

# HOW FAR BEYOND PAX WESTPHALICA

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## I. INTRODUCTION

“International legal scholars have made much of 1648,”<sup>1</sup> as David Kennedy succinctly and accurately put it. This is of course the year the Thirty Years’ War ended in Europe with the Peace of Westphalia. What has been known as the “Westphalian model” of international relations holds that this German principality was the cradle of our modern international state system, where the distinct separate polities of the Holy Roman Empire became sovereign.<sup>2</sup> “The traditional European international law

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\* An earlier version of this paper was given at the 6th Biennial Conference of the European Community Studies Association—Canada, entitled “A Constitution for Europe? Governance and Policy Making in the European Union”, held in Montreal, Canada, on 27–29 May 2004. It was first published in the conference proceedings, under the title “*Constitutio Westphalica: Europe’s First Constitution?*”, and draws from the author’s book, *The Power of Language in the Making of International Law—The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden & Boston: Martinus Nijhoff, 2004).

<sup>1</sup> D. Kennedy, “Primitive Legal Scholarship”, 27 *Harvard International Law Journal* (1986), 1, at 1.

<sup>2</sup> See among numerous international legal commentators who take that position or assume its validity, H. Wheaton, *History of the Law of Nations in Europe and America—From the Earliest Times to the Treaty of Washington, 1842* (New York: Gould, Banks, 1845), at p. 69; J. Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894), at p. 66; L.F.E. Oppenheim, *International Law—A Treatise*, vol. 1, Peace (London: Longmans, Green, 1905), at p. 60; A.P. Higgings, “International Law and the Outer World, 1450–1648”, in J.H. Rose, A.P. Newton and E.A. Benians (eds.), *The Cambridge History of the British Empire*, vol. 1, The Old Empire, From the Beginnings to 1783 (Cambridge: Cambridge University Press, 1929), pp. 183, at p. 206; R.A. Falk, “The Interplay of Westphalia and Charter Conceptions of the International Order”, in

system dates from the Treaty of Westphalia of 1648, which *marked the formal recognition of states as sovereign and independent political units*,<sup>3</sup> wrote Charles Rhyne. Accordingly, Westphalia has been considered “the cornerstone of the modern system of international relations,”<sup>4</sup> and of international law.<sup>5</sup>

The question on many European legal scholars’ minds is whether we are having another “Westphalian moment” with the combined effect<sup>6</sup> of the eastern enlargement of the European Union and the attempted adoption of the *Treaty Establishing a Constitution for Europe*.<sup>7</sup> In other words, are we in the middle of another paradigm shift in the organisation of Europe, for the now 27 Member States of the Union? Or, on the other more pessimistic side, are Valéry Giscard d’Estaing and the architects of the latest super-version of Europe not more likely to join the like unsuccessful visionaries such as William Penn with his *Essay towards the Present and Future Peace of Europe by*

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R.A. Falk and C.E. Black (eds.), *The Future of the International Legal Order*, vol. 1, Trends and Patterns (Princeton: Princeton University Press, 1969), pp. 32; and W.G. Grewe, *The Epochs of International Law* (Berlin & New York: Gruyter, 2000), at p. 7.

<sup>3</sup> C.S. Rhyne, *International Law—The Substance, Processes, Procedures and Institutions for World Peace with Justice* (Washington: CLB Publishers, 1971), at p. 9. [emphasis added]

<sup>4</sup> G. Poggi, *The Development of the Modern State—A Sociological Introduction* (London: Hutchinson, 1978), at p. 89. See also H.J. Morgenthau, “The Problem of Sovereignty Reconsidered”, 58 *Columbia Law Review* (1988), 341, at 341; and K.J. Holsti, *Peace and War—Armed Conflicts and International Order, 1648–1989* (Cambridge: Cambridge University Press, 1991), at p. 25.

<sup>5</sup> Cf. P. Daillier and A. Pellet (eds.), *Nguyen Quoc Dinh—Droit international public*, 5th ed. (Paris: Librairie générale de droit et de jurisprudence, 1994), at p. 50: “Juridiquement, les Traités de Westphalie peuvent être considérés comme la base de départ de toute l’évolution du droit international contemporain.” See also D. Anzilotti, *Cours de droit international*, vol. 1, Introduction—Théories générales (Paris: Sirey, 1929), at p. 5; and L. Gross, “The Peace of Westphalia 1648–1948” (1948), 42 *American J. Int’l L.* 20, at 28.

<sup>6</sup> On the interrelation between the enlargement and the constitutionalisation of the European Union, see N. Walker, “Constitutionalising Enlargement, Enlarging Constitutionalism”, 9 *European Law Journal* (2003), 365; W. Sadurski, “Charter and Enlargement”, 8 *European Law Journal* (2002), 340; and J.H.H. Weiler, “Europe 2000—The Constitutional Agenda”, in A.E. Kellermann *et al.* (eds.), *EU Enlargement—The Constitutional Impact at EU and National Level* (The Hague: T.M.C. Asser Press, 2001), pp. 3.

