

## Westphalia: a Paradigm? A Dialogue between Law, Art and Philosophy of Science

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### A. Introduction

On 23<sup>rd</sup> June 2007, after three years of uncertainty, European Union leaders agreed on relaunching the old idea of a *Magna Charta* for Europe (now called “the Reform Treaty”), a normative structure based on the old ideas of deference to national identities, sovereignty and equality. To many authors, the first time that juridical equality between states was solemnly stated was in the aftermath of the Thirty Years’ War (1618-1648), in the Westphalia Peace Treaties, representing the beginning of modern international society established in a system of states, and at the same time, “the plain affirmation of the statement of absolute independence of the different state orders.”<sup>1</sup> In fact, under an Eurocentric conception of political ideas (which envisages England as an isolated island and Iberia as Maghreb, north of Africa), the modern state emerges with the Westphalia Peace Treaties. However, under a broader conception, the modern nation-state (under the form of absolute monarchy) emerged long before the Westphalia Peace Treaties, in Iberia and England.<sup>2</sup> Nevertheless, it is in these documents which lies the “birth certificate” of the modern sovereignty nation-state, base of the present democratic state, and “founding moment” of the international political system. Far beyond this merely formal aspect, the importance of the Westphalia Peace Treaties is so great to the understanding of the notion of state that Roland Mousnier, in describing the 16th and 17th centuries in the *General History of the Civilizations*, organized by Maurice Crouzet, asserts that those treaties symbolized a real “constitution of the new

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<sup>1</sup> PAOLO BISCARETTI DI RUFFIA, *DERECHO CONSTITUCIONAL* (Constitutional Law) 121-122 (1965).

<sup>2</sup> José Roberto Franco da Fonseca, *Geopolítica e Direito Internacional* (Geopolitics and International Law), 91 *REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE SÃO PAULO* 315, 316 (1996).

Europe,"<sup>3</sup> a multifarious Europe, plural and very distant from the religious unit of Christianity, from the political unit of the Holy Roman Empire, and from the economical unit of the feudal system. Constitutions are especially important because they establish the rules for the political authority, they determine who governs and how they govern: "[I]n codifying and legitimating the principle of sovereign statehood, the Westphalian constitution gave birth to the modern states-system."<sup>4</sup>

The symbolic character of the Westphalia Peace Treaties is undeniable and can be estimated by innumerable and multidisciplinary references to a "westphalian" or "post-westphalian" model of State or of international relations. The political, juridical, geographical, religious, and philosophical outcomes of the Westphalia Peace Treaties induced many State and Law scholars to speak of a "Westphalian paradigm" to describe a standard, a parameter, or a model of State which became an absolute reference as from the 17th century.

Paradigms should be differentiated from the word legacy. They are more than a legacy. A paradigm, according to Fourez,<sup>5</sup> is a mental structure, conscious or not, that is useful to classify the world and approach it. In other words, paradigms are the key theories, instruments, values and metaphysical assumptions that comprise a disciplinary matrix. Philosopher Thomas Kuhn, in the beginning of his classical study about the thinking and scientific revolutions, teaches: the study of paradigms is what basically prepares the student for membership in the scientific community in which he or she will later work<sup>6</sup>. The concept of state that emerges from the Westphalia Peace Treaties reaches this status of fundamentality. Thus, reference to the understanding of the world which occurs after it, and taking it as a paradigm, would be no great orthodoxy<sup>7</sup>. Beaulac asserts that references to the centrality of the Westphalian profile of State date back at least to the middle 19th century by important authors of International Law.<sup>8</sup> With undoubted legitimacy, Leo Gross, in

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<sup>3</sup> Roland Mousnier, *Os Séculos XVI e XVII (Centuries XVI and XVII)*, in *HISTÓRIA GERAL DAS CIVILIZAÇÕES IV/1 (General History Of The Civilizations IV/1)* 302 (Maurice Crouzet ed., 1973).

<sup>4</sup> JOHN BAYLIS & STEVE SMITH eds., *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 29-30 (2006).

<sup>5</sup> GÉRARD FOUREZ, *A CONSTRUÇÃO DAS CIÊNCIAS (The Construction of Sciences)* 103 (1995).

<sup>6</sup> THOMAS KUHN, *A ESTRUTURA DAS REVOLUÇÕES CIENTÍFICAS (The Structure of Scientific Revolutions)* 30 (1997).

<sup>7</sup> Stéphane Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?*, 2 *JOURNAL OF THE HISTORY OF INTERNATIONAL LAW* 148, 148 (2000).

<sup>8</sup> *Id.*

a referential text marking the three-hundredth anniversary of those peace treaties, emphasises that “the Peace of 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 to the new world.”<sup>9</sup> In the same direction, Harding & Lim point out that “undoubtedly, there was a pre-Westphalian system (see e.g. Nussbaum, Verdross, Ago) ... which somehow was supplanted.”<sup>10</sup>

Despite being central to the understanding of the contemporary scene, very few times has the Westphalian paradigm occupied the core of papers in the world of legal writings, especially in Latin America. Related reports are found in sciences akin to Law and almost always as support for other historical studies. The origins, implications, characteristics, and present content of the Westphalian paradigm, from a Legal point of view, form the core of the work here presented. It is important to remember that the deep implications of the Westphalia Peace Treaties, established three hundred and fifty years ago, transcend the legal world to reach to the peak of international relations, sociology, economics, and philosophy. The investigation which follows is restricted to objects of law dogma in general, and constitutional dogma in particular.

In the framework of relationships between State and Law, to understand one is to fully understand the other. This fact gives legitimacy to the inquiry about the Westphalian Legal paradigm which is to be developed here. All the “vision of the world” (*Weltanschauung*) structuring of the modern and contemporary modes of understanding/applying Law is based on the tripod Stateness-rationality-oneness, according to which Law identifies with the rule imposed solely by the State, the only one valid, in use and effective in its territory and conceived according to principles of coherence, systematization, harmony and logic. The political-juridical category “State” is the base to the study and understanding of this model of Law that has been formed since the disintegration of the feudal world. State and Law maintain between each other a relationship of mutual interference so that Law (starting from the constitutional one) is meant to give a form, constitute or conform a given scheme of political organization of which main characteristic is the monopoly of the political-juridical power over a determined community gathered in a territory.<sup>11</sup>

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<sup>9</sup> Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 20, 28 (1948).

<sup>10</sup> CHRISTOPHER HARDING & C. L. LIM eds., *RENEGOTIATING WESTPHALIA: ESSAYS AND COMMENTARY ON THE EUROPEAN AND CONCEPTUAL FOUNDATIONS OF MODERN INTERNATIONAL LAW* 6 (1999).

