Chapter VI

Incentives for War and the Law of War (1618 – 1648/59)

The Holy Roman Empire and the European States System

Since the middle of the fifteenth century, the ruling kin group of the Habsburgs had transformed itself into the unofficial imperial dynasty. As a rule, the Electors chose a member of this dynasty when they had to decide about a new emperor, and they had done so since the accession of Frederick III in 1440. Not always was the imperial election an easy and straightforward process, as several rulers might announce their candidacies seeking to win the Electors' favour. Upon the death of Emperor Maximilian I in 1519, King Francis I of France, King Henry VIII of England and Elector Frederick the Wise of Saxony decided to run against each other and Maximilian's heir and presumptive successor Charles, who had become King of Aragón in 1516. All candidates were heavyweights. But Charles won the election as had been expected, the Habsburgs solidified their position and gained in prestige with this and each subsequent election that turned one of their members into the imperial office. They succeeded in drawing ever more central competences of the imperial administration into the residential capital of Vienna. In fulfillment of Maximilian's court orders of 13 December 1497 and 13 February 1498, Vienna was already the home of the Imperial Aulic Council as an adjudicative and arbitrative institution,[1] and since 1556, the Imperial War Council was in operation as the highest decision-making institution on military matters for the Empire as a whole.[2] Since 1482, the year of the death of Maximilian's first wife Mary, the Habsburgs ruled over Burgundy, since 1516 over Aragón in the north of the Iberian Peninsula and since 1555 over the united Kingdom of Spain. In 1526, after the devastating defeat and death of King Louis of Bohemia and Hungary (1516 – 1526) during the Battle of Mohács against the army of Sultan Suleiman the Magnificent, the Habsburgs gained control over Bohemia together with that small part of Hungary that did not come under Ottoman Turkish rule, and placed it under Charles's younger brother Ferdinand. Charles had appointed his brother Roman King in 1521, a kind of imperial regent for the German-speaking areas. As King of Bohemia, Ferdinand was also one of the Imperial Electors. Maximilian I had, rather pretentiously, claimed for himself to be ruler over "Seven Kingdoms",[3] even though he never held executive rulership over any kingdom; yet his grandson Ferdinand was effective ruler over three "kingdoms". Propagandists working for Charles I/V composed the device PLVS VLTRA (still further), modified from the Dantean "Non Plus Ultra (no further) to articulate the claim that the Habsburgs were transcenders of the limits of the Old World. The device was also applied to Charles's son Philipp II and remained in use well into the eighteenth century.[4] Through their kin ties, the Habsburgs connected the Empire with the rest of Europe. But their factual power was limited. Charles I/V himself had recognised that he was unable to do service to his

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*In this and the following chapters, the abbreviation *CTS* stands for: Clive Parry, ed., *The Consolidated Treaty Series*, 231 vols (Dobbs Ferry, 1969-1981).

[1] See: Wolfgang Wüst, 'Hof und Policey. Deutsche Hofordnungen als Medien politisch-kulturellen Normenaustausches vom 15. bis zum 17. Jahrhundert', in: Werner Paravicini and Jörg Wettlaufer, eds, *Vorbild – Austausch – Konkurrenz. Höfe und Residenzen in der gegenseitigen Wahrnehmung* (Residenzenforschung, 23) (Ostfildern, 2010), pp. 115-134.

[2] See: Oskar Regele, *Der österreichische Hofkriegsrat. 1556 – 1848* (Mitteilungen des Österreichischen Staatsarchivs, Ergänzungsband 1) (Vienna, 1949).

[3] Maximilian I, Emperor, [Ruler over Seven Kingdoms], in: Ms. Vienna: Österreichische Nationalbibliothek, Cod. 2800, fol. 48^{v}.

[4] Paolo Giovio, *Dialogo dell'imprese militari et amorose*, edited by Maria Luisa Doglio (Rome, 1978), pp. 46-47 [first published (Venice, 1558)]. Giovanni Battista Pittioni, *Imprese nobili et ingeniose di diversi Prencipi et d'altri personaggi illustri* (Venice, 1566), nr 4. Hernando de Soto, *Emblemas moralizadas* (Madrid, 1599), fol. 40^{v} [reprint, edited by Carmen Bravo-Villasante (Publicaciones de la Fundación Universitaria Española, 9) (Madrid, 1873)]. Georg Sauermann [Sauromannus], *Hispaniae consolatio* (Louvain, c. 1520), fol. C II^{v}. Sebastian de Covarrubias y Orozco, *Emblemas morales*, Centura I (Madrid, 1610), nr 34. Carl Gustav Heraeus, *Vermischte Neben-Arbeiten* (Vienna, 1715), fol. F [1^{r}]. Heraeus, *Inscriptiones et symbolae varii argvmenti* (Nuremberg, 1721), p. 76. On the device see: Earl E. Rosenthal, 'Plus Oultre. The Idea Imperial of Charles V in His Columar Device on the Alhambra', in: *Hortus imaginarum. Essays in Western Art* (Humanistic Studies, 45) (Lawrence, KS, 1974), pp. 85-93. Hans Sedlmayr, 'Die Schauseite der Karlskirche in Wien', in: Sedlmayr, *Epochen und Werke. Gesammelte Schriften zur Kunstgeschichte*, vol. 2 (Vienna and Munich, 1960), pp. 174-187, at p. 184, note 14.

many offices at various places, even though he was travelling much throughout his life.[5] Inside the Empire, Ferdinand arranged himself with the Protestants through toleration agreements in 1552 and 1555. These agreements provided for some form of self-governing autonomy, specifically with regard to religious matters, thereby avoiding forced conversions. But the agreements excluded the followers of Jean Calvin.[6]

Moreover, specifically those rulers within the Empire who had an entitlement to make and enforce laws over territories and population groups under their control, were interconnected with rulers outside the Empire through marriage arrangements and other dynastic ties. Thus, in the early seventeenth century, the Count Palatinate was married to the daughter of King James I of Great Britain, the duchies of Sleswig and Holstein were under the rule of the Danish crown, rulers of some small Calvinist territories on the Western flanks of the Empire, such as the Counts of Nassau maintained close kin and personal ties with the Calvinist Oranians as the leaders of the revolt in the Netherlands and, last but not last, in the self-governing towns and cities of the Empire, the ruling patriciates of merchants cultivated their personal and business relations with merchants in cities beyond the confines of the Empire. The Netherlands were in a crucial position. As parts of the Netherlands were considered to be imperial territory, the revolt that had been going on there since the 1580s raised critical questions about the relations among the various Christian confessions within the Empire. More importantly, the dynastic ties crisscrossing the boundaries of the Empire on its Western flanks brought the problem on the agenda of diplomats and jurists whether Imperial Estates as law-giving members of the Empire could become allies of rulers elsewhere or whether their duties towards the Emperor stood against alliances that might compel Imperial Estates to act militarily against the Emperor and the Empire. By consequence, the revolt in the Netherlands did not only call into question the legitimacy of Spanish rule but also the relationship that should or could exist between the Dutch ruling aristocracies and urban patriciates on the one side and the Empire on the other.[7] Even though the Oranians confirmed their willingness to remain within the Empire, questions about the legitimacy of the revolt aggravated the need to determine the precise location of the imperial borders not merely towards France but also in the Northwest.

The solution to the problem of determining the exact location of the imperial borders raised serious difficulties, as one of the essential preconditions was lacking, namely the expectation that the border of the Holy Roman Empire could be drawn in analogy to those of every sovereign state, that means, through human action. Obviously, there were many human made borders within the Empire, such as walls encircling towns and cities, demarcation lines that carved the landscape up in administrative districts and could become visualised through fortified places, and also maritime boundaries that might have been agreed upon in treaties under international law.[8] But all these lines separated zones in which certain ruling agencies had entitlements to exercise certain rights, and were not understood as instruments to partition the world into spaces that had few or no relations across their borders. However, the Dutch rebels wanted sovereignty in the very sense in which Jean Bodin had described it, namely as the right of legislative autonomy, restricted through no other rules than the "lois fondamentales", and the recognition of legal equality with all other sovereigns. In pursuit of these goals, the Dutch rebels agreed not merely with the Swiss confederates, among whom there also were some Calvinists, but also with most rulers outside the Empire. By consequence, questions about entitlements to what kind of rule over which territories and population groups raised serious controversies that were difficult to solve despite continuing intense dynastic and economic relations.

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[5] Charles V, Emperor, *Ain ernstliche red Kayserlicher Majestet Caroli des fünfften, die er zu den Hispaniern gethon hat, von seinem Abschied auss Hispania, und was er im, in Welchen und Teutschen Landen, zu endern und zu thun hatt fürgenommen* (Basle, 1528) [edited by Karl Brandi, 'Eigenhändige Aufzeichnungen Karls V. aus dem Jahre 1525. Der Kaiser und sein Kanzler', in: *Nachrichten von der Gesellschaft der Wissenschaften zu Göttingen*, Philol.-Hist. Kl. (1933), pp. 136-138].

[6] Ferdinand I, Roman King, [Mandate on the Imperial Diet Resolution, art. 15-25, Augsburg, 25 September 1555], partly printed in: Hanns Hubert Hofmann, ed., *Quellen zum Verfassungsorganismus des Heiligen Römischen Reiches Deutscher Nation. 1495 – 1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 13) (Darmstadt, 1976), pp. 98-128, at pp. 100-104.

[7] William the Silent, Stadhouder of the Netherlands, *Apology or Defence* [1581], edited by Ernst Heinrich Kossman[n] and Albert Fredrik Mellink, *Texts Relating to the Revolt of the Netherlands* (London, 1974), pp. 211-216.

[8] Treaty Great Britain – Spaini, London, 18/28 August 1604, in: Jean Dumont, Baron von Careels-Cron, *Corps diplomatique universel*, vol. 5, part 2 (The Hague, 1728), pp. 32-36 [also in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 49-61].

At the turn towards the seventeenth century, some Protestant and Calvinist ruling agencies were better prepared for these controversies than their Catholic counterparts. Around the mid-1590s[9], the Dutch rebels introduced mandatory military service and started to recruit militia armed forces under their control from local resident populations, subjected them to regular drill following Greek and Roman,[10] English[11] as well as Swiss[12] models and also used Machiavelli's proposals.[13] They followed these models in order to train the militia forces in the handling of and thereby to prepare them for the conduct of battle. By the early 1600s, voluminous drill manuals appeared in print. Commanding officers were expected to use them as guidelines for the organisation of drill sessions.[14] Oranian drill practice quickly spread among their Calvinist allies within the Empire, specifically among the Counts of Nassau, the Count Palatine and the Marchgrave of Brandenburg, but also in England where Queen Elizabeth joined the anti-Spanish alliance. Their defensive strategy stood under the goal of repelling potential invasions by Spanish and Imperial armies. To implement this strategy, some Protestant and Calvinist rulers agreed upon the conditions for military and political cooperation in 1594[15] and formed a formal alliance on 4 May 1608.[16] On 10 July 1609, the Catholic side responded with the foundation of its own military alliance.[17] By 1609 then, for the first time since the early sixteenth century, there were in existence within the Empire two opposing military alliances whose membership was determined on confessional grounds and which were ready for combat at any time.

