

THE PEACE OF WESTPHALIA, 1648-1948

By LEO GROSS

The acceptance of the United Nations Charter by the overwhelming majority of the members of the family of nations brings to mind the first great European or world charter, the Peace of Westphalia. To it is traditionally attributed the importance and dignity of being the first of several attempts to establish something resembling world unity on the basis of states exercising untrammelled sovereignty over certain territories and subordinated to no earthly authority.

The next attempt, the settlement of Vienna of 1815 and the Congress of Aix-la Chapelle of 1818, which in a sense completed the former, gave birth to that loose system of consultation between the Great Powers known as the Concert of Europe. Born of the cataclysm of the Napoleonic Wars and anchored in the Protocol of the Aix-la-Chapelle of November 15, 1818, the Concert provided some sort of a self-appointed directing body for the maintenance and manipulation of that balance of power on which the European peace precariously reposed for about a hundred years. Uncertain in its foundations, devoid of much organization or continuity, it was characterized as much by the devotion of the Great Powers which composed it to the policy of a free hand as it was, in consequence, by the absence of definite commitments. Consultation and conference on problems of mutual interest was a frequent practice but no obligation of the Great Powers. It was precisely this flexibility, frequently regarded and praised as the chief virtue of the concert system, which ultimately brought about its ruin at a moment when it was most desperately needed. The policy of free hands reaped a large harvest in World War I.

Faced with the devastating results of World War I and the bankruptcy of the Concert, the Paris Settlement of 1919, without essentially departing from the Peace of Westphalia, attempted a novel solution, drawing for its inspiration on the Concert, the Hague Peace Conferences, the experience of the nineteenth and twentieth centuries in non-political international collaboration, and the wartime collaboration between the Allied and Associated Powers. It produced the League of Nations, in which the member states assumed certain commitments to coöperate in various fields and, above all, without abolishing the right of war, *jus ad bellum*, to establish "the undertakings of international law as the actual rule of conduct among governments." It is a moot question whether the failure of the League should be attributed to a defective legal technique in organizing international security or to a kind of fatal and gradual relapse of the Great Powers into the traditional methods of consultation untrammelled by and frequently in open disregard of their obligations under the Covenant.

The climax in this process of degeneration was reached in 1939 when alliances were hurriedly tossed around and when Poland, though attacked by Germany on September 1, 1939, found it convenient to manifest its contempt of the League of Nations by not even appealing to it under Article 10 of the Covenant, and when Great Britain and France went to the assistance of Poland not because they were legally bound to do so by the Covenant but because they felt in honor bound to fulfill their obligations as allies in Poland. Thus World War II started in the customary way, even as if the League were non-existent; as a consequence the League was doomed.

Critics of the United Nations Charter point out that it includes some of the elements of the League organization and that it relies even more heavily than did the League on the notion of consultation, on limited obligations in the political, and the method of voluntary coöperation in the non-political, field. The Charter proclaims that the organization is based on the sovereign equality of all the members only in order the firmer to establish the hegemony of a group of Great Powers. On the other hand, in Articles 24 and 25, the principal framers of the Charter almost obtained what the Concert never succeeded in obtaining, namely, the recognition by the lesser nations of the preëminent position of the Great Powers as the guardians of international peace and security. In spite of this and other important indications of a new approach to the problem of international security and relations, the Charter at first glance would seem to have left essentially unchanged the framework of the state system and of international law resulting from the Peace of Westphalia.

Thus the Peace of Westphalia may be said to continue its sway over political man's mind as the *ratio scripta* that it was held to be of yore. What is the explanation of this curious phenomenon? In view of this continued influence of the Peace of Westphalia, it may not be amiss to discuss briefly its character, background and implications.

It should be clear from the outset that the actual provisions of the Treaties of Osnabrück between the Empire and Sweden, and of Münster between the Empire and France and their respective confederates and allies, have undergone more than one substantial change in the course of time. The political map of Europe as outlined in these Treaties is no longer. It should be noted, however, that the chief political idea underlying the Franco-German settlement of 1648 has undergone relatively little change. Then the axiom of French politics was, as it appears to be today, that the best guarantee of French security lies in a divided and impotent Germany, and that this division and impotence must be secured by appropriate provisions such as those which gave France a right to intervene when necessary in order to vindicate the principle of the sanctity of treaties.

The Thirty Years' War had its origin, at any rate partially, in a religious conflict or, as one might say, in religious intolerance. The Peace

of Westphalia consecrated the principle of toleration by establishing the equality between Protestant and Catholic states and by providing some safeguards for religious minorities. To be sure, the principle of liberty of conscience was applied only incompletely and without reciprocity.¹ The religious Peace of Augsburg of 1555 and the rule *cujus regio ejus religio* were confirmed. With a view to alleviating the lot of religious minorities, however, the Treaty of Osnabrück provided that²

subjects who in 1627 had been debarred from the free exercise of their religion, other than that of their ruler, were by the Peace granted the right of conducting private worship, and of educating their children, at home or abroad, in conformity with their own faith; they were not to suffer in any civil capacity nor to be denied religious burial, but were to be at liberty to emigrate, selling their estates or leaving them to be managed by others.

Moreover, in an effort to assure equality between Catholic and Protestant members of the German Diet, the Treaty of Osnabrück laid down the important rule that in matters pertaining to religion³

a majority of votes should no longer be held decisive at the Diet; but that such questions should be settled by an amicable 'composition' between its two parts or *corpora*. . . . In the same spirit of parity it was agreed that when possible there should be equality of consulting and voting power between the two religions on all commissions of the Diet, including those *Deputationstage* which had come to exercise an authority nearly equalling that of the Diets themselves.