<sup>11</sup> J. J. GOMES CANOTILHO, *DIREITO CONSTITUCIONAL E TEORIA DA CONSTITUIÇÃO (Constitutional Law and Constitution's Theory)* 87-90 (2002).

## B. Historical Environment: From the Thirty Years' War to the Peace of Westphalia

Before the Thirty-Years' War, the European political order was an amalgam of the traditions of the Roman Empire and the Catholic Church. The world was heaven's mirror. One only God reigned in heaven, and so just one Emperor should be the lord in the secular world and just one Pope should rule the universal church.<sup>12</sup> Along this same line of singular religious and political thinking, both Truyol y Serra<sup>13</sup> and Machado<sup>14</sup> speak of a "Res Publica Christiana," Augustinian-based and valid in all of Europe.

The Thirty Years' War represented a titanic conflict between the rival dynasties of Bourbon (France) and Hapsburg (lords of Spain and of the Holy Roman Empire, with territories in Austria, Bohemia, the Netherlands, Bavaria, Flanders, north of Italy, Belgium and Hungary) for the domain of continental Europe. Few military conflicts in History have caused such devastation to the civilian population. It is estimated that at least half of the German and Bohemian people lost their lives due to starvation, diseases and brutal attacks from soldiers bent on pillage. The armies from both sides looted, tortured, killed and set fire to everything transforming entire regions into great deserts<sup>15</sup>.

The violence of the Thirty Years' War was particularly intense in the German territories where pain molded all the German baroque literature in the seventeenth century. Never was any country submitted to such cruel and systematic devastation, having its population, in certain regions, reduced to a tenth, having all their moral and material values destroyed. It was the greatest catastrophe of the German people: the country came out of it extremely poor, undeveloped and politically divided into small principedoms, ruled in the north by mean Lutheran rulers and in the south by neglectful Catholic prelates, while in the few larger States absolutism was established in the French way.<sup>16</sup> Andreas Gryphius, the greatest name in German baroque poetry, in his 1636 sonnet "*Thränen des Vatterlandes*" ("*Homeland Tears*"), portrayed with unique clarity, the long pain of war in the sonnet.

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<sup>12</sup> HENRY KISSINGER, *DIPLOMACIA* (Diplomacy) 57 (Gradiva trans.) (1999).

<sup>13</sup> ANTONIO TRUYOL Y SERRA, *LA SOCIEDAD INTERNACIONAL* (The International Society) 57 (1974).

<sup>14</sup> JÓNATAS MACHADO, *DIREITO INTERNACIONAL: DO PARADIGMA CLÁSSICO AO PÓS-11 DE SETEMBRO* (International Law: from the Classic Paradigm to the Post-September 11th) 46-50 (2003).

<sup>15</sup> EDWARD MCNALL BURNS, *HISTÓRIA DA CIVILIZAÇÃO OCIDENTAL I* (History of the Western Civilization I) 538 (1981).

<sup>16</sup> OTTO MARIA CARPEAUX, *A LITERATURA ALEMÃ* (The German Literature) 29 (1964).

At the root of the war was a religious conflict deriving from the intolerance between Catholics and Protestants. In fact, the religious coexistence of Catholics and Protestants was a problem within the States as well as among them<sup>17</sup>. The Protestant Reform, breaking the Catholic religious monopoly in Medieval Europe, provided the base from where later flourished the Thirty Years' War and the Peace of Westphalia. Schiller, the great poet who, along with Goethe, gives prestige to German romanticism, starts his unsurpassable "*Histoire de la Guerre de Trente Ans*" mentioning that "*depuis l'époque où la guerre de religion commença en Allemagne, jusqu'à la paix de Münster, on ne voit presque rien de grand et de remarquable arriver dans le monde politique de l'Europe, sans que la Réforme y ait contribué de la manière la plus importante.*"<sup>18</sup>

It is necessary to bear in mind that after the Carolingian dynasty, around 911 AD, the dukes of Franconia, Saxony, Swabia, and Bavaria founded the German kingdom, an elective monarchy in which the king was one of the dukes, elected by the others. In the year 936 AD, the reign of Otto I starts. His victory over the Hungarians in 955 AD brought him enormous prestige, and in 962 AD, the Pope John XII, whom the German monarch protected, pronounced him Holy Emperor with the title of *Imperator Romanorum* ("Emperor of the Romans"). And so was founded the Holy Roman Empire,<sup>19</sup> a fusion between the German monarchy and what was spared of the Roman Empire. Once appointed Holy Emperor by the Pope in Rome, the German elected monarch became the temporal chief of Christendom, respected and obeyed by all noblemen of the continent; a clear prototypical manifestation of the European "supranationality" of the second half of the twentieth century.

In theory, the temporal power of the Holy Empire was universal, while the spiritual power of the Pope remained unique, unquestioned and also universal. As H. Kissinger observed, different from a Pharaoh or a Caesar, the Holy Roman Emperor did not appear to have any divine attributes emanating from him such as the powers to interfere with ecclesiastical nominations.<sup>20</sup> However, not even the relations between these two great European authorities (the spiritual and the mundane) were peaceful.<sup>21</sup>

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<sup>17</sup> G. Östreich, *Problemas Estruturais do Absolutismo Europeu* (Structural Problems of the European Absolutism), in *PODER E INSTITUIÇÕES NA EUROPA DO ANTIGO REGIME* (Power and Institutions in the Europe of the Old Regimen) 192 (António Manuel Hespanha ed., 1984).

<sup>18</sup> SCHILLER, *HISTOIRE DE LA GUERRE DE TRENTÉ ANS I* (History of the Thirty Years' War I) 1 (1803).

<sup>19</sup> Also called *Sacred Roman Empire of the German Nation*, *Sacrum Romanum Imperium*, *Heiliges Romisches Reich Deutscher Nation*, or still *I Reich*.

<sup>20</sup> KISSINGER, *supra* note 12, at 58.

In the beginning, the subjection of noblemen to the Emperor of the Holy Empire was merely formal and princes did what they judged legal, free from Imperial interference. From the 15th century on, however, the political power and warlike force of the Hapsburgs, permanently aspiring to the Imperial Catholic crown, empowered the Holy Emperor with respectability and authority. In this way, from 1438, the Imperial crown became hereditary among the Hapsburgs, though formally it remained elective. Although the Hapsburgs were feared, they also feared the crown could be taken by others.<sup>22</sup> Since the formation of the Holy Empire, the "electoral college" charged with selecting the Emperor varied according to circumstantial alliances, battles and quarrels. From 1356 on, however, with the edition of the "Golden Bull" (*Bulla Aurea*) by the Emperor Charles IV, the Emperor was hand selected by seven permanent electors: the Archbishops of Cologne, Mainz and Trier, the King of Bohemia, the Count Palatine of the Rhine, the Duke of Saxony and the Margrave of Brandenburg.<sup>23</sup> With the Lutheran Reform, the confrontation among the Catholic electors and noblemen, as against the Protestant electors and noblemen, became inevitably more intense, all of them aspiring to the imperial crown and defense of Catholicism and the Pope. All these vectors of holy and profane powers transformed the Holy Roman Empire into a scene of internal and external rivalries. As Voltaire noted, the Holy Empire was never holy, not even Roman and never truly an Empire.<sup>24</sup>

The first battles of the Thirty Years' War started in 1618, when the Hapsburgs from Austria, the "natural" protectors of Christendom as against the infidels or heretics, encouraged by the victories of the Catholic Counter Reform, attempted to enlarge their domains in Central Europe and to limit the Protestant's religious freedom. Such behavior disgusted many Protestant noblemen in the area of today's Germany and started an insurrection in Bohemia (today's Czech Republic) where there had been mass conversions into Calvinist Protestants after the Protestant Reformation.