The early seventeenth-century military alliances differed from their sixteenth-century predecessors in their defensive character and did not result from immediate preparations for a war. According to its foundation charter, the Protestant-Calvinist Union of 1608 was to provide for the "defense" (Defension) of the allied rulers and the population groups under their control, to enforce the rule of law and to preserve "peace and unity" (Frieden und Einigkeit) within the Empire.[18] Members of the counter alliance of the Catholic League, according to its foundation charter of 1609, obliged themselves to support the defense and to the "continuation of common peace, repose and well-being" (Fortpflanzung gemainen fridens, rue und wolfart), thus declaring their willingness to contribute to stability and the maintenance of the balance of power.[19] Even though both camps heavily accused each other of jeopardising the peace, both alliances showed the common feature of obliging themselves to maintain and enforce the imperial laws. This strategy of arguing the need for the establishment of

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[9] Anthonis Duyck, Journaal van Anthonis Duyck, advocaat-fiskaal van den Raad van Staten. 1591 – 1602, edited by Lodewijk Mulder, vol. 1 (The Hague, 1862), p. 636.

[10] Aelianus [Ailianos Taktikos], *De instruendis aciebus* [editio princeps 1487], edited by Hermann Köchly and Wilhelm Rüstow, *Griechische Kriegsschriftsteller*, vol. 2 (Leipzig, 1855), pp. 201-472 [reprint (Osnabrück, 1969)]. Justus Lipsius, *De militia Romana libri quinque* (Antwerp, 1595) [reprint of the edn (Antwerp, 1602), edited by Wolfgang E. J. Weber (Hildesheim, 2002)].

[11] Robert Dudley Earl of Leicester, *A Brief Report of the Militarie Services Done in the Low Covntries* (London, 1587). W. Wade, The Trayning of Men [c. 1587]. Ms. London: British National Archives, SP 12/266, Nr 100, fol. 139^{r}-140^{r}.

[12] Edgard Boutaric, *Institutions militaires de la France* (Paris, 1863), p. 318 [reprint (Geneva, 1978)]. Gabriel Daniel, *Histoire de la milice françoise et des changements, qui s'y ont faits depuis l'établissment de la monarchie françoise dans les Gaules jusqu'à la fin du règne de Louis le Grand*, vol. 1 (Paris, 1721), pp. 377-378.

[13] Niccolò Machiavelli, *Libro dell'Arte della Guerra* (Florence, 1521) [new edn (Machiavelli, *Opere*, vol. 2) (Verona, 1979), pp. 51-52].

[14] Jacob de Gheyn, *Wapenhandelinghe van roers, musketen ende spiessen* (The Hague, 1607) [reprint, edited by Johannes Bas Kist (Loechem, 1971); English versions (The Hague, 1607; 1616)].

[15] [Heilbronn Resolution, 26 March 1594], in: *Briefe und Acten zur Geschichte des Dreissigjährigen Krieges in den Zeiten des vorwaltenden Einflusses der Wittelsbacher*, vol. 1 (Munich, 1870), pp. 74-93.

[16] Treaty Ansbach/Brandenburg/Palatinate/Württemberg (Union Treaty = Foundation of the Special Protestant Confederation within the Holy Roman Empire), Auhausen, 4 May 1608, edited by Gottfried Lorenz, *Quellen zur Vorgeschichte und zu den Anfängen des Dreissigjährigen Krieges* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit, 19) (Darmstadt, 1991), pp. 66-77; partly printed in: Hanns Hubert Hofmann, ed., *Quellen zum Verfassungsorganismus des Heiligen Römischen Reiches Deutscher Nation. 1495 – 1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 13) (Darmstadt, 1976), pp. 149-153.

[17] Treaty Augsburg/Bavaria/ Constance/Ellwangen/Kempten/ Passau/Regensburg/Strasbourg/Würzburg (League Treaty = Foundation of the Special Catholic Confederation within the Holy Roman Empire), Munich, 10 July 1609, partly printed in: Hanns Hubert Hofmann, ed., *Quellen zum Verfassungsorganismus des Heiligen Römischen Reiches Deutscher Nation. 1495 – 1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 13) (Darmstadt, 1976), pp. 153-156.

[18] Treaty (note 16), p. 151.

[19] Treaty (note 17), p. 154.

military alliances was new in the Empire round 1600. It confirms the expectation that military alliances might meet with wider acceptance, as long as they were styled as defensive groupings, not targeted against a specifically identified enemy, but declared to exist in pursuit of maintaining the existing order within and across states. Not only did the texts of the alliance treaties convey this expectation but also theorists commenting on current affairs. For one, at around 1600, a pamphleteer from the Spanish Netherlands could demand that the conclusion of a peace agreement between England and Spain, at war since 1588, was required as a condition for making an alliance between the two states, and that this alliance was necessary as a counterpoise against France and as a means to maintain stability in Europe as a whole.[20] A French pamphleteer could slightly later argue conversely that an alliance between France and some sovereigns outside the Empire was required to establish a counterpoise against Spain.[21] The right to make alliances thus could become declared as an instrument for the preserving of the bilateral balance of power which, in turn, appeared to be a condition for the maintenance of stability within the European states system. Theorists argued these points with the help of the model of the scales hoping to make explicit the link between alliance and balance-of-power politics with the apparent endeavour to preserve the stability of states.

Protestant and Calvinist rulers within the Empire used the defensive alliance to advance the buildup of fortifications seen as instruments for the protection of territories. Moreover, they drilled militiamen more or less consistently. The fortifications had the side effect of making visible state borders even when they were located within the Empire. The Empire thus fell apart into fortified zones, through which, at time of war, travel was possible solely with restrictions. On the Catholic side, rulers retained the sixteenth-century practice of recruiting professional soldiers as mercenaries and even expanded this practice by concluding service contracts not merely with individual soldiers but also with military entrepreneurs. These entrepreneurs recruited entire contingents of troops at their own expense and then rented them out to warring sovereigns. Hence, both alliances featured structurally different types of combat forces, militiamen on the one, and professional mercenaries on the other side. The great war was just waiting for a cause to trigger it off, while the Dutch revolt had been suspended in 1609 by a truce for twelve years.

The cause arrived with the abdication of Matthew, the Habsburg King of Bohemia, who was also Emperor (in office as King of Hungary, 1609 – 1617, as King of Bohemia 1611 – 1617, as Emperor 1612 – 1619). Bohemian aristocrats rebelled refusing to recognise the Habsburg Ferdinand (1617 – 1637) as successor. Instead of the Catholic Habsburg, they elected Frederick V, Calvinist Count Palatinate (1596 – 1632, in office as Count Palatinate 1610 – 1623, as King of Bohemia 1619 – 1620), son-in-law to King James I of Great Britain. Frederick's residential palace at Heidelberg had emerged as the unofficial centre of the Calvinist Union.[22] Frederick accepted the election in 1619 and moved to Prague, while remaining in office as Count Palatinate. As a consequence of Frederick's move, all four secular Electorates, namely those of Bohemia, Brandenburg, the Palatinate and Saxony were in the hands of Calvinists or Lutheran Protestants. The Imperial administration in Vienna categorised the Bohemian election as an act of rebellion, argued that the Bohemian-Palatine Confederation was directed against the Empire and the Emperor and launched a military campaign. The Imperial army dispatched to Bohemia won a skirmish at the White Mountain outside Prague on 8 November 1620 over confederate forces which were under Frederick's command but fought hardly with determination.[23] Frederick went into exile into the Netherlands and then sought refuge with his father-in -law in England. The Emperor had him banned from office. Frederick not only lost the crown of Bohemia to Ferdinand but also his status as an Elector. Instead of the Counts Palatinate, the Duke of Bavaria emerged as Elector in 1623. Ferdinand was elected Emperor after Matthew's death in 1619.

Conducting War over the Right to War

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[20] S'il est expedient de faire pais avec l'angleterre. Ms. Brussels, Archives Générales du Royaume de Belgique, Papiers d'état et de l'audience, liasse 367, Nr 662, fol. 1^{r}-8^{r}, at fol. 1^{r} [English version, partly printed in: Moorhead Wright, ed., *The Theory and Practice of the Balance of Power* (London and Totowa, 1975), pp. 24-26].

[21] *Politischer Diskurss. Ob sich Frankreich der Protestierenden Chur- und Füresten wieder Spanien annehmen oder neutral erzeigen und mit diesem Hause [i. e., Brandenburg] befreunden solle* (Berlin, 1615), fol. A[IV]^{r}.

[22] See: Wolf, Peter, ed., *Der Winterkönig. Friedrich von der Pfalz, Bayern und Europa im Zeitalter des Dreißigjährigen Krieges* (Stuttgart, 2003).

[23] See: Olivier Chaline, *La Bataille de la Montagne Blanche (8 Novembre 1620). Un mystique chez les guerriers* (Paris, 1999).

While the Bohemian troubles seemed settled, Protestant and Calvinist resistance against Imperial rule lingered on. The harsh punishment of Frederick V and Bohemian aristocrats also raised annoyance outside the Empire. Already in 1620, King Christian IV of Denmark (1588 – 1648) entered the war with the argument that the Vienna Imperial administration was threatening the King's positions in Sleswig and Holstein. In the Netherlands, the rebels took up their military resistance in 1621 after the expiration of their truce with Spain. Thus, the war continued within and outside the Empire. However, Christian withdrew from the war after he was badly defeated in the battle at Lutter am Barenberg on 27 August 1626 and on 22 May 1629 conceded the peace of Lübeck which was advantageous for the Imperial-Catholic side.[24] Emperor Ferdinand II enforced the so-called restitution edict on 6 March 1629 according to which all territories were to be returned to the Catholic faith that had become Protestant or Calvinist since the toleration agreement of 1552.[25]

However, the war continued, because King Gustavus Adolphus of Sweden (1611 – 1632) as yet another sovereign outside the Empire entered the scene claiming that the advance of Imperial armed forces restricted his ancient rights in areas south of the Baltic Sea.[26] In 1630, Gustavus Adolphus moved across the Baltic Sea an army of militiamen recruited in central Sweden, maneuvered quickly through northern German-speaking areas, where he left behind some of his troops as occupations forces in towns and cities, filled his army up with mercenaries whom he paid through Amsterdam bankers,[27] and fought major battles with Imperial forces at Breitenfeld on 18 September 1631 and at Lützen on 6 November 1632. The Imperial side lost both battles but Gustavus Adolphus was killed in action at Lützen, leaving behind Protestants and Calvinists without a commander-in-chief. In 1635, then, Protestants and Calvinists acceded to a peace treaty at Prague which had initially been concluded only between the Emperor and the Duke of Saxony.[28] The terms of the peace treaty were unfavourable for the Protestant and Calvinist side. In the declared effort to restore the "security" (Sicherheit) of the Empire, the treaty enforced the dissolution of all "unions, leagues, alliances and the like", thereby placing Protestant and Calvinist military forces under the Imperial control.[29] By the 1635 at the latest, the Protestant-Calvinist strategy of defense on the basis of militiamen drafted into military service had resulted in a complete failure. Professional soldiers as mercenaries from then on conducted the war among themselves.

The war continued because the Catholic King of France intervened against the peace treaty of Prague, taking side with the Protestants and Calvinists within the Empire. At the same time, he launched a strike against Spain. Christina, daughter of and successor to Gustavus Adolphus (1626 – 1689, in office as Queen of Sweden 1632 – 1654, as Duchess of Bremen and Verden 1648 – 1654), was not bound by the Prague peace and continued the war, which evolved into a campaign against the dynastic network of Habsburg rulers in Europe. Neither the Danish nor the Swedish nor the French sides stated religious reasons for their interventions. Instead, their war deductions, that means, officially published texts pronouncing war aims, contained arguments focused on political motives, featuring prominently the intentions of enforcing effective borders of the Empire towards states in its vicinity and restricting of the power of the Emperor over Imperial Estates. Religious motives were added as instruments of propaganda only after the interventions had been launched and while the combat was actually taking place. Specifically after the end of battles, pamphleteers would resort to

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[24] Treaty Denmark – Roman Emperor and Holy Roman Empire, Lübeck, 22 May 1629, in: Jean Dumont, Baron von Careels-Cron, *Corps diplomatique universel*, vol. 5, part 2. (The Hague, 1728), pp. 584-586.