The principle of religious equality was placed as part of the peace under an international guarantee.⁴ The Peace of Westphalia thereby established a precedent of far-reaching importance. One or two illustrations may be in order. The Constitution of the Germanic Confederation of June 8, 1815, which forms part of the Final Act of the Congress of Vienna of June 9, 1815, stipulates in Article XVI that the difference between the Christian religions should cause no difference in the enjoyment by their adherents of civil and political rights, and, furthermore, that the German Diet should consider the grant of civil rights to Jews on condition that

¹ Sir A. W. Ward, *The Peace of Westphalia*, The Cambridge Modern History, Vol. IV, 1934, p. 416: ". . . the provision made for individual freedom in the exercise of any of the recognized religions was insufficient; and from the dominions of the House of Austria as a whole, Protestant worship was deliberately excluded." But see Yves de la Brière, *La Société des Nations?*, 1918, p. 57.

² Ward, work cited, p. 412. See also Andrea Rapisardi Mirabelli, "Le Congrès de Westphalie," 8 *Bibliotheca Visseriana* (1929), p. 75.

³ Ward, work cited, p. 414; Mirabelli, work cited, pp. 13, 76.

⁴ Mirabelli, work cited, p. 13: *Mais une circonstance ultérieure—importante au point de vue international—c'était que le principe de l'égalité des confessions (basé jusqu'alors sur la tolérance des Princes, ou sur des lois révocables) prenait alors la forme d'engagement international, fixé conventionnellement par les traités et pour cela assuré par leur force et leur durée.*

they assume all civic duties incumbent on other citizens.⁵ By the time the Congress of Berlin convened the principle of religious tolerance had become so firmly established that the delegate of France, M. Waddington, could make the following statement:⁶

Mr. Waddington believes that it is important to take advantage of this solemn opportunity to cause the principles of religious liberty to be affirmed by the representatives of Europe. His Excellency adds that Serbia, who claims to enter the European family on the same basis as other states, must previously recognize the principles which are the basis of social organization in all states of Europe and accept them as a necessary condition of the favor which she asks for.

The representatives of Great Britain, Germany, Italy, Austria-Hungary, and of the Ottoman Empire concurred in the view propounded by M. Waddington and the Congress acted accordingly in the case of Serbia, Montenegro, and Rumania.

This precedent was relied upon by the Principal Allied and Associated Powers in submitting to Poland the Treaty of June 28, 1919, concerning the protection of minorities. In his covering letter to M. Paderewski, the President of the Paris Peace Conference stated that "This treaty does not constitute any fresh departure," and continued as follows:⁷

It has for long been the established procedure of the public law of Europe that when a state is created, or even when large accessions of territory are made to an established state, the joint and formal recognition by the Great Powers should be accompanied by the requirement that such State should, in the form of a binding international convention, undertake to comply with certain principles of government.

The latest step in this long line of evolution is represented by the United Nations Charter, the Preamble of which declares that the peoples of the United Nations are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations, large and small," and, "to practice

⁵ 2 *British and Foreign State Papers*, 1814-1815, p. 132. The Final Act of Vienna and its Annexes include several interesting provisions designed to ensure freedom of religion. A particularly illuminating example is to be found in Article II of the Annex to the Treaty between the King of the Netherlands and Austria of May 31, 1815, which reads: *Il ne sera rien innové aux Articles de cette Constitution qui assurent à tous les Cultes une protection et une faveur égales, et garantissent l'admission de tous les Citoyens, quelle que soit leur croyance religieuse, aux emplois et offices publics.* Work cited, p. 141.

⁶ Protocol of June 28, 1878. 69 *British and Foreign State Papers*, 1877-1878, p. 960; English translation from the "Letter addressed to M. Paderewski by the President of the Conference (M. Clemenceau) transmitting to him the Treaty to be signed by Poland under Article 93 of the Treaty of Peace with Germany" of June 24, 1919. 112 *British and Foreign State Papers*, 1919, p. 226. See also George A. Finch, "The International Rights of Man," in this JOURNAL, Vol. 35 (1941), p. 662.

⁷ See letter quoted in the preceding note.

tolerance and live together in peace with one another as good neighbors." It is one of the basic purposes of the United Nations to achieve international coöperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." If the efforts of the United Nations are crowned with success by the adoption of an international bill of the fundamental rights of man, they will have accomplished the task which originated in the religious schism of Europe and which had found its first, albeit an inadequate, solution on an international basis in the Peace of Westphalia.

Another aspect of the Peace of Westphalia which exercised considerable influence on future developments relates to the guarantee of the peace itself. Both treaties declare that the peace concluded shall remain in force and that all parties to it "shall be obliged to defend and protect all and every article of this peace against anyone, without distinction of religion."⁸ This was by no means a new departure. As Van Vollenhoven pointed out, the promise of guarantee in the treaties of 1648 merely followed earlier precedents.⁹ Nevertheless this guarantee of the observance and the execution of an agreed international transaction, including as it did clauses of a constitutional character, as far as the Empire was concerned, came to assume in the following decades an overriding significance. It was pointed out that "no guarantee was more important or has been more often referred to than that included in the treaties of Westphalia."¹⁰

These treaties contain clauses by which Sweden and France not only make peace with the Emperor on certain terms, but pledge themselves to their allies, the subordinate German Princes, that they will ensure that the privileges and immunities conferred on the Princes and free cities of Germany in the treaty shall be upheld and maintained. This is constantly referred to in later treaties as the guarantee for the execution of the terms of the treaty and, as Sir Ernest Satow has pointed out, it continued to be regarded as valid almost down to the outbreak of the French Revolution. Here, again, the fact of the guarantee was of the highest importance in ensuring that the treaties should be observed and that they should continue to hold their place as part of the general European System.

For the first time Europe thus received "what may fairly be described as an international constitution, which gave to all its adherents the right of intervention to enforce its engagements."¹¹ That this attempt to guarantee effectively a peace so laboriously achieved was not wholly successful needs hardly to be emphasized.¹² In this respect the Settlement of Westphalia is in good company with many other international instruments of historical importance.

⁸ Text from Article CXXIII of the Treaty of Münster, in *A General Collection of Treatys*, Vol. I, 1710, p. 36.

⁹ See C. Van Vollenhoven, *The Law of Peace*, 1936, p. 85.

