

THE POWER OF THE WESTPHALIAN MYTH IN INTERNATIONAL LAW

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The paper examines the 1648 Peace of Westphalia and argues that it is a myth, an aetiological myth that has extraordinary power within the consciousness of international society. Indeed, Westphalia has had a profound semiotic effect by suggesting that, with the consecration of state sovereignty (as a structural *idée-force*), a new international model came into being, a model of international relations which remains strong to this day. This social construct, however, has formed part of a continuing system originating before the Thirty Years' War and continuing long after the Peace that ended it. The paper shows that Westphalia did not put an end to multi-layered authority in Europe, but was simply a case of redistribution of power within the Holy Roman Empire. Thus Westphalia is a "myth", in the technical sense of the term, to explain the international society's genesis to itself and build a belief-system about the whens, wheres and hows of its becoming and its being. Westphalia is a very-large-scale myth that is liable to have very-large-scale social power, even more so given that it is endorsed by international law, as the incontestably true basis of the present international state system.

1. Introduction

The year was 1648. For international law, this date is year zero, the genesis, the birth of the system, when everything started.¹ 1648 was of course the year the Thirty Years' War ended in Europe with the Peace of Westphalia. In a nutshell, what has been known as the "Westphalian model" of international relations holds that this German principality is no less than the cradle of our modern international state system, where the distinct separate polities of the Holy Roman Empire became sovereign.² "The traditional European international law system dates from the Treaty of Westphalia of 1648, which *marked the formal recognition of states as sovereign and independent political units*,"³ wrote Charles Rhyne. Thus Westphalia has been considered "the cornerstone of the modern system of international relations,"⁴ and of international law.⁵

Since I first got interested in the Peace of Westphalia, when I was conducting research at the University of Cambridge at the turn of the century, much ink has spilled over whether or not it is founded to consider 1648 in this matter. At the risk of oversimplification, one can argue that there are the Westphalia-believer, on the one hand, and the Westphalia-sceptics, on the other. In the last thirty years, among the scholars of the first group is Kalevi J. Holsti, in his book *Peace and War — Armed Conflicts and International Order, 1648 - 1989*,⁶ as well as John G. Ruggie, in his paper "Territoriality and Beyond: Problematizing Modernity in International Relations."⁷ Similarly, Hendrik Spruyt, in *The Sovereign State and Its Competitors*, believes that the Peace of Westphalia "formally acknowledged a system of sovereign states."⁸ Even more recently, Daniel Philpott, in a book entitled *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*, opined thus: "Before 1648, as long as the Thirty Years' War was still smoldering, significant features of political authority in Europe were incompatible with sovereign statehood; afterward, sovereignty prevailed."⁹

Of the second group of scholars, the Westphalia-sceptics, is first and foremost Stephen Krasner, in his celebrated paper "Westphalia and All That," who unequivocally wrote that "the conventional view that the Peace of Westphalia of 1648 marks a turning point in history is wrong."¹⁰ In an article entitled "Sovereignty, International Relations, and the Westphalian Myth," Andreas Osiander quoted the works of several Westphalia-believers and forcefully stated that: "Such quotes could be multiplied almost at will. Yet the actual treaties do not corroborate any of the claims quoted earlier: the settlements to which they refer is a figment of the imagination."¹¹ Derek Croxton's paper, "The Peace of Westphalia of 1648 and the Origins of

Sovereignty," was also critical of the believers: "A great deal of creativity is required to attribute sovereignty to the peace of Westphalia in the way scholars have traditionally done."¹² Finally, in a book simply called *The Myth of 1648*, Benno Teschke adopted a historical and theoretical perspective to show how the traditional interpretation of the Peace of Westphalia is unfounded.¹³

