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THE WESTPHALIAN MODEL IN DEFINING INTERNATIONAL LAW: CHALLENGING THE MYTH

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1 INTRODUCTION

Words and expressions are activities in themselves.[1] Words and expressions are mental-social phenomena separate and distinct from reality.[2] Words and expressions exist and act within human consciousness.[3] 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.[4] ' Westphalia' is one of those powerful words which has its own existence as an active force within human consciousness. The expression ' Westphalian model' acts as an *organic* instrument which can demonstrate, and may actually be strategically used to carry, tremendous social power within the shared consciousness of the international community.[5]

In fact, the ' Westphalian model' of international legal order holds that the *Peace of Westphalia* in 1648, which ended the Thirty Years' War in Europe, constituted a paradigm shift in the development of the present state system.[6] The twin congresses held are deemed the forum where, for the first time in the history of international relations, distinct separate polities became sovereign. It is portrayed as a historical fact that *Westphalia* ' represented a new diplomatic arrangement — an order created by states, for states — and replaced most of the legal vestiges of hierarchy, at the pinnacle of which were the Pope and the Holy Roman Emperor' .[7] As Mark Janis unequivocally put it:

The Peace of Westphalia legitimated the right of sovereigns to govern their peoples free of outside interference, whether any such external claim to interfere was based on political, legal or religious principles. [...] Sovereignty, as a concept, formed the cornerstone of the edifice of international relations that 1648 raised up. *Sovereignty was the crucial element in the peace treaties of Westphalia*, the international agreements that were intended to end a great war and to promote a coming peace. The treaties of Westphalia enthroned and sanctified sovereigns, gave them powers domestically and independence externally.[8]

In his essay marking the tercentenary of the *Peace*, Leo Gross emphasised how much 1648 constituted a turning point in the organisation of Europe, away from the so-called *ancien régime*. He wrote: ' Westphalia, for better or worse, *marks the end of an epoch and the opening of another*. It represents the majestic portal which leads from the old into the new world.' [9] Dionisio Anzilotti, for his part, observed that Westphalia has been ' considered, rightfully so, as the starting point of the historical development of the present international law' .1[0] Recently, Richard Falk opined: ' It was not until some decades later, [after Grotius] by way of the Peace of Westphalia in 1648 that ended the Thirty Years' War, that *the modern system of states was formally established as the dominant world order framework*' .[11]

In terms of social effect on the consciousness of humanity, the *Peace of Westphalia* is said to have consecrated the principle of sovereign equality of states,1[2] which has been at the core of international law ever since.1[3] Charles Rhyne explained it in the following terms: ' 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*' .1[4] Likewise, Donat Pharand wrote that ' state sovereignty came to be *accepted as a principle of international law* at the Peace of Westphalia, ending the Thirty Years' War' .1[5] Again, recently, Thomas Franck noted: ' Since the Reformation, the *Peace of Westphalia*, and the writings of Hugo Grotius, there has been an explicit assumption that *the international system is an association of sovereign states*' .1[6]

In social sciences, *Westphalia* has also long been considered ' the cornerstone of the modern system of international relations' .1[7] One of the first advocates of the realist school of international relations, Hans Morgenthau, wrote the following about the *Peace*:

By the end of the Thirty Years' War, *sovereignty as supreme power over a certain territory was a political fact*, signifying the victory of the territorial princes over the universal authority of emperor and pope, on the one hand, and over the particularistic aspirations of the feudal barons, on the other.1[8]

The large majority of modern international relations scholarships explicitly share that view.1[9]

To give the contemporary example of the International Criminal Court, which became operational in The Hague on 1 July 2002,2[0] the rhetoric surrounding the adoption of the *Rome Statute*2[1] included claims of a fundamental change in the ' Westphalian model' of international legal order. In a chapter on the creation of the Court, for instance, William Schabas spoke of the progressive emergence of the concepts of international prosecution for humanitarian abuses, away from ' the sanctity of State sovereignty resulting from the Peace of Westphalia of 1648' .2[2] Likewise, Leila Nadya Sadat and Richard Carden wrote:

For if many aspects of the Rome Treaty demonstrate the tenacity of traditional Westphalian notions of State sovereignty, there are nonetheless elements of supranationalism and efficacy (in spite of the complementary principle) in the [Rome] Statute that could prove extremely powerful.2[3]

Dwelling on the jurisdiction of the Court in the *Rome Statute*,2[4] Richard Wilkins opined that: ' Not since the Treaty of Westphalia in 1648 has a treaty *ever* purported to bind parties which are not signatories to the treaty' .2[5]

This paper will show that the dogma according to which the *Peace of Westphalia* constitutes the first case where the idea of state sovereignty was recognised and applied is a *myth*. The *aetiological* myth2[6] of *Westphalia* has carried extraordinary power within the shared consciousness of society, including international society, and continues to impact discourses on contemporary issues on the international plane. Preliminarily, the notion of myth and mythology will be examined because it is at the centre of the present argument about the ' Westphalian model' .

II MYTH AND MYTHOLOGY

Like ordinary words, myths are also powerful social productions, often themselves expressed through language, which provide a shared explanatory structure for substantial areas of socially constructed reality. In the last century and a half, myths and mythology have been the subject of numerous scholarly works in different disciplines,2[7] including not only theology and philosophy, but also psychology, anthropology, semantics, literary criticism, sociology, and political science.2[8]

The term ' mythology' combines the Greek ' *mùthos*' and ' *lógos*,' both of which originally referred to the ideas of ' speech' and ' story' .2[9] In its earliest sense, *mùthos* was the thing spoken, uttered by the mouth.3[0] Only later did it come to connote ' speech' and, with Herodotus in the 5th century BC, *mùthos* was relegated to fictitious narrative.3[1] For its part, *lógos* (relating to ' *légein*') denotes demonstrable facts, formal conceptualisation, the rational

explanation of things.3[2] 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*)' .3[3]

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.3[4] 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 a society.3[5] Similarly, here, it is the allegorical value and the semiotic significance of myths that interest the present study.3[6]

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 myths) to explain its genesis to itself, thus building a belief-system about the whens, wheres and hows of its becoming and its being.3[7] Further, similar to ordinary words, myths are involved both passively and actively in reality, reflecting but also inventing dynamic structures within social consciousness.3[8] 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.3[9]

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. In examining this myth, the historical facts and events which the linguistic sign originally represented/created before it became a mythical sign will be scrutinised to show that the mythical reality for which it now stands is substantially remote from the initial material reality. The extraordinary social power that the Westphalian myth has demonstrated in spite of such equivocal historical basis, especially in relation to the idea of sovereignty and the making of international law (including the International Criminal Court), will also be considered.

III THE ' WESTPHALIAN MODEL' OF INTERNATIONAL LEGAL ORDER

The following discussion will support the hypothesis that *Westphalia* is a myth through a three-part analysis. First, the social organisation and the transcendental political entities in the Middle Ages, as well as the dynamics at work in Europe and the events that led to the Thirty Years' War, will be considered. Second, the actual agreements reached in Westphalia will be analysed to ascertain their main objects and material provisions, which have nothing to do with the creation of a state system. Finally, the period following 1648 will be examined to assess whether or not, as an aftermath of the *Peace*, the universal institutions disappeared in favour of distinct separate polities.

A *From the Barbarian Invasions to the Thirty Years' War*

After the collapse of the Western Roman Empire in 476,4[0] most territories in Europe were in a chaotic political status because of the so-called *barbarian* invasions.4[1] The separate communities constituted segmented societies4[2] characterised by a heteronomous form of social organisation.4[3] At the time, individuals had different rights and obligations, which could overlap and conflict since the decentralised feudal structure was not based on a strictly linear hierarchy.4[4] As Daniel Philpott put it: ' Feudal lines of obligation resembled a system of arteries in a body, not a pyramid with an apex' .4[5]

Furthermore, the vassalage system,4[6] which provided land in exchange for services, meant that subordinates could acquire considerable resources and corresponding power.4[7] The medieval ruling structure ' was an inextricably superimposed and tangled one, in which different juridical instances were geographically interwoven and stratified, and plural allegiances, asymmetrical suzerainties and anomalous enclaves abounded' .4[8] It is not until the second half of the Middle Ages, starting in

the 11th century, that some monarchs began to develop a more organised form of government.4[9]

1 *Christendom*

This period also saw most of these polities getting together in a common Christian community, known as the *Christendom*.5[0] This spiritual union encouraged and facilitated contacts and, with the martial energy of the Crusades, was the catalyst to a profound social transformation of almost all Western Europe.5[1] It also brought two new powerful actors to the forefront of European politics5[2] the Pope and the Emperor. Both aspired to the throne of the *civitas Christiana*,5[3] which entailed an authority superior to all other rulers.5[4] This was said to constitute the ' greatest attempt of all time at supranational organisation in Europe' .5[5] The co-existence of these two transcendental political entities, however, was never entirely peaceful and amicable.

When the Roman Empire in the West resumed in 800,5[6] Charlemagne (also known as Karl the Great) seemed to acknowledge the Papacy' s authority.5[7] After the *Treaty of Verdun* in 843,5[8] however, the new Holy Roman Emperor began to challenge the universal authority of the Pope.5[9] The latter defended himself with the *two swords doctrine*,6[0] according to which God delegated Its power over both spiritual and temporal6[1] spheres directly to the Papacy.6[2] The Emperor replied with formulas supporting his supreme secular authority over the *communitas communitatum*.6[3] He could not deny the divine origin of authority, but rather argued that God had equally distributed spiritual and temporal powers and that the Emperor directly received the *secular sword*.6[4]

In short, as Philip Allott Cartesianly explained, the medieval

European society [was] the scene of a structure-system struggle in two dimensions — horizontal, between Papacy and German Empire; vertical between Papacy/German Empire, on the one hand, and the countless subordinate civil societies of Europe, on the other hand.6[5]

From the point of view of the monarchs, therefore, the struggle for power6[6] was on two fronts: (i) within, vis-a-vis the vassals and the people; and, (ii) without, vis-a-vis the Pope and the Emperor.6[7]

2 *European chessboard*

Eventually, the interaction of the different polities in both religious and political fields, as well as the developments in organisation and governance, allowed monarchies to gain a leading position on the European political chessboard. It shall become clear, however, that this slow process began several centuries before, and cumulated a century-and-a-half after, the *Peace of Westphalia* in 1648.