¹⁰ Sir James Headlam-Moreley, *Studies in Diplomatic History*, 1930, p. 108. The statement quoted in the text continues, as follows:

¹¹ David Jayne Hill, *A History of Diplomacy in the International Development of Europe*, Vol. II, 1925, p. 602; but see La Brière, work cited, p. 67.

¹² Christian L. Lange, *Histoire de l'Internationalisme*, Vol. 1, 1919, p. 498.

In addition to the guarantee, the Settlement of Westphalia formulated certain extremely interesting rules for the peaceful settlement of disputes and collective sanctions against aggressors. Thus the Treaty of Münster, in Articles CXIII and CXXIV stipulates that¹³

if it happens that any point should be violated, the Offended shall before all things exhort the Offender not to come to any Hostility, submitting the Cause to a friendly Composition, or the ordinary Proceedings of Justice. Nevertheless, if for the space of three years the Difference cannot be terminated, by any of those means, all and every one of those concern'd in this Transaction shall be oblig'd to join the injur'd Party, and assist him with Counsel and Force to repel the Injury, being first advertis'd by the Injur'd that gentle Means and Justice prevail'd nothing; but without prejudice, nevertheless, to every one's Jurisdiction, and the Administration of Justice conformable to the Laws of each Prince and State; and it shall not be permitted to any State of the Empire to pursue his Right by Force and Arms; but if any difference has happen'd or happens for the future (between the states of the Empire), every one shall try the means of ordinary Justice, and the Contravener shall be regarded as an Infringer of the Peace. That which has been determin'd (between the States of the Empire) by Sentence of the Judge, shall be put in execution, without distinction of Condition, as the Laws of the Empire enjoin touching the Execution of arrests and Sentences.

This was a "novel feature"¹⁴ in international treaty and peacemaking. The provisions for a moratorium of war, the settlement of disputes by peaceful means, and for individual and collective sanctions against the aggressor, after a delay of three years, although proclaimed primarily for the Empire, the members of which had been given their sovereign rights to conclude treaties of alliance, have nevertheless served as a model for numerous subsequent treaties.¹⁵ They constitute, in a sense, an early precedent for Articles 10, 12, and 16, of the Covenant of the League of Nations. Writers on the subject, of course, have not failed to point out the shortcomings of the above-quoted provisions which admittedly were serious.¹⁶

The grave dislocations in the social and economic life of Europe caused by the long war prompted the delegates to the Congress of Westphalia to discuss means designed to facilitate reconstruction. For this purpose two clauses were inserted in the Treaties of Münster and Osnabrück. One aimed at restoring freedom of commerce by abolishing barriers to trade which had developed in the course of the war, and the other intended to

¹³ From Articles CXXIII and CXXIV of the Treaty of Münster, in work cited. C. Van Vollenhoven, "Grotius and Geneva," 6 *Bibliotheca Visseriana*, p. 72.

¹⁴ Van Vollenhoven, *The Law of Peace*, p. 86; see also p. 88.

¹⁵ Van Vollenhoven, *The Law of Peace*, p. 86.

¹⁶ Lange, work cited, p. 498. More definite provisions for arbitration were included in the Treaty between Spain and the United Provinces signed at Münster on January 30, 1648. See Van Vollenhoven, work cited, p. 88.

provide a measure of free navigation on the Rhine.¹⁷ In this respect, as in many others, there is apparent the particular character of the Westphalian peace which distinguishes it sharply from routine peace treaties and which points out its kinship with the great peace settlements of 1815 and 1919.

As the above rapid survey of some of the salient features of the Peace Settlement of 1648 discloses, the actual terms of the settlement, interesting and novel as they may be, would hardly suffice to account for the outstanding place attributed to it in the evolution of international relations. In order to find a more adequate explanation it would seem appropriate to search not so much in the text of the treaties themselves as in their implications, in the broad conceptions on which they rest and the developments to which they provided impetus.

In this order of ideas it has been affirmed that the Peace of Westphalia was the starting point for the development of modern international law.¹⁸ It has also been contended that it constituted "the first faint beginning of an international constitutional law" and the first instance "of deliberate enactment of common regulations by concerted action."¹⁹ In this connection the special merits of the work of Grotius have been stressed. On the one hand it has been argued that "Grotius adapted the (old) Law of Nature to fill the vacuum created by the extinction of the supreme authority of Emperor and Pope."²⁰ On the other hand it has been affirmed that Grotius developed a system of international law which would equally appeal to, and be approved by, the believers and the atheists, and which would apply to all states irrespective of the character and dignity of their rulers.²¹ It can hardly be denied that the Peace of Westphalia marked an epoch in the evolution of international law. It undoubtedly promoted the laicization of international law by divorcing it from any particular religious background, and the extension of its scope so as to include, on a footing of equality, republican and monarchical states. Indeed these two by-products of the Peace of 1648 would seem significant enough for students of international law and relations to regard it as an event of outstanding

¹⁷ Mirabelli, work cited, p. 84.

¹⁸ Paul Fauchille, *Traité de Droit International Public*, Vol. I, Pt. I, p. 75; see also P. H. Winfield, *The Foundations and the Future of International Law*, 1941, p. 18.

¹⁹ F. S. Dunn, "International Legislation," 42 *Political Science Quarterly* (1927), p. 577.

²⁰ Winfield, work cited, p. 20.

²¹ W. Van der Vlugt, "L'Oeuvre de Grotius et son Influence sur le Développement du Droit International," 7 *Recueil des Cours* (1925), p. 448; Mirabelli, work cited, pp. 54, 92. But see John N. Figgis, *From Gerson Grotius, 1414-1625*, 1916, p. 284, n. 13. This merit is now claimed for Gentili: A. P. Sereni, *The Italian Conception of International Law*, 1943, p. 114, "His first merit lies in having cleared the field of international law from the dogmas of a particular religion and of having distinguished the juridical from the ethical and political aspects of the problems debated."

and lasting value. It would seem hazardous, however, to regard the Settlement of Westphalia and the work of Grotius as more than stages in the gradual, though by no means uniform, process which antedates and continues beyond the year 1648.²² As to the contention that Grotius filled the vacuum created by the deposition of Pope and Emperor, more will be said about this in a different context.