In my own work, first published in 2000,¹⁴ I have taken the firm position of a Westphalia-sceptic, showing from the point of view of the history of international law that the 1648 peace treaties constitute no more than an origin myth for the international society. This paper will substantiate this claim, in empirical terms, by looking at the actual legal documents that were agreed upon at the end of the Thirty Years' War in Europe. It will conclude that this "aetiological myth"¹⁵ has nevertheless carried extraordinary power within the shared consciousness of society.¹⁶

2. The Peace of Westphalia

This section examines the actual treaty documents of the *constitutio Westphalica*, with a view to prove 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:¹⁷ 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.¹⁸

Although the *Treaties* paid homage to the unity of Christendom,¹⁹ it is significant that they involved numerous polities.²⁰ Sweden and France insisted on having the German Princes as parties to the Peace, a strategy 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.²¹ 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.²²

This large number of actors from both within and without the Empire²³ seem, *a priori*, to bear witness to the termination of the Imperial transcendental domination in Europe.²⁴ 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.

2.1. Religious issues

First and foremost, building on the *acquis* from the Peace of Augsburg in 1555,²⁵ the main object of the Peace of Westphalia was to establish a regime on religious practice and denominational matters.²⁶ 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.²⁷ Indeed, several provisions were inserted to circumscribe and curtail the Princes' formerly absolute authority over the religious sphere.²⁸ 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.²⁹

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 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.³⁰

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.”³¹ People living in denominationally mixed cities — Augsburg, Duncelfpiel, Biberach, Ravensburg, Kauffbeur — were free to practice their religion without any “molest or trouble.”³²

Furthermore, *Osnabrück* promoted equality between Catholics and Protestants in the assemblies of the Diet and in other decision-making bodies of the Empire.³³ 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.”³⁴ Likewise, in judicial procedures at the Imperial Courts, a party could demand the religious parity of judges.³⁵ These rights afforded to the Lutheran Protestants (“Confession of *Augsburg*”) were also extended to Calvinist

Protestants (the "Reformed").³⁶

2.2. 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 Crown.³⁷ It must be emphasised, however, that the conveyances were not total — Sweden was to hold these territories as *Imperial fiefs*.³⁸ Indeed, article 10 of the *Osnabrück Treaty* repetitively stated that all transfers were "in perpetual and immediate Fief of the Empire."³⁹ 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."⁴⁰ Unlike Sweden, therefore, the French Crown received full title in, and authority over, most transferred territories,⁴¹ which included the bisoprics of Metz, Toul and Verdun,⁴² as well as the area known as Pinerolo.⁴³ The House of Austria's rights in the region of Alsace were also conveyed to France,⁴⁴ 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 abness 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 contented 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 Declaration, nothing is intended that shall derogate from the Sovereign Dominion already hereabove agreed to.⁴⁵

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.⁴⁶

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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.⁴⁷ The parties also formally recognised the United Provinces of the

Netherlands⁴⁸ and explicitly provided for the independence of the Swiss Confederation,⁴⁹ which however were already at this point *faits accomplis*.⁵⁰

2.3. 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 would epitomise statehood, namely, that dealing with the delegation of power to conclude treaties.⁵¹ 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.*⁵²

Article 8, paragraph 1, of the *Osnabrück Treaty* was to the same effect.⁵³ 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.⁵⁴

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.⁵⁵ 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.

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Going back to the hypothesis I defend, 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 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.⁵⁶

3. Conclusion: The Power of the Westphalian Myth

Like ordinary words,⁵⁷ myths are also powerful social productions, often themselves expressed through language, which provide a shared explanatory structure for substantial areas of socially constructed reality.⁵⁸ In the last century and a half,⁵⁹ myths and mythology have been the subject of numerous scholarly works in different disciplines, including not only theology and philosophy, but also psychology, anthropology, semantics, literary criticism, sociology, and political science.⁶⁰