Indeed, despite continuous efforts until the 13th century to expand its authority, the Papacy was never fully recognised by some powerful monarchies in Europe. For instance, France and Spain never accepted feudal vassalage vis-a-vis the Pope and England repudiated Papal overlordship in 1366.6[8] Further, the Great Schism of the West in the Christian Church (1378-1417) considerably weakened the authority of the Pope.6[9] Then, in 1517, Martin Luther nailed his 95 theses to the door of the Schlosskirche in Wittenberg, setting in motion the forces of the Reformation.7[0] His ideas, and those of John Calvin, spread rapidly throughout the numerous German principalities, as well as to Sweden, the Netherlands, France, England.7[1] The Protestant political tenets, which favoured secular governance,7[2] constituted the *coup de grâce* for the Pope' s *plenitudo potestatis*.7[3]

With respect to the Holy Roman Empire, no overall authority was ever fully secured in Europe. In fact, even before the *Great Interregnum* (1254-1273),7[4] the character and the scope of Imperial power began to be challenged. By the 14th century, authority over secular matters had ceased to be considered the exclusive privilege of the Emperor.7[5] His *de jure* overlordship remained — even invigorated under Charles V — but legists like Bartolus7[6] admitted that *principes superiores non recognoscentes*;7[7] Baldus formulated this plurality in terms of *rex in regno suo est imperator regni sui*.7[8] The *imperium*' s dismissal was more categorical in certain countries — Spain never

formally recognised Imperial power; France severed its feudal ties with the Emperor after 973; and England's vassalage vis-a-vis the Empire was terminated in the 13th century.7[9]

However, it seems to be the consolidation of power under autonomous rulers in England and France, as well as the emergence of free cities in Northern Italy,8[0] that effectively replaced the ideal of a universal Christendom with the idea of distinct separate polities enjoying full autonomy over their territories.8[1]

3 *Emergence of independent polities*

Chronologically, the Northern cities of the Italian peninsula — Genoa, Florence, Pisa, Venice — were the pioneers in reaching a certain system of organisation during the 11th and 12th centuries, which fell within the general enthusiasm of the Renaissance.8[2] The *querelles* between the Pope and the Emperor considerably helped the establishment and survival of these relatively self-sufficient polities.8[3] At the beginning of the 14th century, it was recognised that the Northern Italian cities could not be conquered. By the 16th century, however, their strength had comparatively decreased because of their opponents' enhanced military capacity and the change in trade routes.8[4]

England was the first large geographic area to reach a centralised form of governance. Following the Great Conquest in 1066, the English segmented societies embarked upon the process towards unity.8[5] With the help of the King's courts based on the common law8[6] and of representative assemblies that led to Parliament,8[7] the loyalty of the people moved from the local authorities to the monarchy.8[8] The aristocracy-initiated movement of protest that brought the Magna Carta in 1215 did not challenge the centralised institutions *per se*;8[9] rather, it sought some basic guarantees of protection from the King, especially with regard to property rights.9[0] Although the unity of the English royal power was later shaken by the War of the Roses, it remained largely independent from any higher authority.9[1]

The French communities proceeded more slowly towards the organisation of central ruling under the authority of a monarch.9[2] Centralisation was accomplished only gradually by the appointment of the King's representatives in the provinces, instead of being imposed from above by the royal administration, as in England.9[3] France's judiciary did not even apply uniform laws9[4] — the South constituted the *pays de droit écrit*9[5] and the North was considered the *pays de droit coutumier*.9[6] The Hundred Years' War increased the King's power as people sought protection and guidance from the monarch.9[7] The war effort also accredited ' a permanent tax, which made possible a standing army and the development of an executive to carry out the royal will' .9[8]

Even in German areas, in spite of the actual overlordship enjoyed by the Emperor, the seed of monarchical organisation was planted long before the *Peace of Westphalia*.9[9] With respect to secular matters, increasingly substantial political concessions were gradually granted in favour of the principalities.10[0] As regards religious matters, several powerful German Princes took the Protestant side in the emerging conflicts and soon revolted against the Catholic Empire.10[1] These turmoils were settled with the *Peace of Augsburg* in 1555,10[2] between the Emperor and the Protestant Princes, which consecrated the rule of *cuius regio eius religio*.10[3] *Augsburg* largely contributed to direct the focus towards the separate polities within the Empire.10[4]

4 *Conflicts of religion and politics*

This temporary truce in the European religious chaos and the peaceful coexistence it brought deteriorated over the next fifty years.10[5] Especially during the reign of Emperor Rudolf II (1576-1612) worship restrictions were progressively reimposed.10[6] In fact, after the troubles in Donauwörth,10[7] the *Treaty of Augsburg* was invoked as the basis for the resurgence of Catholicism. By the beginning of the 17th century, both camps had their coalitions of armed force10[8] — the Evangelical Union (est 1608), a Protestant defensive alliance;10[9] and, the Catholic League (est 1609), a similar organisation for Catholics.11[0] Although the majority of Princes were not in favour of war, some were willing to take advantage of any opportunity to increase their land base and political power.

The rivalries of the time, however, did not stop at the German borders.11[1] England and the United Provinces of the Netherlands allied with the Evangelical Union and were ready to support its cause; in the North, both Denmark and Sweden had ambitions to control the strategic Baltic region; Catholic Spain was preparing to reconquer the Protestant Netherlands; and, France was opposed to the hegemonic aspirations of the Emperor-Spanish King coalition.11[2] This large number of increasingly powerful actors in Europe, in addition to the multilayered system of political authorities, as well as the religious dimension of the different polities, made a violent solution of the situation virtually inevitable.

The spark that ignited the fire came from Bohemia in 1618 following the so-called *Defenestration of Prague*,11[3] which prompted a revolt against the Emperor and the Catholic domination. The series of wars that followed are known as the Thirty Years' War,11[4] which is said to have been the most destructive armed conflict in Europe until the 20th century.11[5] Originally, the War was primary based on profound religious antagonism, but these motives only lasted for the first decade of the conflicts.11[6] The power politics of the belligerents, which was never absent, came to finally predominate the main battles,11[7] which were fought on German soil between France and Sweden, on the one side, and the Habsburgs and their allies, on the other.11[8] The negotiations to end the bloody conflicts took place from 1644 to 164811[9] and culminated in the *Peace of Westphalia*,12[0] without any decisive victory by anyone.12[1]

At this stage, the most important point to acknowledge about this analysis of *Westphalia* is that, by the 17th century, Europe was no longer dominated by the Holy Roman Empire or the Papacy.12[2] The supreme authority in spiritual and temporal spheres was not exclusively held anymore — assuming it once was— by transcendental institutions. Instead, distinct separate polities both within and without the Empire had started to establish a solid foundation based on the idea of political autonomy.12[3] This already suggests that, contrary to the general opinion, what is considered a *nouveau régime* after 1648 did not come into existence by enchantment through the stroke of a pen at the bottom of some peace agreements.12[4]

The section that follows will look at the so-called *constitutio Westphalica*12[5] by examining the actual treaty documents, with a view to prove that the orthodoxy according to which 1648 can be credited for the birth of the modern state system is unsupported by historical facts, and is hence a myth.

B *The Peace of Westphalia*

The *Peace of Westphalia*, formalised on 24 October 1648, was in fact composed of two separate agreements.12[6] The *Treaty of Osnabrück* was concluded between two groups of political entities — on the one hand, the Protestant Queen of Sweden and her allies and, on the other, the Holy Roman Habsburg Emperor and the German Princes. The *Treaty of Münster*, for its part, was also concluded between two groups — one the one hand, the Catholic King of France and his allies and, on the other, the Emperor and the Princes.12[7] Thus these agreements were bilateral in nature, which reflects the practice of the time that had not yet evolved to the making of multilateral treaties.12[8]

Although the *Treaties* paid homage to the unity of Christendom,12[9] it is significant that they involved numerous polities.13[0] 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-a-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.13[1] 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.13[2]

This large number of actors from both within and without the Empire13[3] seem, *a priori*, to bear witness to the termination of the Imperial transcendental domination in Europe.13[4] However, a proper analysis of *Westphalia* that concentrates on the relevant discourse 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.

1 *Religious issues*

First and foremost, building on the *acquis* from the *Peace of Augsburg* in 1555,13[5] the main object of the *Peace of Westphalia* was to establish a regime on religious practice and denominational matters.13[6] Although the *Treaties* did not explicitly abandon the principle that the monarch could determine the religion of the land, they nevertheless provided for some constitutional safeguards.13[7] Indeed, several provisions were inserted to circumscribe and curtail the Princes' formerly absolute authority over the religious sphere.13[8] 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.13[9]

Also, the *Westphalia 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.14[0]

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' .14[1] People living in denominationally mixed cities — Augsburg, Dunckelfpiel, Biberach, Ravensburg, Kauffbeur — were free to practice their religion without any ' molest or trouble' .14[2]

Furthermore, *Osnabrück* promoted equality between Catholics and Protestants in the assemblies of the Diet and in other decision-making bodies of the Empire.14[3] 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' .14[4] Likewise, in judicial procedures at the Imperial Courts, a party could demand the religious parity of judges.14[5] These rights afforded to the Lutheran Protestants (' Confession of *Augsburg*') were also extended to Calvinist Protestants (the ' Reformed').14[6]

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 Bremen and Verdun, and the port of Wismar passed under the Swedish Crown.14[7] It must be emphasised, however, that the

conveyances were not total — Sweden was to hold these territories as *Imperial fiefs*.14[8] Indeed, article 10 of the *Osnabrück Treaty* repetitively stated that all transfers were ' in perpetual and immediate Fief of the Empire' .14[9] 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' .15[0] Unlike Sweden, therefore, the French Crown received full title in, and authority over, most transferred territories,15[1] which included the bishoprics of Metz, Toul and Verdun,15[2] as well as the area known as Pinerolo.15[3] The House of Austria' s rights in the region of Alsace were also conveyed to France,15[4] 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 Declaration, nothing is intended that shall derogate from the Sovereign Dominion already hereabove agreed to.15[5]

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.15[6]

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*.15[7] The parties also formally recognised the United Provinces of the Netherlands15[8] and explicitly provided for the independence of the Swiss Confederation,15[9] which however were already at this point *faits accomplis*.16[0]

3 *Treaty-making power*

According to the general view that considers 1648 as a break from the *ancien régime*, there is another highly material provision in the agreements which would epitomise statehood, namely, that dealing with the delegation of power to conclude treaties.16[1] 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*.16[2]

Article 8, paragraph 1, of the *Osnabrück Treaty* was to the same effect.16[3] 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.16[4]

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.16[5] 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 1618.16[6] 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 distinct separate polities.

4 *Recapitulation*

The rest of the provisions in the two documents finalised in 1648 related to rather secondary issues.16[7] They included matters such as a general amnesty going back to the Bohemian troubles, the neutralisation of certain territories, the restitution of property and the renouncement of debts, the re-establishment of commerce and trade, the hereditary succession in some German monarchies, as well as the general representation in Imperial institutions and the election of the Emperor.

To summarise, the principal objects and material provisions of the *Osnabrück* and *Münster Treaties* do not at all support the traditional 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-a-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* focussing on the relevant documents clearly shows, therefore, that 1648 cannot legitimately be deemed 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 enjoying full autonomy over their territories.16[8] Put another way, the confinement of the transcendental institutions in Europe and the erosion of their authority over both spiritual and temporal spheres in favour of their constituting parts did not start, and certainly did not culminate either, with the *Peace*.

In the next section, the post-1648 period in Germany must be considered in order to assess the situation of the Holy Roman Empire and the status of the Princes following the congress, and thus complete a comprehensive examination of *Westphalia*.