Closely related with the stimulus to international law is the impetus said to have been given by the Peace of Westphalia to the theory and practice of the balance of power. Indeed, the existence of a political equilibrium has frequently been regarded as a necessary condition for the existence of the Law of Nations.²³ It has also become virtually axiomatic that the maintenance of the state system depends upon the preservation of a balance of power between its component and independent parts.²⁴ There is substantial evidence for the fact that while the principle of the balance of power had been evolved prior to 1648,²⁵ the Peace of Westphalia first illustrates its application on a grand scale. The operation of the maxim *partager pour équilibrer*²⁶ can be traced in the territorial clauses of the Treaties of Münster and Osnabrück. This is notably the case in those referring to the aggrandizement of France and Sweden, to the independence of the United Provinces, of the Swiss Confederation, and to the consolidation of about nine hundred units of the Empire into about three hundred. Henceforth, in the organization of Europe resulting from the Peace, *tout repose sur la convenance de balancer les forces et de garantir les situations acquises par l'établissement de contre-poids*.²⁷ It is interesting to note that the advocacy of a political equilibrium in the literature of the Renaissance has been interpreted as having the character of a protest against the rival principle of a universal monarchy.²⁸ It was argued, in effect, that the freedom of all states would be brought about as a result of the establishment of a political equilibrium.²⁹ In this sense the balance of power doctrine forms an important part of that

²² Van Vollenhoven, *The Law of Peace*, p. 1; Mirabelli, work cited, p. 7; Sereni, work cited, p. 124.

²³ Oppenheim, *International Law*, 4th ed., edited by Arnold McNair, Vol. I, 1928, p. 99; but see La Brière, work cited, pp. 62, 68.

²⁴ Van Vollenhoven, work cited, p. 91.

²⁵ Mirabelli, work cited, p. 10. See E. Kaeber, *Die Idee des europäischen Gleichgewichts in der publizistischen Literatur vom 16. bis zur Mitte des 18. Jahrhunderts*, 1907, pp. 8, 20.

²⁶ Charles Dupuis, *Le Principe d'Equilibre et le Concert Européen*, 1909, p. 23.

²⁷ Dupuis, p. 22; see also pp. 12, 20, and 21; La Brière, work cited, p. 60, 62.

²⁸ Lange, work cited, p. 133: *Au fond le principe d'équilibre implique une protestation contre le principe de l'Empire universel*. A publication in the year 1632 espoused the notion of the *système des contre-poids* and argued that the King of France *tiendra la balance du monde en ses mains, qu'il a apporté du Ciel*. Kaeber, work cited, p. 32.

²⁹ Kaeber, work cited, p. 41; G. L. Comte de Garden, *Histoire Générale des Traités de Paix*, Vol. I, 1848, pp. 246, 250.

body of political thought which came to fruition in the Peace of Westphalia. It assumed, thereby, increased significance and prestige.

Of even greater importance than any of these particular aspects of developments of the Treaties of Osnabrück and Münster were the general political ideas, the triumph of which they apparently consecrated in the mind of man. The Peace of Westphalia, for better or worse, marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old into the new world.³⁰ The old world, we are told, lived in the idea of a Christian commonwealth, of a world harmoniously ordered and governed in the spiritual and temporal realms by the Pope and Emperor.³¹ This medieval world was characterized by a hierarchical conception of the relationship between the existing political entities on the one hand, and the Emperor on the other.³² For a long time preceding the Peace of 1648, however, powerful intellectual, political, and social forces were at work which opposed and, by opposing them, undermined, both the aspirations and the remaining realities of the unified control of Pope and Emperor. In particular the Reformation and the Renaissance, and, expressive of the rising urge of individualism in politics, nationalism, each in its own field, attacked the supreme authority claimed by the Pope and the Emperor. The combined impact of these centrifugal forces could not, in the long run, be resisted solely by the writings of the defenders of their authority. To maintain the claims it would have been necessary to display a real overpowering authority. Neither the Pope nor the Emperor, however, was at that time in the position to restrain effectively the centrifugal tendencies. The latter was ultimately forced to abandon all pretenses on the field of battle and the former's protest against the Peace of Westphalia, the Bull *Zel Domus* of November 26, 1648,³³ failed to restrain the course of history. In the spiritual field the Treaty of Westphalia was said to be "a public act of disregard of the international authority of the Papacy."³⁴ In the political field it marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multi-

³⁰ Robert Redslob, *Histoire des Grands Principes du Droit des Gens*, 1923, p. 223.

³¹ Dupuis, work cited, p. 9: *Le moyen âge avait revê d'organiser l'Europe sur la double base de l'unité de la chrétienté et de la hiérarchie des pouvoirs. Le pape et l'empereur, placés au sommet de la société internationale devaient, en théorie, maintenir l'unité, en se partageant la domination dans l'ordre spirituel et dans l'ordre temporel; ils devaient, en même temps, sauvegarder les droits de tous, en offrant un recours suprême contre les abus auxquels se pouvaient livrer les mille détenteurs de la souveraineté morcelée par régime féodal.* See also Julius Goebel, *The Equality of States*, 1923, p. 22.

³² Van der Vlugt, work cited, p. 448.

³³ J. Du Mont, *Corps Universel Diplomatique du Droit des Gens*, Vol. VI, Part I, 1708, p. 463.

³⁴ John Eppstein, *The Catholic Tradition of the Law of Nations*, 1935, p. 192; see also p. 325.

plicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority.³⁵ The idea of an authority or organization above the sovereign states is no longer. What takes its place is the notion that all states form a world-wide political system or that, at any rate, the states of Western Europe form a single political system.³⁶ This new system rests on international law and the balance of power, a law operating between rather than above states and a power operating between rather than above states.