Local noblemen, displeased with the attitudes of the Catholic Emperors from Vienna toward the Protestants of the region, organized themselves in 1608 around the Protestant Union (an armed alliance to defend the Princes and Protestant cities, led by the Palatinate elector) in opposition to the Catholic League. The Catholic

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<sup>21</sup> Beaulac, *supra* note 7, at 153-60.

<sup>22</sup> ARNO KAPPLER, TATSACHEN ÜBER DEUTSCHLAND (Facts on Germany) 13 (1996).

<sup>23</sup> The Duke of Saxony and the Marquise of Brandenburg later became known as the "Prince Elector of Saxony" and the "Prince Elector of Brandenburg," respectively. The Count Palatine of the Rhine was called the "Palatine Elector." Given his ordering character and fundamental imperial politics, the *Bulla Aurea* is seen as a true constitutional norm of the Holy Roman Empire.

<sup>24</sup> See Beaulac, *supra* note 7, at 169.

League was headed by Duke Maximilian I, the Duke of Bavaria and was formed shortly after 1609.<sup>25</sup> The common perception among German Protestants was that the Emperor of the Holy Empire was no more than a tyrant from Vienna associated with the decadent papacy.<sup>26</sup>

The lack of satisfaction in Bohemia came to its climax on the morning of May 23rd, 1618, when a group of protestant noblemen invaded the *Hradschin* Castle, headquarters of the representatives of the Austrian Catholic government in Prague. The invaders made two representatives jump out of windows in reprisal for the destruction of the Lutheran churches under the orders of Vienna.<sup>27</sup> Though the rebels had intended to kill their victims (Catholic noblemen William Slavata and Jaroslav Martinitz), both of them miraculously escaped to personally inform the Courts in Vienna.<sup>28</sup> This episode, which was recorded in History as the “defenestration of Prague,” led to the refusal of the Evangelical league to accept the election of the radical Catholic Prince, Ferdinand II, Archduke of Austria (a Hapsburg) and a pupil of the Jesuits, as Emperor of the Holy Roman Empire.<sup>29</sup> By this time, the Protestant Union had named Frederick V, the Calvinist Prince elector from the prosperous Palatinate region, the new king of Bohemia,<sup>30</sup> Simultaneously, the Protestant Union proclaimed independence for the Austrian domain. With the accession to the crown of Bohemia, whose king was one of the seven electors of the Sacred Emperor, the Protestants eventually obtained a majority sufficient to elect, for the first time, a non-catholic Holy Emperor. From the “defenestration of Prague”, which was apparently local and restricted to Bohemia, the conflict spread to all of Europe, transforming it into the first war in history of European proportions.

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<sup>25</sup> Andréas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 2 INTERNATIONAL ORGANISATION 251, 253 (2001).

<sup>26</sup> KISSINGER, *Supra* note 12, at 59.

<sup>27</sup> ROBERT BIRELEY, *THE JESUITS AND THE THIRTY YEARS WAR 1* (2003).

<sup>28</sup> J. P. COOPER ed., *THE NEW CAMBRIDGE MODERN HISTORY: THE DECLINE OF SPAIN AND THE THIRTY YEARS WAR*, IV 308 (1970).

<sup>29</sup> The religious fanaticism of Ferdinand II, for whom the state existed only to serve religion, could be measured by the words of his confident counsellor Gaspar Scioppius: “unfortunate is the king who ignores the voice of God begging him to kill the heretics. You should not make war for yourselves but for God (*Bellum non tuum, sed Dei esse statuas*).” See KISSINGER, *supra* note 12, at 62.

<sup>30</sup> The Palatinate was a German region around the university city of Heidelberg, its capital.

By November 1620, Ferdinand II had re-conquered the capital of Bohemia and expelled Frederick V, nicknamed “king for a winter,” transferring his right as Prince Elector to the Duke of Bavaria. The success of the Austrian Hapsburgs and Ferdinand II in regaining the domain of Bohemia and defeating the rebellious Protestants, depended to a large extent on the help they had received from Spain (also ruled by the House of Hapsburg), from Poland, and from several German Catholic noblemen (specifically Duke Maximilian from Bavaria). Such facts – besides the ruin and poverty left in Bohemia and in the Palatinate region by the troops loyal to the Holy Catholic Emperor<sup>31</sup> – brought about conflicts between other European Protestant governments such as other German Princes, the king Christian IV from Denmark and king Gustaf Adolf from Sweden, all of them expansionist, non-Catholic and anti-Imperialist. These two last had the hope to reunite territories north of continental Europe and wished to balance the power of religious base, so they fought violent wars, without success, with the troops of the Catholic League in the fields on the German side of the Baltic Sea.

In 1629, Holy Emperor Ferdinand II aggravated the political crisis by imposing the “Edit of Restitution” upon the Germans; an imperial act that annulled all Protestant titles over Catholic properties effective from 1555 and put the expropriate lands at the Emperor’s and his allies’ will. By doing so, Ferdinand II intended to pay part of his moral and financial debt to the Catholic noblemen who had helped him to regain Bohemia and keep the Danish and Swedish temporarily at odds. For the first time, an Imperial act had force of law, directly enforced in the territories of the Princes, and backed by the Emperor’s private army led by the competent condottiere Wallenstein.<sup>32</sup> In this context of continuous strengthening, the Imperial power became a monarchic power and the Emperor, a great danger for Europe.<sup>33</sup>

This danger would not be isolated to the east of the river Rhine. In 1630, the Teutonic Protestants gained the enormous and continuous financial support of the French (catholic) in their fight against the neighboring Hapsburgs (also catholic), starting a new phase of the conflict. This conflict started the multi-centurial French

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<sup>31</sup> The humiliation imposed to the Palatinate region had its climax when the Catholic King Maximilian of Bavaria sent part of the library of the University of Heidelberg to the Vatican, where it still is according to J. P. Cooper. See COOPER, *supra* note 28, at 317.