<sup>7</sup> CIG87/2/04 REV 2. The final version of the text was adopted at the Conference of the Representatives of the Governments of the Member States on 29 Oct. 2004. The documents are available at: [europa.eu.int/constitution/index\\_en.htm](http://europa.eu.int/constitution/index_en.htm)

*the Establishment of an European Dyet, Parliament or Estates*,<sup>8</sup> Charles Irénéé Castel Abbé de Saint-Pierre with his *Mémoires pour rendre la Paix perpétuelle en Europe*,<sup>9</sup> and (to a lesser extent) Immanuel Kant with his *Zum ewigen Frieden*.<sup>10</sup>

Ironically, this latest episode in the development of a formal constitution for modern Europe struggles over, indeed is haunted by, that structural *idée-force*<sup>11</sup> of “state sovereignty” deemed born in Westphalia. As examples, one may think of such issues as the division of competences between the Union and the Member States, the reforms of the institutions of the Union, the changes in the jurisdiction of the Court, even the protection of fundamental rights, all of which must be reconciled with sovereignty-related arguments. This seems to testify to the profound social effect that the Peace of Westphalia has had on the shared consciousness of humanity. But is it really the case? Is the Westphalian orthodoxy historically founded? Can a powerful idea like sovereignty be empirically traced to such one event?

The chapter argues that no, the social construct that is sovereignty has formed part of a continuing system originating long before the Thirty Years’ War and continuing long after the Peace of Westphalia. What happened in 1648 did not at all put an end to multi-layered authority in Europe, but simply constituted a case of redistribution of power within the Holy Roman Empire. In that sense, these international treaties are not dissimilar to the many that have created the European Union in the second half of the 20th century, including the latest such proposal with the *Constitutional Treaty for Europe*. The reality of imperial overlordship in fact long survived Westphalia and, as history tends to repeat itself, one can indeed contend that, conversely, the reality of state sovereignty will also survive the next attempt to provide a (pseudo) constitution for the Europe of 27 Member States.

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<sup>8</sup> W. Penn, *Essay Towards the Prefent and Future Peace of Europe by the Eftablifhment of an European Dyet, Parliament or Eftates* (London: n.b., 1693).

<sup>9</sup> C.I.C. de Saint-Pierre, *Mémoires pour rendre la paix perpétuelle en Europe* (Cologne: Jacques le Pacifique, 1712). This work was later reprinted in two volumes under the name of *Projet pour rendre la Paix perpétuelle en Europe* (Utrecht: Antoine Schouten, 1713).

<sup>10</sup> I. Kant, *Zum ewigen Frieden* (Leipzig: Schubert, 1838), first published in 1795.

<sup>11</sup> See A. Fouillée, *L'évolutionnisme des idées-forces* (Paris: Félix Alcan, 1890), at p. XI.

## II. THE PEACE OF WESTPHALIA

This section examines the treaty documents of the *constitutio Westphalica*, with a view to proving that the dogma according to which 1648 can be credited for the birth of the modern state system is unsupported by historical facts. The first thing to point out is that the Peace of Westphalia, formalised on 24 October 1648, was made of two separate agreements:<sup>12</sup> the *Treaty of Osnabrück*, concluded between the Queen of Sweden and her allies, on the one hand, and the Holy Roman Emperor and the German monarchs, on the other; and, the *Treaty of Münster*, concluded between the King of France and his allies, on the one hand, and the Emperor and the Princes, on the other.<sup>13</sup>

Although the *Treaties* paid homage to the unity of Christendom,<sup>14</sup> it is significant that they involved numerous polities.<sup>15</sup> Sweden and France insisted on having the German Princes as parties to the Peace, a strategy

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<sup>12</sup> However, it was imperative for the participants to achieve a “unitary peace;” see H. Steiger, “Concrete Peace and General Order: The Legal Meaning of the Treaties of 24 October 1648”, in K. Bussmann and H. Schilling (eds.), *1648—War and Peace in Europe*, vol. 1, Politics, Religion, Law and Society (Münster: Westfälisches Landesmuseum, 1998), pp. 437, at p. 444.

<sup>13</sup> For the full text of the *Osnabrück* and *Münster Treaties*, in both their Latin and English versions, see C. Parry (ed.), *Consolidated Treaty Series*, vol. 1 (Dobbs Ferry, U.S.: Oceana Publications, 1969), pp. 119 and pp. 270. [hereinafter *Treaty Series*] It is the English translation that will be used here, which Parry said is taken from the *General Collection of Treaties*; the old English spelling used will be modernised.

<sup>14</sup> Towards the end of the *Osnabrück Treaty*'s preamble, it stated that the parties “agreed among themselves, to the Glory of God, and Safety of the Christian World;” similarly, in the *Münster Treaty*, one can read that the agreement was reached “to the Glory of God, and the Benefit of the Christian World;” [spelling modernised] see *Treaty Series*, *id.*, at pp. 199–200 and p. 321. See also A. Osiander, *The States System of Europe, 1640–1990—Peacemaking and the Conditions of International Stability* (Oxford: Clarendon Press, 1994), at pp. 27–30, who notes that the rulers' representatives at the peace conferences viewed themselves as part of a community based on the Christian religion.

