elaborate anecdotes or court gossip, intercession in favour of merchants, rumours on internal British politics, is like searching for a needle in a haystack. In spite of the numerous generations of previous historians from Voltaire[23] to Jeremy Black[24], who have treated this era, a lot of material still remain unexplored, giving way to new interpretations.

C. Anarchical Society

The interactions between states are generally qualified as a "society" of states, as opposed to a socially more integrated group or "community[25]". No central authority can enforce agreements, or sanction those who contravene them. Between the actors in this society, contracts are inevitably imperfect[26] and thus precarious. International order in bilateral agreements does not necessarily reflect morality[27]. Lasting power configurations over several decades have more than purely factual consequences. They are the essential precondition to the creation of rules, not to mention their enforcement[28].

II. International Order: Balance of Power

> "Das Gleichgewicht war dabei das regulatieve Ordnungsprinzip, das von allen Beteiligten beständige Wachsamkeit erforderte, weil jede Störung die Beziehungen aller zu allen berührte. Es war Rahmenbedingeung und Richtschnur für das Mass der tragbaren Veränderungen im Staatensystem."
>
> Johannes Kunisch[29]

A. Terminology

The first three words of my study's title, "Balance of Power", are of the most controversial in public international law[30], international relations theory[31] or diplomatic history[32]. Taking Balance of Power, in

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[20] J. M. Hobson & G. Lawson, "What is History in International Relations ?", Millennium: journal of International Studies, XXXVII (2008), No. 2, 420.

[21] Sometimes opposed to its formulation by politicians (definition of Roberts, Satow's diplomatic practice, 3). The strict line between the formulation and carrying out of foreign policy is not adequate for the analysis of material treated in this dissertation: the conceptual separation between formulation and execution or conduct is inexistent in the 18th century, e.g. in the case of Horatio Walpole or James Stanhope, who acted at the same time as instructors and executioners.

[22] Covering volumes AMAE, CP, Angleterre, 243-251 and Angleterre, Supplément, 5, or about 2700 folios.

[23] F. M. Arouet (Voltaire), Précis du siècle de Louis XV, servant de suite au Siècle de Louis XIV, Genève, 1769, 2 v.

[24] J. Black, British foreign policy in the age of Walpole, Edinburgh, Donald, 1984, XI + 202 p.

[25] A. Truyol y Serra, "Genèse et structure de la société internationale", Recueil des Cours de l'Académie de Droit International de La Haye, XLVI (1959), 553-642.

[26] M. Lefebvre, Le jeu du droit et de la puissance. Précis de relations internationales [P. Gauchin, ed., Collection Major], Paris, PUF, 2000, 4.

[27] H. Lauterpacht, The Function of Law in the International Community, Oxford: Oxford UP, 2011 [1933], 438: "In a sense, peace is morally indifferent, inasmuch as it may involve the sacrifice of justice on the altar of stability and security." J. Mayerfield, "No peace without injustice: Hobbes and Locke on the ethics of peacemaking", International Theory, IV (2012), No. 2, 269-299.

[28] E.g. W.G. Grewe, Epochen der Völkerrechtsgeschichte, Baden-Baden: Nomos, 1984, 328 on Balance of Power as "Grundlegendes Verfassungsgesetz des Droit public de l'Europe".

[29] J. Kunisch, Staatsverfassung und Mächtepolitik [Historische Forschungen; 15], Berlin, Duncker & Humblot, 1979, 54.

[30] L. Donnadieu, La Théorie de l'équilibre, étude d'histoire diplomatique et de droit international, Paris: Rousseau, 1900, XX + 293 p.; A. Vagts & D.F. Vagts, "The Balance of Power in International Law: a History of an Idea", American Journal of International Law LXXIII (1979), No. 4, 555-580.

Talleyrand's words "le palladium des droits de chacun et du repos de tous[33]", mentioned in Thucydides[34] or Gentili[35], as an analytical concept in a legal study seems more than hazardous. Is "Balance of Power" a mere factual relationship or an appropriate legal expression (*ex facto non oritur ius*[36]) ? Can it be confined within the limits of a workable definition ? Does it have any significance outside the just war framework[37] ? The expression serves as a metaphor for distinct historical periods, such as the international system of the seventeenth[38], eighteenth[39] or nineteenth[40] century, or that of the whole Ancien Régime[41], or even as a synonym for the "Westphalian" system of European international relations[42]. When researchers apply their typology of the concept to facts, their hypotheses are generally rejected[43]. The works of Michael

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[31] D. B. Haas, "The Balance of Power: Prescription, Concept, or Propaganda", World Politics V (1953), No. 4, 442-477; D. Hume, "Of the Balance of Power" in: D. Hume, Political Discourses, Edinburgh: Fleming, 1752², 101-114; J. K. Oliver, "The Balance of Power Heritage of 'Interdependence' and 'Traditionalism' ", International Studies Quarterly, XXVI (1982), No. 3, 373-396; T.V. Paul, J. J. Wirtz & M. Fortmann (eds.), Balance of power: theory and practice in the 21st century, Stanford, Stanford UP, 2004, 400 p.; R. Schweller, Unanswered threats : political constraints on the balance of power, Princeton, Princeton UP, 2006, 182 p., R. Hjorth, "Hedleys Bull's paradox of the balance of power : a philosophical inquiry", Review of International Studies XXXIII (2007), No. 4, 597-613; R. Little, "Deconstructing the Balance of Power", Review of International Studies XV (1989), No. 2, 87-100 ; Id., The balance of power in international relations: metaphors, myths and models, Cambridge, Cambridge UP, 2007, X + 317 p.; J. A. Vasquez & C. Elman (eds.), Realism and the Balancing of Power: A New Debate [Prentice Hall studies in international relations], Saddle River (N.J.), Prentice Hall, 2003, XXII + 330 p.

[32] L. Bély, Les relations internationales en Europe: XVI[e]-XVIII[e] siècles [Thémis. Histoire], Paris, PUF, 2007, XXIII + 773 p.; J. Black, A History of Diplomacy, London, Reaktion Books, 2010, 312 p.; H. Butterfield & M. Wight (eds.), Diplomatic Investigations: essays in theory of international politics [Unwin university books], London: Allen & Unwin, 1966, 227 p.; P. Krüger & P.W. Schroeder (eds.), The Transformation of European Politics, 1763-1848: Episode or Model in European History ?, London, Palgrave Macmillan, 2003, 400 p; P. Renouvin & J.-B. Duroselle, Introduction à l'histoire des relations internationales [Agora; 182], Paris, Pocket, 1997, 530 p.

[33] Talleyrand to Metternich, 19 December 1814, quoted in C. Dupuis, Le principe d'équilibre et le concert européen, de la paix de Westphalie à l'acte d'Algésiras, Paris, Perrin, 1909, 90.

[34] M. Sheehan, Balance of Power: history and theory, London: Routledge, 1996, 60; R. Howse, "Thucydides and Just War: How to Begin to Read Walzer's Just and Unjust Wars", European Journal of International Law XXIV (2013), No. 1, 17-24.

[35] E. Luard, The balance of power: the system of international relations, 1648-1815, London, Macmillan, 1992, 3.

[36] "tantôt la primitive union des faibles contre le puissant, tantôt une égalisation des forces", E. Nys, Le droit international. Les principes, les theories, les faits, Bruxelles: Weissenbruch, 1912, I, 23 ?

[37] B. Arcidiacono, "De la balance politique et de ses rapports avec le droit des gens: Vattel, la 'guerre pour l'équilibre' et le système européen", in: P. Haggenmacher & V. Chetail (eds.), Vattel's International Law from a XXIst Century Perspective - Le Droit International de Vattel vu du XXI[e] Siècle, The Hague, Martinus Nijhoff, 2011, 77-100; K. Repgen, "Kriegslegitimationen in Alteuropa. Entwurf einer historischen Typologie", Historische Zeitschrift CCXLI (1985), No. 1, 27-49, S. Zurbruchen, "Vattel's law of nations and just war theory", History of European Ideas XXXV (2009), 408-417.