<sup>32</sup> Mousnier, *supra* note 3, at 199. The condottieri, appearing in the Italian peninsula in the fourteenth century, were mercenaries who recruited, commanded, supplied and paid the private armed forces. PHILIP BOBBITT, *A GUERRA E A PAZ NA HISTÓRIA MODERNA* (The Shield of Achilles: War, Peace and the Course of History) 75 (2003). The troops commanded by the *nouveau riche* Albrecht von Wallenstein gave Emperor Frederic II greater freedom than Duke Maximilian of Bavaria who depended on the military to a higher degree. Osiander, *supra* note 25, at 256.

<sup>33</sup> Mousnier, *supra* note 3, at 200.



battle for the fragmentation and dispersion of the German people. The war loses its religious character (Catholics *versus* Protestants) to become a geopolitical conflict between the rival houses of Bourbons and Hapsburg for the domain of the European Continent. From an ideological perspective, it's possible to identify a sharp confrontation between two antagonistic visions of the world: first, a turn towards the past, incarnated in the Holy Roman Empire, representative of the Catholic medieval universalism and of the preeminence of the Holy Emperor and second, towards the future with a radical French argument for freedom, equality and fraternity among all the States.

A geopolitical reading of the Thirty Years' War shows that for France, a Bourbon "island" surrounded by the Hapsburgs' territories in Iberia and in the long corridor between the north of Italy and the Netherlands, a victory in Vienna would certainly mean being relegated to a peripheral position in European politics. In light of this, France became radical in its position and, in spite of being Catholic, in 1634 intervened directly in the conflict on behalf of Protestants. Thus, the French dispensed with their secret financial support to enter into an open war against the Holy Empire. This was sufficient for the Spanish crown, the Madrid branch of the Hapsburgs, to respond to the declaration of war. It must be mentioned that religious and nationalist unrest was in progress by this time in the Spanish provinces situated in the Netherlands, against the Hapsburgs of Madrid. The United Provinces of Holland constituted a Spanish possession. Thus, Spain viewed France as a natural ally of the revolting Netherlanders and Protestants, and an enemy of the Hapsburgs in Europe.<sup>34</sup>

Over the course of this conflict, the Swedish, led by King Gustaf Adolf, won several battles against the troops of Ferdinand II and managed to surround Austrian Prague. After numerous victories in German territory, the French army came to siege Vienna. Rebellions in Portugal, Catalonia and in Naples weakened Spanish power, whose fleet saw heavy attacks by the Dutch in British waters. It was up to Cardinal Richelieu, the powerful prime minister of Louis XIII, and Cardinal Mazarino (after Richelieu's death in 1643) to lead France and its allies to great victories until Austria sought a truce. By that time, Richelieu's pragmatism was so great that the Cardinal had made an alliance with the "infidel" Turkish Ottomans so that they could assess Austria's eastern borders and draw Austrian attention and resources from Vienna and the west battle front.<sup>35</sup> Richelieu's justification was purely objective: "a king who sacrificed his state to his faith was exposing himself to losing both."<sup>36</sup>

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<sup>34</sup> BOBBITT, *supra* note 32, at 102.

<sup>35</sup> BOBBITT, *supra* note 32, at 103.

The peace conferences which resulted in the Westphalia Treaties started on December 4th, 1644 as a truly European congress, though informal negotiations had already commenced in Hamburg in 1641.<sup>37</sup> Complex negotiations (starting by protocol questions) extended for four long years. It would be the first time in which treaties would put an end to wars in Europe.

### C. The Peace Treaties

Through the Westphalia Treaties, specifically the *Instrumentum Pacis Monasteriense* and the *Instrumentum Pacis Osnabrugense*, both concluded in Latin on October 24, 1648, in the cities of Münster (Catholic) and Osnabrück (Lutheran), considerable territorial conquests were guaranteed to the French (incorporation of the Alsatia and of the Bishoprics of Metz, Toul and Verdun) and German territories were conceded to Sweden. The independence of Switzerland and Holland<sup>38</sup> from the Holy Empire was recognized and Catholicism and Protestantism (Lutherans and Calvinists) were declared confessions with identical rights. Through the Westphalia Treaties, the Holy Roman Empire was reduced to a mere fiction as each German Prince elector was given the very same rights of Sovereignty. Barriers to commerce were abolished and a long period of relative balance of power in Europe started. It is said the balance was "relative" because there was an undeniable French prominence to European policies of the 17th century.<sup>39</sup> However, this Gallic prestige was far from having the same force of the "Iberic era" that took over international politics long before the discovery of America.

With the celebration of the Peace of Westphalia, each Prince elector had the power to declare war, to sign peace treaties, establish alliances with other potencies and govern their respective States as they fancied. Such abilities resumed the *jus foederationis*<sup>40</sup> as critically important to contemporary constitutional engineering.

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<sup>36</sup> Paul Sonnino, *D'Avaux to Dévot: Politics and Religion in the Thirty Years War*, 286 HISTORY 192, 194 (2002).

<sup>37</sup> Alfred-Maurice de Zayas, *Peace of Westphalia (1648)*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 537 (Rudolf Bernhardt ed., 1984).

<sup>38</sup> On 15 May 1648, also in the city of Münster, a specific treaty between Spain and the Netherlands put an end to eighty years of conflict.

<sup>39</sup> JACQUES DROZ, HISTOIRE DIPLOMATIQUE: DE 1648 À 1919 (Diplomatic History: From 1648 to 1919) 19 (1972).

<sup>40</sup> ANTONIO CASSESE, INTERNATIONAL LAW 21 (2001).

Though still existent, the Holy Empire turned into a deliberative stage.<sup>41</sup> Once the Princes reached a point of in relation to the Emperor, the fragmentation of the Holy Roman Empire was inevitable, as it was constituted by an amalgam of more than three hundred sovereign territories with no national sentiment (counties, landgraviates, margraviates, duchy archbishoprics, bishoprics, abbeys, free cities and minor domains of knights of the Empire.)<sup>42</sup> The Holy Roman Empire maintained a mere façade of unity until being dissolved by Napoleon Bonaparte in 1806, when Emperor Francis II renounced the imperial crown. The German fragmentation pulverized the power of the Hapsburg in Vienna and made the Hohenzollern dynasty, based in Prussia and in Brandenburg, possible, thus receiving the territories to the north of the Holy Empire and begin its great rivalry with “the Austrias.”<sup>43</sup> This Hohenzollern’s strategy would become most significant when the constitution of the German Customs Union (*Zollverein*) was created at the initiative of the Prussians in the 19<sup>th</sup> century.