<sup>15</sup> The preamble of the *Osnabrück Treaty*, *in fine*, stated: “[T]he Electors, Princes and States of the Sacred Roman Empire being present, approving and consenting;” likewise, the *Münster Treaty*'s preamble ended: “[I]n the presence and with the consent of the Electors of the Sacred Roman Empire, the other Princes and States;” *Treaty Series*, *id.*, at p. 200 and p. 321. [emphasis in original] [spelling modernised] As well, there are mentions of the different polities making up the Empire—some 332 of them—throughout the two *Treaties of Westphalia*; A.D. McNair, *Law of Treaties—British Practice and Opinions* (Oxford: Clarendon Press, 1938), at p. 70. See also R. Redslob, *Histoire des grands principes du droit des gens—Depuis l'antiquité jusqu'à la veille de la grande guerre* (Paris: Rousseau, 1923), at pp. 215–216.

obviously meant to weaken the position of the Emperor vis-à-vis the Princes. In fact, the *Treaties* were instruments not only to bringing peace between the former belligerents, but also to dealing with constitutional matters within the Empire.<sup>16</sup> Indeed, Article 70 of the *Münster Treaty* declared:

For the greater Firmness of all and every one of these Articles, *this present Transaction shall serve for a perpetual Law and established Sanction of the Empire, to be inserted like other fundamental Laws and Constitutions of the Empire* in the Acts of the next Diet of the Empire, and the Imperial Capitulation; binding no less the absent than the present, the Ecclesiastics than Seculars, whether they be the States of the Empire or not: insomuch as that it shall be a prescribed Rule, perpetually to be followed, as well by the Imperial Counsellors and Officers, as those of other Lords, and all Judges and Officers of Courts of Justice.<sup>17</sup>

This large number of actors from both within and without the Empire<sup>18</sup> seem, *a priori*, to bear witness to the termination of the Imperial transcendental domination in Europe.<sup>19</sup> However, the following analysis of Westphalia will go beyond this *facade* and will show that the Peace did not signal the death toll of the Empire in favour of the German distinct separate polities. Thus the actual agreements reached in 1648 must now be scrutinised to ascertain their main objects and material provisions, which have nothing to do with the creation of a state system.

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<sup>16</sup> See R. Lesaffer, “The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements Prior to 1648”, 18 *Grotiana* (1997), 71, at 71 and 77; and C. Bilfinger, “Les bases fondamentales de la communauté des États”, 63 *Recueil de cours de l’Académie de Droit international (RCADI)* (1938), 129, at 156, who wrote: “Le Traité de Westphalie, généralement regardé comme la base juridique et positive de la première période du droit des gens moderne, était, en même temps qu’un traité de droit des gens, une loi fondamentale constitutionnelle de l’ancien Empire allemand.”

<sup>17</sup> *Treaty Series, supra*, note 13, at 353. [emphasis added] [spelling modernised]

<sup>18</sup> See Holsti, *supra*, note 4, at p. 25, who wrote: “The congresses [of Westphalia] brought together the main heterogeneous political units of Europe at that time. There were 145 delegates representing 55 jurisdictions, including the Holy Roman Empire and all the major kingdoms except Great Britain [and Russia], as well as significant duchies, margraves, landgraves, bishoprics, free cities, and imperial cities.” [footnotes omitted] See also V. Gerhardt, “On the Historical Significance of the Peace of Westphalia: Twelve Theses”, in K. Bussmann and H. Schilling (eds.), *1648—War and Peace in Europe*, vol. 1, Politics, Religion, Law and Society (Münster: Westfälisches Landesmuseum, 1998), pp. 485.

<sup>19</sup> See Steiger, *supra*, note 12, at p. 422.

## 1. RELIGIOUS ISSUES

First and foremost, building on the *acquis* from the Peace of Augsburg in 1555,<sup>20</sup> the main object of the Peace of Westphalia was to establish a regime on religious practice and denominational matters.<sup>21</sup> Although the *Westphalia Treaties* did not explicitly abandon the principle that the monarch could determine the religion of the land, they nevertheless provided for some constitutional safeguards.<sup>22</sup> Indeed, several provisions were inserted to circumscribe and curtail the Princes' formerly absolute authority over the religious sphere.<sup>23</sup> The most material one, at Article 5, paragraph 11, of the *Osnabrück Treaty*, established that a ruler who chose to change his or her religion could not compel his or her subjects to do the same.<sup>24</sup>

Also, the *Treaties* formally recognised freedom of conscience for Catholics living in Protestant areas and *vice versa*, which included protection for worship practices and religious education. Article 5, paragraph 28, of the *Osnabrück Treaty* thus read:

It has moreover been found good, that those of the Confession of *Augsburg* [i.e. Protestants], who are Subjects of the Catholics, and the Catholic Subjects of the States of the Confession of *Augsburg*, who had not the public or private Exercise of their Religion in any time of the year 1624, and who after the Publication of the Peace shall profess and embrace a Religion different from that of the Lord of the Territory, shall in consequence of the said Peace be patiently suffered and tolerated, without any Hindrance or Impediment to attend their Devotions in their Houses and in Private, with all Liberty of Conscience, and

<sup>20</sup> The Peace of Augsburg recognised and legitimised the Protestant religions (Lutheran and Calvinist) and gave to the ruler the right to determine the religion of its subjects. See J.-G. Gagliardo, *Germany under the Old Regime, 1600–1790* (London: Longman, 1991), at p. 16.

<sup>21</sup> See G. Pagès, *La guerre de trente ans—1618–1648* (Paris: Payot, 1949), at pp. 247–249. See also, on the religious practices before and after 1648, S.D. Krasner, “Sovereignty and Intervention”, in G.M. Lyons and M. Mastanduno (eds.), *Beyond Westphalia?—State Sovereignty and International Intervention* (Baltimore, U.S. & London: Johns Hopkins University Press, 1995), pp. 228, at pp. 234–236.

<sup>22</sup> See A. Hobza, “Questions de droit international concernant les religions”, 5 *RCADI* (1924), 371, at 377–378.