It is true that the powers assembled at the Congress of Westphalia paid homage to the old conception of world unity by proclaiming in the preamble of the Treaty of Münster that it was made *ad Christianae Reipublicae salutem* and in that of the Treaty of Osnabrück *au salut de la République Chrestienne*.³⁷ Nevertheless, there is a notable lack of consensus in the appreciation of the major implications of the Peace of Westphalia. According to one view the old system was simply superseded by a modern, the present political, state system, a world-wide system.³⁸ On the other hand the view is also held that the Peace of Westphalia marks a decisive date in the history of the disorganization of the public law of Europe.³⁹ In this order of ideas it was argued that the system inaugurated by the Peace, while it may be new, was "as utterly remote as possible from a juridical order founded on a common respect for law";⁴⁰ and that in spite

³⁵ Sir Paul Vinogradoff, "Historical Types of International Law," 1 *Bibliotheca Visseriana* (1923), p. 45.

³⁶ Van Vollenhoven, *The Law of Peace*, p. 81.

³⁷ Du Mont, work cited, p. 450, 469.

³⁸ Van Vollenhoven, work cited, p. 81; G. F. de Martens, *Traité de Droit International*, Vol. I, 1883, p. 117; similarly Paul Fauchille, work cited, p. 75. Fauchille underscores *la reconnaissance par les Etats européens de la solidarité de leurs intérêts politiques, . . . dans l'application de l'idée qu'un certain équilibre politique était l'un des facteurs de la paix*; Oppenheim, work cited, p. 69; H. Treitschke, *Politics* (English translation), Vol. II, 1916, p. 569; Montagu Bernard, *Four Lectures on Subjects Connected with Diplomacy*, 1868, p. 6; T. J. Lawrence, "The Work of Grotius as a Reformer of International Law," *Essays on Some Disputed Questions of International Law*, 1885, p. 189; Edwin L. Borchard, "International Law," 8 *Encyclopaedia of the Social Sciences*, 1935, p. 169; James Bryce, *The Holy Roman Empire*, 1866 (revised edition), p. 372; see also Mirabelli, work cited, p. 8; Jacob ter Meulen, *Der Gedanke der Internationalen Organisation in seiner Entwicklung, 1500-1800*, 1917, p. 24; Hill, work cited, Vol. III, p. vii; same, Vol. II, 1906, p. 599, 604; Wolfgang Windelband, *Die auswärtige Politik der Grossmächte in der Neuzeit. Von 1494 bis zur Gegenwart*, 4th ed. (1936), p. 126 f.; see also Singer, "Völkerrechtsgeschichte," *Wörterbuch des Völkerrechts*, edited by Strupp, Vol. III, 1929, p. 193; Dupuis, work cited, pp. 13, 21; T. A. Walker, *A History of the Law of Nations*, 1899, Vol. I, pp. 147 and ff.; The Collected Papers of John Westlake on Public International Law, ed., by L. Oppenheim, 1914, pp. 55 ff.; E. H. Carr, *Nationalism and After*, 1945, p. 1.

³⁹ de la Brière, work cited, p. 58.

⁴⁰ Same, p. 53. The passage quoted with approval in Van Vollenhoven, at p. 83, appeared in the following context: *Dans leur mode ités politiques et diplomatiques, en effet, les tractations de Westphalie portent le caractère d'un empirisme tellement*

of all the appearances of the birth of a new international society of nations "even the germ of such a society was likely to be absent under a system in direct opposition to any impingement upon the sovereign independence of each individual state."⁴¹ Which of these conflicting views is accurate? The answer is difficult in the extreme for the materials regarding the basic problems of the origin of our state system lack coördination and clarity⁴² and all the necessary sources are not readily available. For these reasons the following remarks are necessarily tentative and intended to indicate rather than to solve the problems connected with the rise of the modern state system and the particular role of the Peace of Westphalia in this vital process.

The imperial authority, the gradual weakening of which is sometimes said to have set in as early as the Treaty of Verdun of 843, probably received a serious blow in the course and as a result of the Great Interregnum (1254-73) on the one hand, and the rise of independent or quasi-independent communities in Italy and of national states in England,⁴³ Spain, and France, on the other. The discovery of the New World and the extension of intercourse between the Western Christian and Eastern non-Christian world provided those opposing the claim of the Emperor to universal dominion with arguments of considerable persuasiveness. The Great Schism in the Church (1378-1417) and the rise of sects and eventually of the Reformation weakened correspondingly the authority of the Pope. These developments in the secular and spiritual fields which finally culminated in the Thirty Years' War and the Peace of Westphalia, were reflected in and stimulated by contemporaneous political thought.

One of the early opponents of the Emperor was Bartolus of Sassoferrato, who drew a fine distinction between the *de jure* overlordship of the Emperor and the *de facto* existence of *civitates superiores non recognoscentes*.⁴⁴ The formula, said to be of French origin, was later cast by Baldus in a

brutal, tellement immoral, tellement incohérent, qu'on est en droit de les proposer aux négociateurs futurs de la paix du XXe siècle comme un parfait exemple des erreurs et des fautes dont il faudra désormais nous préserver à tout prix. Bien plus, dans son principe même (et c'est là surtout que nous voulons en venir), le règlement européen adopté à Münster et à Osnabrück constituera la première application général et solennelle de la politique d'équilibre, système diplomatique aussi radicalement éloigné que possible de l'ordre juridique, fondé sur le respect du droit des tous, qui est aujourd'hui le très noble objectif des promoteurs de la 'Société des Nations.'

⁴¹ Van Vollenhoven, *The Law of Peace*, p. 93.

⁴² Professor Sereni's book referred to above constitutes a recent and useful contribution.

⁴³ Sir Henry Maine, *Ancient Law*, 1930, p. 129, Pollock's Notes, to the effect that the Kings of England never owed or rendered any temporal allegiance to the Empire. Figgis, work cited, p. 213 suggests that "the dream of a universal state had disappeared with the failure of Charles V to secure the Empire for his son."