[25] Michael Frisch, *Das Restitutionsedikt Kaiser Ferdinands II. vom 6. März 1629* (Jus ecclesiaticum, 44) (Tübingen, 1993).

[26] Johan Adler Salvius, *Ursachen / Warumb der Durchlauchtigste und Großmächtigste Fürst und Herr / Herr Gustavus Adolphus Der Schweden ... König ... Entlich genötiget ist / Mit einem Kriegs-Heer auff den Teutschen Boden sich zu begeben* (Stralsund, 1630), fol. 1^{v} [also in: Sigmund Goetze, *Die Politik des schwedischen Reichskanzlers Axel Oxenstierna gegenüber Kaiser und Reich* (Beiträge zur Sozial- und Wirtschaftsgeschichte, 3) (Kiel, 1971), pp. 349-365]. Goetze, *Politik*, pp. 51-74.

[27] Sven A. Nilsson, 'Kriegsfinanzierung während der schwedischen Großmachtzeit', in: Nilsson, Hans Landberg, Lars Ekholm and Roland Nordlund, eds, *Det kontinentala krigets ekonomi. Studier i krigsfinansiering under svensk stormaktstid* (Studia historica Upsaliensia, 36) (Uppsala, 1971), pp. 453-479.

[28] Treaty Roman Emperor and Holy Roman Empire – Sweden, Prague, 30 May 1635, in: Jean Dumont, Baron von Careels-Cron, *Corps diplomatique universel*, vol. 6, part 1 (The Hague, 1728), pp. 1623-1629. Conze, Werner, 'Sicherheit, Schutz', in: Conze, Otto Brunner and Reinhart Koselleck, eds, *Geschichtliche Grundbegriffe*, vol. 5 (Stuttgart, 1984), pp. 831-862, at p. 841.

[29] Treaty (note 28), p. 1626.

contemptuous and derogatory phrases aimed at delegitimising the confession of the enemy.[30] Nevertheless, the old legal rule that just wars could not be conducted for religious reasons, still continued to influence the official war deductions during the early seventeenth century. However, the very fact that the war was being conducted among alliances formed on confessional grounds did convey the impression that any agreement eventually ending the war would have to establish a peace within Latin Christendom, embracing all major confessions while not standing above religion.

After 1632 and despite the Prague peace treaty, the military forces of both camps became virtually equal in strength, so that neither side had the capacity to launch a decisive attack. The conduct of the war was accompanied by acts of violence on both sides and shed terror among contemporaries. Descriptions of excesses found their way into written pamphlets and series of printed pictures[31] and have, until today, shaped the image of the war as an outbreak of murderous violence.[32] Even though articles of war remained in force, putting under harsh sanctions the use of force against unarmed non-combatant civilians,[33] many fell victim to undisciplined bands of mercenaries. During a major battle, up to 12000 soldiers could find their deaths on a single day. The battles were carefully planned through the building of depots for ammunition and through the Oranian practice of the partition of big contingents into smaller units that could maneuver on the battle field with relative ease. Battle tactics showed little difference against sixteenth-century practice, as the main tactical goal in the course of a battle was the disruption of the combat array and order of the opponent, thereby seeking to drive the opponent away from the battlefield. Even the military entrepreneurs, whose business was war, did not call into question the validity of the law of war. They did not challenge the sovereign right to declare, conduct and end war, as, in a legal sense, they were deployed as men in service to rulers who paid them.

Even though this war absorbed large military forces, it was not the only military conflict in its own time. The Ottoman Turkish Sultan honoured his treaty with the Emperor of 1606 and did not intervene during the first half of the seventeenth century, even though a Turkish intervention might have weakened the Imperial side significantly. Yet the European long-distance trading companies stood in competition against one another and the King of Portugal over access rights to the coasts of the Indian Ocean and America, with this competition carried out with military force at times. The trading companies benefited from the dissolution of the Portuguese-Spanish joint kingdom in 1640 and the ensuing restoration of a sovereign Portuguese state. The Dutch East India Company (VOC) seized this opportunity in surprise attacks on the Portuguese positions at Melaka (Malacca) on the Malay Peninsula in 1641 as well as in Kandy on Sri Lanka in 1658 and forced the Portuguese occupation forces to withdraw. As a sovereign, the VOC emerged as the dominating power in waters east of the Cape of Good Hope and added new trading spots and strongholds to its network of positions on the coasts of the Indian Ocean. In 1651, it succeeded in establishing itself in control over the Cape of Good Hope, which Portuguese sailors had left untouched since the end of the fifteenth century. The "Cape" developed into the largest European settlement on African soil and served as the link between the trading zones of the VOC and its sister company, the Dutch West India Company that was mainly engaged in the transatlantic slave trade. Africans whom the VOC deported from the coats of East and Southeast Africa, were passed on to the Dutch West India Company at the "Cape" to be delivered to American slave markets. At that time, the Spanish monopoly on the transatlantic slave trade existed only on paper. The ruler of Portugal and Spain did, however, try to strengthen control over dependencies in Africa and America and made out treaties to establish close relations and to prevent the occurrence of conflict. Thus a trade treaty came into existence between Monomotapa in Southeast Africa and Portugal/Spain in 1629, and the Mapuche in what is southern Chile today,

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[30] See: Esther-Beate Körber, 'Deutschsprachige Flugschriften des Dreißigjährigen Krieges. 1618 bis 1629', in: *Jahrbuch für Kommunikationsgeschichte* 3 (2001), pp. 1-47. Hermann Weber, 'Zur Legitimation der französischen Kriegserklärung von 1635', in: *Historisches Jahrbuch* 108 (1988), pp. 90-113.

[31] Jacques Callot, *Les misères et les malheurs de la guerre* (Paris, 1633) [reprint of the German version, edited by Franz Winzinger (Die bibliophilen Taschenbücher, 332) (Dortmund, 1982)].

[32] As noted by: Peter Hamish Wilson, *Europe's Tragedy. A History of the Thirty Years War* (London, 2009), p. 6 [further edns (Cambridge, MA, 2009); (London, 2010)].

[33] Ferdinand III, Emperor, 'Kaiserliche Kriegs- und Wehrverfassung [12 October 1642]', edited by Josef J. Schmid, *Quellen zur Geschichte des Dreissigjährigen Krieges zwischen Prager Frieden und Westfälischem Frieden* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 21) (Darmstadt, 2009), pp. 147-152.

entered into an agreement with the King of Spain in 1641.[34] The latter treaty was to avoid conflicts between the Mapuche who had retained their sovereignty as a state, and areas that had come under Spanish colonial rule. Likewise, the British Massachusetts Colony entered into some kind of alliance treatz with the Narangansett in 1636.[35] Nevertheless, the activities of the long-distance trading companies put on record that not merely a plethora of sovereigns existed in the world at large, but that there also were various types of sovereigns, ranging from the Emperor to rulers of sovereign states, rulers or ruling agencies of Imperial Estates to private trading companies. The European long-distance trading companies as private non-state actors exercised their sovereign status in areas outside Europe and they stood in competition against European rulers such as the kings of Portugal and Spain in these areas. Thus, recognition of sovereignty did not under all circumstances require the recognition of statehood, and state as well as non-state sovereigns could equally claim for themselves the right to go to war.

In fact, the war in Europe did not form merely an uncontrolled outburst of violence, without any thought devoted to its conduct. Even leading military commanders, such as General Gottfried Heinrich Graf von Pappenheim (1594 – 1632) found time to reflect on the principles of war. Pappenheim was not convinced of the view that battles could be decisive. In a memorandum on war, dated 28 July 1631, Pappenheim equated "luck" in war with the scales that could turn at any time, and identified victory "as nothing else but the turning of the scales". Hence, he regarded battles as incalculable. The course of war, seemingly depending on "luck", appeared to him as the "moving and doubtful equilibrium, which alone hosts the danger". Victory in battle alone would not bring peace, he observed. For many previous victories had "not reached the predetermined goal of the war, namely peace".[36] Even Pappenheim thus underwrote the Augustinian conviction that peace was the natural condition of human existence and that war was nothing but an intermittent process separating two periods of peace.

Moreover, soon after the beginning of the Bohemian revolt and immediately following the Imperial decision to dispatch armed forces to Prague, diplomatic envoys took action with the goal of sorting out possibilities to bring about a peace agreement.[37] Likewise, the general theory of peace remained popular in the course of the war. The statesman Maximilien de Béthune, Duke of Sully (1560 – 1641), administrator to King Henry IV of France (1589 – 1610, 1572 – 1610 King of Navarre), proposed a so-called "Great Plan" which he fathered upon the French king. According to the plan, a general congress should bring about peace among European states as members of the "family". Moreover, Sully demanded that Christian rulers should accept the pronouncements of an arbiter for the conflicts. However, Sully followed the conventional argument that already George of Podebrad had promoted, namely that Christian rulers had the duty to establish unity among themselves as a condition for a war against "infidels". He further believed that he could implement his peace plan through restricting the powers and rights of the Habsburgs.[38] Mathematician Emeric de Crucé (c. 1590 – 1648), however, argued against Sully. Crucé believed that it was more advantageous for the accomplishment of peace to tailor the states of the world as roughly same-sized territorial entities, so that no government of any state could have the strategic capability of expanding its control onto another state. Crucé explicitly included into his proposal the realms under the control of the Ottoman Turkish Sultan, the rulers of Ethiopia, China and Persia together with the so-called "Tartars" believed to rule in Central Asia. Crucé thus cast his proposal in non-religious terms and categorised peace as

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[34] Treaty Monomotapa – Portugal, c. 1629, in: Julio Firmino Judice Biker, ed., *Colleção de tratados*, vol. 1(Lisbon, 1880), p. 234. Treaty Mapuche – Spain, 6 January 1641, in: José de Antonio Abreu Bertodano, ed., *Colección de tratados de paz, alianza, neutralidad, garantia, protección, tregua, mediación, reglamento de limites, comercio, navegación etc.*, vol. 3 (Madrid, 1740), p. 416.

[35] Treaty Massachusetts Colony – Narragansett, Boston, 22 October 1636, in: *The Journal of John Winthrop. 1630 – 1649. Abridged Edition*, edited by Richard S. Dunn and Laetitia Yeandle (Cambridge, MA, and London, 1996), pp. 104-105.

[36] Gottfried Heinrich, Graf von Pappenheim, [Memorandum on the War, 28 July 1631], in: *Pappenheim, bairischer Feldmarschall. Beyträge zur Geschichte seiner Feldzüge*, edited by Josef von Xylander and Karl Maria Freiherr von Aretin, Issue 5 (Munich, 1820), pp. 109-111, at p. 109.

[37] Christoph Kampmann, Maximilian Lanzinner, Guido Braun and Michael Rohrschneider, eds, *L'art de la paix* (Schriftenreihe der Vereinigung zur Erforschung der Neuzeit, 34) (Munster, 2011).