<sup>23</sup> See A.W. Ward, “The Peace of Westphalia”, in A.W. Ward, G.W. Prothero and S. Leathes (eds.), *The Cambridge Modern History*, vol. 4, *The Thirty Years' War* (Cambridge: Cambridge University Press, 1934), pp. 395, at p. 416.

<sup>24</sup> *Treaty Series, supra*, note 13, at 218–219.

without any Inquisition or Trouble, and even to assist in their Neighbourhood, as often as they have a mind, at the public Exercise of their Religion, or send their children to foreign Schools of their Religion, or have them instructed in their Families by private Masters; provided the said Vassals and Subjects do their Duty in all other things, and hold themselves in due Obedience and Subjection, without giving occasion to any Disturbance or Commotion.<sup>25</sup>

As well, such dissenters were not to be “excluded from the Community of Merchants, Artisans or Companies, nor deprived of Successions, Legacies, Hospitals, Lazar-Houses, or Alms-Houses, and other Privileges or Rights.”<sup>26</sup> People living in denominationally mixed cities—Augsburg, Duncelfpiel, Biberach, Ravensburg, Kauffbeur—were free to practice their religion without any “molest or trouble.”<sup>27</sup>

Furthermore, *Osnabrück* promoted equality between Catholics and Protestants in the assemblies of the Diet and in other decision-making bodies of the Empire.<sup>28</sup> For example, Article 5, paragraph 42, stated: “In the ordinary Assemblies of the Deputies of the Empire, the Number of the Chiefs of the one and the other Religion shall be equal.”<sup>29</sup> Likewise, in judicial procedures at the Imperial Courts, a party could demand the religious parity of judges.<sup>30</sup> These rights afforded to the Lutheran Protestants (‘Confession of *Augsburg*’) were also extended to Calvinist Protestants (the “Reformed”).<sup>31</sup>

It is interesting to draw a parallel with the *Constitutional Treaty for Europe*, which provides for the constitutionalisation of a bill of rights.<sup>32</sup>

<sup>25</sup> See *Treaty Series, id.*, at 228–229. [emphasis in original] [spelling modernised]

<sup>26</sup> Art. 5, par. 28, of the *Osnabrück Treaty, id.*, at 229. [spelling modernised]

<sup>27</sup> Art. 5, par. 24, of the *Osnabrück Treaty, id.*, at 225–227. [spelling modernised]

<sup>28</sup> See Ward, *supra*, note 23, at p. 414.

<sup>29</sup> *Treaty Series, supra*, note 13, at 234–235. [spelling modernised]

<sup>30</sup> Art. 5, par. 45, of the *Osnabrück Treaty, id.*, at 237–238.

<sup>31</sup> See article 7 of the *Osnabrück Treaty, id.*, at 239–240. [emphasis in original] [spelling modernised]

<sup>32</sup> See E.M.H. Hirsch Ballin, “The EU Charter of Fundamental Rights: A Building Block for the European Constitutional Order”, in A.E. Kellermann *et al.* (eds.), *EU Enlargement—The Constitutional Impact at EU and National Level* (The Hague: T.M.C. Asser Press, 2001), pp. 31; and N. Walker, “Protection of Fundamental Rights in the European Union: The Charter of Fundamental Rights”, in P. Cullen and P.A. Zervakis (eds.), *The Post-Nice Process: Towards a European Constitution* (Baden-Baden: Nomos Verlag, 2001), pp. 125. See also, on the *Charter of Fundamental Rights* in general, K. Lenaerts,



Article I-9(1) reads: “The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II,” that non-binding instrument proclaimed at Nice in December 2000.<sup>33</sup> One can therefore argue that, similar to the *Westphalia Treaties*, one of the main objects of the *Constitutional Treaty for Europe*, indeed one of its three parts, also pertains to the protection of the rights and freedoms of the people living on the territories.<sup>34</sup> Relevant as well is that the obligations thus imposed fall on both the European Union and the Member States,<sup>35</sup> much like the religious guarantees had to be provided for by both the Holy Roman Empire and the German separate polities pursuant to the provisions of the Peace of Westphalia.<sup>36</sup>

## 2. TERRITORIAL SETTLEMENT

The second object of the Peace of Westphalia concerned territorial settlement, which turned mainly on the *satisfaction* of Sweden and France. Sweden’s traditional claims with respect to the south shore of the Baltic region were given effect in the *Treaty of Osnabrück*. Accordingly, Western Pomerania, the islands of Rügen, Usedom and Wollin, the bishoprics of remen and Verdun, and the port of Wismar passed under the Swedish

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“La protection des droits fondamentaux en tant que principe constitutionnel de l’Union européenne”, in *Mélanges en hommage à M. Waelbroeck* (Brussels: Bruylant, 1999), pp. 423; H.G. Schermers, “Drafting a Charter of Fundamental Rights of the European Union” in A.E. Kellermann a.o. (eds.), *EU Enlargement—The Constitutional Impact at EU and National Level* (The Hague: T.M.C. Asser Press, 2001), pp. 15; G. de Búrca, “The Drafting of the EU Charter of Fundamental Rights”, 26 *European Law Review* (2001), 126; and K. Lenaerts and E. de Smijter, “A “Bill of Rights” for the European Union”, 38 *Common Market Law Review* (2001), 273.

<sup>33</sup> OJ 2000, C364.

<sup>34</sup> See on the importance of the *Charter of Fundamental Rights* for the *Constitutional Treaty for Europe*, E. Bribosia, “La protection des droits fondamentaux”, in P. Magnette (ed.), *La constitution de l’Europe* (Brussels: Editions de l’Université de Bruxelles, 2002), pp. 113, at pp. 128–129.