[38] K. Malettke, Hegemonie - Multipolares System – Gleichgewicht [Handbuch der Geschichte der Internationalen Beziehungen; 3], Paderborn: Schöningh, 2012, XIX + 581 p.

[39] H. Duchhardt, Balance of power und Pentarchie [Handbuch der Geschichte der Internationalen Beziehungen; 4], Paderborn, Schöningh, 1997, XVII + 488 p.; A. Hassall, The Balance of Power, 1715-1789 [Periods of European History; VI], London, Rivingtons, 1925, 440 p.; C. Ingrao, "Paul Schroeder's Eighteenth-Century Balance of Power: a Critique", International History Review, XVI (1994), 661-680.

[40] C. Bilfinger, "Friede durch Gleichgewicht der Macht ?", Zeitschrift für Ausländisches Recht und Völkerrecht XIII (1950), 51; W. D. Gruner, "Was There a Reformed Balance of Power System or Cooperative Great Power Hegemony?", American Historical Review, XCVII (1992), No. 3, 725-732; E.V. Gulick, Europe's classical balance of power : a case history of the theory and practice of one of the great concepts of European statecraft, New York, Columbia UP, 1955, XVII + 337; A. Lev, "The transformation of international law in the 19th century", in: Orakhelashvili (ed.), Research Handbook, 121-138.

[41] J. Kunisch (ed.), Expansion und Gleichgewicht. Studien zur europäischen Mächtepolitik des Ancien Régime [ZHF; Beiheft; 2], Berlin, Duncker & Humblot, 1986, 239 p; G. Livet, L'équilibre européen de la fin du XVe à la fin du XVIII[e] siècle [Collection SUP. L'Historien; 28], Paris, PUF, 1976, 231 p. G. Zeller, "Le Principe d'équilibre dans la politique internationale avant 1789", Revue Historique, CCXV (1956), 25-37.

[42] C. Dupuis, Le principe d'équilibre et le concert européen, de la paix de Westphalie à l'acte d'Algésiras, Paris, Perrin, 1909, 527 p.

[43] Law: Q. Wright, "International Law and the Balance of Power", American Journal of International Law XXXVII (1943), No. 1, 102: "Balance of Power as the structure of world politics […] has even come to be

Sheehan[44] and Evan Luard[45] stand out in this respect. Both authors argue forcefully in favour of a nuanced but systematic understanding of balancing behaviour between states. Balance of Power is a rational attempt to reconcile anarchy with order, or, in other words, to assign power structures to enforce a minimal consensus between equal players[46]. My dissertation followed this line of argumentation. The falsification of Balance of Power theory as an organizing principle is not a very arduous task. Yet, its vagueness is precisely responsible for its swift adoption by so many different actors throughout history[47]. Balance of Power thinking delegates the elaboration of vague norms to diplomats and politicians. The persistence of its use by diplomatic practitioners[48] and its enduring appeal to political audiences point to a recurrent legitimating force, that cannot be explained away by mere theoretical reasoning[49]. As Ian Clark has emphasised in his work on legitimacy in international relations, the key explaining factor for the subsistence of any international system is a "highly significant common belief that stability is a function not of material distributions alone, but also of degrees of acceptance within the relevant social constituency[50]." The presence of Balance of Power in the title reflects not as much the expression of the rigorous zeal used to judge primary sources, but is more the result of its omnipresence in diplomatic correspondence, as the starting point, or precondition to any legal analysis by the actors themselves[51].

"Balance of Power" is all the more significant as a rhetorical *catch-all* term for conflict resolution in the early modern period. To paraphrase Vauban, any outstanding quarrel between sovereigns could be resolved by a peace treaty, or, conversely, "par une bonne guerre[52]". Given that international conflict took place between equals, it could not be subject to the medieval rules of just war[53], which counted on the

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incompatible with the international law, which, during most of the 19th century, supported it". History: M.S. Anderson, "Eighteenth-century theories of the balance of power", in: R. Hatton & M.S. Anderson (eds.), Studies in diplomatic history, essays in Memory of D.B. Horn, London, Longman, 1970, 183-198; J. Black, "The Theory of the Balance of Power in the First Half of the Eighteenth Century: A Note on Sources", Review of International Studies, 1983, 55-61; M. Sheehan, "The Sincerity of the British Commitment to the Maintenance of the Balance of Power 1714-1763", D&S, XV (2004), No. 3, 489-506. Political Science: S. J. Kaufman, R. Little, W.C. Wohlforth et al., The balance of power in world history, Basingstoke, Macmillan, 2007, X + 279 p.

[44] Sheehan, Balance of Power: theory and hsitory; Id., "The Place of the Balancer in Balance of Power Theory", RIA XV (1989), 123-133.

[45] Luard, The Balance of Power.

[46] "Its merits lay in its objectivity, its detachment from ideology, its universality, and its independence from short-term considerations. It stressed the essentials, timeless and inescapable, in international affairs: power and power relationships" (Sheehan, Balance of Power: history and theory, 53).

[47] Analogous: E. Carolan, "Diffusing Bad Ideas: What the Migration of the Separation of Powers Means for Comparative Constitutionalism and Constitutional Transplants", Hart Legal Workshop, 2010 [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2203680, last consulted 31 January 2013].

[48] G.-H. Soutou, "De l'équilibre européen à l'équilibre mondial ?", Mondes. Les cahiers du Quai d'Orsay, 2010, No. 5, 5-12.

[49] "Erstens lässt sich keine internationale Ordnung, vor allem keine völkerrechtlich normierte nachthaltig nur durch eine Macht stiften genauso wenig wie allein militärische Überlegenheit dauerhaft Sicherheit schafft. Zweitens muss eine internationale Rechtsordnung zumindest von ihrenn wichtigsten Mitgliedern als legitim anerkannt und dementsprechend respektiert werden." (U. Lappenküper & R. Marcowitz, „Einführung", in: U. Lappenküpper & R. Marcowitz (eds.), Macht und recht: Völkerrecht in den internationalen Beziehungen [Wissenschaftliche reihe; 13], Paderborn, Schöningh, 2010, XXIII).

[50] I. Clark, Hegemony in International Society, Oxford, Oxford UP, 2011, 32; A. Buchanan, "The Legitimacy of International Law", in: S. Besson & J. Tasioulas (eds.), The Philosophy of International Law, Oxford, Oxford UP, 2010, and J. Tasioulas, "The legitimacy of international law", ibid., 79-96.

[51] Bourdieu's concept of implicit practical logic reinforced this hypothesis (cf. infra).

[52] Vauban to Louvois (Louis XIV's Secretary of State for War), 4 October 1675: "Le Roi devrait un peu songer à faire son pré carré […] soit par traités, soit par une bonne guerre" (F. Dhondt, Op Zoek naar Glorie in Vlaanderen. De Zonnekoning en de Spaanse Successie, 1707-1708, Heule, UGA, 2012, 72). In the same sense : P.W. Kahn, "Imagining Warfare", European Journal of International Law XXIV (2013), No. 1 (Feb), 207: "War is declared; it is a political act spoken in the sovereign voice. War is never a judicial conclusion founded on a claim of right."

[53] G. Bacot, La doctrine de la guerre juste [Histoire], Paris, Économica, 1989, 86 p. R. Lesaffer, "Paix et guerre dans les grands traités du dix-huitième siècle", Journal of the History of International Law-Revue d'histoire du droit international VII (2005), No. 1, 24-42; J.-C. Monod, "La déstabilisation humanitaire du droit international et le retour de la « guerre juste » : une lecture critique du nomos de la terre", Les études philosophiques, 2004, No. 68, 39-56 ; F. H. Russell, The Just War in the Middle Ages [Cambridge Studies in Medieval Life and Thought ; 8], Cambridge, Cambridge UP, 1975, 332 p.

intervention of a superior authority. In reality, sovereigns disposed of a broad array of possibilities for solving their conflicts themselves, stretching from all-out war to a peace treaty[54]. Third party-mediation[55], arbitration[56] or the resort to individual or general reprisals[57] permitted to solve problems within the borders of the balance system[58].