[38] Maximilien de Béthune de Sully, *Sully's Grand Design of Henry IV* [c. 1611], edited by David Ogg (Grotian Society Publications, 2) (London, 1921), pp. 25, 33, 33-34, 37-38.

the lasting result of human action.[39] According to both plans, the Holy Roman Empire was reduced to the format of a state among many others and peace became described as a really given possibility that did not require support from the Emperor. Instead, both authors insisted that peace was possible through the removal of rivalries among rulers and imbalances of territorial sizes of states as the seemingly most significant causes of war. In this respect, both authors, early in the seventeenth century, confirmed the Augustinian vision that peace would simply emerge if only wars could be avoided.

The Search for Peace

Even though the peace treaties of 1629 and 1635 were not implemented, the search for peace did not end in the course of the war. By 1643, peace negotitations were becoming conceivable, and in 1644 eventually, diplomats obtained priority over military commanders and formally launched a process of convening a peace conference seeking to terminate the war. Yet the negotiations turned out to be complicated as decisions about procedural matters might predetermine the results of ensuing debates about material issues. Moreover, as a rule the negotiators had to wait for special instructions they had to solicit from their governments. Without these special instructions, delegates could not be certain that positions they were taking were in agreement with those of their governments. The release and transmission of instructions were time-consuming and thus protracted the negotiations. In a nutshell, the main difficulty from the beginning of negotiations consisted in the central question what the conditions for the recognition of the legal equality of sovereigns might be and which consequences the application of the principle of the legal equality of sovereigns might have on the relations among rulers and states. The war was being fought among many parties which had to be allowed to participate in the negotiations if the peace was going to be lasting. The diversity of the warring parties put on the agenda of the negotiators the problem of determining the rank among the delegations. This problem found a solution in the choice of two negotiation places, the Catholic city of Munster and the neighbouring Protestant city of Osnabrück. Eventually, the peace agreement was signed in the form of two treaties which were not identical in wording but featured similar legal stipulations. The Emperor, acting for the Empire, concluded the treaty of Munster with the King of France, while the Emperor, again acting for the Empire, made out the treaty of Osnabrück with the Queen of Sweden. Both treaties were signed simultaneously on 24 October 1648. Through both treaties, the Emperor had retained his privilege of managing relations with other states on behalf of the Empire, including the making and enforcement of legally binding agreements. At the same time, however, the Emperor recognised the King of France and the Queen of Sweden as partners to treaties and, by consequence, as legally equal to himself. The treaties did not provide for restrictions regarding the sovereign right to war. Another decision prior to the beginning of the material negotiations referred to the other ongoing military conflicts. The decision was that the wars between the Netherlands and Spain and between France and Spain would not be considered during the negotiations at Munster and Osnabrück. Both conflicts were therefore excluded from the framework of the two treaties signed there.[40]

The congress took place while the wars were going on. The compromises found eventually during the negotiation process, received the status of the second basic law for the Empire, next to the Golden Bulla of Emperor Charles IV of 1356. They did so against criticism from the side of the Pope who rejected the treaties as unlawful. Both peace treaties featured among the latest major agreements which the delegates swore to honour. This means that the treaties were still protected by the ancient practice of swearing the oath as the pledge of a conditioned self-condemnation before God. They remained officially in force as valid law of the Empire until 1806 and set the frame for the conduct of relations between Imperial Estates and European states outside the Empire. The treaties comprise a

[39] Emeric Crucé [Emeric de la Croix], *Le nouveau Cynée* [(Paris, 1632)], Reprint (Paris, 1976); new edn (Rennes, 2004) [English versions, edited by Thomas William Balch (New York, 1909); edited by C. Frederick Farrell Jr and Edith Farrell, *The New Cyneas* (New York, 1972), pp. 46, 49].

[40] Ulm, the City Council, [Order, dated 8 August 1643]. Print. Ulm: Stadtarchiv, A 3971 Polizeiordnungen, comprise, on fol. 6, a prayer for divine grace to let the upcoming peace negotiations succeed (zu den vorstehenden Friedensverhandlungen seine Göttlich Gnad vnd Segen der Gestalt zu verleiten). For a survey of the peace negotiations see: Fritz Dickmann, *Der Westfälische Frieden*, second edn (Munster, 1965) [first published (Munster, 1959)].

myriad of stipulations, some rather detailed, but their main contents can be summed up under the following eight points.

First, by the very fact of having concluded the treaties on behalf of the Empire, the Emperor obtained a highest position in the hierarchy of rulers within the Empire. He was the only ruler to whom the honorific formula "Sacred Imperial Majesty" (Sacra Caesarea Majestas) was to be applied. This privilege was combined with the right vested solely in the Emperor to implement the stipulations of the treaties with regard to matters of religion.[41] Rulers within the Empire were classed as "Estates of the Empire and Subjects" (Status Imperii et subditos).[42]

Second, the treaties downgraded the Emperor as a sovereign to the same level as all other sovereigns. The Imperial decision to accept this legal consequence of the treaties had implications for the relationship between the Emperor and the Imperial Estates, specifically as, with Bohemia, a state recognised as a kingdom was an Imperial Estate. On the basis of the treaties, at least the King of Bohemia could claim legally equality with the Emperor. That this claim might be raised was excluded not in legal terms, but merely in terms of politics because the Emperor was in personal union King of Bohemia. As, in the aftermath of the war, the Habsburg position as the Imperial and Royal Bohemian dynasty was solidified, a clash of interests between holders of these two offices could practically not arise.

Third, the Emperor guaranteed equal legal rights to the confessions and included Calvinists into this guarantee.[43]

Fourth, rulers within the Empire received permission to conclude, at their discretion, alliances with other rulers within and outside the Empire. The conclusion of such alliances had been common practice since the Golden Bulla of Charles IV but had been banned through the Prague peace treaty of 1635. The treaties of 1648 restored the permission, however now with the qualification that alliances should not be established against the Emperor, the Empire and the treaties.[44]

Fifth, agreement was reached to restore rights to titles over territory and population based on the distribution that had been in existence on 1 January 1624.[45] Thus, the treaties featured for the first time the practice of setting the so-called "normal year" as the temporal boundary after which all changes of ruling titles were to be restored. The choice of 1624 as the "normal year" left untouched the decisions regarding Bohemia and limited the validity of the legal principle of ownership *uti possidetis* to the conditions that had emerged up until the battle at the White Mountain.[46] The peace makers thus returned to the distribution of titles to rule to the conditions that had emerged after 1624 with regard to all other controversial matters. In doing so, they confirmed the ancient norm of the law of war and peace according to which expansion of rule could not be a legitimate cause of war and again put on record that the Augustinian paradigm of peace, war and peace, which continued to be accepted not only among theorists of peace but also among practical political decision-makers. According to this paradigm, the end of a war was to lead to the restoration of the conditions prevailing before the beginning of the war (status quo ante). The treaties thus formed a compromise between the general willingness to adhere to the Augustinian paradigm and the special Imperial interest to retain control over the Kingdom and Electorate of Bohemia. This compromise was eased by the fact that the deposed Bohemian King Frederick had died in 1632 and was therefore no longer available as a claimant. Late in the eighteenth century, Georg Friedrich von Martens (1756 – 1821), jurist at the University of Göttingen and theorist of the law among states, took a critical stance against the practice

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[41] Treaty Roman Emperor and Holy Roman Empire – Sweden [Instrumentum Pacis Osnabrugense], Art. VII, Osnabrück, 24 October 1648, edited by Antje Oschmann, *Die Friedensverträge mit Frankreich und Schweden*, part 1: Urkunden (Acta Pacis Westphaliae. Series III, Abteilung B, vol. 1) (Munster, 1998), pp. 97-170, at p. 157 [also in: *CTS* (Clive Parry, ed., *The Consolidated Treaty Series*, Dobbs Ferry), vol. 1, pp. 119-197; also in: Acta Pacis Westphalicae Supplementa electronica, vol. 1: Die Westfälischen Friedensverträge vom 24. Oktober 1648; http://www.pax.westfalica.de/ipmipo/index.html].

[42] Ibid., Art. VI, p. 152.

[43] Ibid., Art. V/18, p. 115.

[44] Ibid., Art. VIII/2, p. 150. Treaty France – Roman Emperor and Holy Roman Empire [Instrumentum Pacis Monasteriense], Art. 63, Munster, 24 October 1648, edited by Antje Oschmann, *Die Friedensverträge mit Frankreich und Schweden*, part 1: Urkunden (Acta Pacis Westphaliae. Series III, Abteilung B, vol. 1) (Munster, 1998), pp. 271-318, at p. 292 [also in: *CTS*, vol. 1, pp. 3-94; also in: Acta Pacis Westphalicae Supplementa electronica, vol. 1: Die Westfälischen Friedensverträge vom 24. Oktober 1648; http://www.pax.westfalica.de/ipmipo/index.html].

[45] Ibid. (Osnabrück), Art. IV/19, p. 132; (Munster), Art. 63, p. 282.

[46] See: Heinrich Bernhard Oppenheim, *System des Völkerrechts*, Chap. 3/2 (Frankfurt, 1845), p. 25.

of returning to the status quo ante. He argued that this practice would only paste over existing conflicts without actually solving them, thereby giving cause to further wars in the future.[47] But this was the retrospective criticism of a later generation. The recognition of the Augustinian paradigm of peace, war and peace further emerged from fact that the two treaties served as a legal framework for later peace agreements, and helped extending the practice of back-reference to other treaties as well. Thus, the Peace of the Pyrenees of 1659 contained a reference to the treaty of Cateau-Cambresis of 1559,[48] the Peace of Aix-la-Chapelle of 1668 to the Peace of the Pyrenees[49] and the Peace of Nijmegen of 1678 to the Peace of Aix-la-Chapelle.[50]

Sixth, the Count Palatinate had his status as Imperial Elector restored, with the consequence that the Imperial College of electors from 1648 onwards had eight members.[51]

Seventh, the Swiss canton of Basle, representing the Swiss Confederacy during the peace negotiations, obtained the guarantee that the Empire as a whole, with all its institutions including the Imperial Court of Law, would not interfere into the domestic affairs of the Confederacy.[52]

Eighth, the treaties granted to the King of France and the Queen of Sweden the status of powers guaranteeing the observation of the treaties, whereby the latter acted as ruler over territories that were part of the Empire, south of the Baltic Sea and the Duchies of Bremen and Verden.[53]

Altogether, the treaties established a "general, perpetual, true Christian peace" and true friendship among the treaty partners,[54] thereby placing the "general peace" within the bounds of religion. Thus, the agreements that have come to be termed the "Treaties of Westphalia" from the places where they were concluded had their range limited to Christendom. The Empire had been downgraded to a sovereign state like all others, with a complicated "constitution" though and with an Emperor, who was endowed with certain representation rights but had little further competences. Already contemporaries referred to the conflict that was coming to its end, as the "Thirty Years War", thereby projecting the course of events in the Empire between 1618 and 1648 as one single coherent sequence.[55] The conflict between the Netherlands and Spain remained categorised as the "Eighty Years War" in contradistinction against the "Thirty Years War".

The so-called *Most Recent Imperial Edict* of 17 May 1654 was the first to rank the treaties of Munster and Osnabrück as a "specifically enacted basic law of the Holy Empire and perpetual guideline" (gegebenes Fundamental-Gesetz des Heiligen Reichs und immerwährende Richtschnur), prohibited any attempt to change the treaties through acts of Imperial legislation and banned all acts of resistance against the treaties.[56] The Capitulatio Caesarea Leopoldina, released on the occasion of the inauguration of Emperor Leopold I in 1658,[57] further extended the obligation to maintain peace among the members of the Empire through the demand "not to engage in strife, feud or war against neighbouring Christian powers within or beyond the Empire" (gegen Benachbarten und Anstossenden

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[47] Georg Friedrich von Martens, *Über die Erneuerung der Verträge in den Friedensschlüssen der Europäischen Geschichte* (Göttingen, 1797), p. 12.