The term "mythology" combines the Greek "*mûthos*" and "*lógos*," both of which originally referred to the ideas of "speech" and "story."⁶¹ In its earliest sense, *mûthos* was the thing spoken, uttered by the mouth.⁶² Only later did it come to connote "speech" and, with Herodotus in the 5th century B.C., *mûthos* was relegated to fictitious narrative.⁶³ For its part, *lógos* (relating to "*légein*") denotes demonstrable facts, formal conceptualisation, the rational explanation of things.⁶⁴ When *lógos* evolved to the sense of logical reasoning, however, *mûthos* became somewhat problematic — "*Mythos* came to be seen not as a relevant presentation of the world but as simply a story which has an emotional effect on listeners and thus not a decisive account (*logos*)."⁶⁵

This opposition between *mûthos* as story-telling and fiction, on the one hand, and *lógos* as rational explanation, on the other, remains relevant today and explains that, in everyday usage, a myth is often taken to involve an imagined, untrue account.⁶⁶ As a result, works on myth invariably contain the *caveat* according to which one must not confuse the popular, pejorative sense of the term "myth" as a synonym for metaphor, falsehood and distortion, with the scholarly and technical sense which considers myths as valid and true within the shared consciousness of society.⁶⁷ Similarly, here, it is the allegorical value and the semiotic significance of myths that are of interest for the present paper.⁶⁸

The truth of the matter is that mythology constitutes one of the ways that society may explain itself to itself. Society can use aetiological myths — that is, origin myths⁶⁹ — to explain its genesis to itself, thus building a belief-system about the whens, wheres and hows of its becoming and its being.⁷⁰ Further, similar to ordinary words,⁷¹ myths are involved both passively and actively in reality, reflecting but also inventing dynamic structures within social consciousness.⁷² Therefore, aetiological myths like the myth of Westphalia would not only represent reality, but would also create and transform reality through the human mind, within the shared consciousness of society.⁷³

It follows that the very-large-scale myth of Westphalia is liable to have a very-large-scale social effect, as the incontestably true legal basis of the present international state system.⁷⁴ In technical terms, the word "Westphalia", which represented the reality of the twin peace congress,

metamorphosed into a myth which has represented, as well as indeed created, a new reality, a mythical reality, about the present international state system. Most importantly, in the process whereby the word became a myth the historical facts and events surrounding the Peace became irrelevant and/or incontestable. Put another way, although "Westphalia" changed from *lógos* to *mûthos*, it has nonetheless continued to be viewed in terms of *lógos*, that is, as the rational explanation of the origin of modern international relations. For human societies, and in particular for the international society, Westphalia is real, it is not fiction.

By holding as unquestionably true and valid what is in fact a human-made fabrication, the aetiological myth of Westphalia has built a belief-system. This social production has thus provided a shared explanatory structure for the socially constructed international reality and, in doing so, has had an extraordinary impact upon the shared consciousness of humanity. Furthermore, given that this myth managed its way into the very fabric of our international legal order — as the model for the idea, and the ideal, of state sovereignty in international law — the social power that Westphalia has continuously demonstrated within human reality has, accordingly, increased exponentially.

Indeed, one can imagine, for instance, that people involved in international law and international relations, who use the word "Westphalia" every day of the week — like the scholars referred to in the introduction — do not care about the history of the Peace of Westphalia. They resort to the expression "Westphalian model," in most cases, as a "convenient shorthand"⁷⁵ to explain the fundamental juristic basis of the world organisation founded on the principle of

sovereign equality of states,⁷⁶ in which is rooted the whole scheme of international relations, as well as the rules of international law.⁷⁷ In sum, a reference to "Westphalia" will invariably bring up, through the cognitive process of the mind, a legally-empowered image⁷⁸ of our "international system [as] an association of sovereign states."⁷⁹ This constitutes, in effect, the absolutely fabulous power that the aetiological myth of Westphalia has been carrying, sometimes strategically, within the shared consciousness of society.

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¹ David Kennedy writes: "International legal scholars have made much of 1648." See D. Kennedy, "Primitive Legal Scholarship" (1986), 27 *Harvard Int'l L.J.* 1, at 1.