B. Research Hypotheses

Any scientific research entails a choice of "facts deemed relevant or the elements that actually constitute them, hypotheses, theories that should be confronted with the facts[59]". Moreover, in the present undertaking, the selected cases ("Eighteenth-Century European International Relations after the War of the Spanish Succession" and "de Gaulle's contestation of the Cold War bipolar world in the 1960s") served to test a theoretical hypothesis. I attempted to gain an understanding of the underlying structures which function or guide practice in two diverse historical periods. My yardstick for comparison was the enunciation of anti-hegemonic legal discourses, within the framework of the Balance of Power-metaphor, as used by the actors themselves[60].

Schematically, the main hypotheses can be understood as follows:

Anti-hegemonic discourse	**18th century**	**Post 1945**
Source of Law	New treaties, consent	Bilateral treaty, consent
Legal change	Open and flexible framework	Normative diversity
Politics	Prima donna, consensual	Egalitarian, sovereignty-based

Hegemonic discourse	**18th century**	**Post 1945**
Source of law	Older, unilateral norms	Institutions
Legal change	Fixed and immutable	Forward looking, integration
Politics	Conflictual, "take it or leave it"	Hierarchical, revolutionary

In this scheme, anti-hegemonic discourse is seen as a transformative vector in the "Trente Heureuses", or the decades following the peace treaties of Utrecht and Rastatt[61]. I did not venture to take this expression literally. Military intervention and formally declared wars did not disappear after 1713. However, the contrast[62] with the bellicose 17th century is striking[63]. Relying on the superior position of international treaties versus domestic norms, French and British diplomats stabilised international relations. Succession problems capable of inflaming all powers in Europe were solved in diplomatic talks. Negotiations served to amend or enlarge the consensus that brought the War of the Spanish Succession to an end (1711-1713).

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[54] R. Lesaffer (ed.), Peace treaties and international law in European history : from the late Middle Ages to World War One, New York, Cambridge UP, 2004, XII + 481 p.

[55] F. Dhondt, "Balance of Power Language and Mediation Rituals: The Quadruple Alliance's Italian Investitures (1718-1727)", 2000: The European Journal – 2000: Die Europäische Zeitschrift, XIII (2012), No. 2, 10-13; H. Duchhardt (Hrsg.), Zwischenstaatliche Friedenswahrung im Mittelalter und Früher Neuzeit [Münstersche Historische Forschungen; Band 1], Köln, Böhlau, 1991, 260 p.

[56] Gaurier, Histoire du droit international public [Didact Droit], Rennes: PUR, 2005, 525 p., 415.

[57] Grewe, Epochs, 386.

[58] F. Dhondt, "Legal Discourse between Integration and Disintegration: The Case of the Peaceful Succession Struggles, 1713-1739", in: J. Oosterhuis & E. Van Dongen (eds.), European Traditions: Integration or Disintegration ?, Nijmegen, Wolf Legal Publishers, 2013, 159-174.

[59] I. Scobbie, "In bed with Alcibiades: theory and doctoral research", EJIL!Talk, 4 January 2013 [http://www.ejiltalk.org/in-bed-with-alcibiades-theory-and-doctoral-research-3/, last accessed 31 January 2013].

[60] F. Dhondt, "Law on the Diplomatic Stage: the 1725 Ripperda Treaty", in: V. Draganova, L. Heimbeck et al. (eds.), Die Inszenierung des Rechts - Law on Stage [6 Jahrbuch Junge Rechtsgeschichte - Yearbook of Young Legal Historians 2010], München, Martin Meidenbauer Verlag, 2011, 303-324.

[61] E. Le Roy Ladurie, L'Ancien Régime. T. 2: l'absolutisme bien tempéré, Paris, Hachette, 1991, 93.

[62] "Une époque de réparation et de tranquillité" (M. Huisman, La Belgique commerciale sous l'empereur Charles VI : la Compagnie d'Ostende: étude historique de politique commerciale et coloniale, Bruxelles, Lamertin, 1902, 501).

[63] A. Corvisier, "Présence de la guerre au XVIIe siècle", in: L. Bély, J. Bérenger & A. Corvisier (dir.), Guerre et Paix dans l'Europe du XVIIe siècle, Paris, S.E.D.E.S., 1991, 13.

De Gaulle's challenge to the bipolar world order after 1945, however, started from an opposite position. The Utrecht system was on the rise after 1713. Chapters 2 and 3 will show Franco-British cooperation growing to an apex in the 1720s, when the legal structure of the mediators' operational methods at the Congress of Cambrai will exert a decisive influence on the other powers' arguments. French contestation of the bipolar Cold War order, however, seemed to be going against the course of history. Economic and military integration produced a new hierarchical system, restricting traditional state freedom.

Hegemonic discourse, by contrast, stood for Imperial legal argumentation in the "trente heureuses", clinging on to the Emperor's *prodominium*, or feudal overlordship, within the Holy Roman Empire, or to unilateral dynastic claims in the Spanish case. Internal opponents to the Utrecht settlement relied on older norms, such as the French *loi fondamentale* of inalienability of the crown, or the claims of Philip of Anjou to the whole of the Spanish composite monarchy.

Hegemonic discourse after 1945 should be seen as the revolutionary idea to structure the world in two blocs, on the basis of radically different value systems (market economy v. socialist planning). As such, the promotion of these values had their repercussions on the internal organisation of the participating states. In the 18th century, alliance between princes were limited to norms governing their mutual conduct. However, the ideological programme behind the 20th century division tended to reduce sovereignty, in favour of the realisation of common goals. Both blocs created institutions on a higher level. States originally contracted into them, but had to note that, as cooperation increased, they had abandoned competences and thus aspects of their sovereignty. These dynamics were forward-looking and designed to incrementally undermine the European state system as it functioned after the Peace of Westphalia (1648), or –in the present dissertation- the Peace of Utrecht (1713). France, in reaction against this logic of bloc building, which subjected interstate relations to supervision by the dominant power in each ideological camp, brandished the fundamental rights of states against interference. In other words, hegemonic and anti-hegemonic argumentation had changed in nature and purpose. Whereas the former had been used to innovate after Utrecht, it became a reference to a safe haven of fundamental state rights in the past. Conversely, whereas the dominant position of the Emperor had always been under ideological and increasingly under material attack in the Early Modern period, Atlantic and European integration were only at the beginning of an impetuous development. The dialogue between these two sets of argumentation is, in my hypothesis, recurring in the structure of international politics. Both strands are simultaneously in search of historical, precedent-based, or moral, principle-based legitimacy. The legal translation of this fundamental need has been at the core of my research.

III. Normativity: law as interaction in the Society of States

"Powerful nations obey powerless rules[64]". Law is the ultimate expression of consensus between parties, since they judge to feel bound by it. Studying international law thus requires a broadening of the normativity perspective, irrespective of a document's formal status as a source of law[65]. This means that not only hard, written norms count. In essence, the classical law of nations is of a liberal tendency: only state consent can bind autonomous, sovereign and equal entities[66]. According to the International Court of Justice's statute[67], international custom[68] (state behavior, confirmed by an intention to have this new standard set as a rule of law) or "the general principles of law recognized by civilized nations" bear the

[64] T. Franck, The Power of Legitimacy Amongst Nations, Oxford, Oxford, UP, 1990, 3.

[65] R. Howse & R. Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters", Global Policy I (2010), No. 2, 127-136

[66] G. Jellinek, Die rechtliche Natur der Staatenverträge : ein Beitrag zur juristischen Construction des Völkerrechts, Wien, Hölder, 1880, 66 p.

[67] A. Rasulov, "The Doctrine of Sources in the Discourse of the Permanent Court of International Justice", in: M. Fitzmaurice & C. J. Tams (eds.), Legacies of the Permanent Court of International Justice [Queen Mary Studies in International Law; 13], Leiden, Martinus Nijhoff, 2013, 271-319; A. Zimmerman, C. Tomuschat, K. Oellers-Frahm, C. J. Tams (ed.), The Statute of the International Court of Justice: a commentary [Oxford commentaries on international law], Oxford, Oxford UP, 2012, lii + 1745 p. See as well A. Eyffinger, La Cour international de Justice 1946-1996, La Haye, Kluwer Law International, 1999, 428 p.