⁴⁴ Sereni, work cited, p. 59.

sharper form: *Rex in regno suo est Imperator regni sui*.⁴⁵ In that sentence, observed Professor Barker, "we may hear the cracking of the Middle Ages."⁴⁶ Bartolus, however, in spite of his insistence on the *de facto* independence of Italian city states, still recognized the Empire and the Emperor as the Lord of the world albeit on an idealistic or spiritualistic plane.⁴⁷ In France a similar movement against the universalistic claims of both Emperor and Pope was on foot. The development of the theory of sovereignty by Bodin may be regarded as marking the end, on the doctrinal level, of the efforts to throw off the overlordship of the Emperor and vindicate the independence of states.⁴⁸ This movement was not unopposed. Imperialist writers continued to defend and support the claims of the Emperor. Their argument was, broadly, that being of divine origin, the rights of the Emperor existed irrespective of their actual exercise. No voluntary abandonment, not even an express grant, was susceptible of impairing them. As late as the seventeenth century, imperialist lawyers repeated the claim that the King of France, like other princes, was of right, and must forever remain, subject to the Roman Emperor.⁴⁹

While some of the jurists of the sixteenth century questioned with increasing boldness the claim of any single potentate to be *totius orbis dominus*⁵⁰ others combined their opposition with the exposition of a new positive doctrine, that of an international community of states. This doctrine is admittedly of ancient origin. The conception of the entire human race forming a single society goes back to the Stoa and the teachings

⁴⁵ Same, note 11.

⁴⁶ Ernest Barker, *Church, State, and Study*, 1930, p. 65.

⁴⁷ Sereni, p. 60: "All the cities, however, all the states, are in Bartolus' mind co-ordinated within the empire. The emperor is the Lord of the world: to deny it would be heresy. . . . Thus the superiority of the empire over the cities is admitted on a purely ideal plane. Bartolus' elevation of the empire to the function of a spiritual institution amounts to a complete denial of its political authority, in accordance with the reality of the age. The empire is envisaged by Bartolus as the necessary universal society, in which all the powers of Christendom must co-operate. In Italy, Dante, Marsilio of Padua, Cino da Pistoia, and many other political thinkers, jurisconsults, and poets had invoked the authority of the empire on the same ideal plane. The empire was to have been the unifying force of the Christian world, to have appeased all discords, suppressed wars and reprisals, affirmed the reign of peace and justice on the earth. For Bartolus as well as for these other Italians the empire was then but a messianic dream, an ideal aspiration." Cf. also Sir Paul Vinogradoff, work cited, p. 43.

⁴⁸ Maine, work cited, p. 129: "Modern National sovereignty may be regarded, in a general way, as a reaction against both the feudal and the imperial conceptions. Rulers of the Middle Ages, as and when they felt strong enough, expressly or tacitly renounced both homage to any overlord and submission to the Emperor."

⁴⁹ Bryce, work cited, p. 243. Sereni, work cited, p. 65, n. 33. "As late as the end of the sixteenth century there were still Italian jurisconsults who endeavored to maintain the supremacy and the universality of the authority of the pope and the emperor."

⁵⁰ Walker, work cited, p. 149.

of the early church fathers.⁵¹ It experienced a revival in the works of some of the early writers of international law, notably those of Victoria, Suarez, and Gentili. They denied, on the one hand, the claim of the Emperor to exercise temporal jurisdiction over princes,⁵² and affirmed, on the other, the existence of an international community governed by international law.

Victoria, in a famous passage arguing the binding force of laws made by a king upon the king himself, irrespective of his will, and of pacts entered into by the free will of the contracting parties upon them, declares:⁵³

From all that has been said, a corollary may be inferred, namely: that international law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.

Gentili referred with approval to the teachings of the Stoics that⁵⁴

the whole world formed one state, and that all men were fellow citizens and fellow townsmen, like a single herd feeding in a common pasture. All this universe which you see, in which things divine and human are included, is one, and we are members of a great body. And, in truth, the world is one body.

And again, he declared:⁵⁵

Now what Plato and those expounders of the law say of private citizens we feel justified in applying to sovereigns and nations, since the rule which governs a private citizen in his own state ought to govern a public citizen, that is to say a sovereign or a sovereign people, in this public and universal state formed by the world. As a private citizen

⁵¹ Barker, work cited, p. 62; James Brown Scott, *The Law, the State, and the International Community*, Vol. II, 1939, p. 255.

⁵² Walker, work cited, p. 149; Sereni, work cited, pp. 64, 115.

⁵³ Relectio of the Reverend Father, Brother Franciscus de Victoria Concerning Civil Power, a translation by Gwladys L. Williams. In James Brown Scott, *The Spanish Origin of International Law*, 1934. Appendix C, p. xc.

⁵⁴ Alberico Gentili, *De Iure Belli Libri Tres*, translation of the edition of 1612 by John C. Rolfe, *The Classics of International Law*, edited by James Brown Scott, 1933, p. 67. See also Sereni, work cited, p. 64.

⁵⁵ Gentili, work cited, p. 68. Affirming that it is right to make war upon pirates, Gentili says: "And if a war against pirates justly calls all men to arms because of love for our neighbor and the desire to live in peace, so also do the general violation of the common law of humanity and the wrong done to mankind. Piracy is contrary to the law of nations and the league of human society": p. 124.

conducts himself with reference to another private citizen, so ought it to be between one sovereign and another, says Baldus.

Suarez' conception of the international society is expounded in the following "perhaps the most memorable passage of the 'Law of Nations.'"⁵⁶

The rational basis . . . of this phase of law consists in the fact that the human race howsoever many the various peoples and kingdoms into which it may be divided, always preserves a certain unity . . . enjoined the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation.

Therefore, although a given sovereign state, commonwealth, or kingdom, may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need. This fact is made manifest by actual usage.

Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner with respect to all matters; therefore, it was possible for certain special rules of law to be introduced through the practice of these same nations. For just as in one state or province law is introduced by custom, so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations. This was the more feasible because the matters comprised within the law in question are few, very closely related to natural law and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself that, while this derivation (of the law of nations from the natural law) may not be self-evident—that is, not essentially and absolutely required for moral rectitude—it is nevertheless quite in accord with nature, and universally acceptable for its own sake.