Both the cities of Münster and Osnabrück, 50 kilometers apart, are situated in the Westphalia region (an area located northwest of present Germany). That is why this region’s name was given to those famous treaties. In catholic Münster, the representative of the Holy Empire negotiated with France and its Catholic allies, while in protestant Osnabrück, the Ambassadors from the Holy Empire met Sweden, the German Princes and their Protestant allies<sup>44</sup>. The presence of the German Princes at the signing of the treaty was part of the French-Swedish strategy to weaken the position of the Holy Emperor.

Each of the two treaties took the form of a bilateral agreement, as the multilateral treaty had not yet been conceived. It is estimated that around three hundred representatives signed the two treaties. Members of all political forces in Europe were present, with the exception of Russia, England, Turkey and the Pope, whose Catholicism was weakened and defeated. In Münster, the Catholic Church acted as mediator .<sup>45</sup> The powerful Pope Innocence X protested firmly against the treaties, stating, in his *Bulla Zelo Domus Dei*, of November 26, 1648, that the Peace of Westphalia was null, invalid, injurious, condemnable, inane and destitute of any

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<sup>41</sup> Daniel Philpott, *Westphalia, Authority and International Society*, 47 POLITICAL STUDIES 566, 581 (1999).

<sup>42</sup> Mousnier, *supra* note 3, at 199.

<sup>43</sup> DEMÉTRIO MAGNOLI, *RELAÇÕES INTERNACIONAIS: TEORIA E HISTÓRIA* (International Relations: Theory and History) 36 (2004).

<sup>44</sup> Beaulac, *supra* note 7, at 163.

<sup>45</sup> COOPER, *supra* note 28, at 352.

significance and effect for ever more.<sup>46</sup> In spite of this personal statement from Pope Innocence X about the validity of the Westphalia Peace treaties, his nuncio Monsignor Fabio Chigi would later become Pope Alexander VII, for his close following of the Conference of Peace and thus knowledge of the new reality of continental politics outlined in Westphalia.

The number of intervening actors, complexity of the interests involved in the negotiations of peace, and the logistical difficulties intrinsic to the multiplicity of idioms and the distance between the two cities, resulted in a much more sophisticated and exhausting treaty as compared to the bilateral acts commonly put into effect until then.<sup>47</sup>

#### **D. Juridical Consequences of Peace: the Core of the Westphalian Paradigm**

From a Legal perspective, there were two great legacies from the Peace of Westphalia: the consolidation of religious freedom (associated with the secularization of the State) and the formal affirmation of State sovereignty (associated to the “reason of State”).<sup>48</sup> In other words, secularization, centralization and nationalization occupied a privileged place in the description of the new Westphalian world that has been built from then. If, on one hand, it is true that such conquests derived from the efforts of European kings and noblemen dating back to the period prior to the Protestant Reformation, it is also true that it was the Westphalia Peace Treaties which formally consolidated such conquests for the first time with a truly European Constitution; the *constitutio Westphalica*<sup>49</sup>. This new constitution created a set of norms, mutually established, which sought to define who would be the holders of authority in the European International scene, which rules were necessary to become one of these actors, and what were the prerogatives;<sup>50</sup> a whole new world order.

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<sup>46</sup> BOBBITT, *supra* note 32, at 108.

<sup>47</sup> David Parrott, *The Peace of Westphalia*, 8 JOURNAL OF EARLY MODERN HISTORY 153, 153 (2004).

<sup>48</sup> The religious dimension of Westphalia, though, went unnoticed in the analysis made by Richard Falk, for whom the Westphalian model is only the “state centric, sovereignty-oriented, territorially bounded global order.” Richard Falk, *Revisiting Westphalia, Discovering Post-Westphalia*, 4 THE JOURNAL OF ETHICS 311, 312 (2002). Conversely, that religious aspect is affirmed by Meinhard Schröder. See generally MEINHARD SCHRÖDER ed., 350 JAHRE WESTIFÄLISCHER FRIEDE (350 years of Peace of Westphalia) (1999).

<sup>49</sup> JACQUES DROZ, HISTOIRE DIPLOMATIQUE: DE 1648 À 1919 (*Diplomatic History: From 1648 to 1919*) 9 (1972); Beaulac, *supra* note 7, at 162.

<sup>50</sup> Daniel Philpott, *supra* note 41, at 567.

The three dimensions of the modern state (secularization, centralization and nationalization) comprise a united trinity because it is ultimately the sovereign, a strong and centralized Nation-State, that creates inter-confessional peace and religious freedom. “*Der staat war Freiheitsgarant und Friedensstifter*”, sentenced Gehard Robbers.<sup>51</sup>

With respect to religion, it is verifiable that until the peace treaties of 1648, the population had to follow the beliefs of their Prince.<sup>52</sup> The peace treaties abolished this compulsion in a way that politics no longer identify with religion.<sup>53</sup> The preservation of this religious freedom was a first step towards the protection of fundamental rights. On the other hand, once the religious and political unity of the Middle Ages came to an end, the Empire and the Papacy could no longer intervene in the internal matters of kingdoms and princedoms.<sup>54</sup>

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<sup>51</sup> “The State was guarantor of the liberty and founder of the peace.” Gehard Robbers, *Religionrechtliche Gehalte des Westfälischen Friedens – Wurzeln und Wirkungen* (Religion-legal Contents of the Westphalian Peace - Roots and Effects), in 350 JAHRE WESTFÄLISCHER FRIEDE (350 years of Peace of Westphalia) 73 (Meinhard Schröder ed., 1999).

<sup>52</sup> “*Cuius regio eius religio*” is a phrase in Latin that means “whose the region is, his religion.” It was with the “Augsburg Peace” (1555), in the course of the Protestant Reformation, that the territorial princes of Germany got the right to determine the official religion of their subjects. Gross, *supra* note 9, at 22. By this time four-fifths of the German population was Protestant.

<sup>53</sup> In fact, Article IV, # 19 of the *Instrumentum Pacis Osnabrugensis* and Paragraph 27 of the *Instrumentum Pacis Monasteriensis* use the same words to affirm the principle of religious tolerance: “(...) and that it shall be allowable for others who are willing to embrace the Exercise of the Augsburg Confession, to practise it, as well publickly [sic] in the Churches at set Hours, as in private in their own Houses, or other Places appointed for that end by their Ministers of the Divine Word, or by those of their Neighbours.” Available at the official site of the *Acta Pacis Westphalicae* [hereinafter “Official Site”], <http://www.pax-westphalica.de>. The extensive research on the site, led by Professor Repgen, represents, in the words of David Parrot, “surely one of the most impressive historical projects of the last two centuries.” David Parrott, *supra* note 47, at 154.