[68] D. F. Vagts, "International Relations Looks at Customary International Law: A Traditionalist's Defence", European Journal of International Law XV (2004), 1031-1040.

same intrinsic quality as treaties, albeit accessorily. My study was concerned with international law, in its literal sense of *law between sovereigns*[69]. It aimed at a deliberate comparison of inter-state relations and the permanence in the diplomatic function[70], Consequently, I left out important developments such as the furthering of collective citizen welfare[71], human rights or the position of the individual, international criminal law[72], which lead to situations "unthinkable in earlier times[73]".

Contemporary international law, although marked by a state consent-centered hierarchy, recognizes other sources as well. State practice, for instance, has always been seen as a classical source of international law[74]. Soft law has been recognized a source of law[75]. The present contribution, however, focused on a universal attitude in the confrontation of diplomats, who are political practitioners as the agents of their government, and legal arguments, conferring legitimacy on state acts. This exercise necessitatd the analysis of diplomatic correspondence as a supplementary legal source. I did not aim to write a history of "international political thought" in the line of Quentin Skinner[76] or David Armitage[77]'s writings. Not political or legal theory, but legal history was my focus. Legally relevant practical logic, or "the life of the law" was at the center.

The field of the history of public international law is in full frenzied activity, as general public international lawyers again turn to theory and history[78], influenced *inter alia* by Martti Koskenniemi's seminal work on the key generation of lawyers during the transition of the late 19th into the 20th century[79], or his theoretical work[80], linking the political character of international law[81] to the necessity of meta-juridical self-reflection or the need of shared interpretation principles[82]. Attempts to render international law autonomous, and to

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[69] R. Zouche, Iuris et Iudicii Fecialis, sive, Iuris Inter Gentes, et Quaestionium de Eodem Explicatio (Ed. T.E. Holland) [The Classics of International Law], Washington, Carnegie Institute, 1911 [1650], XVI + 204 + 186 p.

[70] M.-C. Kessler, Les ambassadeurs [Sciences Po Gouvernances], Paris, PSP, 2012, 17 and 382-383: "L'ambassadeur n'est pas un anachronisme comme l'écrivait Zbigniew Brzezinski en 1970. La fonction comporte un noyau stable et pérenne qui résiste à l'évolution du monde moderne […] L'institution, très liée dans sa forme première à l'État classique, westphalien et wéberien, est devenue mondiale. Tous les États, quels qu'ils soient, même avec une souveraineté et des frontières improbables, ou une autorité discutée, se targuent d'avoir une diplomatie et un ambassadeur. La diplomatie vient au secours des États. Elle aide à leur création, à leur maintien et à leur reproduction."

[71] E. Jouannet, Le droit international libéral-providence: une histoire du droit international, Bruxelles, Bruylant, 2011, 351 p.

[72] W.G. Grewe, Nürnberg als Rechtsfrage, Stuttgart, Klett-Cotta, 1947, 111 p.; R. Teitel, Humanity's law, Oxford, Oxford UP, 2011, XII + 304 p.

[73] Teitel, Humanity's law, 39.

[74] C. Reus-Smit, "Obligation through Practice," International Theory, III (2011), No. 2, 339-347.

[75] A. T. Guzman, "Against consent", VJIL, LII (2012), No. 4, 747-790; A. Nollkaemper, "Inside or Out: Two Types of International Legal Pluralism", in: J. Klabbers & T. Piiparinen (eds.), Normative Pluralism and International Law, Cambridge, Cambridge UP, 2013 (forthcoming); P.B. Stephan, "Privatizing International Law", VLR, XLVII (2011), 1573-1664; P. Weil, "Vers une normativité relative en droit international public ?", Revue Générale de Droit International Public, 1982, 5-47.

[76] Q. Skinner, The Foundations of Modern Political Thought, Cambridge: Cambridge UP, 1978, 2 v.; A. Brett, J. Tully & H. Hamilton-Bleakley (eds.), Rethinking the Foundations of Modern Political Thought, Cambridge, Cambridge UP, 2006, X + 298 p.; H. A. Lloyd, G. Burgess & S. Hodson (eds.), European Political Thought 1450-1700, New Haven (Conn.), Yale UP, 2007, 658 p.

[77] Armitage, Foundations of modern international thought.

[78] E.g. J. Crawford & M. Koskenniemi, eds., The Cambridge Companion to International Law; A. Orakhelashvili, ed., Research Handbook on Theory and History of International Law, Cheltenham, Edward Elgar, 2011, 566 p.

[79] M. Koskenniemi, The gentle civilizer of nations : the rise and fall of international law, 1870-1960 [Hersch Lauterpacht memorial lectures], Cambridge, Cambridge UP, 2001, XIV + 569 p., G. Bandeira Galindo, "Martti Koskenniemi and the Historiographical Turn in International Law", European Journal of International Law XVI (2005), 539-559.

[80] Koskenniemi, From Apology to Utopia.

[81] M. Koskenniemi, La politique du droit international [Collection Doctrine(s)], Paris, Pedone, 2007, 423 p.; Id., "What Should International Lawyers Learn from Karl Marx ?", Leiden Journal of International Law VII (2004), No. 2, 229-246.

[82] M. Koskenniemi, Fragmentation of international law: difficulties arising from the diversification of international law. Report of the Study Group of the International Law Commission [Publications of the Erik Castrén

see it as a "practical craft[83]" carrying autonomous and self-evident ideas, are long gone. Influenced by the general international turn in historiography[84], the select studies in the history of international law[85], as well as the most recent collective work tried to incorporate non-Western or European dimensions, stressing the absence of a "single global history" and the importance of "many global experiences"[86]. Nevertheless, my study was devoted to classical European international relations and did not venture into this field. Yet, the otherness (*altérité*) which lies at the basis of the recent attempts to contextualize contemporary Western-dominated international law, has, in my view, been present within the European system itself[87]. This follows the absence of an effective regional hegemon: international structure reflects states' beliefs about legitimate behaviour[88]. At least part of the belief in the universality of "European" international law is grounded in its de-concentrated character.

A. Cultural Turn in Historiography: Lucien Bély

Yet, the cultural turn in diplomatic history opened a new perspective on the law as an explanatory factor of human behaviour. Lucien Bély's path-breaking study on the Congress of Utrecht appeared in 1990[89]. Bély linked the anthropological and cultural *acquis* of the *Annales*-school with "traditional" diplomatic history[90]. This combination has proven to be extremely fruitful[91]. Even twenty years ago, the amount of historical writing on the Spanish Succession[92] or the congresses that ended the question, was gargantuan. Yet, the richness and vastness of the available material still makes new interpretations possible, as historical knowledge in other domains progresses. First, diplomatic correspondence flew from the pen of educated, civilized men. The main actors in the networks between courts were commercial experts[93] or

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Institute of International Law and Human Rights], Helsinki: Erik Castrén Institute of International Law and Human Rights, 2007, III + 306 p.; A. Orakhelashvili, The interpretation of acts and rules in public international law [Oxford monographs in international law], Oxford, Oxford UP, 2008, 3: "In our time, where many international lawyers have opted for a narrow field of specialisation, the risk of general structural factors being misunderstood and underestimated is greater than ever."; J. P. Trachtman, "Fragmentation and Coherence in International Law", Tufts University Working Paper Series, 25 p. [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908862, last consulted on 31 January 2013].

[83] Koskenniemi, "International law in the world of ideas", 53.

[84] Armitage, Foundations, 18.

[85] A. Anghie, Imperialism, Sovereignty and the Making of International Law [Cambridge Studies in International and Comparative Law], Cambridge: Cambridge UP, 2004, 356 p.; Y. Onuma, A Transcivilizational Perspective on International Law [Pocketbooks of the Hague Academy of International Law], The Hague, Martinus Nijhoff, 2011, 480 p.

[86] A. Peters, B. Fassbender, S. Peter & P. Högger (eds.), The Oxford Handbook of the History of International Law [Oxford Handbooks in Law], Oxford, Oxford UP, 2012, 10.