C *From Westphalia to the Napoleonic conquest*

Even if the *Treaties of Osnabrück* and *Münster* did not establish, *de jure*, a system of independent states, perhaps they nevertheless constitute a *plaque tournante* because, *de facto*, the *imperium* substantially atrophied as a result of *Westphalia*, which meant that the distinct separate polities

effectively exercised exclusive control and power over their territories. This section will refute this postulate and will show that, in fact, Europe's secular transcendental institution did not disappear in favour of its constituting parts as an aftermath of the *Peace*.16[9]

1 *Survival of Imperial institutions*

In the 17th century and 18th century, the principal German political entities within the Empire could be gathered in the following categories: first, Ecclesiastical Principalities (dominated by Catholic Princes); second, Secular Principalities (dominated by Protestant Princes); third, Imperial Cities; and, finally, families of Imperial Counts and Knights.17[0] Some of the Secular Principalities — Brandenburg-Prussia, Electoral Saxony, Bavaria, the Palatinate, Hesse, Trier, and Württemberg — were antagonistic to the Imperial authority and challenged the Emperor's prerogatives. The other Secular Principalities, as well as Ecclesiastical Principalities, Imperial Cities, Counts and Knights, supported the Empire and were in favour of keeping its institutions alive and strong.17[1]

These institutions included the Diet and the Emperor himself, as well as the Imperial Courts, the Imperial Circles and the Imperial Army.17[2] The principal functions of the Diet were advisory and legislative; it also constituted the adjudicator of final appeal.17[3] Laws duly enacted by the Diet and sanctioned by the Emperor bound the Empire in its entirety,17[4] hence the adage *Reichsrecht bricht Landerecht*.17[5] Accordingly, there is little doubt that, originally, the Diet was intended to be the most important Imperial body after the Emperor.

It was seen that the *Treaty of Osnabrück* modified the composition of the Diet by establishing guarantees for denominational equality.17[6] Article 5, paragraph 43, of this *Treaty* further provided:

In matters of Religion, and in all other Affairs, wherein the States cannot be considered as one Body, and when the Catholic States and those of the Confession of *Augsburg* are divided into two Parties; the Difference shall be decided in an amicable way only, without any side's being tied down by a Plurality of Voices. However, as to what concerns the Plurality of Voices in the matter of Impositions, that Affair not being capable of being decided in the present Assembly, it shall be remitted to the next Diet.17[7]

It followed that any measure pertaining to religion, even remotely, had to be approved by both the *corpus Evangelicorum*17[8] and the *corpus Catholicorum*.17[9] This consensus requirement18[0] meant that, after 1648, the Diet could hardly fulfil its legislative functions.18[1]

Indeed, although it remained in permanent session starting in 1663,18[2] very little at all was accomplished by the Diet, mainly because of deadlocks caused by denominational equality or by lack of unanimity. The consequential impeded leadership and direction given to the Empire as a whole was fertile ground for the subordinate German polities to claim and, indeed, exercise power over their territories.18[3] But in spite of this, the Diet continued to be a forum within the Imperial system where issues of national concerns could at least be voiced and debated.18[4] One must also realise that it was only in the middle of the 18th century — that is, one-hundred years after the *Peace of Westphalia* — that the Diet thus became dysfunctional.

Similarly, although the *Osnabrück* and *Münster Treaties* affected the other Imperial institutions, they continued to play unremitting roles within the increasingly decentralised Empire for years after the *Peace*.18[5] ' Imperial institutions were not totally defunct, for they encouraged peace, solidarity, and military cooperation among the many German states.' 18[6] Indeed, the political activities of the Imperial Circles remained instrumental in most German areas, the jurisdiction of the Imperial Courts steadily shrunk but stayed strong until the 18th century, and the command of the Imperial Army abided with the Emperor and his *Reichs-Generalfeldmarschälle*18[7] to the end.

The last, but certainly not least, of the Imperial institutions was the Emperor himself, whose gradual decline in power owed nothing substantial to *Westphalia*. It is rather the expansion of the so-called *Landeshoheit*18[8] principle — imposed on Emperor Charles V in 1519 and enacted into

Imperial law in 1711 — which allowed the German distinct separate political entities to gain ever-expanding control and authority over their territories at the expense of the *imperium*.18[9] Significantly, here, this progressive erosion of the transcendental Imperial power began several centuries before 1648.19[0] According to the historian John Gagliardo, it can actually be traced back to the *Golden Bull* in 1356, which first prescribed legal modalities for the election of the Emperor.19[1]

Since this revolutionary landmark in the constitutional annals of the Empire, and up to the *Reichsdeputationshauptschluss*19[2] in 1803, just before the demise, the Emperor and the other Imperial institutions underwent piecemeal and virtually uninterrupted reductions in their functions and powers. However, one must emphasise that it was as a result of Napoleon's conquest of Germany in 180619[3] that the Holy Roman Empire ceased to exist.19[4] Put another way, the *imperium* did not disappear by atrophy victim of the German Princes; rather, it ended because of an external force unrelated to internal political struggles — Napoleonic France, the hegemonic power in Europe then.19[5]

2 *Theories of the Empire*

Finally, an account of the theoretical assessment of the Imperial political organisation given by some of the leading intellectuals both before and after 1648 will close this look at *Westphalia*. Unsurprisingly, the European academics of the time could not agree on who enjoyed ultimate power over German territories.19[6] In *Les six Livres de la Republique*,19[7] first published in 1576, the Frenchman Jean Bodin followed the Aristotelian categories of polities — monarchy, aristocracy, democracy19[8] — and held that the Empire was an aristocracy, not a monarchy, because:

the seven princes Electors, having by little and little withdrawn the sovereignty, have left nothing unto the emperor, but the bare marks thereof in show; the sovereignty it self in effect remaining unto the state of the seven electors, of three hundred German princes or thereabouts, and the ambassadors deputed for the imperial cities.19[9]

With the one exception of Henning Arnisaeus, this conclusion was opposed by German publicists — including Johannes Althusius, Bartholomaeus Keckermann, Hermann Kirchner, Daniel Otto, and Tobias Paurmeister — who insisted that the Emperor was a true monarch.20[0]

Other 17th century authors avoided a strict classification of ruling orders, which could not possibly reflect the multifarious German political reality. Among them, Veit Ludwig von Seckendorf and Johannes Limnaeus who, building on the idea of compound polyarchy first formulated by Christoph Besold,20[1] suggested that the Emperor and the Princes simply shared the supreme authority within the Empire.20[2] Samuel von Pufendorf also wrote on the issue shortly after *Westphalia* in his 1667 essay *De statu Imperii Germanici*, published under the pseudonym Severini de Monzambano.20[3] Influenced by Thomas Hobbes' *Leviathan*,20[4] the German theorist used the categories of regular and irregular forms of polity — instead of Aristotle's tripartite grouping — and held that the German political structure was *monstrous*, that is, of a hybrid nature between monarchical and aristocratic.20[5]

Now, for the present purposes, the most meaningful facet of the post-1648 period of German political history is that the Holy Roman Empire did not dissipate in favour of its constituting parts, neither in law nor in fact, as a result of the *Peace of Westphalia*. As one historian appositely wrote: ' The peace [in 1648] was not the tombstone of the empire but a charter which gave it another century-and-a-half of life' .20[6] Therefore, not only did *Osnabrück* and *Münster* blatantly failed to establish a legal system of independent states but, *de facto*, the German distinct separate polities did not gain full control and authority over their territories before the *imperium* vanished following Napoleon's conquest of the region in the 19th century.20[7]

<div align="center">IV CONCLUSION</div>

To recapitulate, the hypothesis at the heart of this paper is that the orthodoxy according to which the *Peace of Westphalia* recognised and applied for the first time the idea of sovereignty and hence

constitutes a paradigm shift in the development of the present state system is historically unfounded and, in effect, is a myth. It was argued that 1648 constitutes no more than one instance where distinct separate polities pursued their continuing quest for more authority over their territory through greater autonomy.

The discussion attempted to substantiate this argument in a three-part analysis. First were examined the segmented and heteronymously organised medieval societies based on decentralised feudal structures, which later unified through the Christendom under two transcendental political entities — the Pope and the Emperor. It was also seen that the dynamics at work in Europe's religious and political spheres meant that, at the break of the Thirty Years' War, the respective universal authorities of the Pope and the Emperor had already been severely depleted by the joint actions of the Reformation and the centralisation of government both within and without the Holy Roman Empire.

Second, the principal objects and material provisions of the *Osnabrück* and *Münster Treaties* were shown to deal with religious matters, territorial settlements and the transfer of treaty-making power. The purpose of *Westphalia*, in fact, was not at all about the creation of independent polities, let alone independent states. On the contrary, it kept the *imperium* very much alive, be it in the Empire's institutions, through feudal territorial links, or by restricting the Princes' alliance privileges. Finally, it was seen that the Empire did not disappear in favour of the German polities as an aftermath of the *Peace*. Indeed, despite reductions in the scope of their functions and powers, the Imperial institutions remained active until they disappeared.

The study was thus concerned with the material reality originally represented through language by the word 'Westphalia,' which essentially concerned the peace congress that ended the Thirty Years' War. Now, what comes out of this discussion is that the material reality that the linguistic sign 'Westphalia' represented in 1648, through the human mind, does not correspond to the reality with which the 'Westphalian state system' has long been associated. Indeed, it was shown that the *Peace* did not turn the page on multilayered ruling in Europe, but simply constituted a case where distinct separate polities claimed more authority through enhanced independence, which was really only reach a century-and-a-half later. This reality strongly contrasts with the Westphalian dogma according to which, by allegedly recognising the German Princes as sovereign, the *Peace* signalled the beginning of a new era.20[8]

Such a demonstration makes a compelling case that *Westphalia* constitutes a myth, an aetiological myth, or origin myth. Semiotically, 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 increased considerably.

Indeed, one can imagine, for instance, that people involved in international law who use the word 'Westphalia' every day of the week — like the publicists referred to in the introduction20[9] — 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' 21[0] to explain the fundamental juristic basis of the world organisation (or disorganisation) founded on the principle of the sovereign equality of states, in which is rooted the whole scheme of international relations, as well as the rules of international law.21[1] In sum, a reference to 'Westphalia' will invariably

bring up, through the cognitive process of the mind, a legally-empowered image21[2] of our 'international system [as] an association of sovereign states'.21[3]

This constitutes, in effect, the absolutely fabulous power that the aetiological myth of *Westphalia* has carried, sometimes strategically, within the shared consciousness of society. This social construct remains highly compelling today, as we have recently witnessed with the arguments against the creation of the International Criminal Court,21[4] which spoke of a most fundamental change in the 'Westphalian model' 21[5] of our international legal order, that is, in the world as we know it, no less.21[6] The debates on numerous other contemporary issues on the international plane have also been voiced in relation to the myth of 'Westphalia' 21[7] and the contention repeatedly heard now is that the reality this linguistic sign represents is being challenged by 'globalisation,' another extremely powerful word.21[8]

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[1] For more on this, see J L Austin's 'speech-act theory' in *How to do Things with Words* (1962).

[2] Such a conceptualisation of words and expressions as separate and distinct from reality, is essentially *nominalist* — etymologically, belonging to a name. Nominalism is a medieval philosophy, most often associated with William of Ockham, which took the view that abstract concepts are merely words and do not refer to anything that exists in the way that particular things exist.