[48] Treaty France – Spain, 7 November 1659 (Peace of the Pyrenees), in: *CTS*, vol. 5, pp. 327-402. Treaty France – Spain, Cateau-Cambrésis, 3 April 1559, in: Jean Dumont, Baron de Carels-Croon, *Corps universel diplomatique*, vol. 5, part 1 (The Hague, 1728), pp. 34-41; also in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 19-38.

[49] Treaty France – Spain, Aix-la-Chapelle, 2 May 1668, in: *CTS*, vol. 11, pp. 13-25.

[50] Treaty France – the Netherlands, Nimwegen, 10 August 1678, in: *CTS*, vol. 14, pp. 367-397.

[51] Treaty of Munster, Art. 11, p. 279; Treaty of Osnabrück, Art. IV, p. 126.

[52] Ibid. (Munster), Art. 61, p. 291; (Osnabrück), Art. VI, p. 157.

[53] (Munster), Art. 97, p. 302; (Osnabrück), Art. XVII, p. 187.

[54] (Munster), Preamble, p. 276; (Osnabrück), Art. I, p. 123.

[55] Konrad Repgen, 'Seit wann gibt es den Begriff „Dreißigjähriger Krieg"?', in: Heinz Dollinger, ed., *Weltpolitik, Europagedanke, Regionalismus. Festschrift Heinz Gollwitzer zum 65. Geburtstag* (Munster, 1982), pp. 59-70. Repgen, 'Noch einmal zum Begriff „Dreißigjähriger Krieg"', in: *Zeitschrift für Historische Forschung* 9 (1982), pp. 347-352 [reprinted in: Repgen, *Von der Reformation zur Gegenwart*, edited by Klaus Gotto and Hans Günter Hockerts (Paderborn, Munich, Vienna and Zurich, 1988), pp. 25-29].

[56] [Imperial Resolution], *Der jüngste Reichsabschied von* 1654, § 6, edited by Adolf Laufs (Quellen zur neueren Geschichte, 32) (Bern, 1975) [partly printed in: Hanns Hubert Hofmann, ed., *Quellen zum Verfassungsorganismus des Heiligen Römischen Reiches Deutscher Nation. 1495 – 1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 13) (Darmstadt, 1976), pp.195-221, at p. 198].

[57] Leopold I, Emperor, *Capitulatio Caesarea Leopoldina*, Art. 13 (Jena, 1696), p. 696 [text of 1658 with additions from the *Capitulatio Josephina* of 1696]. Justus Wolrad Bodinus [praes.] and Johann Heinrich Baxmann [resp.], *Bilanx justae potestatis inter principes ac status imperii*, LLD thesis (University of Rinteln, 1689), pp. 45-46.

[= angrenzende] Christliche Gewalten ... kein Gezänck, Fehde noch Krieg inn- oder ausserhalb des Reichs).

The Dutch-Spanish conflict was part of the negotiations at Munster, although the issue was not part of the official congress agenda. The rebels had pushed Spanish troops out of the northern part of the Netherlands since resuming warfare in 1621, but Spanish occupation forces retained the southern part. As the war had been going on with interruptions for eighty years, with the Spanish side being unable to suppress the revolt, King Philipp IV (1621 – 1665, as King of Portugal in office 1621 – 1640) became willing to negotiate a peace agreement. Both parties eventually agreed that the Spanish King and his representatives would no longer enter the territory of the northern Netherlands and leave Dutch ships unmolested anywhere in the open seas. This concession was equal to the admission of sovereign legislative competence for the Republic of the Netherlands that had come to be called the "States General". But the agreement was not equivalent of the recognition of the "independence" of that state. The agreement was laid down in a treaty signed at Munster on 30 January 1648.[58] The Emperor stayed away from the agreement, thereby refusing to extend the recognition of the autonomy of legislation and government to the "States General".

Finally, the year 1659 witnessed the solution of the French-Spanish conflict. Both sides convened in the Pyrenees to reach an agreement ending the war that had been going on since 1635. The agreement was disadvantageous for the Spanish side that accepted the cession of territory to the King of France and the Duke of Lorraine. The peace settlement was combined with an agreement according to which King Louis XIV of France (in office 1643 – 1715), then still minor, would become married to the Habsburg-Spanish princess Maria Theresa (1638 – 1683).[59] The treaty of the Pyrenees thus offered to the French dynasty of the Bourbon the prospect of succeeding, should the Habsburgs fail to produce an heir for the Spanish throne.

Conceiving the Law of War and Peace as Law among States and Hugo Grotius

Against the background of the Thirty Years War and the intertwined Eighty Years War, jurist Hugo Grotius (Huig de Groot) wrote a large number of smaller tracts as well as substantial works that have impacted heavily on the law of war and peace as well as on the law between states. Even at young age, Grotius, already then receiving praise as a genius, served the recently founded VOC, compiling legal opinions for the company and for the government of the "States General". He wrote the most widely known of these texts apparently in 1604, most likely in response to the British-Spanish peace treaty signed in that year. Part of this text appeared in print anonymously in 1609 under the title *Mare liberum* (Open Sea), thus becoming generally available.[60] By contrast, the full text remained unknown until an auction of Grotian manuscripts took place in 1864, through which this and other texts became known to the public. In *Mare liberum*, Grotius treated the so-called prize law or law of spoils. The incident on which Grotius had been asked to comment was the seizure of the Portuguese carrack *Santa Catarina* by the crew of three VOC vessels off Singapore in 1603. The conflict raised the issue whether the VOC was entitled to act against Portuguese-Spanish ships in these waters. Even though the British-Spanish peace treaty did not affect the Netherlands directly, the VOC feared that the Spanish king could, on the basis of this treaty and while the war with the Netherlands was going on, close the Indian Ocean to Dutch ships. The governments of England (and successively Great Britain) as well as the "States General" had concluded treaties with rulers in North Africa since the turn of the seventeenth century.[61] It had been the purpose of these agreements to regulate trade relations across the Mediterranean Sea among Christian and Muslim states. These treaties bore various titles, such as *Articles of Friendship*, *Articles of Friendship and Trade*, *Treaty of Peace* or *Treaty of Trade and Peace*, even though their contents might not differ greatly.[62] But the long-distance trading companies

[58] Treaty States General of the Netherlands – Spain, Munster, 30 January 1648. Print (Munster, 1648) [Munster: Stadtarchiv, 2 EUG 300-046]; also in: *CTS*, vol. 1, pp. 3-69; partly printed in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 418-423.

[59] Peace of the Pyrenees (note 48), pp. 327-402.

[60] Hugo Grotius, *Mare liberum* (Leiden, 1618) [editio princeps (1608); reprint, edited by Friedhelm Krüger-Sprengel, *Mare liberum – mare clausum* (Bibliotheca rerum militarium, 42) (Osnabrück, 1978)].

[61] See: Jörg Manfred Mössner, *Die Völkerrechtspersönlicheit und die Völkerrechtspraxis der Barbareskenstaaten (Algier, Tripolis, Tunis, 1518 – 1830)* (Neue Kölner rechtswissenschaftliche Abhandlungen, 58) (Berlin, 1968), pp. 89-101.

[62] Ibid., pp. 102-103.

were not bound by any such treaties in their operations in the Indian Ocean. Grotius adduced a full arsenal of arguments against the fear that the King of Spain might close the Indian Ocean for Dutch ships, and drew on ancient Roman as well as contemporary legal doctrine for his arguments.

In his text, Grotius carefully avoided dispute over the question whether the VOC was entitled to conduct a "public war" like rulers in sovereign states. In 1604, Grotius was cautious with regard to this question because, at this time, several authors ranked only "public wars" as just and postulated that only rulers of sovereign states could be entitled to conduct "public wars".[63] In arguing this position, these authors categorised "public war" as just war in the sense of the traditions of the law of war and peace and restricted the number of legitimate belligerents in "public wars" to rulers of sovereign states. Grotius remained within this tradition of the law of war and peace and even used the term "public war" (*bellum publicum*) in contradistinction against the feud as the main type of the "private war". However, he skillfully shifted the question of the entitlement of the VOC to conduct a "public war" from the issue of the justice of war to the meaning of the word "public". His response to this question overlapped with arguments that his opponent Serafim Freitas proposed subsequently, namely that "public matters" (*res publicae*) must be regarded as accessible to everyone. Yet both contenders differed with regard to the range of public accessibility. On the one side, Grotius, like John Dee in the sixteenth century, claimed that public accessibility would have to apply to humankind as a whole, Freitas would limit it to the territory of a state and the seaways attached to that territory. Grotius thus avoided an answer to the question whether the VOC was entitled to conduct a "public war" against the King of Spain (and Portugal). According to his argument, even if the VOC would not have been entitled to do so, no one could prevent the company legally from participating in "public matters" wherever they were. Hence, Grotius claimed that the law of war was to be applied to all "private wars" that were being conducted over the right to participate in "public matters". According to the law of war, both the VOC and the King of Spain were thus equally entitled to conduct war in the Indian Ocean.[64]

Moreover, Grotius took the criteria for determining the justice of wars solely from the law of war and peace in the tradition of Augustine and Thomas Aquinas, thus allowing no other causes of just wars than defense, restoration of lost legal entitlements and punishment of infringers of the law.[65] According to Grotius, the VOC, like the "States General" as a whole, were acting in defense of their established rights, which the crews of Portuguese-Spanish ships appeared to seek to contest unlawfully. In defense of their position, the Portuguese-Spanish crews seemed to rely on what Grotius categorised as a fictitious legal title, derived from edicts in the name of Pope Alexander VI of 1493. Using arguments that the Spanish jurist Metellus had proposed in the sixteenth century,[66] Grotius ranked the privileges, which, in his view, had been granted to the kings of Portugal and Spain alike, in the literal meaning of the Latin word *donatio* as a gift of land by the Pope and not as an act of the legitimisation of rule.[67] He then concluded from the wording of the texts that the edicts were of no relevance to states other than the kingdoms of Portugal and Spain, as the Pope had not mentioned any other recipients of his privileges.[68] Grotius further added that the Pope was not the universal ruler.[69] According to Roman law, no one could donate without being in possession of what was to be donated, Grotius argued following Cicero.[70] But the Pope had not been the proprietor of the donated lands, and no one could

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[63] Johannes Althusius, *Politica*, Chap. XVI/4-9, 13, XXXI/1 (Herborn, 1614) [first published (Herborn, 1603); newly edited by Carl Joachim Friedrich (Cambridge, 1932), pp. 119-121, 291 [reprint of the original edn (Aalen, 1981); reprint of Friedrich's edn (New York, 1979)]. Christoph Besold, *Discursus politici*, Nr 5: De reipublicae formarum inter sese comparatione, Chap. 1 (Strasbourg, 1624), p. 239. Serafim Freitas, *De iusto imperio Lusitanorum Asiatico Adversus Grotii Mare Liberum*, Chap. 11 [(Valladolid, 1625)], reprint, edited by Miguel Pinto de Meneses (Lisbon, 1983), p. 134.

[64] Hugo Grotius, *De praeda militari*, edited by Hendrik Gerard Hamaker (The Hague, 1868), p. 204 [reprint (Dobbs Ferry, 1964); microfiche edn (The Grotius Collection. International Law on Microfiche, GRI-112) (Leiden, 1995)].

[65] Ibid., p. 249.