It is this conception of an international society embracing, on a footing of equality, the entire human race irrespective of religion and form of government which is usually said to have triumphed in the seventeenth century over the medieval conception of a more restricted Christian society organized hierarchically, that is, on the basis of inequality. As the dominating political position of the Roman Emperor had gradually but decidedly declined in the centuries and decades preceding the Peace of Westphalia, it is probably correct to say that the Peace merely finally sealed an existing

⁵⁶ James Brown Scott, *The Spanish Conception of International Law and of Sanctions*, 1934, p. 90. The English translation of the above quotation from Suarez, *De Legibus*, Book II, Ch. XIX, paragraph 9, is taken from Scott, *The Law, the State, and the International Community*, Vol. II, p. 257.

state of affairs. Lord Bryce said that the Peace of Westphalia "did no more than legalize a condition of things already in existence, but which, by being legalized, acquired new importance."⁵⁷ It is probably also true, in a broad sense, that with the Congress of Westphalia the various states entered into the legal concept of a *societas gentium* which had long before been established by the science of natural law.⁵⁸ It is equally correct that the so-called Grotian Law of Nature school continued to expound the concept of a society of states. Christian Wolff's idea of a *civitas gentium maxima* is a noteworthy and well-known example. A sideline of this type of thinking and writing is represented by the writers who in one form or another, on a restricted or universal basis, advocate the establishment of a more definite society of states than in their view appeared to be actually in existence. One might mention as representatives of this school of thought Dante, Pierre Dubois, George of Podebrad, Erasmus, Emeric Crucé, Sully, William Penn, the Abbé de Saint-Pierre, Rousseau, Jeremy Bentham, Immanuel Kant, William Ladd, William Jay, Elihu Burritt, Saint-Simon, Jean de Bloch, A. H. Fried, J. Novicov, and others. To some extent their writings should have served as evidence that the *pluriversum* which emerged in the sixteenth and seventeenth centuries was not quite an international community and that the states did not always behave as members of one body politic.

Be that as it may, it would seem not altogether unjustified to observe that the development of international law, a determining factor of any conception of an international community, did not come to a standstill with the Peace of Westphalia. It would seem possible to distinguish at least three trends of thought on the subject of the binding force of international law prior to 1648. In Victoria one might discern the attempt to base international law on an objective foundation irrespective of the will of the states and to conceive international law as a law above states. In Suarez the objective foundation is at least overshadowed if not replaced by a subjective foundation in the will of the states. Suarez presented the *jus gentium* as a law between states.⁵⁹ In Gentili, of whom it has been said that he had taken the first step towards making international law what it is,⁶⁰ namely, almost exclusively positive, international law still appears to be based on natural reason and derived from a law of nature superior to the nations.⁶¹ Gentili's doctrine "marked progress because it affirmed the existence of an autonomous system of rules of law distinct from the precepts of religion and ethics and directed at regulating international relations

⁵⁷ Bryce, work cited, p. 372; Mirabelli, work cited, p. 15 ff.

⁵⁸ Ter Meulen, work cited, p. 34.

⁵⁹ Walker, work cited, p. 155; Introduction by Coleman Phillipson to Gentili in the above-quoted edition, p. 23a, n. 4.

⁶⁰ T. E. Holland, *Studies in International Law*, 1898, p. 23.

⁶¹ Sereni, p. 107: "With Gentili there thus begins the naturalistic conception of international law, later accepted by Grotius."

according to abstract principles of justice.”⁶² But what, precisely, we may ask, was the nature of that autonomy? An indication of its meaning may perhaps be gleaned from Gentili’s doctrine of the just war. One of the essential conditions of a just war is that it must be waged for a just cause. Gentili affirms that war may be waged with justice on both sides.⁶³ He is said to come close to Machiavelli’s opinion that all necessary wars are justified.⁶⁴ But who decides whether there is a just cause, whether the necessity is of such a nature as to justify war? The answer to this question must obviously be of decisive importance for the understanding not only of Gentili’s doctrine of just war but equally for his conception of international law. Now it is extremely interesting to note that the decision “concerning the lawfulness of war is on the whole left to each belligerent.”⁶⁴ If this is an accurate interpretation of Gentili’s doctrine, then the autonomy of international law would seem to assume a deeper meaning. It would indicate not merely the independence of international law from the precepts of civil law, religion, and ethics. It would also seem to indicate that the contents of international law as well as the existence or non-existence of international law depends upon the insight of the states concerned, or, to use a modern phrase, upon the will of the states.⁶⁵

Grotius and several subsequent writers still maintain natural or divine law alongside of customary law as a source of international law. It would seem, however, that with Grotius the accent begins to be transferred from the Law of Nature or divine law to that branch of human law which “has received its obligatory force from the will of nations, or of many nations.”⁶⁶ Zouche, the “second founder of the Law of Nations,” rather than Grotius,

⁶² Sereni, p. 107.

⁶³ Gentili, Book I, Ch. VI, p. 31.

⁶⁴ Sereni, p. 109.

⁶⁵ Gentili, while affirming that “some law of nature exists,” stressed the difficulty involved in discovering “what that law is and how we shall prove that it is this or that”: Book I, Ch. I, p. 5. His reasoning on this subject, particularly at p. 7, is illustrative of the difficulty inherent in any law of nature doctrine. Gentili seems to accept the agreement of states, not necessarily of all states, and usage, as a test of the existence of rules of international law: p. 8. See Phillipson’s *Introduction*, p. 22a. It is also interesting to note that in discussing arbitration of dispute between sovereigns Gentili starts from the proposition that “the sovereign has no earthly judge.” Book I, Ch. III, p. 15. Having referred to a number of arbitrations, he says: “But why do I multiply examples, as if any one could not call to mind a great number of such occurrences in every age? Why, to be sure, in order that those who avoid this kind of contest by arbitration and resort at once to the other, that is, to force, may understand that they are setting their faces against justice, humanity, and good precedent, and that they are rushing to arms of their own free will, because they are unwilling to submit to any one’s verdict”: p. 16.