<sup>35</sup> Art. II-111(1) provides: “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.”

<sup>36</sup> See J.H.H. Weiler and S. Fries, “A Human Rights Policy for the European Community and Union: The Question of Competences” in P. Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), pp. 147.



Crown.<sup>37</sup> It must be emphasised, however, that the conveyances were not total—Sweden was to hold these territories as *Imperial fiefs*.<sup>38</sup> Indeed, Article 10 of the *Osnabrück Treaty* repetitively stated that all transfers were “in perpetual and immediate Fief of the Empire.”<sup>39</sup> The Swedish ruler was also to occupy seats in the Diet to represent these regions within the Empire.

Pursuant to the *Treaty of Münster*, France was granted territories “with all manner of Jurisdiction and Sovereignty, without any contradiction from the Emperor, the Empire, House of *Austria*, or any other.”<sup>40</sup> Unlike Sweden, therefore, the French Crown received full title in, and authority over, most transferred territories,<sup>41</sup> which included the bisoprics of Metz, Toul and Verdun,<sup>42</sup> as well as the area known as Pinerolo.<sup>43</sup> The House of Austria’s rights in the region of Alsace were also conveyed to France,<sup>44</sup> but not without a substantial qualification. Indeed, Article 92 of the *Münster Treaty* provided:

That the most Christian King shall be bound to leave not only the Bishops of *Strasbourg* and *Bafle*, with the City of *Strasbourg*, but also the other States or Orders, Abbots of *Murbach* and *Luederen*, who are in the one and the other *Alsatia*, immediately depending upon the *Roman Empire*; the abbess of *Andlavien*, the Monastery of *St. Bennet* in the Valley of *St. George*, the Palatines of *Luzelftain*, and all the nobility of *Lower Alsatia*; *Item*, the said ten Imperial Cities, which depend on the Mayory of *Haganoc*, in the Liberty and Possession they have enjoyed hitherto, to arise as immediately dependent upon the *Roman Empire*; so that he cannot pretend any Royal Superiority over them, but shall rest contended with the Rights which appertained to the House of *Austria*, and which by this present Treaty of Pacification, are yielded to the Crown of *France*. In such a manner, nevertheless, that by the present

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<sup>37</sup> See art. 10 of the *Osnabrück Treaty*, *Treaty Series*, *supra*, note 13, at 244–249.

<sup>38</sup> See Ward, *supra*, note 23, at p. 403–404.

<sup>39</sup> *Treaty Series*, *supra*, note 13, at 244–247.

<sup>40</sup> Art. 76, *id.*, at 341. [emphasis in original] [spelling modernised]

<sup>41</sup> See Ward, *supra*, note 23, at pp. 404–405.

<sup>42</sup> See article 71 of the *Münster Treaty*, *Treaty Series*, *supra*, note 13, at 340.

<sup>43</sup> See article 73 of the *Münster Treaty*, *ibid.*

<sup>44</sup> See article 74 of the *Münster Treaty*, *id.*, at 340–341.

Declaration, nothing is intended that shall derogate from the Sovereign Dominion already hereabove agreed to.<sup>45</sup>

As a consequence, although they officially passed under the French Crown, these parts of the Alsatian territory maintained a *sui generis* autonomist status based on some Imperial privileges.<sup>46</sup>

Obviously, one can make an analogy with modern Europe and the fifth enlargement of the Union, which saw its overall territory increase substantially with the number of Member States going from 15 to 27.<sup>47</sup> The latest two phases of expansion, with 10 of its 12 new countries being from the former Soviet Bloc, was meant to heal the rift opened up by World War II and that continued throughout the Cold War.<sup>48</sup> Beside this geo-political aspect of the enlargement, which makes it akin to the Peace of Westphalia, what is significant in modern terms is that the total population of the European Union is now over 460 million people. As the authorities like to point out,<sup>49</sup> this is more than the combined population of the United States of America and the Russian Federation, which no doubt now makes Europe a major actor (be it politically, economically, strategically) in a multipolar world.

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<sup>45</sup> *Id.*, at 345. [emphasis in original] [spelling modernised]

<sup>46</sup> See Pagès, *supra*, note 21, at pp. 258–259. See also Redslob, *supra*, note 15, at p. 214, footnote 3.

<sup>47</sup> See generally, J. Vandamme and J.-D. Mouton, *L'avenir de l'Union européenne: élargir et approfondir* (Brussels: Presses interuniversitaires européennes, 1995); A.E. Kellermann *et al.* (eds.), *EU Enlargement—The Constitutional Impact at EU and National Level* (The Hague: T.M.C. Asser Press, 2001); H. Sjursen, “Why Expand?: The Question of Legitimacy and Justification in the EU’s Enlargement Policy”, 40 *Journal of Common Market Studies* (2002), 491; and N. Neuwahl (ed.), *European Union Enlargement—Law and Socio-Economic Changes* (Montreal: Thémis, 2004).

<sup>48</sup> Already when the iron curtain fell in 1989, the European Community (as it was then called) declared that it would welcome the countries of Central and Eastern Europe. It created the PHARE Programme to help former communist countries towards liberal democracy and capitalist economy and, in 1993, the Copenhagen European Council set out the political and economic conditions necessary for membership. It is in 1997, with the European Commission’s Agenda “2000” and the Luxembourg European Council, that the latest enlargement processes were formally launched.