[3] This idea of 'consciousness of humanity' is borrowed from the moral philosophy of Georg Wilhelm Friedrich Hegel, in particular from G W F Hegel, *Phänomenologie des Geistes* (1952) first published in 1807, §§ 632-671; see also the translation by A V Miller, G W F Hegel, *Phenomenology of Spirit* (1977) 383-409. The idea of 'consciousness' associated to an ensemble of human beings was suggested by G Butler, 'Sovereignty and the League of Nations' (1920-21) 1 *British Y B Int'l L* 35, 42, who discussed the word *sovereignty*, and more particularly the expression 'external sovereignty,' by resorting, *inter alia*, 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, 223, who expressed the following view: '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 ...' [emphasis added]

[4] This is based on Ludwig Wittgenstein's theory of language which, initially, was to the effect that words could represent reality, that language offered, as it were, a picture of the world; see L Wittgenstein, *Tractatus Logico-Philosophicus* (1961) 15*ff* and 51*ff.* However, in his later work on the issue, *Philosophical Investigations* (1958) the Austrian philosopher categorically revised his position and argued that words and expressions do not merely provide a representation of reality but, in effect, language would be an *activity* happening within reality, that it is indeed a participant in human consciousness — 'Here the term "language-*game*" is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life;' ibid 11. [emphasis in original]] See also P Allott, 'The Nation as Mind Politic' (1992) 24 *J Int'l L & Pol* 1361, 1361-1362: 'With Wittgenstein, we have been forced to face the possibility that human communication is not the transfer of something called Truth through a neutral medium called Language. Communication would then have to be regarded as simply another form of human activity, sharing in the intrinsic and irreducible ambiguity of all human activity.'

[5] The term 'organic' is used here to denote a property of language that allows words and expressions to be, simultaneously, autonomous and intertwined with the reality they represent. This

idea is linked to the so-called ' Ogden and Richards' Triangle,' whereby words are considered linguistic signs (Ogden and Richards' ' symbol') which indirectly represent reality (Ogden and Richards' ' referent') through the cognitive process of the human mind (Ogden and Richards' ' thought or reference') all of which for the purpose of communication within the shared consciousness of society. See C K Ogden and I A Richards, *The Meaning of Meaning — A Study of the Influence of Language upon Thought and of the Science of Symbolism* (2nd ed, 1927) 10-11.

[6] As D Kennedy, ' Primitive Legal Scholarship' (1986) 27 *Harvard Int' l LJ* 1, wrote: ' International legal scholars have made much of 1648' . [footnotes omitted] 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* (1845) 69; T Twiss, *The Law of Nations Considered as Independent Political Communities* (1861) vol 1, iii; S Baker (ed), *Halleck' s International Law — Rules Regulating the Intercourse of States in Peace and War* (2nd ed, 1878) vol 1, 13-14; J Westlake, *Chapters on the Principles of International Law* (1894) 66 and 76; L F E Oppenheim, *International Law — A Treatise* (1905) vol 1, 60; A P Higging, ' 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* (1929) vol 1, 183, 206; G A Finch, ' Les sources modernes du droit international' (1935) 53 *Recueil des cours de l' Académie de droit international* [herinafter *RCADI.*] 531, 536; M Sibert, *Traité de droit international public* (1951) vol 1, 48; T Ruyssen, *Les sources doctrinales de l' internationalisme* (1954) vol 1, 487*ff*; J G Starke, *An Introduction to International Law* (5th ed, 1963) 10; J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed, 1963) 5-6; R A Falk, ' The Interplay of Westphalia and Charter Conceptions of the International Order' in R A Falk and C E Black (eds), *The Future of the International Legal Order* (1969) vol 1, 32; P Daillier and A Pellet (eds), *Nguyen Quoc Dinh — Droit international public* (5th ed, 1994) 49-50; W G Grewe, *The Epochs of International Law* (2000) 7.

[7] K J Holsti, *Peace and War — Armed Conflicts and International Order* (1991) 25. [footnotes omitted] See also the different contributions, all to that same effect, made at the international symposium in commemoration of the 350th anniversary of the Peace of Westphalia: K Bussmann and H Schilling (eds), *1648: War and Peace in Europe* (1998) vol 1.

[8] M S Janis, ' Sovereignty and International Law: Hobbes and Grotius' in R St J Macdonald (ed), *Essays in Honour of Wang Tieya* (1994) 391, 393. [emphasis added] Likewise, see D J Hill, *A History of Diplomacy in the International Development of Europe* (1906) vol 2, 599, who wrote that ' the Peace of Westphalia was the most important, and in its results the most enduring, public act of modern history, *for from it dates the present political system of Europe as a group of independent sovereign states*' . [emphasis added]

[9] L Gross, ' The Peace of Westphalia 1648-1948' (1948) 42 *American J Int' l L* 20, 28. [emphasis added] Later, ibid 28-29, he added: ' In the spiritual field the Treaty of Westphalia was said to be ' a public act of disregard of the international authority of the Papacy' . In the political field it marked man' s abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, *each sovereign within its territory, equal to one another, and free from any external earthly authority* ; [footnotes omitted] [emphasis added] See also L Gross, *Essays on International Law and Organization* (1984) vol 1.

1[0] D Anzilotti, *Cours de droit international* (1929) vol 1, 5; author' s translation of: ' considérés avec raison comme le point de départ du développement historique du droit international actuel' . See also, to the same effect, R Redslob, *Histoire des grands principes du droit des gens — Depuis l' antiquité jusqu' à la veille de la grande guerre* (1923) 213: ' Avec le traité de Westphalie commence une nouvelle époque dans l' histoire du droit des gens.' [footnotes omitted]

[11] R A Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (1998) 4. [emphasis added] He further wrote: ' it was not for another century or so that it seemed possible to appreciate that indeed Westphalia had provided a defining threshold — of course, overgeneralized and simplified, but yet a convenient shorthand by which to situate the transition from the medieval to

the modern' ; *ibid.* [footnotes omitted] See also T Ruyssen, *Les sources doctrinales de l'internationalisme* (1957) vol 2, 8-9.

1[2] See the recent collection of essays on the theoretical basis of our international legal system: C Harding and C L Lim (eds), *Renegotiating Westphalia — Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (1999). See also H Steiger, ' Concrete Peace and General Order: The Legal Meaning of the Treaties of 24 October 1648' in K Bussmann and H Schilling, above n 7, 437, 440, who wrote: ' Sovereignty — as a form of complete external and internal independence and self-determination in relation to every other power — became the fundamental principle of the European order. Thus, a horizontally conceived order of powers developed, in which all powers, including Emperor and Pope, were legally placed side by side. To a certain extent, the treaties of Münster and Osnabrück provided the confirming conclusion to this development, thus at the same time marking the beginning of a new era.' [footnotes omitted]

1[3] See, for instance, the *Charter of the United Nations*, 26 June 1945, TS no 993, 145 UKTS 805, Can TS no 7, reproduced in M D Evans (ed), *Blackstone's International Law Documents* (3rd ed, 1996) 8, which states as its first principle, in article 2: ' The Organization is based on the principle of the sovereign equality of all its Members' . See also I Brownlie, *Principles of Public International Law* (4th ed, 1990) 287.

1[4] C S Rhyne, *International Law — The Substance, Processes, Procedures and Institutions for World Peace with Justice* (1971) 9. [emphasis added] See also C Fenwick, *International Law* (4th ed, 1965) 14, who wrote that after *Westphalia*, ' the international community was to consist of coequal members individually independent of any higher authority' .

1[5] D Pharand, ' Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint' (1994) 20 *Canada-United States LJ* 19, 20. [emphasis added] See also L Henkin, ' International Law: Politics, Values and Functions — General Course on Public International Law' (1989) 216 *RCADI* 9, 25, note **, who wrote that the shift to ' a developed political system with international law rules, is commonly dated from the Peace of Westphalia (1648)' .

1[6] T M Franck, *The Empowered Self — Law and Society in the Age of Individualism* (1999) 5. [emphasis added] For a succinct account of the main legal events on the international plane from 1648 to the beginning of the 20th century, see A S Hershey, ' History of International Law Since the Peace of Westphalia' (1912) 6 *American J Int' l L* 30.

1[7] G Poggi, *The Development of the Modern State — A Sociological Introduction* (1978) 89.

1[8] H J Morgenthau, ' The Problem of Sovereignty Reconsidered' (1948) 58 *Columbia L Rev* 341, 341. [emphasis added].

1[9] See, among numerous contemporaries, D Fagelson, ' Two Concepts of Sovereignty: From Westphalia to the Law of Peoples?' (2001) 38 *Int' l Politics* 499; D Philpott, *Revolutions in Sovereignty — How Ideas Shaped Modern International Relations* (2001); R Jackson, ' Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape' (1999) 47 *Political S* 431; J Rosenberg, *The Empire of Civil Society — A Critique of the Realist Theory of International Relations* (1994). *Contra*, see S D Krasner, ' Westphalia and All That' in J Goldstein and R O Keohane (eds), *Ideas and Foreign Policy — Beliefs, Institutions, and Political Change* (1993) 235.

2[0] Pursuant to its article 126, the *Rome Treaty* became effective upon the ratification of sixty (60) states.

2[1] *Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9 (1998) 37 ILM 999 (1998) http://www.un.org/icc. [hereinafter *Rome Statute*] This instrument was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

[2]2 W A Schabas, *An Introduction to the International Criminal Court* (2001) 1.

2[3] L N Sadat and S R Carden, ' The New International Criminal Court: An Uneasy Revolution' (2000) 88 *Geo LJ* 381, 385.

2[4] See *Rome Statute*, article 12. See also M P Scharf, ' The United States and the International Criminal Court: The ICC' s Jurisdiction over the Nationals of Non-Party State: A Critique of the US Position' (2001) 64 *Law & Contemp Prob* 67.

2[5] R G Wilkins, ' The Right Thing the Wrong Way — Implications of the New International Criminal Court' (2002) 17 *The World & I* 265, 268. [emphasis in original]

2[6] 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 five 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* (1984) 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 Rel* 507. Many authors have in fact restricted mythology to origin myths — also referred to as ' myths of beginnings' or ' creation-myths' . The aetiological category would include: (a) *theogonic* myths, pertaining to the origin of gods; (b) *cosmogonic* myths, concerning the origin of the world; and, (c) *anthropogonic* myths, relating to the origin of human kind.

2[7] See M I Steblin-Kamenskij, *Myth* (1982) 21; J Waardenburg, ' Symbolic Aspects of Myth' in A M Olson (ed), *Myth, Symbol, and Reality* (1980) 41, 60-61.

