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Response to Peter Schröder's review of *Balance of Power and Norm Hierarchy. Franco-British Diplomacy after the Peace of Utrecht*. Brill Nijhoff: Leiden, 2015. (Studies in the History of International Law 7). xii-636 pp. €179.00 (hb). ISBN 978-90-04-29374-8.

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First of all, I would like to thank Prof. Schröder for devoting time to my book, and thus generating the opportunity, generously offered by the editors of H-France, to present the objectives and method of the work in question to this audience. As the reviewer remarks, I did not intend to write a book on the history of political thought. This explains the rest of his comments. My book is driven by bottom-up historical research, and connects complex primary sources to big strands of international legal history.<sup>[1]</sup> As a historian, my methodology is strictly positivist, starting from a classical critical approach to convoluted, complex and lengthy primary sources, with the help of mostly older literature and some inspiration from more recent trends in historical and legal research. As a jurist, my approach is blended. Lawyers are typically bound by a hierarchy of sources, conceived to the benefit of norms and acts emanating from authoritative bodies such as legislators and courts of law. In view of the lack of vertical coordination in the international order, researchers working on international law always had and have to justify their position.<sup>[2]</sup> This generated a focus on sources close to those of private law. Hypotheses challenged in this book range from the denial of the legal character of early modern international law to an irenic and utopian view of international law as the product a restricted number of great thinkers. The originality of my work primarily concerns the field of legal history. All events described are relatively well known in diplomatic history. My work applies a specific close reading of sources, focused on legal argumentation. It can be seen both as a contextual complement to a formalistic history of international law, and as a legal interpretation of political squabbles, offering a possible missing link in explaining the “*trente heureuses*” (Le Roy Ladurie).

Prof. Schröder feels my methodological and theoretical introduction (pp. 1-40) is confusing and insufficiently engaging with theoretical questions originating in the broader humanities and social sciences. Yet, as explained above, the focus of my work is on legal history. For lawyers, writing the history of a branch of the law is conditioned by a theory of sources, or of the essential normative consequences of the relevant actors' behavior. International law, moreover, is essentially horizontal and uncoordinated. The law of nature and theology are but conjectures, high up in the skies. Only positive acts by states, or bottom-up interpretations based on them,<sup>[3]</sup> can lead us to what is considered binding by the relevant social group, the European diplomatic community after the peace of Utrecht. This period is a remarkable gap in legal historiography. The main treatises are either published later on (Vattel, Réal de Curban)<sup>[4]</sup> or earlier (Pufendorf, Rachel). Between 1713 and 1740, neither France nor Britain count a “big name” in law of nations doctrine. Yet, it is inherent in state behaviour to use legal argumentation in foreign policy. My work investigated the British ambassadors in Paris and their French counterparts in London, as well as the elaborate memoranda produced by on the job trained foreign policy officials, such as Nicolas-Louis Le Dran or Antoine Pecquet Sr. and Jr. I did not aim to replace their judgement of political situations with mine. If quotes are elaborate, this is to stress both

the erudition and the reasoning style of the periods' main actors. Legal arguments are often implicit, buried in layers of cultural or political allusions.

Professor Schröder correctly argues that I do not apply Pierre Bourdieu's field theory, but merely mention it in my introduction as a source of inspiration. Bourdieu's description of power and relational argumentation, based on primary work by French (legal) historians, is identified as an argument to enlarge the perimeter of normativity which legal historians traditionally restrict to published treaties and academic treatises. Equally, Lucien Bély's treatment of diplomatic negotiations as cultural practices, or Barbara Stollberg-Rilinger's emphasis on extra-textual sources constituted sources of inspiration, but no roadmaps for this specific research. From the perspective of legal studies, an academic history of international law, written by, on and for academics, has little added value as far as my research question is concerned. Yet, big syntheses by Martti Koskenniemi[5] or Peter Haggenmacher[6] point to elementary reasoning styles, whose value can be exploited in analysing primary sources.[7] I doubt that including a section on legitimacy, or Hobbes and Carl Schmitt would have added any substance.

The main point of this work concerns the discussion of a hierarchy between one the one hand, obligations contracted by states in treaties, and, on the other hand, obligations originating in the domestic legal order. This issue is not treated as a question of doctrine, but as an argumentative *topos* in diplomatic negotiations after the Peace of Utrecht. How did practitioners, often not trained in a law faculty themselves, use the available legal instruments to convince their counterparts? By clinging to the primacy of the legal vector most likely to consolidate the power relations established during the War of the Spanish Succession. Norm hierarchy was not a philosophical issue, but revealed living assumptions on sovereignty and the very essence of the state. Professor Schröder deplores the lack of demonstration on "how diplomatic praxis could have led to the formation of a norm hierarchy". This suggests that the latter would be external to diplomatic negotiations, whereas, in reality, there was no strict divide between arguments drawn from domestic public law and treaty law. The use of the term "norm hierarchy" solely concerns argumentation in the political process. Its *sedes materiae*, the separation of the crowns of France and Spain, enshrined in the Franco-British preliminaries of peace concluded on 8 October 1711 and the ensuing peace treaties, was no coincidental political arrangement, but the fruit of half a century of diplomatic efforts, as well as a precedent for the upcoming Italian and German cases.[8]

It is puzzling that Professor Schröder argues that I was unable to offer "an adequate understanding of wherein the alleged norm hierarchy actually consisted and how it came into being", especially if combined with the assessment that the books brings a "well documented and substantiated [...] assertion that Stanhope and Dubois created a new diplomatic *praxis* and language". Both aspects are intimately linked. I would have expected more fundamental remarks e.g., on the in-depth analysis of the Conference of Cambrai (pp. 253-401), where a delicate interplay of legal orders mixes with the mediating role attributed to France and Britain by the treaty of the Quadruple Alliance. Only a detailed analysis can show the impact of legal reasoning in negotiations. A mere focus on political outcomes bars our access to this process.[9] The baseline of this work is that nothing in European diplomacy between 1713 and 1740 can be understood without the necessary legal background. Claims and counterclaims were not mere objects, but stimulated an active process of exchange. The use of legal arguments was not merely passive or instrumental, in an apologetic *démarche*, but served to inverse negotiation dynamics, or to bring parties to accept the theoretical consequences of political choices assumed in the past, as the Cambrai negotiations brilliantly demonstrate.