<sup>49</sup> See Directorate-General for Press and Communication, “More Unity and More Diversity—The European Union’s Biggest Enlargement”, p. 3, document completed in November 2003 and available at this website address: <http://europa.eu.int/comm/publications/booklets/move/41/en.doc>

Here, what is most relevant for the present demonstration is that the treaty provisions relating to religious practice and denominational matters, as well as those pertaining to the territorial satisfaction of Sweden and France, undoubtedly represent the two principal objects of the Peace of Westphalia.<sup>50</sup> The parties also formally recognised the United Provinces of the Netherlands<sup>51</sup> and explicitly provided for the independence of the Swiss Confederation,<sup>52</sup> which however were already at this point *faits accomplis*.<sup>53</sup>

### 3. TREATY-MAKING POWER

According to the general view that considers 1648 as a break from the *ancien régime*, there is another material provision in the agreements which

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<sup>50</sup> See Holsti, *supra*, note 4, at p. 34.

<sup>51</sup> At the conclusion of the conflict between the United Provinces and Spain, the latter recognised the territorial boundaries of the Netherlands in a peace treaty signed on 30 January 1648, also at Münster. As a consequence, these territories were excluded from the Burgundian Imperial Circle during the negotiations at Westphalia which, implicitly, legally ratified the Dutch independence from the Holy Roman Empire. See J.V. Polišíenský, *The Thirty Years War* (London: Batsford, 1971), at pp. 236–237; and Pagès, *supra*, note 21, at p. 254.

<sup>52</sup> Switzerland's independence was legally consecrated in article 63 of the *Treaty of Münster*, which stated: "And as His Imperial Majesty, upon Complaints made in the name of the City of *Bafle*, and of all *Switzerland*, in the presence of their Plenipotentiaries deputed to the present Assembly, touching some Procedures and Executions proceeding from the Imperial Chamber against the said City, and the other united *Cantons* of the *Swiss* country, and their Citizens and Subjects having demanded the Advice of the States of the Empire and their Council; these have, by a Decree of the 14th of *May* of the last Year, declared the said City of *Bafle*, and the other *Swiss-Cantons*, to be as it were in possession of their full Liberty and Exemption of the Empire; so that they are no ways subject to the Judicatures, or judgments of the Empire, and it was thought convenient to insert the same in this Treaty of Peace, and Confirm it, and thereby to make void and annul all such Procedures and Arrests given on this Account in what form soever," see *Treaty Series*, at 337. [emphasis in original] [spelling modernised]

<sup>53</sup> See Pagès, *supra*, note 21, at p. 254, who wrote as regards the Netherlands and Switzerland: "Enfin divers articles légalisent un état de fait déjà ancien, mais qui n'avait pas encore la garantie d'un instrument diplomatique." [emphasis added] See also F. Hertz, *The Development of the German Public Mind—A Social History of German Political Sentiments Aspirations and Ideas*, vol. 2, *The Middle Ages—The Reformation* (London: Allen & Unwin, 1962), at p. 515; E.A. Beller, "The Thirty Years War", in J.-P. Cooper (ed.), *The New Cambridge Modern History*, vol. 4, *The Decline of Spain and the Thirty Years War, 1609–48/59* (Cambridge: Cambridge University Press, 1970), pp. 306, at p. 358; and Redslob, *supra*, note 15, at pp. 214–215.

would epitomise statehood, namely, that dealing with the delegation of power to conclude treaties.<sup>54</sup> At Article 65, the *Treaty of Münster* read:

They [the German polities] shall enjoy without contradiction, the Right of Suffrage in all Deliberations touching the Affairs of the Empire; but above all, when the Business in hand shall be the making or interpreting of Laws, the declaring of Wars, imposing of Taxes, levying or quartering of Soldiers, erecting new Fortifications in the Territories of the States, or reinforcing the old Garisons; as also when a Peace or alliance is to be concluded, and treated about, or the like, none of these, or the like things shall be acted for the future, without the Suffrage and Consent of the Free Assembly of all the States of the Empire: *Above all, it shall be free perpetually to each of the States of the Empire, to make Alliances with Strangers for their Preservation and Safety; provided, nevertheless, such Alliances be not against the Emperor, and the Empire, nor against the Public Peace, and this Treaty, and without prejudice to the Oath by which every one is bound to the Emperor and the Empire.*<sup>55</sup>

Article 8, paragraph 1, of the *Osnabrück Treaty* was to the same effect.<sup>56</sup> The political entities making up the Empire were thus given the power to independently make agreements between themselves and with foreign countries. This competence, however, was explicitly limited by the *caveat* according to which no such alliance could be directed against the *imperium* or be in breach of the Peace of Westphalia itself. Also significant is that, beside treaty-making, these provisions confirmed to the Imperial Diet all other powers usually linked with the exercise of supreme authority over a territory—for example, legislation, warfare, taxation.<sup>57</sup>

<sup>54</sup> See for instance, F. de Martens, *Traité de droit international*, vol. 1 (Paris: Chevalier-Marescq, 1883), at p. 116; G. Gidel, “Droits et devoirs des Nations—La théorie classique des droits fondamentaux des États”, 10 *RCADI* (1925), 537, at 549; D. Philpott, *Revolutions in Sovereignty—How Ideas Shaped Modern International Relations* (Princeton & Oxford: Princeton University Press, 2001), at p. 85; Redslob, *supra*, note 15, at p. 215; Holsti, *supra*, note 4, at pp. 35–36; and Osiander, *supra*, note 14, at pp. 46–47.