² See, among the classics which have taken that position or have assumed 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 69; J. Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894), at 66; L.F.E. Oppenheim, *International Law — A Treatise*, vol. 1, Peace (London: Longmans, Green, 1905), at 60; A.P. Higgings, "International Law and the Outer World, 1450-1648," in J.H. Rose, A.P. Newton & 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), 183, at 206; H.J. Morgenthau, "The Problem of Sovereignty Reconsidered" (1948), 58 *Columbia L. Rev.* 341, at 341; R.A. Falk, "The Interplay of Westphalia and Charter Conceptions of the International Order," in R.A. Falk & C.E. Black (eds.), *The Future of the International Legal Order*, vol. 1, Trends and Patterns (Princeton: Princeton University Press, 1969), 32; and, W.G. Grewe, *The Epochs of International Law* (Berlin & New York: Gruyter, 2000), at 7.

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

⁴ G. Poggi, *The Development of the Modern State — A Sociological Introduction* (London: Hutchinson, 1978), at 89.

⁵ See P. Daillier & A. Pellet (eds.), *Nguyen Quoc Dinh — Droit international public*, 5th ed. (Paris: Librairie générale de droit et de jurisprudence, 1994), at 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 5; and, L. Gross, "The Peace of Westphalia 1648-1948" (1948), 42 *American J. Int'l L.* 20, at 28.

⁶ K.J. Holsti, *Peace and War — Armed Conflicts and International Order, 1648 - 1989* (Cambridge: Cambridge University Press, 1991), at 25.

⁷ J.G. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations" (1993) 47 *International Organization* 137.

⁸ H. Spruyt, *The Sovereign State and Its Competitors* (Princeton: Princeton University Press, 1994), at 27.

⁹ D. Philpot, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001), at 77.

¹⁰ S.D. Krasner, "Westphalia and All That," in J. Goldstein & R.O. Keohane (eds.) *Ideas and Foreign Policy — Beliefs, Institutions, and Political Change* (Ithaca & London: Cornell University Press, 1993), 235, at 235. See also S.K. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

¹¹ A. Osiander, "Sovereignty, International Relations, and the Westphalian Myth" (2001) 55 *International*

Organization 251, at 261.

¹² D. Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty" (1999) 21 *International History Review* 569, at 588.

¹³ B. Teschke, *The Myth of 1648 — class, Geopolitics, and the Making of Modern International Relations* (London & New York: Verso, 2003).

¹⁴ S. Beaulac, "The Westphalian Legal Orthodoxy — Myth or Reality?" (2000) 2 *J. History Int'l L.* 148. See also, generally, S. Beaulac, *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).

¹⁵ Myths may be classified according to their topics, based on what they are about, although any such attempt is somewhat dubious as the categories are not mutually exclusive and the borders between them remain vague. Generally speaking, however, one can identify the following types of myth: (i) aetiological myths, concerning the origin of things; (ii) eschatological myths, about the final end of things; (iii) soteriological myths, pertaining to momentous saving and salvation; (iv) ritual myths, combining rites with narratives; and, (v) heroic myths, relating to accounts of glorious deeds and accomplishments. See M.S. Day, *The Many Meanings of Myth* (Lanham & London: University Presses of America, 1984), at 21-27. "Aetiology" (spelt "etiology" in American English) is interested in the beginning of things and the reason for things; see E. Thomas Lawson, "The Explanation of Myth and Myth as Explanation" (1978) 46 *J. American Academy of Religion* 507.