2[8] See, for instance, F W J von Schelling, *Philosophie der Mythologie* (1857) reprinted in M Schröter (ed), *Schellings Werke* (5th ed, 1959) 1; F M Müller, ' On the Philosophy of Mythology' in F M Müller, *Introduction to the Science of Religion* (1873) 335; J G Frazer, *The Golden Bough — A Study in Comparative Religion* (1890) 2 vols; S Freud, *Die Traumdeutung* (1900); É Durkheim, *The Elementary Forms of the Religious Life — A Study in Religious Sociology* (Joseph Ward Swain trans, 1915); J E Harrison, *Mythology* (1925); B Malinowski, *Myth in Primitive Psychology* (1926) reprinted in B Malinowski, *Magic, Science and Religion, and Other Essays* (1955); L Lévy-Bruhl, *La mythologie primitive — Le monde mythique des Australiens et des Papous* (2nd ed, 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 Ancien East* (1933); E Cassirer, *Language and Myth* (1946); A W Watts, *Myth and Ritual in Christianity* (1953); C Lévi-Strauss, ' The Structural Study of Myth' (1955) 68 *J American Folklore* 428, reprinted in C Lévi-Strauss, *Structural Anthropology* (1972) 206, [hereinafter *Structural Anthropology*] and also in the original C Levi-Strauss, *Anthropologie structurale* (1958) 227; [hereinafter *Anthropologie structurale*] P Wheelwright, ' The Semantic Approach to Myth' (1955) 68 *J American Folklore* 473; N Frye, *Anatomy of Criticism — Four Essays* (1957); R Graves, *The Greek Myths* (1958); C G Jung, *Man and His Symbols* (1964); P Gay, *The Enlightenment: An Interpretation — The Rise of Modern Paganism* (1967); P Ricoeur, *The Symbolism of Evil* (1969); G S Kirk, *The Nature of Greek Myths* (1974); J Campbell, *The Masks of God: Creative Mythology* (1974); G W Egerton, ' Collective Security as Political Myth: Liberal Internationalism and the League of Nations in Politics and History' (1983) 5 *Int' I History Rev* 496; I Strenski, *Four Theories of Myth in Twentieth Century History— Cassirer, Eliade, Lévi-Strauss and Malinowski* (1987); P Hegy, *Myth as Foundation for Society and Values — A Sociological Analysis* (1991).

2[9] See, generally, H Levin, ' Some Meanings of Myth' in H A Murray (ed), *Myth and Mythmaking* (1960) 103.

3[0] See P Stambovsky, *Myth and the Limits of Reason* (1996) 32; T F Hoad (ed), *The Concise Oxford Dictionary of English Etymology* (1986) 307.

3[1] See J P Vernant, *Myth and Society in Ancient Greece* (trans from the French by Janet Lloyd, 1979) 186*ff.*

3[2] See J A K Thomson, *The Art of the Logos* (1935) 17-19; Stambovsky, above n 30, 33-34; Hoad, above n 30, 270.

[3]3 L J Hatab, *Myth and Philosophy: A Contest of Truths* (1990) 334, n 30. See also W G Doty, *Mythography — The Study of Myths and Rituals* (1986) 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.'

3[4] See C G Flood, *Political myth: A theoretical introduction* (1996) 6. See also Vernant, above, n 31, 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).'

3[5] For instance, see E Leach, *Lévi-Strauss* (1970) 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* (1984) 1; Doty, above n 33, 7-8.

3[6] See E Cassirer, *The Myth of the State* (1946) 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.*'

3[7] See Flood, above n 34, 35, who wrote: ' Myths offer charters, warrants, validations, legitimations, and authoritative precedents for beliefs, attitudes, and practices in any important domain of social existence' .

3[8] See Malinowski, above n 28, 23: ' Myth fulfills 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 of primitive faith and moral wisdom.' [emphasis added].

3[9] See Doty, above n 33, 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, 64-66.

4[0] See, on the end of the Roman Empire, C G Starr, *A History of the Ancient World* (4th ed, 1991) 694 *ff.*

4[1] See, generally, F L Ganshof, *L' histoire des relations internationale* (1953) vol 1, 5-9.

4[2] Segmentation was at various stage in European communities, with pre-conquest England' s decentralised governance, the Anglo-Norman Kingdom relatively integrated, the German area and its fundamental duchy divisions, and the French kingdom' s theoretical centralisation; see F H Hinsley, *Sovereignty* (2nd ed, 1986) 61-62.

4[3] On heteronomous systems, see J G Ruggie, ' Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis' in R O Keohane (ed), *Neorealism and its Critics* (1986) 131, 141-143. Essentially, heteronomy bases the authority of polities on the functions fulfilled, not on the territory where the authority is exercised.

[4]4 See M Fischer, ' Feudal Europe, 800-1300: Communal Discourse and Conflictual Practices' (1992) 46 *Int' l Org* 427, 449, who wrote: ' [T]he legal institutions of vassalage, dependency, servitude, and fief organized feudal society into a highly heteronomous network of mutual obligations and shared rights.' See also B de Jouvenel, *Sovereignty — An Inquiry Into the Political Good* (1997) 206-206; J A Camilleri, ' Rethinking Sovereignty in a Shrinking, Fragmented World' in R B J Walker and S H Mendlovitz (eds), *Contending Sovereignties — Redefining Political Community* (1990) 13.

4[5] Philpott, above n 19, 79.

4[6] On the legal institution of vassalage, see F L Ganshof, *Feudalism* (Philip Grierson trans, 1952) 63-95; M Bloch, *Feudal Society* (1965) vol 1, 218-230; J S Critchley, *Feudalism* (1978) 30-55.

4[7] On the power dimension of the vassalage system, see F de Coulanges, *Histoire des institutions politiques de l' ancienne France* (1892) vol 6, 703*ff*.

4[8] P Anderson, *Lineages of the Absolute State* (1974) 37-38.

4[9] See, generally, G Clark, *Early Modern Europe from about 1450 to about 1720* (1957) 28; M Wilks, *The Problem of Sovereignty in the Later Middle Ages — The Papal Monarchy with Augustinus Triumphus and the Publicists* (1963) 233*f*; J R Strayer, *On the Medieval Origins of the Modern State* (1970) 26-36; J Anderson and S Hall, ' Absolutism and Other Ancestors' in J Anderson (ed), *The Rise of the Modern State* (1986) 21, 25-28.

5[0] See Philpott, above n 19, 78: ' The *Respublica Christiana* comprised all Christians, whether they lived in Europe or abroad in the Holy Land' .

5[1] See T A Walker, *A History of the Law of Nations* (1899) vol 1, 87, who wrote: ' The Crusades brought a social revolution.' He identified six areas where the Christendom' s fight over the Holy Land influenced the development of the European fabric. They include: (i) the shifting of baronial war effort from private combats to foreign conflicts; (ii) the creation of great centres of political power, such as the cities of Northern Italy; (iii) the increase of the authority of the Papacy, which was militant abroad but peacemaker at home; (iv) the lessons in Saracenic civilisation that the Crusaders brought back with them to the West; (v) the consolidation of the idea of Christendom unity; and (vi) the sentiment of identity that foreign involvement sparked with the people at home — see ibid 86-89.

5[2] See, generally, G Schwarzenberger, *A Manual of International Law* (4th ed, 1960) vol 1, 4-5.

5[3] That is, Christian body politic.

5[4] See J N Figgis, *Churches in the Modern State* (2nd ed, 1914) 175*ff*. See also M Zimmermann, ' La crise de l' organisation internationale à la fin du Moyen Âge' (1933) 44 *RCADI* 315, 320; K Pennington, ' Law, Legislative Authority, and Theories of Government, 1150-1300' in J H Burns (ed), *The Cambridge History of Medieval Political Thought — c 350 — c 1450* (1988) 424, 430-436.

[5]5 E N van Kleffens, ' Sovereignty in International Law' (1953) 82 *RCADI* 1, 21.

5[6] On how the Christian Empire was considered to be the natural and rightful continuation of the Roman Empire, see J van Kan, ' Règles générales du droit de la paix — L' idée de l' organisation internationale dans ses grandes phases' (1938) 66 *RCADI* 295, 446 *ff*; W Ullmann, ' Reflections on the Medieval Empire' (1964) 14 *Transactions Royal Hist Soc* (5th) 89, 95-103.

5[7] In fact, the Pope, who crowned Charlemagne, traded his support for the re-establishment of the Roman Empire in exchange for the recognition of the Church's authority.

5[8] Charlemagne's only successor, Louis the Pious, died in 840 and with him the Carolingian Empire. After some years of unrest, the *Treaty of Verdun* divided the Empire into three parts but, given that there was only one *imperium*, the crown was shifted around for the first few decades. Germanic pre-eminence was finally asserted in 881.

5[9] On the struggles between the Pope and the Emperor, see J Bryce, *The Holy Roman Empire* (4th ed, 1873) 153-166.

6[0] This contention was first forcefully propounded in the 11th century by Pope Gregory VII against Emperor Henry IV, who was even excommunicated. On Gregory VII's ambitions of supremacy over both spiritual and temporal spheres, see C H McIlwain, *The Growth of Political Thought in the West — From the Greeks to the End of the Middle Ages* (1932) 217-221.

6[1] The Pope's claim of supremacy over secular matters was founded on various texts of the Holy Bible, New Testament, most notably in the *Book of Matthew*, 16:19, which quotes Jesus Christ saying: 'I will give you the keys to the kingdom of heaven; whatever you bind on earth will be bound in heaven, and whatever you loose on earth will be loosed in heaven'. This statement is repeated at *Matthew*, 18:18. See also, generally, W Ullmann, *Principles of Government and Politics in the Middle Ages* (2nd ed, 1966) 32*ff*; Wilks, above n 49, 171-174.

6[2] The Papal authority was legally based on the so-called *dictatus papae*, that is, official juridical statements of the Pope. Theoretically, he enjoyed full universal legislative and judicial power, including to adjudicate disputes between rulers, to repudiate royal statutes or customs contrary to divine law, and even to depose monarchs guilty of mortal sins. See Ullmann, ibid 87*ff.*

6[3] That is, community of communities.

6[4] For instance, the following "Declaration of Imperial Independence" was made by Emperor Ludwig IV in 1338: 'Therefore, [...] with the counsel and assent of the Electors and other princes of the Empire, We declare that the imperial dignity and power are derived immediately from God alone; and that, by the law and ancient approved custom of the Empire, when anyone is elected Emperor or king by the imperial electors, unanimously or by majority, at once by the mere fact of election he is to be considered and entitled very King and Emperor of the Romans; [...] nor does he need the approbation, confirmation, authority or consent of the Pope or the Apostolic Sea or of any other person'; see R G D Laffan (ed), *Select Documents of European History*, vol.1, 800-1492 (1930) 149.

6[5] P Allott, 'Self-Determination — Absolute Right or Social Poetry?' in C Tomuschat (ed), *Modern Law of Self-Determination* (1993) 177, 184-185.

[6]6 See P Allott, *Eunomia — New Order for a New World* (1990) 66, who explained the nature of the struggle of power in any type of society as follows: 'Human beings and their societies are locked in a necessary struggle of the one and the many, as each empowers the other by disempowering itself, as each empowers itself by disempowering the other'.

6[7] See R Aron, *Peace and War — A Theory of International Relations* (Richard Howard and Annette Baker, trans 1966) 738, who wrote: 'Absolute sovereignty corresponded to the ambition of kings eager to free themselves from the restriction Church and Empire imposed upon them, medieval residues. At the same time, it permitted condemning the privileges of intermediate bodies: feudal lords, regions, cities guilds — privileges which no longer had any basis if the sovereign's will was the unique source of rights and duties.' See also G Andrassy, 'La souveraineté et la Société des nations' (1937) 61 *RCADI* 637, 646-647; A Truyol Serra, 'Souveraineté' (1990) 35 *Archives Philo D* 313, 316-317, who noted: 'On sait que l'idée moderne de l'État s'est imposée par une guerre sur deux fronts, à savoir, celui de l'opposition aux prétentions universalistes de la Papauté et de l'Empire, et celui de la réduction de l'enchevètrement des pouvoirs du système

féodal.'