[87] "L'équilibre des puissances entre États ou entre groupes d'États, n'est pas le droit lui-même, mais il est la meilleure garantie du droit", A. Pillet, "Recherches sur les droits fondamentaux des États dans l'ordre des rapports internationaux et sur la solution des conflits qu'ils font naître", Revue Générale de Droit International Public, 1898, 252-253).

[88] S. A. Kocs, "Explaining the Strategic Behaviour of States: International Law as System Structure", International Studies Quarterly, XXXVIII (1994), No. 4, 554.

[89] L. Bély, Espions et ambassadeurs au temps de Louis XIV, Paris: Fayard, 1990, 905 p.

[90] L. Bély, "Les larmes de M. de Torcy: la leçon diplomatique de l'échec, à propos des conférences de Gertruydenberg (mars-juillet 1710)", Histoire, Économie et Société, 1983, No. 3, 429-456.

[91] L. Bély, "Les Temps Modernes", in: J.-F. Sirinelli, P. Cauchy & C. Gauvard (dir.), Les historiens français à l'oeuvre 1995-2010, Paris, PUF, 2010, 261-275.

[92] W. Churchill, Marlborough. His Life and Times, London: Harrap, 1933, 4 v.; A. Kirchhammer, Feldzüge des Prinzen Eugen von Savoyen. Nach den Feld-Acten und anderen authentischen Quellen, Wien, Gerold, 1876-1892, vol. 3-15; A. Mignet, Négociations relatives à la Succession d'Espagne sous Louis XIV [Collection de documents inédits sur l'histoire de France; première série: histoire politique], Paris: Imprimerie Royale, 1835-1842, 3v.; A. Legrelle, La Diplomatie française et la Succession d'Espagne, 1659-1725, Paris, Pichon, 1888-1892, 4 v.; F.E. Pelet & J.J.G. de Vault, Mémoires militaires relatifs à la succession d'Espagne sous Louis XIV [Collection de documents inédits sur l'histoire de France; première série: Histoire politique], Paris, Imprimerie Nationale, 1835-1862, 11 v.

[93] F. Dhondt, "L'équilibre européen et la Succession d'Espagne. L'épisode révélateur des négociations de Nicolas Mesnager en Hollande, 1707-1708", in: V. Demars-Sion, R. Martinage, H. François & A. Deperchin (dir.), Diplomates et Diplomatie. Actes des Journées Internationales tenues à Péronne du 22 au 23 mai 2009 [Société

noblemen brought up by preceptors not averse to the nascent republic of letters, e.g. the French Regent, who had abbot Dubois as his teacher in public law[94]. Their lives are extensively documented in letters leaving in all directions and touching upon so many aspects of 18th century European society, that historians could almost reconstruct every day. Second, Bély rehabilitated rules of precedency [95] or diplomatic incidents, both of them classified as objects of mere erudition, or antiquarianism[96]. Again, applying the *Annales'* practice to explore the "*non-dits*" or "*choses banales*", or the study of continuity, rather than that of disruptions, reveals anchored mentalities, linked to the social and cultural context wherein law lived.

B. Sociology: Pierre Bourdieu

A second source of inspiration for my work are Pierre Bourdieu's notions of *field* theory and *praxeology*. Both terms may be classified as vague. Moreover –as the edition of his course on the State at the Collège de France shows[97]- it is sometimes difficult to distinguish between inspiration and recuperation of well-known earlier work by historians or legal historians. Yet, both terms are particularly useful to describe the social structure of international relations. In spite of a fundamental anarchy, a consequence of the lack of a proper monopoly of violence[98], the European international system has often been characterized by stability, rather than by conflict. To the 21st century jurist, however, the *horizontal* law between states of the early modern period seems inadequate to explain this stability, in respect to the *vertical* institutions which emerged after the first and second world war. An era as the "Trente heureuses" cannot then be explained by anything else but precarious and temporary good personal relationships between prominent internal political actors.

Yet, interactions between actors create new social systems in their own right. As Bourdieu has pointed out repeatedly, language in human interactions is not neutral, but represents power relationships[99]. The agreement on concepts, or a string of concepts carrying legitimacy, is impossible without implicitly recognizing the power of the player who defines them. Bourdieu described the monopoly of the lawyer during the French high middle ages as the power to render monarchical acts acceptable and legitimate.

My work started from the hypothesis that the lawyers working as diplomats, secretaries, secretaries of state, undersecretaries of state or *premiers commis*[100], had a similar function in the 18th century. Not only on an internal level, but most of all on a *horizontal* basis, when they interacted with their counterparts in another sovereign's service. They shape the practical international law discourse, serving as the unique vector of international politics, and render themselves indispensable in carrying out foreign policy. This essential function of the lawyer as an "apologist" of power is not a unidirectional phenomenon. Legal

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d'Histoire du Droit et des Institutions des Pays Flamands, Picards et Wallons], Lille, Université Lille 2-Centre d'histoire judiciaire, 2013, 97-112.

[94] G. Chaussinand-Nogaret, Le Cardinal Dubois, 1656-1723 ou une certaine idée de l'Europe, Paris: Perrin, 2000, 26.

[95] J. Rousset de Missy, Mémoires sur le rang et la préséance entre les souverains de l'Europe et entre leurs ministres représentans suivant leurs différens Caractères. Pour servir de supplement à l'ambassadeur et ses fonctions de Mr. de Wicquefort, Amsterdam, François l'Honoré & fils, 1746, 258 p.

[96] E.g. L. Bély, L'Art de la Paix en Europe: naissance de la diplomatie moderne, Paris, PUF, 2007, 745 p.; L. Bély & G. Poumarède (dir.), L'Incident diplomatique (XVIe-XVIIIe siècle), Paris, Pedone, 2010, 416 p.

[97] P. Bourdieu, Sur l'État: cours au collège de France, 1989-1992 (éd. P. Champagne, R. Lenoir, F. Poupeau & M.-C. Rivière) [Cours et Travaux], Paris, Seuil, 2012, 656 p.

[98] "iubeo, ergo sum" (A. Cassese, "States: Rise and Decline of the Primary Subjects of the International Community", in: A. Peters & B. Fassbender (eds.), The Oxford Handbook of the History of International Law, 51. W. Reinhard, Geschichte der Staatsgewalt : eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart, München: C.H. Beck, 1999, 631 p.

[99] P. Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field", Hastings Law Journal XXXVIII (1987), 827.

[100] The two or three top civil servants reporting directly to the Secretary of State, in charge with a certain set of geographic areas (J.-P. Samoyault, Le secrétariat d'État des Affaires étrangères sous Louis XV [Bibliothèque de la revue d'histoire diplomatique], Paris, Pedone, 1971, 35).

discourse itself is reinforced when experienced gatekeepers see its permanence as the exercise of their own symbolic dominance[101].

C. Cultural Constitutional History: Barbara Stollberg-Rilinger

A third source of inspiration was Barbara Stollberg-Rilinger's work *Des Kaisers alte Kleider*[102], wherein she described how traditional political history's understanding of the Holy Roman Empire was incomplete. Based on a narrow positivist understanding of the law, previous generations of historians failed to recognize the power of rituals, symbols and communications, or… law on the political stage. My initial idea was to see balance of power as a formal converging principle. The relative stability of international relations made a hierarchy of norms possible. Early modern legal pluralism would thus have been organized around the principle of sovereign equality and consent, introducing the precedence of international norms over vertical ones. Stollberg-Rilinger's work is a warning not to mistake a symbol for a legal principle, or to swap effective legal culture and doctrinal construction. Especially when comparing two periods, the positivist trap, and thus the attempt to prefer the seemingly most congruent explanation, can be deceitful. Ancien Régime legal culture, and diplomacy in general as well "did not suppress its institutions", but "superimposed new forms by allowing the old ones to remain dormant and in atrophy without realizing that one day they might be resuscitated[103]". Social or legal institutions and their perceptions can live through a cyclical evolution, whereby their legitimacy does not collapse, but can gently erode, at a slower pace than first thought[104]. Thus, the initial scheme sketched above (Section 1: I) whereby, in the eighteenth century, Balance of Power and normative hierarchy impose themselves from 1713 on, should be nuanced from the start on, and understood as an attempt to describe one distinct pattern in a general legal pluralism.