¹⁶ This idea of "consciousness of humanity" is borrowed from the moral philosophy of Georg Wilhelm Friedrich Hegel, in particular from G.W.F. Hegel, *Phenomenology of Spirit* (Oxford & New York: Oxford University Press, 1977), at 383-409. The idea of "consciousness" associated to an ensemble of human beings was suggested by G. Butler, "Sovereignty and the League of Nations" (1920-1921) 1 *British Y.B. Int'l L.* 35, at 42, who discussed the word sovereignty, and more particularly the expression "external sovereignty," by resorting to insights from the new field of psychology. See also P. Allott, "Reconstituting Humanity — New International Law" (1992) 3 *European J. Int'l L.* 219, at 223, who wrote: "Society exists nowhere else than in the human mind. And the constitution of a given society exists in and of human consciousness, the consciousness of those conceived as its members and its non-members, past and present. Wherever and whenever a structure-system of human socializing is so conceived in consciousness, there and then a society is conceived — family, tribe, organized religion, legal corporation, nation, state [...]."

¹⁷ 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 & H. Schilling (eds.), *1648 — War and Peace in Europe*, vol. 1, Politics, Religion, Law and Society (Münster: Westfälisches Landesmuseum, 1998), 437, at 444.

¹⁸ 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), at 119 & 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.

¹⁹ 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 199-200 & 321. See also A. Oslander, *The States System of Europe, 1640-1990 — Peacemaking and the Conditions of International Stability* (Oxford: Clarendon Press, 1994), at 27-30, who noted that the rulers' representatives at the peace conferences viewed themselves as part of a community based on the Christian religion.

²⁰ 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 200 & 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 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 215-216.

²¹ See R. Lesaffer, "The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements Prior to 1648" (1997), 18 *Grotiana* 71, at 71 & 77; C. Bilfinger, "Les bases fondamentales de la communauté des États" (1938), 63 *R.C.A.D.I.* 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."

²² *Treaty Series, supra*, at 353. [emphasis added] [spelling modernised]

²³ See K.J. Holsti, *supra*, at 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 & H. Schilling (eds.), *1648 — War and Peace in Europe*, vol. 1, Politics, Religion, Law and Society (Münster: Westfälisches Landesmuseum, 1998), 485.

²⁴ See H. Steiger, *supra*, at 422.

²⁵ 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 16 ff.

²⁶ See G. Pagès, *La guerre de trente ans — 1618-1648* (Paris: Payot, 1949), at 247-249. See also, on the religious practices before and after 1648, S.D. Krasner, "Sovereignty and Intervention," in G.M. Lyons & M. Mastanduno (eds.), *Beyond Westphalia? — State Sovereignty and International Intervention* (Baltimore, U.S. & London: Johns Hopkins University Press, 1995), 228, at 234-236.

²⁷ See A. Hobza, "Questions de droit international concernant les religions" (1924), 5 *R.C.A.D.I.* 371, at 377-378.

²⁸ See A.W. Ward, "The Peace of Westphalia," in A.W. Ward, G.W. Prothero & S. Leathes (eds.), *The Cambridge Modern History*, vol. 4, The Thirty Years' War (Cambridge: Cambridge University Press, 1934), 395, at 416.

²⁹ *Treaty Series, supra*, at 218-219.

³⁰ See *Treaty Series, id.*, at 228-229. [emphasis in original] [spelling modernised]

³¹ Article 5, paragraph 28, of the *Osnabrück Treaty, id.*, at 229. [spelling modernised]

³² Article 5, paragraph 24, of the *Osnabrück Treaty, id.*, at 225-227. [spelling modernised]

³³ See A.W. Ward, *supra*, at 414.

³⁴ *Treaty Series, supra*, at 234-235. [spelling modernised]

³⁵ Article 5, paragraph 45, of the *Osnabrück Treaty, id.*, at 237-238.

³⁶ See article 7 of the *Osnabrück Treaty, id.*, at 239-240. [emphasis in original] [spelling modernised]

³⁷ See article 10 of the *Osnabrück Treaty, Treaty Series, supra*, at 244 -249.

³⁸ See A.W. Ward, *supra*, at 403-404.

³⁹ *Treaty Series, supra*, at 244-247.

⁴⁰ Article 76, *id.*, at 341. [emphasis in original] [spelling modernised]

⁴¹ See A.W. Ward, *supra*, at 404-405.