If my conclusions (pp. 500-514) are considered indeterminate or vague, this is perfectly normal. Why should I go further than Horatio Walpole, Charles Whitworth, Cardinal Fleury or Fleuriau de Morville? No authority is more fundamental and absolute than that of primary archival sources. Prof. Schröder remarks my treatment of negotiations is "classical" and "descriptive." I could not agree more. Others have delved into philosophy[10] or political theory on the balance of power[11], in an

admirable academic way. Yet, in practice, there was no balance of power doctrine.[12] A “thorough discussion” of the concept would not have helped the analysis any further. The contents of this formula changed in every negotiation. It would have been pointless to make this the core of the book. Yet, a detailed rendering of different expressions, intimately tied to political context, was indispensable to demonstrate something else. Diplomats used the most plausible and flexible of all reasoning systems, which had proven its utility and had been taught at universities for centuries: law.[13] The object of my work was to uncover these legal discussions in three complex decades of Franco-British diplomacy. Not to construct an alternative system or to posit general statements on the European order. It would have been preposterous to do so based on the sources I consulted. The conclusion serves to link the material studied with the classical characteristics of public international law, and nothing more.

Professor Schröder’s review can be read as an encouragement to oppose practice and theory. Yet, the relevance of legal history is not restricted to theory.[14] At present, the field turns away from traditional dogmatic or genealogic enterprises, and focuses on the life of the law, or even the law in minds. This is the most fruitful ground for collaboration and exchange with historians. Is an isolated study of Saint-Pierre relevant to understand eighteenth-century diplomatic practice? Philosophy was not a source of authority in political discussions. Nothing in the sources I studied provides arguments for the contrary. If books were requested during negotiations, I only found demands for Dumont’s *Corps Universel Diplomatique*—a compilation of state practice—and (the French translation of) Grotius’s *De iure belli ac pacis*. Memoranda produced by Le Dran or Pecquet, or by cardinal Dubois’s experts, were essential go-betweens.

I would rather argue that the opposite is true. If Saint-Pierre is quoted in my book, this should foremost point to something evident to contemporaries: even if Saint-Pierre aimed for the stars, his feet were firmly on the ground. The *Projet de Paix Perpétuelle* could only find an audience if its author started from the reality of inter-sovereign relations. In that sense, I agree with Professor Schröder’s final call for a study of the “link between the various strands of this political thought and the evolving practice of these actors”, but I doubt this would be indispensable to “understand how the “norm hierarchy” of eighteenth-century international relations came into being”.

## NOTES

[1] Frederik Dhondt, “La représentation du droit dans la communauté des diplomates européens des « Trente Heureuses »”, *The Legal History Review* 81 (2013): 595-620.

[2] Friedrich V. Kratochwil, *Rules, norms, and decisions : on the conditions of practical and legal reasoning in international relations and domestic affairs* (Cambridge: Cambridge University Press, 1989).

[3] James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Leiden: Brill, 2014).

[4] Frederik Dhondt, “History in Legal Doctrine. Vattel and Réal de Curban on the War of the Spanish Succession”, in: D. De ruysscher et al., ed., *Rechtsgeschiedenis op nieuwe wegen. Legal history, moving in new directions* (Antwerp: Maklu, 2015), pp. 367-394.

[5] Martti Koskenniemi, *From apology to utopia : the structure of international legal argument* (Cambridge: Cambridge University Press, 2005 [1989]).

[6] Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Geneva: Graduate Institute Publications, 2014 [1983]).

- [7] Frederik Dhondt, "The Law of Nations and Declarations of War after the Peace of Utrecht", *History of European Ideas* 42 (2016).
- [8] Frederik Dhondt, "From Contract to Treaty: the Legal Transformation of the Spanish Succession, 1659-1713", *Journal of the History of International Law* 13 (2011): 347-375.
- [9] Lucien 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* 3 (1983): 429-456.
- [10] Bruno Arcidiacono, *Cinq types de paix : une histoire des plans de pacification perpétuelle, XVIIe-XXe siècles* (Paris: Presses Universitaires de France, 2011).
- [11] Michael Sheehan, *The balance of power: history and theory* (London: Routledge, 1996).
- [12] Frederik Dhondt, "Law on the Diplomatic Stage: the 1725 Ripperda Treaty", in: Viktoria Draganova et al. ed., *Die Inszenierung des Rechts--Law on Stage* (München: Martin Meidenbauer, 2011), 303-324.
- [13] Seán Patrick Donlan and Dirk Heirbaut, "A Patchwork of Accommodations: Reflections on European Hybridity and Jurisdictional Complexity", in: Seán Patrick Donlan and Dirk Heirbaut (ed.), *The Law's Many Bodies. Studies in Legal Hybridity and Jurisdictional Complexity, c1600-1800* (Berlin: Duncker & Humblot, 2015), pp. 9-34.
- [14] Fred Parkinson, "Why and how to study the history of public international law", in: Ben Cheng & E.D. Brown, *Contemporary problems of international law : Essays in honour of Georg Schwarzenberger on his eightieth birthday* (London: Steven & sons, 1988), pp. 230-241.

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