<sup>54</sup> As to the more mundane aspect of this question, §65 of the *Instrumentum Pacis Monasteriensis* and Article VIII, # 4 of the *Instrumentum Pacis Osnabrugensis* affirm: “That as well at general as particular Diets, the free Towns, and other States of the Empire, shall have decisive Votes; they shall, without molestation, keep their Regales, Customs, annual Revenues, Libertys [sic], Privileges to confiscate, to raise Taxes, and other Rights, lawfully obtain'd [sic] from the Emperor and Empire, or enjoy'd [sic] long before these Commotions, with a full Jurisdiction within the inclosure [sic] of their Walls, and their Territorys [sic]: making void at the same time, annulling and for the future prohibiting all Things, which by Reprisals, Arrests, stopping of Passages, and other prejudicial Acts, either during the War, under what pretext soever [sic] they have been done and attempted hitherto by private Authority, or may hereafter without any preceding formality of Right be enterpris'd [sic]. As for the rest, all laudable Customs of the sacred Roman Empire, the fundamental Constitutions and Laws, shall for the future be strictly observ'd [sic]; all the Confusions which time War have, or could introduce, being remov'd [sic] and laid aside.” Official Site, *id.*

After Westphalia, the Holy Roman Empire's ability to enforce its ecclesiastical and political hegemony was virtually destroyed. With the collapse of the universal unit of the Holy Roman Empire and the Catholic Church, each state could promote its own interests. To complete this idea, the State welfare, a *raison d'État*, gave legitimacy to the means to reach it. A concept of sovereignty that frees the king or prince, simultaneously, of superior political domains (the Papacy and the Empire), equal ones (other royalties) and inferiors ones (feudal barons) starts then, what precisely had characterized all national and international political order of before.<sup>55</sup> These ruptures marked the beginning of a new political thought about centralizing governments, stern borders, exclusive internal sovereignty, and formal interstate diplomacy. It is then with the Westphalia Peace treaties that can be found the clearest point in the historical transition of the international scenery to the normative territorial sovereignty and the prevalence of laicism as fundamental to a truly multi-polar system of states interested in temporal issues. The use of the term "system" shows the unity of many individualized differences.<sup>56</sup>

Moral or religious considerations of the State are moved towards the outskirts of governmental concerns in a clear separation between heresy and sovereignty, a phenomenon which was known as the "*de-theologization of the politics*."<sup>57</sup> It was Armand Jean du Plessis, also known as Cardinal Richelieu, who conceived the pragmatic concept of *raison d'État*<sup>58</sup>, showing that when he put French interests above his catholic origins, faith and hierarchy, became an ally of the protestant Princes of a German central Europe, as against the House of Austria, or when he recognized the Protestants freedom to preach in catholic France, and also when he edited the "Amnesty of Alais" in 1629, the same year in which Emperor Ferdinand

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<sup>55</sup> ANTENOR PEREIRA MADRUGA FILHO, A RENÚNCIA À IMUNIDADE DE JURISDIÇÃO PELO ESTADO BRASILEIRO E O NOVO DIREITO DA IMUNIDADE DE JURISDIÇÃO (The Brazilian State's Resignation to the Jurisdiction Immunity and the New Right to the Jurisdiction Immunity) 24 (2003).

<sup>56</sup> TRUYOL Y SERRA, *supra* note 13, at 32. Essentially, a system is a theoretical tool of great utility for the analysis of reality. In general, it could be defined as a set of elements related, working together in a way that each element is the function of another element, without a single element working alone. As an epistemological unit, all systems constitute, then, a collective of elements which maintain some kind of specific order, organization or structure linked to each other, which confers a sense of unity, yet one made of many pieces. If a system is a group of units which relate each other, we easily conclude that three ideas are inherent to a conception from any system: collectivity (the whole), unit (the part) and interdependency (the structure that unites the parts composing the whole). Further, there are also three base components for the constitution of any system: 1) the repertoire of its elements (distinct between themselves and the system itself); 2) the relation between these elements or its organization and structure; and 3) the organic unit that keeps the elements together for its relations.

<sup>57</sup> Östreich, *supra* note 17, at 192.

<sup>58</sup> KISSINGER, *supra* note 12, at 59.

II imposed the "Edit of Restitution". The *raison d'État* opposed the universal medieval moral law and indicated the independence and the supremacy of the State's interests to face religious questions. Before, politics and religion maintained an indissoluble union – mere questions of political opportunity are taken as options of confessional nature. As from Richelieu, however, the situation suffers a radical alteration: "*the interests of a state and the interests of religion are two entirely different things*", the Cardinal would have said in 1616, when he was still the Bishop of Luçon<sup>59</sup>. There is a certain irony in the fact that a catholic Cardinal, the Huguenots' scourge in his French homeland, was the greatest responsible for expelling religious questions from European chancelleries in the brink of the Modernity.

Definitely, the verticality of the political-religious relations of the Middle Ages gives way, in the international scene, to the formal horizontality between the States, with intense individual character. This priority of interests of each monarchy in particular illustrates a more sociable feature than a communitarian profile of the European system of States of the seventeenth century.<sup>60</sup> In the internal environment, in parallel, the absolute power of monarchies is more and more unquestionable and thus the divine legitimacy of kings plays a fundamental role.

It is fair to recognize then, that a certain notion of "*reason of State*" was already known but had a more internal and selfish meaning, differently from the one developed by Richelieu. In the Middle Ages, the "*jus eminens*" consisted of the supreme power of the prince to dispose of the belongings of his subjects, and of the power to intervene in a supreme way in the rights of people. As described by Rogério Soares,<sup>61</sup> the "*jus eminens*" embodied the "*reason of State where all privileges were dissolved*" or a way to break any positive legal rights at stages or privileged instances.<sup>62</sup> This idea of superiority of the prince's power with respect to internal

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<sup>59</sup> Sonnino, *supra* note 36, at 192.

<sup>60</sup> TRUYOL Y SERRA, *supra* note 13, at 35. The dichotomy between "community" and "society" was analyzed, among others, by Celso Mello, for whom "the community would represent the following characteristics: natural formation, organic will (the energy from the organism, which is shown in the pleasure, habits and memory), and the individuals who would take part in a deeper way in the ordinary life (...). The society already had different features: volunteer formation, reflected will (it would be a product of thinking, dominated by the idea of conclusion and having as a supreme end, the happiness); and the individuals who would take part in a less deep way of ordinary life." CELSO D. DE ALBUQUERQUE MELLO, DIREITO INTERNACIONAL PÚBLICO I (Public International Law I), 45 (1997).

<sup>61</sup> ROGÉRIO GUILHERME EHRHARDT SOARES, INTERESSE PÚBLICO, LEGALIDADE E MÉRITO (Public Interest, Legality and Merit) 55 (1955).