⁴² See article 71 of the *Münster Treaty, Treaty Series, supra*, at 340.

⁴³ See article 73 of the *Münster Treaty, ibid.*

⁴⁴ See article 74 of the *Münster Treaty, id.*, at 340-341.

⁴⁵ *Id.*, at 345. [emphasis in original] [spelling modernised]

⁴⁶ See G. Pagès, *supra*, at 258-259. See also R. Redslob, *supra*, at 214, footnote 3.

⁴⁷ See K.J. Holsti, *supra*, at 34.

⁴⁸ 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 236-237; and, G. Pagès, *supra*, at 254.

⁴⁹ 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]

⁵⁰ See G. Pagès, *supra*, at 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 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), 306, at 358; and, R. Redslob, *supra*, at 214-215.

⁵¹ See, for instance, F. de Martens, *Traité de droit international*, vol. 1 (Paris: Chevalier-Marescq, 1883), at 116; G. Gidel, “Droits et devoirs des Nations — La théorie classique des droits fondamentaux des États” (1925), 10 *R.C.A.D.I.* 537, at 549; D. Philpott, *supra*, at 85; R. Redslob, *id.*, at 215; K.J. Holsti, *supra*, at 35-36; and, A. Osiander, *supra*, at 46-47.

⁵² *Treaty Series*, *supra*, at 337-338. [emphasis added] [spelling modernised]

⁵³ *Id.*, at 241. See also R. Lesaffer, *supra*, at 71.

⁵⁴ 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, article 8 of the said proposition, which was ultimately rejected, read: “Que tous lesdits Princes & Etats en 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 Negotiations qui se firent à Munfter & à Ofnabrug*, vol. 3 (Paris: n.b., 1751), at 428-429. Therefore, it appears that the compromised article 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.

⁵⁵ See G. Parker, *The Thirty Years' War* (London: Routledge & Kegan Paul, 1984), at 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.

⁵⁶ 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 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 152: “At Westphalia the states-system does not come into existence: it comes of age;” and, J. Westlake, *supra*, at 55: “When the plenipotentiaries at Munster 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.”

⁵⁷ Words and expressions are activities in themselves; they are mental-social phenomena separate and distinct from reality. See J.L. Austin's “speech-act theory” in *How to do Things with Words* (Oxford: Clarendon Press, 1962).

⁵⁸ Here, I draw from the theory of language proposed by C.K. Ogden & I.A. Richards, *The Meaning of Meaning — A Study of the Influence of Language upon Thought and of the Science of Symbolism*, 2nd ed. (London: Kegan Paul, 1927).

⁵⁹ See M.I. Steblin-Kamenskij, *Myth* (Ann Arbor: Karoma, 1982), at 21; J. Waardenburg, "Symbolic Aspects of Myth" in A.M. Olson (ed.), *Myth, Symbol, and Reality* (Notre Dame & London: University of Notre Dame Press, 1980), 41, at 60-61.