6[8] See H Steinberger, 'Sovereignty' in R Bernhardt (ed), *Encyclopedia of Public International Law* (1987) vol 10, 397, 398.

6[9] Before the Council of Constance, which ended the Great Schism of the West in 1417, several popes claimed to be the legitimate representative of the Papacy. See K C Cole, 'The Theory of the State as a Sovereign Juristic Person' in W J Stankiewicz (ed), *In Defense of Sovereignty* (1969) 86, 88, who wrote: 'When, finally, the schism within the religious community occurred, it became evident that the old order was doomed.' See also J Canning, *A History of Medieval Political Thought — 300-1450* (1996) 176-184; M Wight, *Systems of States* (1977) 131-133.

7[0] See, generally, M Boegner, 'L'influence de la Réforme sur le développement du droit international' (1925) 6 *RCADI* 241; R A Brand, 'External Sovereignty and International Law' (1994-95) 18 *Fordham Int' l LJ* 1685, 1688. See also J B Elshtain, *Women and War* (1987) 136, who wrote: 'Luther prepares the way for the political theology that underlies the emergence of the nation-state'.

7[1] Certainly the most notorious case of monarchial Protestant disengagement from the authority of the Papacy was that of King Henry VIII of England who used the Pope's refusal to grant an annulment for his marriage to Catherine of Aragon as a political justification to elevate himself to Supreme Head of the Church of England, thus acquiring spiritual authority in addition to political power — legally accomplished through the *Act of Supremacy, 1534*. See J Goldsworthy, *The Sovereignty of Parliament — History and Philosophy* (1999) 48*ff*; N Davies, *Europe — A History* (1996) 490*ff*; G R Elton, *Reform and Reformation — England 1509-1558* (1977) 199-200.

7[2] At that time, Francisco de Vitoria notoriously argued against the Pope's claim of temporal jurisdiction above all princes in the first two lectures of his collection of thirteen *Relectiones*, first published in 1557 — see F de Vitoria, *Relectiones Theologicae Tredecim Partibus* (1587) 1*ff* and 60*ff*. Likewise, in the fifth essay, dealing with the Spanish authority over the Indians in the new world, the great professor of Salamanca University expressed his unequivocal view that the Pope was not the temporal master of the world — see ibid 164*ff.*; and the French translation by M Barbier, F de Vitoria, *Leçons sur les Indiens et sur le droit de la guerre* (1966) 46*ff.* See also, generally, A Nussbaum, *A Concise History of the Law of Nations* (1950) 80*ff.*

7[3] That is, fullness of power. On this idea, see A P d'Entrèves, *The Notion of the State — An Introduction to Political Theory* (1967) 97.

7[4] The *Great Interregnum* refers to a period of roughly 20 years when, for all practical purposes, the throne of the Holy Roman Empire was vacant. Following the death of Emperor Frederick II, German princes took advantage of the weak Hohenstaufen dynasty and elected a series of what proved to be ineffectual Imperial rulers. This era ended in 1273, when Count Rudolph of Habsburg was elected Emperor following pressure by Pope Gregory X, who was seeking imperial support for a new crusade.

7[5] See Pennington, above n 54, 432-433; Walker, above, n 51, 90, who wrote: 'The Empire and the Pontiff had alike failed to fulfil their mission. The Emperor at no time fully responded to his call. Endowed with an unique style, held the natural protector and leader of Christendom, Divine Viceregent in things temporal, the rightful source of the royal title, the convoker, at least concurrently with the Pope, of oecumenical councils, he failed to constitute himself international arbiter and *pacificator mundi.*' [footnotes omitted]

7[6] On the work of these legists and their influence on medieval thoughts, see J N Figgis, *The Divine Right of Kings* (2nd ed, 1922) 55-56; F S Ruddy, *International Law in the Enlightenment — The Background of Emerich de Vattel' s Le Droit des Gens* (1975) 6-12. See also, generally, P Guggenheim, 'La souveraineté dans l'histoire du droit des gens — Les conceptions des glossateurs et des commentateurs' in *Mélanges offerts à Henri Rolin* (1964) 134.

[7]7 That is, princes do not acknowledge any superior.

7[8] That is, a king in his own kingdom is emperor of his realm. On this doctrine in general, see W Ullman, ' The Development of the Medieval Idea of Sovereignty' (1949) 64 *English Hist Rev* 1, 5-7.

7[9] See Steinberger, above n 68, 398. Also worth noting is that Francisco de Vitoria' s lecture on the Spanish authority over the Indians in the new world demonstrated that, no more than the Pope, the Emperor was not the master of the whole world according to neither natural, divine nor human law — see de Vitoria, above n 72, 164*ff*; Barbier, above n 72, 36*ff*.

8[0] On the authority enjoyed by the rulers of France, England and the Italian free cities, see van Kleffens, above n 55, 22-25. See also Philpott, above n 19, 80, who concluded: ' By the eve of the Reformation in 1517, monarchs in Britain, France, and Sweden had established supremacy over the Church and other territorial rivals, while in Italy, a small system of sovereign states, sealed from Europe by alpine partitions, had survived for a century.'

8[1] See H J Laski, *The Foundations of Sovereignty and Other Essays* (1921) 12-13; G Gidel, ' Droits et devoirs des Nations — La théorie classique des droits fondamentaux des États' (1925) 10 *RCADI* 537, 546-547; and, generally, H Spruyt, *The Sovereign State and Its Competitors* (1994).

8[2] See, generally, P M Hohenberg and L H Lees, *The Making of Urban Europe, 1000-1950* (1985) 59-73; G Mattingly, *Renaissance Diplomacy* (1955) 55-63; J Burckhardt, *The Civilization of the Renaissance in Italy — An Essay* (2nd ed, 1945) 39*ff*.

8[3] See A P Sereni, *The Italian Conception of International Law* (1943) 7-9.

8[4] See Walker, above n 51, 139; C Tilly, *Coercion, Capital, and European States, AD 990-1990* (1990) 64-66.

8[5] See Strayer, above n 49, 36-48; R Lansing, *Notes on Sovereignty — From the Standpoint of the State and of the World* (1921) 16-18.

8[6] See, generally, K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir trans, 3rd ed, 1998) 182-187.

8[7] See A F Pollard, *The Evolution of Parliament* (1920) who opined that the development of the parliamentary system in England contributed immensely to the idea of sovereignty. The author wrote: ' The crown had never been sovereign by itself, for before the days of parliament that was no real sovereignty at all: sovereignty was only achieved by the energy of the crown in parliament, and the fruits of conquest were enjoyed in common' ; ibid 230.

[8]8 See Krasner, above n 19, 254.

8[9] See P Allott, ' The Courts and Parliament: Who Whom?' (1979) 38 *Cambridge LJ* 79, 89, who wrote: ' In the turbulent political history of medieval England, such events as the baronial resistance to John in the years up to 1215 and the coups of 1399 and 1485 were not structural discontinuities in the manner of modern revolutions.'

9[0] Indeed, several provisions of the Magna Carta (for instance, articles 9, 27, and 52) had nothing to do with fundamental rights or civil liberties, but related directly or indirectly to property rights that the barons wanted to shield from the monarch' s arbitrary power. See the English translation of the text in Appendix 6 of J C Holt, *Magna Carta* (1992) 449.

9[1] See, generally, K H F Dyson, *The State Tradition in Western Europe — A Study of an Idea and Institution* (1980) 36-44.

9[2] See G Zeller, *L' histoire des relations internationales* (1953) vol 2, 18-19.

9[3] See Strayer, above n 49, 48-56.

9[4] See, generally, Zweigert and Kötz, above n 86, 75-80.

9[5] That is, country of written law.

9[6] That is, country of customary law.

9[7] See Daillier and Pellet, above n 6, 48-49.

9[8] de Jouvenel, above n 44, 213.

[9]9 See, generally, F Hertz, *The Development of the German Public Mind — A Social History of German Political Sentiments Aspirations and Ideas* (1957 and 1962) 2 vols.

1[0]0 See below at notes 188-192 and accompanying text.

[1]01 See Walker, above n 51, 143: ' The German princely supporters of the Reformed doctrines united in the League of Schmalkalden (1531), but hesitated and wavered, and at length the Imperial victory of Mühlberg (1547) seemed to ring the death-knell of their hopes. Then, however, Maurice of Saxony, cool-headed and scheming, threw off the mask, and the flight of the Emperor through the Innsbruck pass with the subsequent *Treaty of Passau* (1552) proclaimed the forceful revival of the Lutheran cause.'

10[2] 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* (1991) 16*ff*; Jackson, above n 19, 440.

10[3] That is, whose the region, his the religion.

10[4] See A B Murphy, ' The Sovereign State System as Political-Territorial Ideal — Historical and Contemporary Considerations' in T J Biersteker and C Weber (eds), *State Sovereignty as Social Construct* (1996) 81, 86; Redslob, above n 10, 216. See also C V Wedgwood, *The Thirty Years War* (1944) 42, who wrote: ' This extraordinary compromise [*Augsburg*] saved the theory of religious unity for each state while destroying it for the Empire.'

10[5] See Philpott, above n 19, 81, who stated: ' But Augsburg did not last. The settlement was packed with endless clauses and legal arcana, eliciting so much mutual dissatisfaction that Catholic and Protestant princes continually took up arms to dispute the succession of a neighboring prince of the rival religion. Over the following generations, religious war raged between a continually speading Protestantism and the Counter Reformation, a revival of Catholicism across Europe whose most fervid participants fought for the eradication of the Protestant heresy and a restored Christendom.' [footnotes omitted] See also, generally, D Maland, *Europe at War — 1600-1650* (1980) 12-18; J Elliott, ' War and Peace in Europe, 1618-1648' in K Bussmann and Schilling (eds), *1648 — War and Peace in Europe* (1998) vol 1, 23, 23-24.

10[6] See Gagliardo, above n 102, 21-23.

10[7] Pursuant to the *Peace of Augsburg*, Donauwörth was designated a ' parity' city, but later became overwhelmingly Protestant. Feuds between Lutheran burghers and Catholic monks in 1606-1607 degenerated into street brawls which prompted Emperor Rudolf II to put the city under an Imperial ban in order to defend the religious rights of the Catholic minority.

10[8] See Gagliardo, above n 102, 23-24.

10[9] It included at first Palatinate, Württemberg, Neuburg, Baden, Ansbach, Anhalt and some Imperial Cities; it was later expended to include Brandenburg, Hesse-Kassel and other Cities.

11[0] It included Bavaria, various bishoprics of Bavaria, Swabia and Franconia, as well as some ecclesiastical polities.

11[1] 11 See E A Beller, 'The Thirty Years War' in J P Cooper (ed), *The New Cambridge Modern History* (1970) vol 4, 306, 306*ff*.

11[2] Ibid. 306.

11[3] On 23 May 1618, a group of Protestants in Prague invaded the Imperial palace and threw two Catholic members of the Bohemian Council out a window, some 70 feet above the ground. The rarely told aspect of the story, however, is that the officials fell into a pile of manure and suffered only minor injuries!

11[4] See, generally, H Sacchi, *La Guerre de trente ans*, 3 vols (1991); G Parker, *The Thirty Years' War* (1984); J V Polišenský, *The Thirty Years War* (1971); T K Rabb (ed), *The Thirty Years' War — Problems of Motive, Extent and Effect* (1964); G Pagès, *La guerre de trente ans — 1618-1648* (1949).