[66] Grotius, *Mare* (note 60), pp. 24-27. Johannes Metellus [Matalius], 'Praefatio', in: Hieronymus Osorius, *De rebvs Emmanvelis Lusitaniae Regis Invictissimi, virtvte et avspicio Domi foriqve gestis libri dvodecim*, vol. 1 (Coimbra, 1791), pp. 1-204, at pp. 20-21 [first published (Cologne, 1580)]. On the use of the work of Metellus by Grotius see: Erik Staedler, 'Hugo Grotius über die "donatio Alexandri" von 1493 und der Metellus-Bericht', in: *Zeitschrift für Völkerrecht* 25 (1941), pp. 257-274, at p. 261.

[67] Grotius, *Mare* (note 60), pp. 24, 65, 93.

[68] Ibid., p. 25.

[69] Ibid., p. 26.

[70] Ibid., p. 38.

legislate over some place in the middle of the ocean where no one could reside permanently.[71] Therefore, the Indian Ocean was accessible to anyone who wanted to go there.[72] Should Portuguese-Spanish ships seek to obstruct the VOC advance into the Indian Ocean, the VOC was entitled to defend itself.

The logic Grotius followed was straightforward and focused, as was appropriate for a legal argument. The rules of the law of war were to be valid and applicable for all humankind throughout the world, as Grotius perceived it. In his perception, the law of war flew from theories which had their origin in the Christian faith. But the specific religious origin of these theories was not to obstruct their universal application in military conflicts anywhere in the world. The law of war was to be valid for all kinds of war, no matter who the belligerents were. Sovereign rulers could not own the oceans and, consequently, the seaways that came to be called the Atlantic and the Indian Oceans could not be closed to anyone. In 1604, this line of argument was neither new nor was Grotius the only one to argue it in his time. Instead, the argument had been current with regard to the Atlantic throughout the sixteenth century.[73] But Grotius shifted the focus of the argument from the Atlantic to the Indian Ocean and from rulers of sovereign states to private long-distance trading companies as legitimate belligerents. Thereby, he extended the reach of the law of war in geographical respects as well as with regard to the number of types of sovereign belligerents. That he had written his text on the prize law to the end of legitimising VOC activities in the Indian Ocean, Grotius admitted himself early on.[74]

Grotius's argument did not remain uncontested. In 1615, the English jurist William Welwood (1578 – 1622) replied to Grotius's tract as published in 1608 contending, on the basis of Bartolo of Sassoferato, that the sea was by nature, the art of navigators and the law, divided into areas under the control of rulers and that, hence, there was no general right of unrestricted access to the sea.[75] In 1625, Serafim de Freitas added the argument that, even though the ocean was a "public matter" for everyone, its general accessibility was guaranteed by the Roman Emperor as the universal ruler. Therefore, he concluded, the ocean was not exempt from any law; instead, he maintained that it was under the legislation of the universal ruler.[76] In 1635, jurist John Selden (1584 – 1654) argued conversely in a work with the provocative title The Closed Sea (*Mare clausum*). In this work, Selden tried to prove that sovereign rulers had the right to regulate access to seaways off the coasts of the territories under their sway.[77] This was the restatement in legal terms of the policy that had been pursued since James I in response to the Spanish invasion attempt and which Gentili had already defended. Selden thus argued with local concerns whereas Grotius and Freitas were focused with the globe at large. But both counterarguments against Grotius touched upon marginal aspects of Grotius's theory and were therefore not capable of obstructing its reception.

Grotius wrote a further legal opinion which is undated but, by reason of its contents, may be dated to the period shortly after the truce between the Dutch rebels and the Spanish king of 1609. In this text, of which no early print exists, Grotius sums up in eleven "theses" his defense of the Dutch demand for the recognition of the sovereignty of the "States General". Grotius referred to the institutions of rule which by then had emerged in the "States" with the Latin word *ordines*, rendered into Dutch as *Staaten*, into German as *Stände*, into English as *estates*. According to Grotius, the *ordines* in the Netherlands had been sovereign before the beginning of the war against Spain. They had, in his view, been so because they had held the ancient privilege of approving of Spanish royal taxation requests.[78] The Spanish king had unlawfully revoked this and other privileges, for the

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[71] Grotius, *Praeda* (note 64), p. 260.

[72] Ibid., p. 237.

[73] For an early case see: William Fulbeke, *The Pandectes of the Law of Nations* (London, 1602), pp. 34, 35, 37-39. For a study see: Gundolf Fahl, *Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 51) (Cologne, 1969).

[74] Hugo Grotius, 'Defensio capitis quinti Maris Liberi oppugnati a Gulielmo Welwodo', edited by S. Visschering, 'Over een drietal handschriften van Hugo Grotius korte inhoud eener mededeeling', in: *Verslagen en mededeelingen der Koninklijke Academie van Wetenschappen*, Afdeling Letterkunde 9 (1865), pp. 148-149, at p. 148 [the edn has been based on: *Maris liberi vindiciae adversus Gulielmum Welwodum De dominio maris* (The Hague, 1653)].

[75] William Welwood, *De dominio maris*, Chap. I, II (London, 1615), pp. 8, 11-3 [further edn (The Hague, 1653)].

[76] Freitas, *De imperio* (note 63).

[77] John Selden, *Mare clausum* (London, 1635) [reprint, edited by Friedhelm Krüger-Sprengel, *Mare liberum – mare clausum* (Bibliotheca rerum militarium, 42) (Osnabrück, 1978)].

[78] Hugo Grotius, *Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War and the Legitimacy of the Dutch Revolt* [c. 1609], Thesis 3, Thesis 9, edited by Peter Borscheid (Bern, 1994), pp. 222-225, 268-275.

restoration of which the rebels were waging a just war.[79] This was so because sovereigns could conduct wars for the restorations of their rights.[80] According to Grotius, the claim of the Dutch *ordines* that they were sovereigns did not stand against their willingness to remain part of the Holy Roman Empire, because sovereign rights could be distributed among various rulers.[81] Contrary to previous theorists seeking to legitimise the revolt, Grotius thus did not resort to the natural right of resistance but postulated that the Spanish king had, without legal entitlement, levied taxes directly from the Dutch *ordines*. Resistance against this unlawful interference with the sovereignty of the *ordines* with military means was, in the view of Grotius, not merely possible but even mandated.

With these "theses", Grotius contradicted Jean Bodin's theory of sovereignty in one core respect. Although Grotius restated Bodin's as well as older theorists' position that sovereignty consisted essentially in the right of autonomous legislation, sovereigns could, in Grotius's view, be unequal and ordered in hierarchies. Sovereignty also appeared divisible. Consequently, within the Holy Roman Empire, the Emperor could hold the position of a sovereign above other sovereigns. In presenting this argument, Grotius took up positions that theorists had argued during the thirteenth, fourteenth and fifteenth centuries against those that Bodin had supported. Contrary to Bodin, Grotius admitted many types of holders of sovereignty within and beyond the Empire. Violating sovereign rights could result in a just war against the violator. The Dutch *ordines* had held sovereign rights legally since ancient times, thus did not acquire them through acts of rebellion. Grotius directed his defensive argument against the King of Spain as well as against the Emperor and thereby positioned the law among states above the autonomous legislative competence of holders of sovereignty.

Grotius's career as jurisconsult to the VOC and the political leadership of the revolt ended abruptly with a dubious trial of high treason for which he was convicted and sentenced to life imprisonment. Thanks to his wife's courage, he could escape from prison in 1621and go into exile in France. Forced to abstain from advocacy in exile, Grotius devoted himself to intensive study of the law among states and laid the results down in a comprehensive work that appeared in 1625 under the programmatic, yet conventional title *Three Books on the Law of War and Peace, wherein the Law of Nature and of the Gentes as well as the Essentials of Public Law Are Explained* (De ivre belli ac pacis libri tres in quibus jus Naturae et Gentium item juris publici præcipua explicantur).[82] The first title words were a verbatim quotation of Cicero's formula of the law of war and peace. But Grotius combined this formula with the correlated terms of the law of nature and the *ius gentium*. The title thus announced the explication of the law of war and peace as an aspect of the law of nature and positioned the *ius gentium* in proximity to the law among states. In order to be able to discuss the law of war and peace as an aspect of a legal framework that was positioned above sovereigns and non-statutory,[83] Grotius assumed that sovereigns throughout the world were forming some form of social order under the rule of law in the same way as all orders within states stood under the rule of law.[84] The law that appeared to be binding for sovereigns without resulting from their will, was to be derived, according to Grotius, from "nature, divine commands, custom and tacit agreements".[85] As the law of war and peace was to follow from these four sources of the legal order above sovereigns, the statement was wrong according to which there could not be any law of war. The law of nature, which in turn resulted not directly from divine will but from divinely-willed reason, should demand honouring promises that had been given and treaties that had been concluded.[86] In addition, not merely the law of nature but also the entirety of human made legal rules, having resulted from mutual agreements among contracting parties, were valid for the sovereigns subjected to the social order among them. For the human made legal rules were in existence, not for the benefit of any single sovereign but for their

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[79] Ibid., Thesis 11, pp. 280-283.
[80] Ibid., Thesis 8, pp. 258-267.
[81] Ibid., Thesis 4, pp. 224-235.
[82] Hugo Grotius, *De jure belli ac pacis libri tres* [(Paris, 1625)] reprint of the edn (Amsterdam, 1646) (Washington, 1913); newly edited by Bernardina Johanna Aritia de Kanter-van Hettinga Tromp (Leiden, 1939). Reprint of this edn (Aalen, 1993); further reprint, edited by Richard Tuck, *The Rights of War and Peace. Hugo Grotius from the Edition by Jean Barbeyrac* (Indianapolis, 2005)].
[83] Ibid., Prologue, nr 28.
[84] Ibid., Prologue, nr 6, 8, 23.
[85] Ibid., Prologue, nr 1.
[86] Ibid., Prologue, nr 1, 15. For a study of this aspect of Grotius's theory of the sources of law see: Malte Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (Forschungen zur neueren Privatrechtsgeschichte, 6) (Cologne, 1959), p. 55.

social order as a whole.[87] The law of war and peace as part of the law among states was thus valid for all, or at least most, of the sovereigns in their relations not only at times of peace, but also of war.[88] Like Suárez, Grotius used the conventional term *ius gentium* for this law, but he, again like Suárez, placed it not below but besides the law of nature. Grotius concluded that sovereigns acting against the law of nature or the law among states were jeopardising peace as demanded by the law of nature.[89] Grotius thus perceived states as solid institutions, protected by the law of nature and thus subject to the rule of law.