[101] "International legal ideas […] have a considerable historical, intellectual and emotional pull […] They work as critique of power and as instruments of power", Koskenniemi, "International law in the world of ideas", 61.

[102] B. Stollberg-Rilinger, Des Kaisers alte Kleider: Verfassungsgeschichte und Symbolsprache des Alten Reiches, München, C.H. Beck, 2008, 416 p.; Id., "Verfassungsgeschichte als Kulturgeschichte", ZRG CXXVII (2010), 1-32.

[103] S. Hanley, The lit de justice of the kings of France : constitutional ideology in legend, ritual, and discourse [Studies presented to the International commission for the history of representative and parliamentary institutions 65], Princeton, Princeton UP, 1983, 343.

[104] E.g. B. Stollberg-Rilinger, "Le rituel de l'investiture dans le Saint-Empire de l'époque moderne: histoire institutionnelle et pratiques symboliques", RHMC LVI (2009), 7-29.

Section 2: Sources and Methodology

I. Sources

A. Eighteenth Century

Apart from the contemporary publications (pamphlets in Rousset de Missy[105]/treaties and other papers in Dumont), mainly diplomatic instructions, for Britain[106] and France [107], have been edited in the 20th century. Nevertheless, this still remains a limited proportion of the available primary sources in handwriting. As well in the *Archives Diplomatiques* (La Courneuve) as in the *State Papers* series (Kew), letters, notes, memoranda, secret intelligence, summaries or overviews, leaflets and legal documents appear in –at best- chronological order. Moreover, as British diplomacy is concerned, private individuals tended to take their papers away to the family manor[108]. Over time, most of these papers have been deposited by descendants at the British Museum (now British Library). As my research was primarily concerned with the standard management of foreign policy, potentially revealing diplomatic legal *habitus*, I concentrated on two main series, with sporadic incursions. For Britain, I examined the *State Papers Foreign: France* series continuously from 1713 to 1739 on, with accessory inquiries into the *Madrid* (1718, 1725, 1733), *Vienna* (1718, 1725, 1733) or *Brussels* (1733-1734) sub-series. Conversely, for France, where the combination *Correspondance Politique* and *Correspondance Politique (supplément)* is too vast for the scope of a single four-year dissertation, the starting point has been in the *Mémoires et Documents*-fund (*France-Espagne-Allemagne-Autriche-Pays-Bas-Sardaigne-Angleterre*), where Louis-Nicolas Le Dran's writings have often provided shortcuts and résumés. The core of my dissertation's material was thus in the *State Papers Foreign: France* series. Moreover, Britain preferred to carry out its foreign policy through negotiations by its envoys abroad, rather than with foreign residents in London[109]. By contrast, the core of French foreign policy was the administration, which directly interacted with Stair[110], Schaub[111], Sutton[112], Horatio Walpole[113] or Waldegrave[114].

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[105] J. Rousset de Missy, Les intérêts présens des puissances de l'Europe, Fondez sur les Traitez conclus depuis la Paix d'Utrecht inclusivement, & sur les Preuves de leurs Prétentions particulieres, La Haye, Adrien Moetjens, 1733, 608 + 768 p. See as well Id., Les interêts presens et les prétentions des puissances de l'Europe : fondez sur les traitez depuis ceux d'Utrecht inclusivement, et sur les preuves de leurs droits particuliers; augmentez d'un supplément de diverses prétensions, entre autres de celles du Roi de Prusse sur la Silésie, La Haye, Adrien Moetjens, 1731, 1017 + 900 + 90 + 879 + 110 p.

[106] L.G. Wickham Legg (ed.), British diplomatic instructions, 1689-1789 [Camden Third Series; 35]. London, Offices of the Royal Historical Society, 1925-1927-1930. Vol. 2, 4 & 6 [France, 1689-1744].

[107] Recueil des instructions données aux ambassadeurs et ministres de France: depuis les traités de Westphalie jusqu'à la Révolution française. Britain (XXV): J.J. Jusserand & P. Vaucher (dir.), Paris, CNRS, 1960, XXV + 581 p.; Dutch Republic (XXI-XXIII): L. André & É. Bourgeois (dir.), Paris, Fontemoing, 1922-1924, 3 v.; Spain (XII-XIIbis-XXVII): A. Morel-Fatio & H. Léonardon (dir.), Paris: F. Alcan/CNRS, 1898-1899, XL + 434 + 498 p. & D. Ozanam (dir.), Paris, CNRS, 1960, X + 122 p.; Vienna (I): A. Sorel (dir.), Paris, F. Alcan, 1884, XV + 552 p.; Mainz (XXVIII)-Cologne (XXIX)-Trier (XXX): G. Livet (dir.), Paris, CNRS, 1962-1963, LXIX + 307 + LXXII + 400 + CLXVII + 360 p.

[108] Dureng, Le Duc de Bourbon, 12-20.

[109] The "English Plan" of diplomacy; J. Black, British diplomats and diplomacy, 1688-1800, Exeter, Exeter UP, 2001, 64; see appendix: presence at the Londonian diplomatic post. See as well, Dhondt, "La représentation du droit".

[110] John Dalrymple, 2nd earl of Stair (1673-1747). Ambassador Extraordinary in Paris, 29 January 1715-21 June 1720. Served as a brigadier in Marlborough's 1708 campaign in Flanders, and carried the news of the allied victory at Oudenaarde (11 July 1708) to London. Dhondt, Op Zoek naar Glorie, 393.

[111] Luke Schaub (1690-1758) became secretary to the British ambassador in Vienna, baron Cobham (1715) and occupied the post of envoy at the latter's return to Britain, while Abraham Stanyan (1669-1732) occupied the post of envoy extraordinary and plenipotentiary (2 December 1716-18 March 1718). In October 1717, he went over to England as Stanhope's confidential secretary. See Philip Woodfine, 'Schaub, Sir Luke (1690–1758)', Oxford Dictionary of National Biography, Oxford University Press, 2004 [http://www.oxforddnb.com/view/article/2479]. Saint-Saphorin was appointed in October 1716 as the personal envoy of George I as elector of Hanover. Only from March 1718, at Stanyan's departure for Constantinople, where the latter took over from Robert Sutton, did Saint-Saphorin represent Britain at the Imperial court. In Parliament, Saint-Saphorin was under attack, since he occupied a post reserved for British subjects under the Act of Settlement (Gehling, Saint-Saphorin, 21-22)

[112] The Robert Sutton who replaced Stair in Paris, served under his cousin Lexington (plenipotentiary at the Utrecht Peace conference) as secretary from 1697 on, when he abandoned the church. After his cousin's retreat due

B. Post 1945

Recent handbooks on the legal discourse of the foreign service are rare[115]. Yet, diplomatic practice has been extensively published for France (*Documents Diplomatiques Français*[116]) and Germany (*Akten zur Auswärtigen Politik der Bundesrepublik Deutschland*[117]). In view of the emphasis of my research on the first cluster, the second part being accessory and comparative, I have limited this inquiry to the *DDF* and *AAPD*-series, bringing argumentation in bilateral meetings between heads of state and government, legal advice or diplomatic dispatches in relation with the typology observed in the first part.