11[5] According to J Perré, *La guerre et ses mutations — Des origines à 1792* (1961) 409, the German population declined from 21 to 13 million because of the Thirty Years' War. See also G Franz, *Der Dreissigjährige Krieg und das deutsche Volk* (3rd ed, 1961) 47, who estimated that 40% of the rural and 33% of the urban population of Germany perished as a result of the War and its aftermath, such as the plague and other epidemics.

11[6] On the motives behind the conflicts that shifted from religion to politics, see Walker, above n 51, 157, who noted: 'Christendom mobilised under opposing flags, and the barriers between people and people and the ties of national allegiance were in the first instance forgotten in the fervour of religious opinion. When, however, the course of the struggle made it evident that the two great hostile armies must be finally content to partition the field of battle, and a clear rule of distribution was looked for, Nationality stepped from behind Religion and asserted effectual the claims.'

11[7] See J Burkhardt, 'The Summitless Pyramid: War Aims and Peace Compromise Among Europe's Universalistic Powers' in K Bussmann and H Schilling (eds), *1648 — War and Peace in Europe* (1998) vol 1, 51.

11[8] The Thirty Years' War conflicts are usually divided by historians into four phases, customarily styled and dated as follows: the Palatine-Bohemian period (1618-1623), ended by the Battle of White Mountain with a Catholic victory; the Danish period (1624-1629), another Catholic triumph consecrated by the *Treaty of Lübeck*; the Swedish period (1630-1635), which saw the *Treaty of Prague* officialise an indecisive Catholic victory; and, finally, the French period (1635-1648), which lead to the *Peace of Westphalia*. See, generally, Beller, above n 111, 307*ff*.

11[9] On the negotiations that led to the settlement of the Thirty Years' War, from original sources, see G H Bougeant, *Histoire du Traité de Westphalie, ou des Negociations qui se firent à Munfter & à Ofnabrug* (1751) 6 vols; J Le Clerc, *Negociations Secretes touchant la Paix de Munfter et d' Osnabrug* (1725 and 1726) 4 vols. See also K Repgen, 'Negotiating the Peace of Westphalia: A Survey with an Examination of the Major Problems' in K Bussmann and H Schilling (eds), *1648 — War and Peace in Europe* (1998) vol 1, 355.

12[0] It is noteworthy, however, that 1648 did not completely end all armed conflicts in Europe. The war between France and Spain continued until the *Peace of the Pyrenees* in 1659. As well, the war between Sweden and Poland, and that between Sweden and Denmark, only ended in 1660 with the *Peace of Olivia* and the *Peace of Copenhagen*. See J Droz, *Histoire diplomatique de 1648 à 1919* (1952) 7*ff*; Wheaton, above n 6, 71; Holsti, above n 7, 41.

[1]21 See Holsti, above n 7, 29, who wrote: 'The war came to an end not because of any great commitment to peace in the abstract or because of decisive military victories and defeats. Rather,

the parties exhausted themselves.'

1[2]2 See G R R Treasure, *The Making of Modern Europe, 1648-1780* (1985) 374; J Bryce, *Studies in History and Jurisprudence* (1901) vol 2, 82*ff*; van Kleffens, above n 55, 38-39; Camilleri, above n 44, 14.

12[3] See Walker, above n 51, 84, who wrote: ' The new Order arose by the positive and negative establishment of the authority of Feudal Monarchy; by the victory of that Monarchy in the struggle with baronial disorder, and by the defeat alike of Papacy and of Holy Roman Empire in the attempt to establish an effective World Sovereignty.' See also Bryce, above n 59, 340, who noted that *Westphalia* ' did no more than legalize a condition of things already in existence'.

12[4] See G Sørensen, ' Sovereignty: Change and Continuity in a Fundamental Institution' (1999) 47 *Political St* 590, 591, who expressed the following view concerning the *Peace of Westphalia*: ' *The world did not change overnight at a specific point in time*; elements of the old system remained in place for a long period. There was no momentous change from one day to the next in 1648' . [emphasis added] See also Murphy, above n 104, 109, who made the following apposite remarks: ' If the history of state-territorial ideas and practices tells us anything, it is that changes in arrangements and understandings occur, but that *no one era represents a radical break with the preceding era*' . [emphasis added]

12[5] That is, the Westphalian constitution. See also Daillier and Pellet, above n 6, 50, who spoke of the ' Charte constitutionnelle de l' Europe' .

12[6] However, it was imperative for the participants to achieve a ' unitary peace' ; see Steiger, above n 12, 444.

12[7] For the full text of the *Osnabrück* and *Münster Treaties*, in both their Latin and English versions, see C Parry (ed), *Consolidated Treaty Series* (1969) vol 1, 119 and 270. [hereinafter *Treaty Series*] It is the English translation that will be used here, which Parry said is taken from the *General Collection of Treatys*; the old English spelling used will be modernised.

12[8] See T Meron, ' The Authority to Make Treaties in the Late Middle Ages' (1995) 879 *American J Int' l L* 1, 6-7. See also, generally, C W Jenks, ' Les instruments internationaux à caractère collectif' (1930) 69 *RCADI* 448; A D McNair, *Law of Treaties — British Practice and Opinions* (1938) 4-6.

12[9] 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*, 199-200 and 321. See also A Osiander, *The States System of Europe, 1640-1990 — Peacemaking and the Conditions of International Stability* (1994) 27-30, who noted that the rulers' representatives at the peace conferences viewed themselves as part of a community based on the Christian religion.

13[0] 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*, 200 and 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*; see McNair, above n 128, 70. See also Redslob, above n 10, 215-216.

[1]31 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, 71 and 77; C Bilfinger, ' Les bases fondamentales de la communauté des États' (1938) 63 *RCADI* 129, 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.'

13[2] *Treaty Series*, 353. [emphasis added] [spelling modernised]

1[3]3 See Holsti, above n 7, 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* (1998) vol 1, 485.

13[4] See H Steiger, above n 12, 422.

13[5] See above n 102.

13[6] See Pagès, above n 114, 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* (1995) 228, 234-236.

13[7] See A Hobza, 'Questions de droit international concernant les religions' (1924) 5 *RCADI* 371, 377-378.

13[8] See A W Ward, 'The Peace of Westphalia' in A W Ward, G W Prothero and S Leathes (eds), *The Cambridge Modern History* (1934) vol 4, 395, 416.

13[9] *Treaty Series*, 218-219.

14[0] See *Treaty Series*, 228-229. [emphasis in original] [spelling modernised]

[1]41 Article 5, paragraph 28, of the *Osnabrück Treaty*, ibid 229. [spelling modernised]

14[2] Article 5, paragraph 24, of the *Osnabrück Treaty*, ibid 225-227. [spelling modernised]

14[3] See Ward, above n 138, 414.

1[4]4 *Treaty Series*, 234-235. [spelling modernised]

14[5] Article 5, paragraph 45, of the *Osnabrück Treaty*, ibid 237-238.

14[6] See article 7 of the *Osnabrück Treaty*, ibid 239-240. [emphasis in original] [spelling modernised]

14[7] See article 10 of the *Osnabrück Treaty*, ibid 244 -249.

14[8] See Ward, above n 138, 403-404.

14[9] *Treaty Series*, 244-247.

15[0] Article 76, *Münster Treaty*, ibid 341. [emphasis in original] [spelling modernised]

[1]51 See Ward, above n 138, 404-405.

15[2] See article 71 of the *Münster Treaty*, *Treaty Series*, 340.

15[3] See article 73 of the *Münster Treaty*, ibid.

15[4] See article 74 of the *Münster Treaty*, ibid 340-341.

1[5]5 Ibid 345. [emphasis in original] [spelling modernised]

15[6] See Pagès, above n 114, 258-259. See also Redslob, above n 10, 214, footnote 3.

15[7] See Holsti, above n 7, 34.

15[8] 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 Polišenský, above n 114, 236-237; G Pagès, above n 114, 254.

15[9] 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*, 337. [emphasis in original] [spelling modernised]

16[0] See Pagès, above n 114, 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* (1962) vol 2, 515; Beller, above n 111, 358; Redslob, above n 10, 214-215; Walker, above n 51, 148.

[1]61 See, for instance, F de Martens, *Traité de droit international* (1883) vol 1, 116; Gidel, above n 81, 549; Redslob, ibid 215; Holsti, above n 7, 35-36; Osiander, above n 129, 46-47; Philpott, above n 19, 85.

16[2] *Treaty Series*, 337-338. [emphasis added] [spelling modernised]

16[3] Ibid 241. See also Lesaffer, above n 131, 71.

16[4] 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 Negociations qui se firent à Munfter & à Ofnabrug* (1751) vol 3, 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.

16[5] See Parker, above n 114, 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.

1[6]6 See above n 108-110 and accompanying text.

16[7] For more detail on these secondary matters, see H Sacchi, *La Guerre de trente ans* (1991) vol 3, 477-484; Holsti, above n 7, 36.

16[8] See Walker, above n 51, 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 pupilage [sic] by the awe-inspiring shadow of a majestic common superior' . See also, to the same effect, Wight, above n 69, 152: ' At Westphalia the states-system does not come into existence: it comes of age' ; and, Westlake, above n 6, 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.'

16[9] One may recall that Voltaire notoriously quipped that the German Empire was ' neither Holy, nor Roman, nor an Empire' ; see L C Buchheit, *Secession — The Legitimacy of Self-Determination* (1978) 8. Pufendorf' s view on the Empire was that of ' an irregular state-body, much like a monster' ; see J G Gagliardo, *Reich and Nation — The Holy Roman Empire as Idea and Reality, 1763-1806* (1980) 41; it must be stressed, however, that the terms ' monstrosity' (in Latin *monstrum*) and ' irregularity' were almost synonyms in the writings of the 17th century and 18th century — see below n 205. These quotes bear witness to how important, yet immensely difficult, it has been to describe and ascertain the nature of the Holy Roman Empire of the German Nation. The objective of this brief review of the Imperial institutions is much more modest — to show that the Empire, whatever it was, did not end following *Westphalia*.

17[0] See Gagliardo, ibid 3-15. The Imperial Constitution consisted in the following series of legal texts adopted throughout the existence of the Empire: (i) the *Golden Bull* in 1356; (ii) the *Eternal Peace* in 1495; (iii) the *Treaty of Passau* in 1552; (iv) the *Peace of Augsburg* in 1555; (v) the *Peace of Westphalia* in 1648; (vi) the *Electoral Capitulations* in 1519; (vii) the *Peace of Teschen* in 1779; and (viii) the *Final Recess of the Imperial Deputation* in 1803.

[1]71 See Krasner, above n 19, 247-248.

17[2] See Gagliardo, above n 169, 16-46, who underscored that these institutions ' functioned essentially unchanged for a century and a half following the Peace of Westphalia' ; see, ibid 16.

17[3] The *Treaty of Osnabrück*, at article 8, assigned to the Diet an almost indefinite programme of work; see *Treaty Series*, 241-243. See also Pagès, above n 114, 246.

17[4] The Diet was formed of three councils — the Council of Electors, the Council of Princes, and the Council of Cities. A majority vote in two of the three bodies was needed to submit a proposal to the Emperor, on which he had the final say.