<sup>55</sup> *Treaty Series*, *supra*, note 13, at 337–338. [emphasis added] [spelling modernised]

<sup>56</sup> *Id.*, at 241. See also Lesaffer, *supra*, note 16, at p. 71.

<sup>57</sup> The legislative history of these provisions shows that the parties originally meant to go much farther in favour of the Princes than what was provided for in the final version of the *Münster Treaty*. The proposition suggested by the French delegation on 11 June 1645 was unqualified and even referred to the idea of sovereignty. Indeed, art. 8 of the said proposition, which was ultimately rejected, read: “Que tous lesdits Princes & Etats en

Moreover, it appears that these treaty articles merely recognised a practice which had already been in existence for almost half a century. Indeed, the powerful German Princes were conducting their own foreign policy long before Westphalia. Palatinate and Brandenburg, for instance, struck alliances with the United Provinces of the Netherlands in 1604 and 1605 respectively.<sup>58</sup> Further, most rulers within the Empire formed part of the armed force coalitions—the Evangelical Union and the Catholic League—that existed at the outbreak of the Thirty Years’ War in 1618. In light of this, the articles concerning the treaty-making power can hardly be viewed as groundbreaking or as compelling evidence of a new independent status for the German monarchs.

When one puts this issue of the power to conclude treaties in the larger picture of the struggle over competences between central authorities and constituting polities,<sup>59</sup> there is an interesting parallel to draw with the European Union and, more particularly, the principle of subsidiarity.<sup>60</sup> First codified in

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général & en particulier seront maintenus dans tous les autres droits de *Souveraineté* qui leur appartiennent, & spécialement dans celui de faire des confédérations tant entre eux qu’avec les Princes voisins, pour leur conservation & sureté;” [emphasis added] [spelling modernised] see G.-H. Bougeant, *Histoire du Traité de Westphalie, ou des Negociations qui se firent à Munster & à Ofnabrug*, vol. 3 (Paris: n.b., 1751), at pp. 428–429. Therefore, it appears that the compromised art. 65, *Treaty of Münster*, was a victory on the part of the Holy Roman Empire because the language used stopped short of recognising any sovereign rights to the German Princes.

<sup>58</sup> See G. Parker, *The Thirty Years’ War* (London: Routledge & Kegan Paul, 1984), at p. 2, who noted that, along with England and France, Palatinate and Brandenburg struck treaties of friendship with the Netherlands, which helped the latter’s effort against Spain.

<sup>59</sup> On the different ways to strike a balance between the two, see K. Lenaerts, “Constitutionalism and the Many Faces of Federalism”, 38 *American Journal of Comparative Law* (1990), 205; and also, generally, G.F. Mancini, “The Making of a Constitution for Europe”, 26 *Common Market Law Review* (1989), 595.

<sup>60</sup> See generally, V. Michel, *Recherches sur les compétences de la Communauté européenne* (Paris: L’Harmattan, 2003); and R. Dehousse, “Le principe de subsidiarité dans le débat constitutionnel européen”, in P. Magnette (ed.), *La constitution de l’Europe* (Brussels: Editions de l’Université de Bruxelles, 2002), pp. 157. See generally, E.T. Swaine, “Subsidiarity and Self-Interest: Federalism at the European Court of Justice”, 41 *Harvard International Law Journal* (2000), 1; G. de Búrca, “The Principle of Subsidiarity and the Court of Justice as an Institutional Actor”, 36 *Journal of Common Market Studies* (1998), 217; N. Bernard, “The Future of European Economic Law in the Light of the Principle of Subsidiarity”, 33 *Common Market Law Review* (1996), 633; F. Thoma, *Le principe de subsidiarité en droit communautaire* (Luxembourg: Publications du centre universitaire de Luxembourg, 1998); K. Lenaerts and P. van

Article 3b of the *Maastricht Treaty*,<sup>61</sup> it is now also found, in a more elaborate version, in Article I-11(3) of the *Constitutional Treaty for Europe*:<sup>62</sup>

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

As regards the Union's external relations (or external "action") and international agreements<sup>63</sup>—explicitly provided for at Article III-323 *Constitutional Treaty for Europe*, to be read with Article I-7 on legal personality—the underlying idea of subsidiarity will most certainly prevent the recognition of a generous European competence over the three pillars. In turn, this situation will mean an increased use of mixed agreements in these matters, with the ensuing complexities and delays,<sup>64</sup> which are arguably reminiscent of 17th century *Germania*.

Since the beginning of the European project in the 1950s, the emergence of the principle of subsidiarity is certainly the most important stumbling block in the redistribution of powers in favour of a single European authority.<sup>65</sup> Similar

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Ypersele, "Le principe de subsidiarité et son contexte: étude de l'article 3B du Traité CE", *Cahier de Droit européen* (1994), 3; T.C. Hartley, "Constitutional and Institutional Aspects of the Maastricht Agreement", 42 *International and Comparative Law Quarterly* (1993), 213; G.A. Bermann, "Subsidiarity and the European Community", 17 *Hartings International and Comparative Law Review* (1993), 97; and A.G. Toth, "The Principle of Subsidiarity in the Maastricht Treaty", 29 *Common Market Law Review* (1992), 1079.

<sup>61</sup> *Treaty of the European Union*, [1992] OJ C191.

<sup>62</sup> See also Jan-Peter Trnka's chapter elsewhere in this volume.