II. Methodology

> "International Law is not a blueprint, still less a logical system, but a language within which contrasting interests and values may be presented, a habit in which they may be dressed […] Often the good answers are intensely contextual: a compromise between opposing parties that can work only where it has been attained."
> Martti Koskenniemi[118]

> "Eine Entzifferung der Grammatiken der Wortverwendungen, der Denkstrukturen und der Gefühle der Vergangenheit […] setzt voraus, sie erst einmal als fremde zu akzeptieren und der Neigung entgegenzuwirken, vordergründig sprachliche Assonanzen zwischen gestern und heute mit den Etiketten "schon" und "noch" zu bekleben."
> Michael Stolleis[119]

My thesis had both the advantage and the disadvantage to be an interdisciplinary undertaking between the disciplines of law and history. Can history be seen as a science ? On one hand, a considerable number of renowned scholars doubt that one can ever become a good historian by sticking to a dry enumeration of

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to ill health, he took over as resident, to be appointed ambassador in Constantinople in 1700, where he remained until 1717. As such, he was appointed mediator in the Turkish-Austrian conflict, for the peace conference of Passarowitz. In Paris, Sutton would soon be joined by Schaub (March 1721), who obtained the title of ambassador. In November 1721, Sutton left Paris for Britain, where he became an MP in April 1722 and sub-governor of the Royal African Company in 1726. A financial scandal (Sutton was accused of insider dealing in shares of the Charitable Corporation, in which he was a member of the management committee) caused his expulsion from the Commons in 1732. See Jeremy Black, 'Sutton, Sir Robert (1671/2–1746)', rev. Oxford Dictionary of National Biography, Oxford University Press, 2004; online edn, Jan 2008 [http://www.oxforddnb.com/view/article/38037].

[113] 1678-1757, Worked as a secretary to James Stanhope during the War of the Spanish Succession and supported Charles of Habsburg as King of Spain, then followed Charles Townshend to the Geertruydenburg negotiations. Opposed to the treaty of Utrecht as "Britain's shame". (Re-)negotiates the Barrier Treaty at the Hague in 1716. From 1723 on in Paris, where he turned into a staunch supporter of the Franco-British alliance, inter alia thanks to his good relationship with cardinal Fleury. C. de Baillon, Lord Walpole à la Cour de France, Paris, F. Didier, 1868², 389 p.; Coxe, Horatio Walpole, I; J. J. Murray (ed.), Honest Diplomat at The Hague. The private letters of Horatio Walpole, 1715-1716 [Indiana University Publications. Social Science Series, No. 13], London, Ayer Publishing, 1971 [1955], 394 p.

[114] James First Earl Waldegrave (1684-1741). See Philip Woodfine, 'Waldegrave, James, first Earl Waldegrave (1684–1741)', Oxford Dictionary of National Biography, Oxford University Press, 2004; online edn, May 2008 [http://www.oxforddnb.com/view/article/28437, accessed 28 May 2013]

[115] M. Schweitzer & A. Weber, Handbuch der Völkerrechtspraxis der Bundesrepublik Deutschland, Baden-Baden: Nomos, 2004. 862 p. Although basic material has been made available in the main journals, e.g. the annual Völkerrechtliche Praxis der Bundesrepublik Deutschland in the Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, or the Chroniques des faits internationaux and the Vie internationale de la France in the Revue Générale de Droit International Public.

[116] Commission de publication des documents diplomatiques français & M. Vaïsse (dir.), Documents diplomatiques français, 1962-1968, Paris, Imprimerie Nationale/Bruxelles, PIE Peter Lang, 1998-2010, 11 v.

[117] Auswärtiges Amt (Germany) & H.-P. Schwartz (Hrsg.) [1962: K. Hildebrand; 1964: H. Haftendorn], Akten zur auswärtigen Politik der Bundesrepublik Deutschland 1962-1967, München, Oldenbourg, 1993-2010, 17 v.

[118] Koskenniemi, "International law in the world of ideas", 59. (our underlining)

[119] Stolleis, Geschichte des öffentlichen Rechts, I, 46 (our underlining).

facts, or the constitution of an objective narrative[120]. History is an art, a craft one can learn by observing the implicit logic of a master at work, and not a codified and predefined procedure. A researcher's individual pleasure and drive seem to have been behind the inspiring major works of historiography, who are closely linked to empathy or aesthetic quality as a writer, more than to his rigid confinement to a sole paradigm[121]. On the other hand, historiography is subject to scientific waves or fashions, that can at times seem to crush or alter its very essence, at the image of the devastating impact of postmodernity on the epistemological foundations of historical knowledge[122]. As far as my study was concerned, history is not a conversation between historians (people writing on history), but is about facts in the past. Without the basic guidelines or *garde-fous*[123] of historical criticism, a historian cannot rank or counter-check the affirmations in his sources. I did not deal with theoretical or meta-historic aspects, which I rank in the realm of the respectable disciplines of philosophy and epistemology.

Conversely, law, as a living discipline, has always been close to practice. The legal science's object, *stricto sensu*, is a closed and auto-referential system of norms, whose existence stands as an axiom. Practitioners see science as a handmaiden, bringing systematisation and structure. Legal scholars traditionally are learned men with a thorough knowledge of positive law, sanctioned by the justice system[124]. As such, the utility of legal history seems instrumental, explaining norms' genealogy or putting older rules into their societal context. In the eyes of the historian, however, his colleagues in the law faculty stay aloof from intellectual developments in the broader humanities. Institutional or legal subjects get associated with late 19th-century German scholarship around figures as Leopold von Ranke[125], relics from an era imbued with the illusion of explaining history as a lawyer would explain an article of the Civil Code, without ever questioning the basic assumptions of his activity. International law has –19th century positivism left aside[126]- been an exception to this[127]. Many of its themes, including its very existence or universality as law of nations, are claimed by other disciplines as well, such as philosophy or theology[128].

I have chosen to focus on the *object* of my research, and to avoid getting entangled in other conceptual discussions than those closely related to my basic question: how did diplomats make use of state-created legal obligations in international relations, in two given cases: the "trente heureuses", and Charles de Gaulle's challenge to Cold War hegemonic discourse ? This choice entailed several risks. Positivist historians could judge that I ignored the *historicity or uniqueness* of events, made a needless abstraction of a legal discourse embedded in a multi-layered and far more complex cultural context, and ventured into a "History without Historicism[129]". Theoretical or philosophically oriented historians,

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[120] A. France, Le Jardin d'Epicure, Paris, Callman Lévy, 1895, 139: "L'Histoire n'est pas une science, c'est un art". ; "Even in writing the history of treaties it is possible to think for oneself" (A.W. Ward, "Review of E. Armstrong, Elisabeth Farnese, 'The Termagant of Spain', London, Longman, 1892", English Historical Review VIII (1893), No. 29 (Jan), 162).

[121] J. Kunisch, Friedrich der Große. Der König und seine Zeit, München, Beck, 2004, 9: "So ist Geschichte nicht einfach das Geschehene, das statisch Vorgegebene, sondern verdankt sich einer imaginativen, von Eingebung gelenkten Beobachtung, so dass […] der Geschichtsschreiber "mehr zu den Künstlern als zu den Gelehrten" gezählt werden müsse (Mommsen)."

[122] R.J. Evans, In defence of history, London, Granta Books, 2000, 371 p.

[123] L. Bély. L'art de la paix en Europe: naissance de la diplomatie moderne, XVIe-XVIIIe siècle [Le noeud gordien], Paris, PUF, 2007, 2.

[124] M. Van Hoecke, "Hoe wetenschappelijk is de rechtswetenschap ?", Tijdschrift voor Privaatrecht, 2009, 629-675; Id. (ed.), Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline ?, Oxford, Hart, 2011, 294 p.

[125] L. von Ranke, Die grossen Mächte, Leipzig: Philipp Reclam, 1917, 68 p.

[126] Cf. H. Lauterpacht, Private Law Soucrces and Analogies of Law, London: Longman 1927, ix: "The modern positivist doctrine […] a true offspring of the doctrine of sovereignty, […] could not countenance the intrusion, into the field of binding rules of international law, not directly derived from the will of the States." See Legohérel, Histoire du droit international public, 105-106; P. Macalister-Smith & J. Schwietzke, "Bibliography of the Textbooks and Comprehensive Treatises on Positive International Law of the 19th Century", Journal of the History of International Law-Revue d'histoire du droit international III (2001), 75-142.

[127] "Law is not a science; the lawyer's materials are not at all found in printed books; and law cannot divorce itself from politics" R. H. Steinberg & J. M. Zasloff, "Power and International Law", American Journal of International Law C (2006), 87.

[128] Koskenniemi, "International law in the world of ideas", 48.