However, Grotius did not believe that nature should have dictated the external borders of states; instead, he assumed that the territorial extension of states was the result of human decision-making. For example, he explained, sovereigns could voluntarily agree among themselves to recognise a river as the border established by nature. Yet, the agreement itself was not the dictate of nature. According to the agreement, the borders were to change if the river altered its course. But it would remain where it had been agreed upon, even if human action, such as the building of a dam, had moved the river bed.[90]

The three parts of Grotius's work, each called "Books", differ in length and overlap with regard to their contents. In the first „Book", definitions and general explanations dominate, while this as the other "Books", deal at length with the several options for legally permitted types of human action in war, including the self-enslavement of entire *gentes* to the purposeful killing of children and prisoners of war.[91] The second "Book" is mainly on the conditions of legally allowed and morally admissible types of human action in war. Finally, the third "Book" raises issues pertaining to the Lipsian ethics of self-constraint, to which sovereigns should subject themselves, and discusses the conditions for the accomplishment of peace settlements. Even though Grotius announced in the prologue to his work that he would focus on just war,[92] he did not, unlike Thomas Aquinas, frame his thought on this topic into a comprehensive theory. Apparently, Grotius refrained from compiling a general theory of just war because he professed to the conviction that everything was unjust that was contrary to the nature of the social order of reasonable human beings.[93] Instead, Grotius devoted much space to belligerent action that could be both legally possible and morally admissible. Accordingly, a just war was a military conflict that occurred under the rule of law and in agreement with the moral command to restore peace. Contrary to the title of his work, Grotius neither dealt at length with peace nor offered a theory of perpetual peace, but remained preoccupied with war. He thus focused the Ciceronian formula of the law of war and peace on war as a legal contest and on the moral command to conduct war in ways that would allow the restoration of peace. This moral command obtained its relevance from the ethics of self-constraint (*temperamenta*) which seemed to oblige sovereigns not to use all legal means that were available for them during war, specifically not to undertake wars rashly, not even just wars, but to limit the means of the conduct of war to what appeared to be required for the purpose of restoring peace. Grotius's technique of description and analysis follow the method of Pierre La Ramée, probably transmitted to him through Giacomo Zabarella (1533 – 1589), Professor of philosophy at the University of Padua.[94] In following this method, Grotius composed a kind of system of the law among states, which he divided into ever smaller sections and subsections and gave out as stable throughout the times. As this was his purpose, he could, without restrictions and scruples, select examples (*exempla*) for his theoretical statements across the periods, ranging from Greek and Roman Antiquity to his very present. Grotius was aware of the time gap that his examples were bridging but subjected it to his overall concern for the manifestation of trans-temporal validity of his system of law.

The starting point for Grotius's systematic explication of the law between states was the restatement of the Augustinian position that every war should lead to the firmer stabilisation of

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[87] Grotius, *De jure* (note 82), Prologue, Nr 17, 23; book I, chap. 1, § 14.
[88] Ibid., book I, chap. 1, § 14.
[89] Ibid., Prologue, nr 18. For an interpretation see: Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, 1963), pp. 448-457 [reprint (Paris, 1983)].
[90] Ibid., book II, chap. 3, § 16, nr 2, § 17, nr 1.
[91] Ibid., book I, chap. 3; book III, chap. 4, § 9; book III, chap. 4 § 10.
[92] Ibid., Prologue, Nr 33.
[93] Ibid., book I, chap. 2. For a detailed study of Grotius's attitudes towards just war theory, see: Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, 1963) [reprint (Paris, 1983)].
[94] Grotius, *De jure* (note 82), book II, chap. 24, book III, chap. 10, § 1. Giacomo Zabarella, *De methodis libri quinque* (Venice, 1578) [reprint, edited by Cesare Vasoli (Bologna, 1985)].

peace.[95] Nevertheless, he insisted that there was no conflict that could not lead to war. Therefore, he concluded, war had to be defined in the general terms that Cicero had already proposed, namely as the state of affairs of those who use force against each other.[96] Likewise, Grotius was in line with the great tradition of the law of war and peace in claiming that wars could only be legally initialised by agents who had the competence to do so. He categorised these conflicts as „public wars".[97] However, he argued that the law of war was valid also in military conflicts that were fought among actors without legitimate competence to do so, and classed these conflicts as "private wars".[98] At first sight, Grotius took up the position he had argued in his *De jure praedae* of 1604. However, in his comprehensive treatment of the law of war and peace, his reason for including "private wars" into his general definition of war, differed from those he had used in his earlier work. In *De jure belli ac pacis*, Grotius aimed not just at defending VOC actions in the Indian Ocean, but sought to argue that the law in war (*ius in bello*) as well as the legitimacy to conduct war (*ius ad bellum*) provided entitlements not merely for rulers of sovereign states but also for actors in "private wars". For, Grotius postulated, „public" as well as „private wars" were in agreement with the law of nature. Hence, Grotius positioned the respect for the inviolability of diplomatic envoys[99] and the willingness to bury enemy dead ceremonially[100], as essential rules of the law in war, which to honour belligerents were unconditionally obliged, and derived them directly from the law of nature.[101] However, he wished to subject "public wars" to specific elements of form. Most importantly, he demanded that "public wars" should be announced through a formal declaration stating the reasons for the impending interruption of peace. Such a declaration was mandatory, he argued, unless the war was conducted purely for purposes of defense against an attack that had already begun.[102] By contrast, Augustine's statement that only the restitution of previously inflicted injustice in conjunction with the recovery of lost property and the punishment of evildoers could be reasons for just wars, was to be valid for "public" and "private wars" alike.[103] This was the reason why, according to Grotius, robber bands could fight neither "public" nor "private wars", because the main goals of robber bands could not be related to "public" matters but was directed towards the unlawful search for gains in private property. Grotius was thus unwilling to agree with the relativistic sixteenth-century position according to which all warring parties might act with the subjective consciousness of acting for a just cause. Even if the legal consequences of a war might be regarded as just by all parties previously at war, the war itself could not be accepted as just by all belligerents.[104]

Grotius listed the breach of treaties among the unlawful acts that might lead to war, because, he argued, the law of nature demanded in general the obligation to honour all given promises, including agreements among sovereign rulers.[105] In deriving the basic norm of *pacta sunt servanda* from natural law, he took a stance against Franciscus Connanus who, in the sixteenth century, had drawn on Roman civil law to contest the theory of the natural binding force of treaties. Instead, Connanus had assumed that the *Corpus iuris civilis* was the source of *pacta sunt servanda*.[106] Grotius was aware of the difficulty that the law among states as such could not be derived from agreements among sovereigns. These agreements were, as a rule, bilateral treaties the purpose of which was not to create new law but to stipulate certain specific rights and obligations for the contracting parties. However, he did postulate that treaties either could add detail to general norms that had already been in existence by the law of nature, or could supplement these rules by new obligations.[107] Grotius added

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[95] Grotius, *De jure* (note 82), booko I, chap. 1, § 1.
[96] Ibid., book I, chap. 1, § 2.
[97] Ibid., book I, chap. 3, § 1; book III, chap. 3, §§ 1, 2.
[98] Ibid., book I, chap. 3, § 2.
[99] Ibid., book II, chap. 18.
[100] Ibid., book II, chap. 17.
[101] Hugo Grotius, *Parallelon rerum publicarum liber tertius*, editd by Johan Meerlan, 4 vols (Haarlem, 1801-1803) [newly edited by Wolfgang Fikentscher, *De fide et perfidia. Der Treuegedanke in den „Staatsparallelen" des Hugo Grotius aus heutiger Sicht* (Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Philos.-Hist. Kl., 1979, Heft 1) (Munich, 1979) , p. 92].
[102] Grotius, *De jure* (note 82), book III, chap. 3, §§ 5, 6.
[103] Ibid., book II, chap. 1, § 1, Nr 4, § 2, Nr 2.
[104] Ibid., book II, chap. 23, § 13.
[105] Ibid, Prologue, nr 15, book II, chap. 11, §§ 1-3.
[106] Franciscus Connanus, *Commentariorum juris civilis libri decem*, bbok I, chap. 6, nr 12 (Naples, 1724), pp. 21-22 [first published (Basle, 1557)].
[107] Grotius, *De jure* (note 82), book II, chap. 15, § 5.

the further statement that treaties could be equal in the sense that they stipulated reciprocal rights and obligations for all contracting parties, such as in cases of alliances,[108] or that they could be unequal by containing non-reciprocal stipulations in accordance with differences of rank.[109] He also claimed that treaties remained valid even while the contracting parties were engaged in war against each other, but refused to admit the *clausula de rebus sic stantibus*. According to this principle, treaties existed under the proviso that treaties were valid as long as the external conditions remained stable from the time the treaties had been concluded, but turned invalid once these conditions changed. Grotius noted that the *clausula* could only be regarded as valid if it had explicitly been laid down in the text of a treaty.[110] In addition, he specified that treaties were valid, even if they had been made with one party acting in confinement,[111] and demanded that agreements should be regarded as binding for the successors and heirs to the rulers who had concluded them.[112] In articulating this demand, Grotius followed the legal practice that had emerged since the fifteenth century,[113] and added the clarification that treaties were binding across religions as long as they followed the general rules of the law of nature binding all humankind irrespective of religious beliefs.[114] At the same time, Grotius also made explicit the conditions under which the basic norm *pacta sunt servanda* was not to be applied. The most important of these conditions was the violation of the rule, enshrined in late Roman private law, that parties should enter into agreements voluntarily.[115] Consequently, Grotius exempted treaties from *pacta sunt servanda*, if they had come into existence through the use of force. He did, though, specify that a prisoner of war could not claim to have acted under force when having signed a treaty ending imprisonment. He reason was, according to Grotius, that the prisoner had decided voluntarily to agree on the treaty instead of staying in prison. It becomes clear from Grotius's arguments about the law of treaties that he had in mind the formulary of the integrated, written diploma which all contracting parties had signed and declared valid. He did thus no longer consider as relevant the practice of making out separate but coordinated declarations of the wills of the contracting parties in the form of concordats. By implication, he further took for granted that merely those stipulations were to be considered as valid that had been laid down in the written text of the agreements. In claiming that treaties were valid only if they had voluntarily been agreed upon, he was in line with legal doctrine as it had emerged since the fourteenth century and, in the same vein, he distinguished between the law of treaties between states as the voluntary law (*ius gentium voluntarium*) and the natural law among states (*ius gentium naturale*).

Grotius thus remained within the traditional Augustinian paradigm that categorised war as the consequence of sinful peace-breaking human action and obliged warring parties to seek the restoration of peace in a more stable condition than before the beginning of the war.[116] Only as long as wars occurred within this paradigm, could they, in Grotius's view, be just. The law among states was to bind all types of belligerents who had the legitimacy to go to war, neither with consideration of religious beliefs, nor with restriction to a certain part of the world, nor with limitation to rulers of states. The law of war and peace, as the core part of the law among states, comprised elements of the law of nature, while also featuring voluntary, human made, though usually unwritten law. It was applicable for states as well as for non-state actors within and beyond the European states system. In many parts of his work, Grotius described, often in depressing detail and variety, the numerous acts of violence that he considered not only possible but also legal in war. But these long lists of acts of violence that Grotius took to be in line with the law of war, linked up, especially in the third "Book", with the moral commands that the belligerents should maintain good faith among each other while at war,[117] and should restrain their deployment of military means.[118] He insisted that peace could only be

[108] Ibid., book II, chap. 15, § 6, nr 2.
[109] Ibid., book II, chap. 5, § 7, nr 1.
[110] Ibid., book II, chap. 15, § 25.
[111] Ibid., book III, chap. 20, § 3.
[112] Ibid., book II, chap.14, nr 10; book III, chap. 20, § 6.
[113] For example, see: Treaty Florence – Milan – Venice, Lodi, 30 August 1454, in: Jean Dumont, Baron von Careels-Cron, *Corps diplomatique universel*, vol. 3, part 1 (The Hague, 1726), pp. 221-224.
[114] Grotius, *De jure* (note 82), book II, chap. 15, § 8.
[115] Ibid., book I, chap. 1, § 14.
[116] Grotius, *Parallelon* (note 101), chap. VI, p. 136.
[117] Grotius, *De jure* (note 82), book III, chap. 19-21.
[118] Ibid., book II, chap. 24, §§ 1-5; book III, chap. 11. Grotius, *De jure praedae* (note 64), p. 310: "in suscipiendo bello justiciam, in gerendo fortitudinem, in deponendo aequitatem".