<sup>63</sup> Generally, see M. Cremona, "The Draft Constitutional Treaty: External Relations and External Action", 40 *Common Market Law Review* (2003), 1347; A. Dashwood, "The Attribution of External Relations Competence", in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000), pp. 115.

<sup>64</sup> On mixity, see A. Rosas, "The European Union and Mixed Agreements", in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000), pp. 200; M. Cremona, "External Relations and External Competence: The Emergence of an Integrated Policy", in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), pp. 137.

<sup>65</sup> Philip Allott is probably the one international commentator who has most fiercely objected to the principle of subsidiarity, arguing that it flies in the face of the creation of a new legal order for Europe—see Ph. Allott, *The Health of Nations—Society and Law beyond the*

to the *Westphalia Treaties*, therefore, the latest attempt to provide an organising structure for Europe does not settle one way or another the continuous and continuing debate over the *locus* of authority to govern over the territory, which is actually at the very centre of the idea of sovereignty.

### III. CONCLUSION

Going back to the hypothesis of the present chapter, it was shown that the principal objects and material provisions of the *Osnabrück* and *Münster Treaties* do not support the position that the Peace of Westphalia constitutes a paradigm shift whereby the political entities involved gained exclusive power over their territories. The two main purposes of the agreements related to the practice of religion and the settlement of territories, not to the creation of distinct separate polities independent from any higher authority. As regards religious matters, the German Princes did not even retain their existing power; *au contraire*, the rule of *cuius regio eius religio* was restrained by denominational protections for minorities and equality guarantees were provided for Catholics and Protestants.

Furthermore, the Empire remained a key actor according to Westphalia. Indeed, it is through Imperial bodies—such as the Diet and the Courts—that religious safeguards were imposed in decision-making process. With respect to territorial settlements, the satisfaction of Sweden was given in terms of fiefdoms within the Empire, thus acknowledging an enduring overlordship for the Emperor. *Vis-à-vis* France, although no Imperial feudal link remained

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*State* (Cambridge: Cambridge University Press, 2002), pp. 159–285. In an unpublished paper (dated mid-1990) he used for his LL.M. course entitled “The European Union as a New Legal Order”, he wrote the following: “Subsidiarity enables us at last to identify the elements of this concealed self-destructive theory. I can best express the essence of it as a series of implications. 1. Subsidiarity implies that the EC is derivative and secondary in relation to the inherent and primary powers of the Member States. 2. Subsidiarity implies that the EC is essentially an aggregating of national interests, to be aggregated as and when it is useful or desirable to do so. 3. Subsidiarity implies that the EC is contractual in character, rather than natural and organic. 4. Subsidiarity implies that the EC is, in principle, a system with limited competence—in other words, it has objectives which are something less than the traditional objectives of a political society—say, peace, order and good government. 5. Subsidiarity implies that the problem of the future development of the EC is a problem of organising the relationship between the constitutional organs of the EC and the constitutional organs of the Member States. 6. Subsidiarity implies that the future constitutional development of the EC lies in an extrapolation of familiar national constitutional structures, and, in particular, its future lies in some manipulation of the established structures of liberal-democratic capitalism.”



after most land transfers, some parts of Alsace maintained their autonomist status granted by the House of Austria. Finally, it was just seen that the power to conclude alliances formally recognised to the German Princes was not unqualified and that, in fact, they had conducted such foreign affairs long before then.

This perspective on Westphalia thus proves that 1648 is not really a turning point in the development of the present state system. Rather, the outcome of the congress constituted nothing more than a step further—even, arguably, a relatively modest one—in the gradual shift from the ideal of a universal overlordship to the idea of distinct separate political entities having sovereignty over their territories.<sup>66</sup> In that regard, it was interesting to draw parallels, if only in passing, between the Peace of Westphalia and the latest episodes in the development of the European Union with the eastern enlargements and the *Constitutional Treaty for Europe*, also relatively modest advances in developing a constitution for the continent. It was seen that the latter's main features, *inter alia*, pertain to fundamental rights and changes in territorial status, and that both the European Union's and the Holy Roman Empire's competences were and are in continuing competition with those of their constituting polities.

Are the recent attempts in the construction of the European system of governance at all seminal? No, probably not. But neither were those of 1648. In any event, does it matter? No, most certainly not. It is rather the *ex post facto* interpretation of such episodes that shall be crucial. In that regard, may the Peace of Westphalia as a precedent in construing, imagining, inventing a constitution for Europe be useful yet again.

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<sup>66</sup> See T.A. Walker, *A History of the Law of Nations*, vol. 1, From the Earliest Times to the Peace of Westphalia, 1648 (Cambridge: Cambridge University Press, 1899), at p. 148, who, speaking of the hybrid political status of the Empire and its constituting parts in 1648, noted: "The territorial state had long existed in point of fact, but, whilst each royal, ducal, or republican ruler of provinces had failed to recognise in his frontiers the precise limits of his jurisdiction, the sense of national independence had been held down in pupillage [sic] by the awe-inspiring shadow of a majestic common superior." See also, to the same effect, M. Wight, *Systems of States* (Leicester, U.K.: Leicester University Press, 1977), at p. 152: "At Westphalia the states-system does not come into existence: it comes of age;" and Westlake, *supra*, note 2, at p. 55: "When the plenipotentiaries at Münster and Osnabruck signed the Peace of Westphalia in 1648 the ground had been well prepared for an international society, such a society had indeed been gradually emerging."