[129] Hobson & Lawson, "What is History in IR ?", 420; "sed authoritas, non veritas, facit legem" (Hobbes, Leviathan, XXVI, 202, quoted in J. Schröder, Recht als Wissenschaft : Geschichte der juristischen Methode vom Humanismus bis zur historischen Schule (1500-1850), München, Beck, 2001, 98).

conversely, will abhor an all too factual and source-driven underpinning of a mere restatement of the same old realist principles of international relations: why write several hundred pages, if it is all about power and its varying legitimacy? What kind of difference between a political and a legal pretext, if both turn out to be pretexts after all[130] ? Positivist lawyers, on the other hand, will get the impression that there is not much law in my analysis, in view of the lack of sanctioning institutions. Alternatively, they can see this work at the most as an historical introduction to contemporary international legal source theory[131].

Primary sources (manuscript and published diplomatic correspondence, legal memoranda), drafted or finalised by the practitioners, the main actors of this research, occupy the most eminent place in my hierarchy of sources. Sometimes written as if their author was still reasoning and formulating his discourse, they serve as the most accurate mirror of international relations. My approach does not eliminate published treaties[132] or doctrine[133]. Quite the contrary. I aimed to complement them, and, consequently, to reinterpret them in the light of their immediate context or practical pedigree[134]. Or, in other words, to link two distinct types of knowledge: sophisticated political background analysis and public international law as expressed through state practice[135]. A mere deconstruction of discourse, or focusing on law as an object of symbolic communication only, would not help us any further than a state of the art would show us. This would, again, create a risk to fall in a factual analysis without intellectual depth. Ideas can originate in diplomatic negotiations, and die before the political process is completed. Yet, failure or non-explicit alternatives to seemingly self-evident paths chosen by the actors constitute a treasure for jurists as well as historians[136]. Documents ought to be studied for what they intended to say, and not merely for what they literally express[137].

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[130] E.g. Ruti Teitel (in reaction to J. Goldsmith & E. Posner, The Limits of International Law, New York, Oxford UP, 2005, 262 p.): "They see the increasing reliance on the uses of legalists discourse and institutions as epiphenomenal of Enlightenment narrative. In other words, they see this development as reflective of control by certain elites; they see the juridical shift to the law of conflict as merely a way to manage the balance of power" (Teitel, Humanity's law, 31 (our underlining); in the same sense: A. Vagts & D. Vagts, "Balance of Power", in: R. Bernhardt (ed.), Max Planck Encyclopedia of Public International Law, New York, North-Holland, 1984, VII, 13-15). On the debate between "realists" and "idealists" in international law, see as well T.-H. Cheng, When International Law Works, Oxford, Oxford UP, 2012, 340 p.

[131] E.g. D.J. Bederman, "Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs. by Friedrich V. Kratochwil", American Journal of International Law LXXXIV (1990), No. 3, 777: "Far from reconciling our two disciplines by developing a unified theory of state behaviour, this volume shows how far our studies have drifted apart" or A. Cassese, "States: Rise and Decline", 54: "Another striking feature of the world community in this initial stage (and until the 19th century) was the paucity of legal rules regulating international intercourse. States were both unable and uninterested in agreeing upon common standards of behaviour".

[132] R. Lesaffer, "In de marge van de rechtsgeschiedenis? Politieke verdragen als rechtshistorische bron (13de-18de eeuw)", Nieuwsbrief Standen en Landen/Bulletin d'Information Anciens Pays et Assemblées d'états, 1997, 60-76;Id., Europa: een zoektocht naar vrede? : 1453-1763 en 1945-1997, Leuven: Universitaire Pers, 1999, XXXIII + 694 p.

[133] E.g. P. Haggenmacher, Grotius et la doctrine de la guerre juste [Publications de l'Institut universitaire de hautes études internationales de Genève], Paris, PUF, 1983, XXIV + 682 p.; E. Jouannet, Emer de Vattel et l'émergence doctrinale du droit international classique [Publications de la Revue Générale du Droit International Public; Nouvelle Série; 50], Paris, Pedone, 1998, 490 p.; J.-M. Mattei, Histoire du droit de la guerre; L. von Ompteda, Literatur des gesemmten sowohl natürlichen als positiven Völkerrechts, Regensburg, Montags, 1785, 2 v. ; B. Sirks, "Bijnkershoek as author and elegant jurist", Tijdschrift voor Rechtsgeschiedenis LXXIX (2011), No. 2, 229-252; R. Tuck, The Rights of War and Peace: Political Thought and International Order from Grotius to Kant, Oxford, Oxford UP, 2001, 243 p.

[134] D. Heirbaut, "A Tale of Two Legal Histories. Some Personal Reflections on the Methodology of Legal History", in: D. Michalsen (ed.), Reading Past Legal Texts [Oslo Studies in Legal History; 1], Oslo, Unipax, 2006, 94: "For contextual legal historians the autonomy of law is anathema: law is anything but an isolated phenomenon, it is a product of a society that in its turn influences that same society."

[135] E.g. F. Dhondt, "So Great A Revolution: Charles Townshend and the Partition of the Austrian Netherlands, September 1725", Dutch Crossing: Journal of Low Countries Studies, XXXVI (2012), No. 1, 50-68.

[136] L. Bély, "Les larmes de M. de Torcy".

[137] "Les documents ont été étudiés en eux-mêmes plutôt que pour l'information qu'ils portent, pour ce qu'ils disent plutôt que pour ce qu'ils veulent dire", L. Bély, Espions et ambassadeurs, 11.

The analysis does not seem novel: one of Grotius's –an *ad hoc* diplomat himself- basic exercises was the accommodation of neo-scholastic theology[138] and Roman law[139] with the rules states actually accepted[140]. The relevance of a source is determined by its normativity, or the "oughtness" of a legal rule. For example, reiterating the building blocks of the international system, establishing a hierarchy between distinct legal sources, or the analysis of a contentious point between two parties by distinguishing their claims in opposite concepts. Any document which "does not merely describe some aspect of reality but poses requirements for it[141]", fell within the scope of my work. For the reasons above mentioned and foremost in view of the determining role of context, I preferred a chronological approach to a thematic one. If, politically speaking, "everything is in everything", the role of law in the very dynamics of negotiations can only be shown if the reader is presented the complete story.

Conclusion: Diplomatic Correspondence As The Legal Historian's Window On Legal Practice

Constructing a bottom-up history of public international law requires a study of the *interaction* between states and the legal language used to formulate claims and pretensions. Balance of Power-rhetoric, if not universal, then at least recurrent in international relations, offers the framework that enabled European diplomats to elaborate vague treaty norms. This practical legal process is hardly covered by traditional histories of international law, based on treaty publications or doctrinal writings. Starting from this angle, I identified two case studies: Franco-British tandem diplomacy after the Peace of Utrecht (1713) and French contestation of the bipolar Cold War world order (post 1945). Anti-hegemonic legal discourse served to convince other sovereigns and their representatives. Diplomatic relations or European states witnessed the formation, adaptation or interpretation of rules in a continuous process. Inspired by the turn to cultural diplomatic history (Lucien Bély), the field sociology of Pierre Bourdieu or Barbara Stollberg-Rilinger's cultural constitutional history, we can reinterpret primary sources once thought to have been exhaustively treated by historians of the late nineteenth and early twentieth century. As a result, our understanding of the *life of international law* can be considerably enhanced.

[138] C. von Kaltenborn, Die Vorläufer des Hugo Grotius auf dem Gebiete des Ius naturae et gentium sowie der Politik, Leipzig, Gustav Mayer, 1848, 250 + 148 p.

[139] D. J. Bederman, Classical Canons. Rhetoric, classicism and treaty interpretation [Applied Legal Philosophy], Aldershot, Ashgate, 2001, 340 p.

[140] H. Bull & B. Kingsbury (eds.), Hugo Grotius and international relations, Oxford: Clarendon press, 1992, XI + 331 p. On Grotius' life as a diplomat and Dutch academic, see H. Nellen, Hugo de Groot. Een leven in strijd om de vrede 1583-1645, Amsterdam, Balans, 2007, 829 p.

[141] Koskenniemi, "International law in the world of ideas", 60.