<sup>62</sup> EDUARDO GARCÍA DE ENTERRÍA, LA LENGUA DE LOS DERECHOS: LA FORMACIÓN DEL DERECHO PÚBLICO EUROPEO TRAS LA REVOLUCIÓN FRANCESA (The Language of Rights: The Development of European Public Law after the French Revolution) 98 (1994).

affairs was received and improved by the scholars of monarchic absolutism and became an indispensable tool to the baroque exercise of power; marked by exaggeration, excess, hyperbole, extravagance, attachment to form, and the constant conflict between the holy and the profane.

The conflicts of religious origin of the seventeenth century, which weakened the power of the Catholic Church, strengthened, simultaneously, the temporal power of the kings in that externally, monarchs were equals, and internally, they had no one equal in power. Religious chaos gave way to a secular political order that, in the proceeding 140 years, until 1789, was marked by absolutism, by bureaucratization and by militarism. What's more, the "de-theologicalization" (lack of theology) of politics contributed decisively to the secularization of the spirit, making absolutism the cradle of the illuminist philosophy.<sup>63</sup> This marks, doubtlessly, the most solid basis of European Public Laws,<sup>64</sup> from where the legitimacy of the true paradigmatic character of the Westphalia Peace Treaties originates.

#### **E. The Conclusion: *Auf Wiedersehen, Westphalia?***

The Westphalia Peace Treaties did not constitute an obvious, radical, or instant revolution in the juridical-political model of State similar to the great modern political revolutions. It was not a "political big bang". Far from this, according to Kuhn, History suggests that the road to stable agreement in scientific research is extraordinarily hard.<sup>65</sup> In fact, those pacts of 1648 dramatically changed the way of seeing and understanding the State. That is, allowing other state actors to come into the modified continental political performance, despite not having disintegrated the Holy Roman Empire or the Papacy. The main jus-political categories of this re-designed world started a progressively larger consensus after 1648.

As opposed to traditional political conceptions of revolution as rupture and eradication, evolutions are typically persistent, daily qualitative modifications, and not necessarily linear or cumulative. Peculiar debates on the pre-paradigm times do not disappear completely with the establishment of the paradigm. Therefore, it is somewhat controversial to talk about a "Westphalian revolution," in the sense

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<sup>63</sup> Robbers, *supra* note 51, at 73. It is fair to recognize, however, that this "de-theologicalization" (lack of theology) is just relative, made much truer via external politics rather than internal politics once the divine attributes of the king are increasingly recalled and reinforced.

<sup>64</sup> JEAN-JAQUES ROCHE, *RELATIONS INTERNATIONALES* (International Relations) 94 (2001).

<sup>65</sup> THOMAS KUHN, *supra* note 6, at 35.



commonly attributed to the term “revolution.” The non-revolutionary character (in *latu* sense) of the Westphalian paradigm, however, does not serve to detract any significance from it. This is what is found in multifarious Europe from 1648: the Westphalia Peace contributed to the secularization of politics and the formation of Public Law in Europe, founded in a secular sovereignty and whose next high points would be the French Revolution and World War II. In this perspective, 1648, 1789 and 1945 constitute fundamental dates, and real paradigms, even for Western (Occidental) State, Law and Justice, central categories for our Legal system.

It should not be forgotten that a paradigm, in its best Kuhnian sense, is better articulated and more coherent whenever it gets to each new occasion on which it is submitted to an original or more rigorous condition. In this way, the sovereignty and the secularism from 1648 are not today's ones, though the 1648's treaties still held the capital importance of having definitely included these new regulating principles in the international institutional matrix. A similar point of view is defended by Philpott<sup>66</sup>, for whom the Westphalian Peace Treaties should not be understood as an “instant metamorphosis”: “Westphalia consolidated the modern system; it did not create it *ex nihilo*”. And this key argument shows that it is irrelevant to know if the modern state appears with the Westphalia Peace Treaties or if emerged long before, in Iberia and England: the great role of the treaties is that “Westphalia consolidated the modern system”, inside and outside Europe. In other words: “in codifying and legitimating the principle of sovereign statehood, the Westphalian constitution gave birth to the modern states-system.”<sup>67</sup>

In contrast, Beaulac<sup>68</sup> and Osiander,<sup>69</sup> a widely recognized minority position, establish that the “Westphalian Myth” (*sic*) did not constitute a real paradigm to the developing system of the modern States. The 1648 treaties did not really alter the European power relation; the Empire continued strong, together with already powerful France and Spain, and the Papacy, which was in decline long before and not necessarily due to the Westphalian peace. Such an argument is not sufficient to discredit the central position of the Westphalia peace in defining the juridical-political scene that followed. The realism of this argument about power factors does not shock the stiffness of the juridical formalism of the sovereignty concept (still

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<sup>66</sup> Philpott, *supra* note 41, at 579.

<sup>67</sup> BAYLIS & SMITH, *supra* note 4, at 29-30.

<sup>68</sup> Beaulac, *supra* note 7, at 175. Stéphane Beaulac, *Westphalia, Dualism and Contextual Interpretation: How to Better Engage International Law in Domestic Judicial Decisions*, 3 EUROPEAN UNIVERSITY INSTITUTE/MAX WEBER PROGRAMME WORKING PAPERS (2007).

<sup>69</sup> Osiander, *supra* note 25, at 261.

undeniable today), upon which all Public Law which follows is set (along with secularism and the reason of state). There is no incoherence in the judicial/territorial/formal equality among the States and its intrinsic geopolitical/hegemonic inequality, to use a conceptual reference used by Falk.<sup>70</sup> An unconditional sovereignty, disconnected from impressions of power and economical influences, never really existed. Furthermore, the complexities of the Westphalian phenomenon have multiple meanings.

For scholars of international relations, the Westphalia Treaties already have a central meaning and even more relevance to jurisprudence; whose normative-prescriptive character finds in those pacts the formal instauration of an international order based on juridical equality among secular states. As for that, it is fair to recognize that a same paradigm can have distinct values to different study fields such as Jurisprudence and International Relations. It still must be registered that it is exactly because Westphalia affirms a jus-political paradigm that can be said today that in 1648 and soon after this paradigm was not completely matured: the conscience of initial anomaly comes from the improvement and refining of the conceptual categories State, Law and Sovereignty along time, what in fact, allowed it to come out as a winner in the eternal conflict with other models, other theories, other paradigms. There is no doubt, however, that Westphalia takes out of place, definitely, the conceptual web through which we understand the State.

It is wrong to infer that the importance of the Westphalia Peace Treaties is simply the product of 19<sup>th</sup> and 20<sup>th</sup> century work, as if rescued from forgotten historical facts. In the eyes of its contemporaries, Peace was solemnly and suitably commemorated.<sup>71</sup> Long before and far away from the narrow limits of legal dogma, seventeenth-century Dutch painter Gerard ter Borch, captured with unique perspicacity the distinctness and consequence of the Westphalia Peace, in his picture "*The Swearing of the Oath of Ratification of the Treaty of Münster*," painted during the last year of the Thirty Years' War.<sup>72</sup> In that painting, it stays clear that art does not modify the world as a tool but it has its magnitude: the greatness of art resides in its incapacity of reducing the world to a simple ephemeral and

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<sup>70</sup> Falk, *supra* note 48, at 312.