⁶⁰ See, for instance, F.W.J. von Schelling, *Philosophie der Mythologie* (Stuttgard & Augsburg: n.b., 1857), reprinted in M. Schröter (ed.), *Schellings Werke*, 5th ed. (Munich: Beck'sche Verlagsbuchhandlung, 1959) 1; F.M. Müller, "On the Philosophy of Mythology" in F.M. Müller, *Introduction to the Science of Religion* (London: Longmans, Green, 1873), 335; J.G. Frazer, *The Golden Bough — A Study in Comparative Religion*, 2 vols. (London: Macmillan, 1890); S. Freud, *Di Traumdeutung* (Leipzig & Vienna: Franz Deuticke, 1900); É. Durkheim, *The Elementary Forms of the Religious Life — A Study in Religious Sociology* (London: Allen & Unwin, 1915); J.E. Harrison, *Mythology* (London: Harrap, 1925); B. Malinowski, *Myth in Primitive Psychology* (London: Kegan Paul, 1926), reprinted in B. Malinowski, *Magic, Science and Religion, and the Other Essays* (New York: Doubleday, 1955); L. Lévy-Bruhl, *La mythologie primitive — Le monde mythique des Australiens et des Papous*, 2nd ed. (Paris: Alcan, 1935); S.H. Hooke (ed.), *Myth and Ritual — Essays on the Myth and Ritual of the Hebrews in Relation to the Culture Pattern of the Ancient East* (London: Oxford University Press, 1933); E. Cassirer, *Language and Myth* (New York: Harper, 1946); A.W. Watts, *Myth and Ritual in Christianity* (London & New York: Thames & Hudson, 1953); C. Lévi-Strauss, "The Structural Study of Myth" (1955) 68 *J. American Folklore* 428, reprinted in C. Lévi-Strauss, *Structural Anthropology* (Middlesex: Penguin, 1972), 206; P. Wheelwright, "The Semantic Approach to Myth" (1955) 68 *J. American Folklore* 473; N. Frye, *Anatomy of Criticism — Four Essays* (Princeton: Princeton University Press, 1957); R. Graves, *The Greek Myths* (London: Cassell, 1958); C.G. Jung, *Man and His Symbols* (London: Aldus, 1964); P. Gay, *The Enlightenment: An Interpretation — The Rise of Modern Paganism* (London: Weidenfeld & Nicholson, 1967); P. Ricoeur, *The Symbolism of Evil* (Boston: Beacon, 1969); G.S. Kirk, *The Nature of Greek Myths* (Harmonsworth: Penguin, 1974); G.W. Egerton, "Collective Security as Political Myth: Liberal Internationalism and the League of Nations in Politics and History" (1983) 5 *Int'l History Rev.* 496; I. Strenski, *Four Theories of Myth in Twentieth Century History — Cassirer, Eliade, Lévi-Strauss and Malinowski* (London: Macmillan, 1987); P. Hegy, *Myth as Foundation for Society and Values — A Sociological Analysis* (Lewiston: Mellen, 1991).

⁶¹ See, generally, H. Levin, "Some Meanings of Myth" in H.A. Murray (ed.), *Myth and Mythmaking* (New York: Braziller, 1960), 103.

⁶² See P. Stambovsky, *Myth and the Limits of Reason* (Amsterdam & Atlanta: Rodopi, 1996); T.F. Hoad (ed.), *The Concise Oxford dictionary of English Etymology* (Oxford: Clarendon Press, 1986).

⁶³ See J.P. Vernant, *Myth and Society in Ancient Greece* (Brighton: Harvester, 1980), at 186 ff.

⁶⁴ See J.A.K. Thomson, *The Art of the Logos* (London: Allen & Unwin, 1935), at 17-19; P. Stambovsky, *supra*, at 33-34; T.F. Hoad, *supra*, at 270.

⁶⁵ L.J. Hatab, *Myth and Philosophy: A Contest of Truths* (La Salle: Open Court, 1990), at 334, n. 30. See also W.G. Doty, *Mythography — The Study of Myths and Rituals* (Tuscaloosa: University of Alabama Press, 1986), at 3, who wrote that, "*logos* gained the sense of referring to those words making up doctrine or theory, as opposed to *mythos* for those words having an ornamental or fictional, narrative function. The outcome of this development was that the mythological came to be contrasted with logic (the *logos*-ical) and later with 'history' in the sense of an overview or chronicle of events."

⁶⁶ See C.G. Flood, *Political Myth: A Theoretical Introduction* (New York & London: Garland, 1996), at 6; See also J.P. Vernant, *supra*, at 186, who wrote: "The concept of myth we have inherited from the Greeks belongs, by reason of its origins and history, to a tradition of thought peculiar to Western civilisation in which myth is defined in terms of what is not myth, being opposed first to reality (myth is fiction) and, secondly, to what is rational (myth is absurd)."