restored if belligerents observed both these moral commands. He thus rejected the theory that belligerents could or should be discriminated on moral grounds, although early twentieth-century theorists interpreted Grotius's statement in exactly opposite terms.[119] His work was thus informed by Lipsius's ethics of self-constraint. This ethics appeared to be the most solid basis for the restoration of peace among belligerents who would respect their moral integrity. Turning explicitly against Bartolo of Sassoferato, Grotius thus rejected the idea that the establishment of universal rule could be a just cause of war.[120]

Even though *De jure belli ac pacis* covered a range of issues far larger than what he had treated in his earlier work, it cannot be isolated from the context of events that took place in Grotius's native Netherlands.[121] Grotius argued a wide concept of war, he insisted that "private war" should be regarded as legitimate, adduced an impressive array of arguments in defense of his position, thereby indicating that he was aware of opposite view, and he was generous in admitting a wide variety of actors as legitimate belligerents. These positions are difficult to explain unless they are placed before the background of the Dutch revolt. In 1625, the existence of the „States General" was everything but safe in military as well as in legal respects, and the right of long-distance trading companies to use their sovereign competences to conduct war and conclude peace in areas outside Europe was far from generally established. Admittedly, neither Grotius's work nor the less comprehensive contributions by his contemporaries to the law among states[122] had any impact on the course of the Thirty Years War, even though Gustavus Adolphus reportedly read Grotius's work.[123] Yet the systematic approach to the analysis of the law among states found wide recognition, although the papal curia placed it on its index of prohibited books.[124] Already during the seventeenth century, it became the subject of several commentaries and has remained a widely used handbook of international law until today.[125] Further seventeenth-century theorists worked independently on the basis of Grotius's work. The English judge Richard Zouche (c. 1590 – 1661) took over much of Grotius's terminology in his compendium of the law among states published in 1651.[126] Yet Zouche differed from Grotius in his choice of the title words "The Law of the Fetials or the Law between States" (*Ius feciale sive ius inter gentes*). Zouche's formula did not connect with Cicero but with the ancient Roman pre-Republican tradition of law that Livy had described. Nevertheless, in avoiding the term *ius gentium*, Zouche explicitly equated the ancient "law of the fetials" with the new concept of the law between states and thereby became the first theorist to use this formula in the title of a monograph. Unlike Grotius, he started his work with the explication of the law of peace.

Summary

The readiness to go to war in Europe during the first half of the seventeenth century was neither the result of some lack of theoretical quests for peace nor conditioned by academic disrespect for the law

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[119] Cornelis van Vollenhoven, 'Grotius and Geneva', in: *Bibliotheca Visseriana dissertationum ius internationale illustrantium*, vol. 6, nr 13 (Leiden, 1926), pp. 1-81 [reprinted in: Vollenhoven, *Mr. C. van Vollenhoven's Verspreide Geschriften*, edited by Frederik Mari van Asbek, vol. 1 (Haarlem, 1934), pp. 406-460, at pp. 415, 427].

[120] Grotius, *De jure* (note 82), book II, chap. 22, § 13.

[121] For a recent study see: Martine Julia van Ittersum, *Profit and Principle. Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies. 1595 – 1615* (Brill Studies in Intellectual History, 139) (Leiden, 2006), pp. 43-52: 'The Natural Right to Punish in Private and Public Wars'; pp. 189-281: 'Hugo Grotius and the Peace Negotiations between Spain and the United Provinces'; pp. 283-358: 'Hugo Grotius and the Truce Negotiations between Spain and the United Provinces'.

[122] Johann Suevus [Schwabe] [praes.] und Elias Schröder [resp.], *Iuris bellici delineatio brevissima*. LLD thesis (University of Jena, 1614).

[123] Adam Friedrich Glafey, *Vollständige Geschichte des Rechts der Vernunft, worin die in dieser Wissenschaft erschienenen Schriften nach ihrem Inhalt und wahren Wert beurteilt werden. Nebst einer Bibliotheca juris naturae et gentium*, § 3 (Leipzig, 1739), p. 3 [reprint (Aalen, 1965)].

[124] *Index des livres interdits*, vol. 11: Index librorum prohibitorum. 1600 – 1966, edited by Jesús Martínez de Bujanda and Marcella Richter (Montreal, 2002), p. 409.

[125] For one, see: Jean Barbeyrac, ed., *Hugonis Grotii de jure belli et pacis libri tres* (Amsterdam, 1720) [further edns (Amsterdam, 1735); (Lausanne, 1751; 1752; 1758; 1759); (Leipzig, 1758); all original edns also as microfiche edn (Leiden, 1995)]. For a study see: Ernst Reibstein, 'Deutsche Grotius-Kommentatoren bis zu Christian Wolff', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 15 (1953/54), pp. 76-102.

[126] Richard Zouche, *Juris et judicii fecialis sive juris inter gentes* (Leiden, 1651) [French version, edited by Dominique Gaurier (Cahiers de l'Institut d'Anthropologie Juridique, 21) (Limoges, 2009)].

among states. Therefore the argument, proposed recently in historical research, is untenable that the Thirty Years War should have been a war of state formation and that some alleged lack of peacefulness should have been due to purported deficits in legitimacy, i. e. the sovereign competence to act lawfully, in egality as well as institutionality, i. e. the existence of regular apparatuses of rule and administration of states.[127] Instead, before, during and after the Thirty Years War, an elaborate theory of legitimacy was in existence offering a comprehensive toolkit for the purpose of determining sovereign competences to go to war and to establish peace. As this theory of legitimacy impacted not only on ideologies of the justification of the use of military force in wars that could become considered as just, but also on peace negotiations, it was not merely an academic construct but a feature of government practice. However, there was no consensus, neither among legal theorists nor among rulers and their advisers, about answers to the question whether sovereigns should be ranked as legal equals. It was precisely the controversy about answers to this question that led directly into the Thirty Years War. Moreover, what triggered the war was the question of who could be entitled to rule legitimately over which territories and population groups. Not all states, it is true, were uncontested political communities, as the "States General" of the Netherlands, members of the Swiss Confederacy as well as, for a short time, some Bohemian aristocrats, struggled for recognition as sovereigns. However, as early seventeenth-century theorists of the state argued at length,[128] rulers and other governing agencies could not claim recognition as autonomous legislators, unless they had at their disposal well-ordered regular bureaucracies. This was so, because only well-ordered regular bureaucracies could enable sovereigns to levy the funds that were required for the conduct of war. Even the VOC as a non-state actor followed this rule and maintained a complex bureaucratic system of government both at its centre in the Netherlands and in its overseas dependencies. The Thirty Years War as well as the military conflicts that took place simultaneously, thus did not lead to the establishment of new states, neither within the Holy Roman Empire nor on its periphery. Instead, the treaties that implicitly recognised the existence of the "States General" and the Swiss Confederacy as autonomous law-giving sovereigns in 1648 employed the traditional legal instrument of the prevention of entry (*introitus*) that had been in use since the eighth century to guarantee the integrity of rulers together with that of the population groups under their control. The guarantee of prohibition of entry came in response to the complaints both of the Swiss Confederates and the Dutch rebels that their ancient rights had been violated. These complaints, together with the concessions that were eventually granted in 1648, presuppose the recognition of the Swiss Confederacy and the "States General" as political communities which had been in existence long before the Thirty Years war or, for that matter, the Eighty Years War began. The Bohemian aristocrats, however, used a different argument to support their claims. They demanded for themselves the entitlement to the free election of the successor to the throne the Kingdom of Bohemia. The Habsburgs could draw on the Bodinian concept of the "fundamental law" (*loi fondamentale*), thereby maintaining that the rule of succession was inalterable, and could declare resistance against the Habsburg heir apparent as illegal rebellion. In Bohemia there was no controversy about the legitimate competence of the sovereign to make and enact laws.

Moreover, the arguments that came into use for justifying the decisions to begin and to continue the sequence of military actions later termed the Thirty Years War, followed the conventional Augustinian paradigm of the sequence of peace, war and again peace. Within this paradigm, the legitimate use of force could be regarded as defensible on the basis of credible evidence to the effect that existing rights had been violated in states that were already in existence. Hence, in the perspectives of the Swiss Confederates and the Dutch rebels, the restoration of peace could be possible for themselves as well as for their allies both within and beyond the Holy Roman Empire, if their states could receive confirmation, if not explicitly then at least by implication through the guarantee of the prohibition of entry. There was thus no state formation among the parties to the wars of the early

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[127] This theory has been advocated by Johannes Burkhardt, 'Die Friedlosigkeit der Frühen Neuzeit', in: *Zeitschrift für Historische Forschung* 24 (1997), pp. 509-574.

[128] Among others, see: Christoph Besold, *Discursus politici* (Strasbourg, 1624). Federigo Bonaventura, *Della ragio di stato e della prudenza politica* (Urbino, 1623). Paulus Busius [Buis], *De republica libri tres* (Franeker, 1613). Scipione Chiaramonti, *Della ragione di stato* (Florence, 1635). Arnoldus Clapmarius, De arcanis rerum publicarum. Bremen 1605. Hermann Conring [praes.] und Heinrich Voß [resp.], 'Dissertatio de ratione status [(LLD thesis (University of Helmstedt, 1651)]', in: Conring, *Opera omnia*, vol. 4 (Brunswic, 1730), pp. 549-580. Wilhelm Ferdinand Efferen, *Manvale politicvm Christianvm de ratione statvs sev idolo principvm* (Frankfurt, 1630) [further edns (Passau, 1634); (Frankfurt, 1662)]. Giovanni Antonio Palazzo, *Discorso del governo e della ragion vera di stato* (Naples, 1604).

seventeenth century. However, the wars did contribute to the reduction of the number of types of sovereigns that could legally conduct war and make peace and, more importantly, reduced the number of sovereigns who could effectively use their *ius ad bellum* in view of the increasing costs for military campaigns.[129] Thus, rulers in control over small territories within the Empire began to assemble around rulers over sizeable territories and population groups as dependent military entrepreneurs. Therefore, the Thirty Years War changed little in the array of states that existed in Europe but predominantly boosted the process of the intensification of rule by sovereigns over the territories and population groups under their sway. Moreover, the war deepened the hierarchy among sovereigns in increasing the powers of rulers over large territories while further reducing the capabilities of those merely controlling small areas. Thus, there was ample reason to use military force in campaigns over the question who could issue what kinds of commands over whom. The treaties of Munster and Osnabrück ended many of these conflicts and established a compromise that lasted for about 150 years. According to this compromise, the Emperor and the kings within and in the vicinity of the Empire were legal equals and yet the Emperor retained a position of superiority over the Imperial Estates with regard to that single respect that he alone could enter into binding legal agreements on behalf of the Empire as a whole. The treaties of Munster and Osnabück thus established Imperial law as the legal framework above the Estates. Imperial law guaranteed the hierarchical subordination of the Estates to the Empire while granting to them recognition as states. The fusion through Imperial law of the concept of sovereignty with the recognition of hierarchy was incompatible with Bodin's notion of sovereignty. Publicists in the Empire noted the contradiction already around the middle of the seventeenth century.[130] Yet Imperial law guaranteed the continuity of the Empire as an institution of governance and, at the same time, allowed the maintenance of relations among sovereigns across Imperial borders.

[129] For a study see: Christopher Storrs, ed., *The Fiscal-Military State in Eighteenth-Century Europe. Essays in Honour of Peter George Muir Dickson* (Farnham, 2009).

[130] Bogislaw von Chemnitz [Hippolytus a Lapide], *Dissertatio de ratione status imperii nostro Romano-Germanico* (Freistadt, 1647), pp. 25, 40, 50.