<sup>71</sup> Claire Gantet, *Peace Ceremonies and Respect for Authority: the Res Publica, 1648-1660*, 3 FRENCH HISTORY 275, 276 (2004).

<sup>72</sup> Gerard ter Borch (1617-1681), "*The Swearing of the Oath of Ratification of the Treaty of Münster*", 1648, oil on copper, 45,4 cm x 58,5 cm, London National Gallery. Available at <http://www.nationalgallery.org.uk>. The picture doesn't portray the ceremony of conclusion of the *Instrumentum Pacis Monasteriense* of Oct. 24th 1648, but instead shows the signing of the previous treaty on May 15th, 1648, also celebrated in Münster, between Spain and the Netherlands.

objective representation of the present and of the real – for ideological, pedagogical, hedonistic or religious reasons, for more realistic or figurative it may seem.

Gerard ter Borch's masterpiece portrays the main room (*Ratskammer*, after *Friedenssaal*) of the Münster Town Hall at the very moment at which the peace treaty is sworn by the authorities of Spain and the Netherlands. The center of the screen is occupied by the Spanish and Dutch versions of the treaty, both in Latin, properly sealed, and displayed with exuberance on a round table, which is covered with a heavy green velvet tablecloth. The *leitmotiv* of the painting is not the independence of the Netherlands or the victory of any religious sect, or political idea, but the swearing of the treaty itself. The artist puts the centrality and force of Law, symbolized by the peace treaty, into relief in the semi-circular depiction of the authorities who watch the scene, and in the use of light, which focus on the center of the action. That is, the light becomes dimmer, both horizontally and vertically, as the eyes move away from the treaties in the center of the painting.

Other aspects of the painting demonstrate the absolute political and religious parity between the delegations: first, the picturesque fact that both delegations are swearing the treaty simultaneously (what, for protocol and practical reasons, is unlikely to have happened); second, the absence of significant distinctions among the seventy-seven Catholics, Protestants, Spanish and Dutch, civilians and military who witnessed the swearing, enhancing the universal, ecumenical, and anti-partisan perspective of the painting; and finally, no authority is attributed greater attention. In the front row of the scene, just two characters have clothing different in color from the others: to the left, an anonymous soldier watches from behind an empty chair and wears the colors of the city of Münster, referencing the city in which the treaty was signed.<sup>73</sup> To the right of the treaties, a diplomat<sup>74</sup> with a magnificent red toga, gives measure to the importance and prominence that chancelleries would subsequently enjoy. The fact that the six representatives from the Netherlands swear the treaty with their fingers up, and the two Spanish ambassadors with their right hand over the Bible and the crucifix indicates that Protestants and Catholics have identical dignity. In the painting, there are no winners or defeated, infidels or heretics. Only in the top right corner of the screen did Gerard ter Borch make reference to the clergy: the figure of a monk, maybe the Pryor of Münster with his habitual brown tunic, watches the scene over the back of

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<sup>73</sup> The empty chair (a traditional allegory for power) is another indication of the restlessness between the two delegations.

<sup>74</sup> According to Kettering, the diplomat referred to is the Dutch Johannes Christopherus Belne, Secretary of Antoine Brun, the second man of the Spanish delegation in that Conference. ALISON MCNEIL KETTERING, GERARD TER BORCH AND THE TREATY OF MÜNSTER 9 (1998).

Spanish Catholics and behind a natty diplomat in red. This order of precedence (opposing red/power to brown/humbleness) certainly is no accident. Although Münster is a Catholic city, the religious symbols are restricted to the sculpture of a Madonna. Recognized by Catholics and Protestants as the mother of Christ-God, the discrete sculpture blesses the scene. Curiously, the only light that invades the *Friedenssaal* is that which enters through the window of the right superior corner of the room, the same light that illuminated and made warm all of Europe.<sup>75</sup> In this work of art, as in many others, there is an opening which reveals a lot about the reason of things and once more it is in the lying of art where the more consistent true can be found.

Today, the international scene is no longer exclusively state-bound; Sovereignty has become more and more shared; there is a certain flow to commercial borders, and a war in the magnitude of that from 1618-1648 seems more and more remote (aspects, no doubt, post-Westphalian).<sup>76</sup> On the other hand, the state is still an indispensable actor in the modulation and execution of Law and in the understanding of international relations. The case of East Timor, the last nation to emerge from the turbulent 20th century, underlines the power of statehood in the era of Globalization. That is, for the international community, the new country was neither too small nor too weak to establish itself as a nation-state. The United Nations efforts towards State-Building in Kosovo, Afghanistan, and Iraq are also great examples of the role now played by Westphalian statehood.

In spite of renewed religious fundamentalism in many places (a rancid, eminently pre-Westphalian note), the maintenance of multicultural dialogue and the guarantee of freedom of conscience are a concern at the top of international and domestic political agendas. These two aspects give us a sample of the validity of the Westphalian elements of State, even though these elements are not yet recognized as greatest legacies, responsible for the permanent updating of the old "Westphalian paradigm." The greatest evidence that the Peace Treaties of 1648 remain central to the understanding of our present model of State and Law, is the fact that more than 350 years after its signature, the constitution of any juridical order claims for a democratic construction, always upwards, from the basis to the summit (from down below), never the opposite way, arbitrarily, by the hands of a Pope or an Emperor.

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<sup>75</sup> According to Israel, Ter Borch was very proud of his masterpiece and conscious of its significance - so much so that he commissioned an engraver, Jonas Suijderhoef, to reproduce the picture. Thanks to this engraver, Ter Borch's work could be hung on the walls on the major public buildings in Netherlands and elsewhere. JONATHAN I. ISRAEL, *CONFLICT OF EMPIRES : SPAIN, THE LOW COUNTRIES AND THE STRUGGLE FOR WORLD SUPREMACY 1585-1713* 104 (1997).

<sup>76</sup> See, among others, Stephen Krasner's theoretical contributions in the field of Political Science.

The globalization of the contemporary international economy imposes many important challenges to the State. Such challenges, instead of weakening the State's authority, reinforces its vitality and ability to adapt to the new economic scene, exercising its sovereignty in deciding policies capable of placing it within the arena of a new international market. Among these national policies are the gathering of huge economic regional blocks such as Mercosul and the European Union. In these processes of regional integration, Law exerts a fundamental role. It is through Law (based on the tripod Stateness-rationality-oneness) that more stable and tighter integrative ties are constructed; clear evidence that the word triumphed over the sword in the field of economic integration.