17[5] That is, Imperial law breaks territorial law.

17[6] See above n 143-144 and accompanying text.

1[7]7 *Treaty Series*, 235. [emphasis in original [spelling modernised]

17[8] That is, body of Protestants.

17[9] That is, body of Catholics.

18[0] This distinction based on denomination existed in addition to the division of the Diet into three councils. It meant that the voting on religious matters was done in a plenary assembly of all representatives, who sided in their respective Catholic and Protestant groups. See Gagliardo, above

n 169, 24.

[1]81 See P Schröder, ' The Constitution of the Holy Roman Empire after 1648: Samuel Pufendorf' s Assessment in his *Monzambano*' (1999) 42 *Historical J* 961, 979-980, who wrote: ' The Protestants realized immediately that they could exploit the right of separating into two different religious congregations for their own ends. By claiming that most of the disputed matters were matters of religious controversy, and thus enforcing the *itio in partes*, they were able to assert that the decision reached in the particular Protestant corpus was the only binding agreement for them, and that the Catholics had no right to intervene or challenge these discussions. This tactical manoeuvring impeded the Diet seriously, while the Emperor attempted to stress the unity of the Empire.'

18[2] Since the Diet was convoked by the Emperor and fearing that the latter could disregard its constitutional role by not calling sessions, the representatives refused to disband the Diet after 1663. Therefore, it remained in permanent session until the end of the Empire in 1806, hence the nickname ' Eternal Diet' of Regensburg. See Gagliardo, above n 169, 21.

18[3] See Sacchi, above n 167, 482, who wrote: ' L' unanimité sur les problèmes constitutionnels ou religieux importants étant en réalité impossible à atteindre, cette institution, qui siégea jusqu' au milieu du XIXème siècle, devint le point où s' accumulèrent tous les dossiers essentiels de l' empire, et paralysa en fait toute réforme.'

18[4] It is through the Diet that the notorious mystical formula *Kaiser und Reich* emerged to signify both the unity and the division within the Holy Roman Empire. According to Gagliardo, above n 169, 21, this expression was ' intended to convey the sense of a kind of coequal responsibility of head and members for the preservation of harmony of a single body, a higher unity within diversity' . The English language cannot properly convey the precise adjectival distinction between *Kaiser* and *Reich*, which would be translated at best as ' Emperor' and ' Empire' .

18[5] For a detailed analysis of the Imperial Circles, the Imperial Courts and the Imperial Army, see Gagliardo, ibid 26-39.

18[6] Philpott, above n 19, 87.

18[7] That is, Imperial General-Field Marshals, who acted as the supreme military representatives of the Emperor.

1[8]8 That is, territorial lordship.

18[9] See F Hertz, *The Development of the German Public Mind — A Social History of German Political Sentiments Aspirations and Ideas* (1957) vol 1, 14.

19[0] Further, it was shown in a previous part of the paper that the Emperor' s authority vis-a-vis other European territories such as Spain, England and France disappeared centuries before. See above n 79 and accompanying text.

[1]91 See Gagliardo, above n 169, 18-19. See also, generally, L Gross, ' The Holy Roman Empire in Modern Times: Constitutional Reality and Legal Theory' in J A Vann and S W Rowan (eds), *The Old Reich: Essays on German Political Institutions, 1495-1806* (1974) 1.

19[2] That is, the *Final Recess of the Imperial Deputation*.

19[3] A study of the Empire' s last period of existence is obviously beyond the present study. For more detail, see Gagliardo, above n 169, 187*ff;* Bryce, above n 59, 359*ff*.

19[4] It is important to point out that the Empire was *not abolished* by Napoleon but, rather, that its dissolution was the result of Emperor Francis II' s renouncement to the Roman-German crown on 6

August 1806, following a note announcing that France no longer recognised the *imperium* which, in fact, amounted to an ultimatum for abdication; from then on, the authority of the Habsburg Emperor was limited to the Austrian borders — see Gagliardo, ibid 279-281; Bryce, ibid 365-366. Therefore, it appears to be erroneous to refer to the Napoleonic *abolition* of the Holy Roman Empire, as some commentators have — see, for example, Krasner, above n 19, 251, who wrote: ' Napoleon abolished the empire completely in 1806' .

19[5] See P Guggenheim, ' La souveraineté dans l' histoire du droit des gens — De Vitoria à Vattel' in *Mélanges offerts à Juraj Andrassy* (1968) 111, 114, who wrote: ' Mais il fallut quand même attendre jusqu' à la dissolution de l' Empire, en 1806, pour qu' une modification fondamentale se produise dans la situation juridique; les territoires dont les princes avaient réussi à s' assurer la puissance publique devinrent des États souverains, englobant les seigneuries dont les titulaires n' avaient pas accédé à la même position' .

19[6] See, generally, D Wyduckel, ' The Imperial Constitution and the Imperial Doctrine of Public Law: Facing the Institutional Challenge of the Peace of Westphalia' in K Bussmann and H Schilling (eds), *1648 — War and Peace in Europe* (1998) vol 1, 77.

19[7] J Bodin, *Les six Livres de la Republique* (1583). See also the translation by R Knolles, J Bodin, *The Six Bookes of a Commonweale* (1606).

19[8] See Bodin, ibid 252; see also Knolles (tr) ibid 184. For more detail on Aristotle' s forms of government, see d' Entrèves, above n 73, 73.

1[9]9 R Knolles (tr), ibid 236. [spelling modernised] See also the original Bodin, ibid 321. Also note that Bodin summarily rebuked the pretensions of Imperial and/or Papal world overlordship later in his work — see Bodin, ibid 199 and 201; Knolles (tr), ibid 135 and 137. See also R Chauviré, *Jean Bodin — Auteur de la ' République'* (1914) 463-466.

2[0]0 See J H Franklin, ' Sovereignty and the Mixed Constitution: Bodin and His Critics' in J H Burns (ed), *The Cambridge History of Political Thought — 1450-1700* (1990) 298, 309*ff.*

20[1] See ibid 323*ff.*

[2]02 See Schröder, above n 181, 963.

20[3] S de Monzambano (i.e. S von Pufendorf), *De statu Imperii Germanici* (1668). See the translation by E Bohun, S von Pufendorf, *The Present State of Germany Written in Latin by the Learned Samuel Pufendorf under the Name of Severinus de Monzambano Veronesis* (1696).

20[4] See T Hobbes of Malmesbury, *Leviathan, or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill* (1651) 115. Von Pufendorf later elaborated on the question of the forms of political system in S von Pufendorf, *De iure naturae et gentium libri octo* (1688) first published in 1672.

20[5] It is important to note that, in 17th century and 18th century writings, the term ' monstrosity' — from *monstrum* in Latin — was used not as an insult to the Empire but, rather, to mean a striking and unusual irregularity in a political body. See Schröder, above n 181, 966-967.

20[6] R Wines, ' The Imperial Circles, Princely Diplomacy and Imperial Reform 1681-1714' (1967) 39 *J Modern Hist* 1, 2.

20[7] See F H Hinsley, *Power and the Pursuit of Peace — Theory and Practice in the History of Relations between States* (1963) 153, who appositely wrote the following concerning the eagerness to ante-date the beginning of pivotal phenomena such as the modern state system: ' Historians are liable to ante-date the completion of massive developments because of their preoccupation with origins. *They are given to ante-dating the beginnings of massive developments for the same reasons and also because such developments are rarely finally completed*: when the end of one phase is

usually but the preliminary to the onset of the next it is easy to mistake the onset of another phase for the beginning of an entirely new departure. These opposite hazards have affected our assessments of the origin and evolution of the modern states' system. *Only when due allowance is made for the first can it be seen that a new European states' system emerged in the eighteenth century, and not at an earlier date*. Only when careful regard is paid to the second can it be seen that, for all the twists and phases it has recently undergone, the system which then emerged or finally matured in Europe is the system which still holds the world in its framework.' [emphasis added]

20[8] On the overlapping of periods of history, see C Gallagher and S Greenblatt, *Practicing New Historicism* (2000) 7: ' In what sense is an era ever truly finished — who sets the boundaries and how are they patrolled. Do we not have overwhelming evidence, in our time and in every period we study of an odd interlayering of cultural perspectives and a mixing of peoples, so that nothing is every truly complete or unitary.'

20[9] See above n 8-19 and accompanying text.

21[0] Falk, above n 11, 4.

2[1]1 Again, very recently, 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, 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 the Peace of Westphalia in 1648 as an event which inaugurated the system of international relations based on a community of sovereign states.' [footnotes omitted]

[2]12 M Koskenniemi, *The Gentle Civilizer of Nation — The Rise and Fall of International Law 1870-1960* (2002) 51, used the expression ' metaphoric sense of Westphalia' to express that idea.

21[3] Franck, above n 16, 5.

21[4] On this futile resistance to the International Criminal Court, see the eloquent editorial closing remarks by W A Schabas, ' International Criminal Court: The Secret of its Success' (2002) 12 *Criminal L Forum* 415, 428: ' As Victor Hugo wrote, in *Histoire d' un Crime*, " On résiste à l' invasion des armées; on ne résiste pas à l' invasion des idées" . Or as it has been put more colloquially, ' nothing can stop an idea whose time has come.'

21[5] See above n 20-25 and accompanying text. *Contra*, see R E Fife, ' The International Criminal Court — Whence It Came, Where It Goes' (2000) 69 *Nordic J Int' l L* 63, 75, who nevertheless used the ' Westphalia' rhetoric: ' The Statute [of Rome] does not challenge the basic Westphalian System of international law. This State-centered and inherently fragmented legal order is reflected to an extreme degree in international criminal law.' [footnotes omitted]

21[6] On the recent developments concerning international judicial instances, see Y Simbeye, ' Internationalised Criminal Courts and Tribunals: Practice and Prospects' (2002) 4 *Int' l L Forum* 82.

21[7] See, for instance, the paper by Canada' s former ambassador to the OECD, K Valaskakis, ' From " Westphalia" to " Seatle" : Long-Term Trends in Global Governance' , communication given at the OECD Forum on 21st Century Governance, Expo 2000, Hanover, Germany, March 24-25 2000. Also, in *The Economist* of 22-28 February 2003, there was a special report on the United Nations and Iraq entitled ' Irrelevant, Illegitimate or Indispensable?' where one could read, 26: ' All in all, though the UN saw some of its darkest days in the 1990s — the massacre in the " safe area" of Srebrenica being over-shadowed only by the inaction in the face of genocide in Rwanda — it also demonstrated its capacity to adjust to changing circumstances. Indeed, in 1999 its secretary-general, Kofi Annan, enunciated a new doctrine that would have shocked most of his predecessors. Atrocities on a grand scale and the denial of democratic fundamentals should no longer be regarded as purely domestic

matters, he said, *thereby tossing out ideas about the inviolability of national sovereignty that went back to the Treaty of Westphalia in 1648.* [emphasis added]

21[8] On the different meanings given to the word 'globalisation' (or '*mondialisation*' in French), see E Hey, 'Globalisation and International Law' (2002) 4 *Int' l L Forum* 12. See also P Allott, 'The Emerging Universal Legal System' (2001) 3 *Int' l L Forum* 12.