⁶⁷ For instance, see E. Leach, *Lévi-Strauss* (London: Fontana/Collins, 1970), at 54, who explained that, "the special quality of myth is not that it is false but that it is divinely true for those who believe, but fairy-tale for those who do not." See also, A. Dundes, "Introduction" in A. Dundes (ed.), *Sacred Narrative — Readings in the Theory of Myth* (Berkeley & Los Angeles: University of California Press, 1984), at 1; W.G. Doty, *supra*, at 7-8.

⁶⁸ See E. Cassirer, *The Myth of the State* (New Haven: Yale University Press, 1946), at 45, who makes the point as follows: "Myth is not only far remote from this empirical reality; it is, in a sense, in flagrant contradiction to it. It seems to build up an entirely fantastic world. Nevertheless even myth has a certain 'objective' aspect and a

definite objective function. Linguistic symbolism leads to an objectification of sense-impressions; mythical symbolism leads to an objectification of feelings."

⁶⁹ On the different categories of myths, see *supra*, note 15.

⁷⁰ See C.G. Flood, *supra*, at 35, who wrote: "Myths offer charters, warrants, validations, legitimations, and authoritative precedents for beliefs, attitudes, and practices in any important domain of social existence."

⁷¹ Indeed, through the cognitive process of the human mind, not only can language represent reality, but it may play a leading part in creating and transforming reality, including modelling the shared consciousness of society. This is based on Ludwig Wittgenstein's theory, first expressed in *Tractatus Logico-Philosophicus* (London: Routledge & Kegan Paul, 1961), originally published in German in 1921, at 55 ff. & 51 ff., but especially his later work found in *Philosophical Investigations* (Oxford: Basil Blackwell, 1958).

⁷² See B. Malinowski, *supra*, at 23: "Myth fulfils in primitive culture an indispensable function: it expresses, enhances, and codifies belief, it safeguards and enforces morality; it vouches for the efficiency of ritual and contains practical rules for the guidance of man. Myth is thus a vital ingredient of human civilization; it is not an idle tale, but a hard-worked active force; it is not an intellectual explanation or an artistic imagery, but a pragmatic charter or primitive faith and moral wisdom."

⁷³ See W.G. Doty, *supra*, at 44, who wrote: "Since Malinowski's time, we operate with a broader perspective: essentially we may differentiate between models of society, setting out in a Durkheimian sense a particular mirror image of the culture, and models for society, as when the model makes visible the ideal standards to which a society aspires." [emphasis in original] See also C. Kluckhohn, "Myths and Rituals: A General Theory" (1942) 35 *Harvard Theological Rev.* 45, at 64-66.

⁷⁴ Recently, Wayne Hudson has spoken of Westphalia in terms of "fables;" see W. Hudson, "Fables of Sovereignty," in T. Jacobsen, C. Sampford & R. Thakur (ed.), *Re-Envisioning Sovereignty — The End of Westphalia?* (Hampshire & Burlington: Ashgate, 2008), 19.

⁷⁵ R. Falk, *supra*, at 4.

⁷⁶ As we all know, the "sovereign equality of state" is a founding principle of the UN system; see section 2(1) of the *Charter of the United Nations*, adopted 26 June 1945, entered into force 24 October 1945.

⁷⁷ See C. Harding, "Statist Assumptions, Normative Individualism and New Forms of Personality: Evolving a Philosophy of International Law for the Twenty First Century" (2001) 1 *Non-State Actors & Int'l L.* 107, at 110: "What may be loosely termed the 'traditional' model of international ordering is, in terms of the history of international law and relations, also the 'modern' or 'westphalian' system, usually for convenience dated back to relations based on a community of sovereign states." [footnotes omitted]

⁷⁸ M. Koskenniemi, *The Gentle Civilizer of Nations — The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002), at 51, who referred to the "metaphoric sense of Westphalia."

⁷⁹ T.M. Franck, *The Empowered Self — Law and Society in the Age of Individualism* (Oxford & New York: Oxford University Press, 1999), at 5.