⁶⁶ Grotius, *De Jure Belli Ac Pacis*, Translated by Francis W. Kelsey, *The Classics of International Law*, Edited by James Brown Scott, Vol. II, 1925, Book I, Ch. I, paragraph 14. Phillipson’s *Introduction*, p. 22a.

is called the father of positivism for the emphasis given by him to customary international law.⁶⁷ Without any attempt to trace the development of the doctrine of the will of states as the basis of international law, it may be useful to conclude this brief survey with a few remarks about Vattel. Vattel, regarded as a Grotian, still maintains the distinction between different types of branches of the Law of Nations. Within the positive law of nations, based on the agreement of nations, he differentiates three divisions: the voluntary, the conventional, and the customary law. The voluntary law proceeds from their presumed consent, the conventional law from their express consent, and the customary law from their tacit consent. Positive international law is distinguished from the natural or necessary law of nations which Vattel undertakes to treat separately. In order to understand the respective functions of natural and positive international law Vattel draws the following distinction:

But after having established on each point what the necessary law prescribes, we shall then explain how and why these precepts must be modified by the voluntary law; or, to put it in another way, we shall show how, by reason of the liberty of nations and the rules of their natural society, the external law which they must observe towards one another differs on certain points from the principles of the internal law, which, however, are always binding upon the conscience.

With these nice distinctions in mind one may ask legitimately what precisely is the role of these branches of the law of nations with respect to the conduct of states in relation to one another. Vattel leaves no doubt about it, for he declares that while the necessary law is at all times obligatory upon the conscience, and that a nation must never lose sight of it when deliberating on the course it must pursue in order to fulfill its duty, it must consult the voluntary law "when there is question of what it can demand from other states."⁶⁸ It may not be unreasonable to conclude that according to Vattel only those rules of the law of nations which proceed from and are based on the consent of states are enforceable in international relations. This rather significant feature of Vattel's doctrine, it is believed, may not have entirely escaped the attention of diplomats to whom it was addressed, and it may, therefore, account at least partially for his immense popularity. But Vattel's international law is no longer above but beside the diplomat.⁶⁹

Although he does not rank as a strict positivist, Vattel prepared the ground for the era of uninhibited positivism. He helped to establish,

⁶⁷ L. Oppenheim, *International Law*, 5th ed., edited by H. Lauterpacht, 1937, Vol. I, p. 87.

⁶⁸ E. Vattel, *The Law of Nations*, translated by Charles G. Fenwick, *The Classics of International Law*, Edited by James Brown Scott, Vol. III, 1916, p. 9.

⁶⁹ Albert de Lapradelle's introduction to the above edition of Vattel, Vol. III, p. liv: "Writing for courts and for the leaders of nations, he could only place law beside diplomacy as wise counsel; he could not set it above diplomacy as a strict rule."

precisely because of his popularity, perhaps more than any of his predecessors or successors, the consensual character of international law and to reduce natural law from the function of supplying an objective basis for the validity, the binding force, of the law of nations to the function of supplying rules for filling gaps in positive international law. This distinction between the dual function of natural law in relation to the law of nations is not always observed and yet it would seem to deserve close attention.

The development of international law along the lines indicated above, was bound to influence the concept of an international society of states. In the course of time it became purely formal. *Ubi ius, ibi societas*. Those who argued the existence of a law of nations accepted the use, though rarely more, of the phrase, "Family of Nations." In the period following the Peace of Westphalia the development of international relations would seem to have followed decidedly not the conception of an objectively founded international law and community of Victoria but that indicated in the teachings of Suárez, if indeed it be accurate to assume an essential difference between their doctrines.⁷⁰ From the 18th century and, in particular, from Vattel onward, however, there can be no doubt as to the trend of the development. It was predominately positivist and consensual. The will of states seems to explain both the contents and the binding force of international law. The concept of the Family of Nations recedes in the background.⁷¹ To have paved the way for this development

⁷⁰ Scott, *The Spanish Conception of International Law and of Sanctions*, 1934, p. 91: "If the two passages (quoted above in the text), however, be compared from the standpoint of international law, the statement of Suárez seemed to lack that sense of ultimate completeness which always seems to have been in the mind of Victoria; his is not merely an international community with law, but it is an international community with a power to create law and to punish the violations of that law. It may well be that the presence of law in Suárez' community implies both the right consciously to create and the power to preserve that law inviolate; but neither the right nor the power are express, as in the case of Francis of Victoria's international community. For does not Victoria say expressly that the *jus gentium* has 'the force of a pact and agreement among men'? Whereas Suárez implies in the succeeding chapter of this very book that the law of nations may have been introduced simply through 'usage and tradition, . . . and without any special and simultaneous compact or agreement on the part of all peoples.' This conception of Suárez looks to an inorganic association; Victoria's conception looks to an organized society, with a law of nations having the force of a pact, the obligations of which are enforceable, not merely under the law of nations but under the natural law."

⁷¹ Lapradelle, as cited, p. liv: "It would be vain to look in his work for a reflection of the fine passage of Suárez on the solidarity of nations; but, on the other hand, it would be too much to require in a diplomat of the end of the eighteenth century, even though he were permeated with the spirit of the Encyclopaedia, the same freedom of speech as in a monk of the sixteenth. Vattel, who does not develop to any great extent the idea of arbitration, would probably have no place as an organizer of the society of the future."

by liquidating, with a degree of apparent finality, the idea of the Middle Ages of an objective order of things personified by the Emperor in the secular realm, would seem to be one of the more vital aspects of the consequences of the Peace of Westphalia and of its place in the evolution of international relations. Viewed in this light the answer to the question formulated above cannot be doubtful. Instead of heralding the era of a genuine international community of nations subordinated to the rule of the law of nations, it led to the era of absolutist states, jealous of their territorial sovereignty to a point where the idea of an international community became an almost empty phrase and where international law came to depend upon the will of states more concerned with the preservation and expansion of their power than with the establishment of a rule of law. In the period immediately following the Peace, of the objective validity of international law there may be some doubt. Of the subjective character of much of modern international law there can hardly be any doubt.⁷²

It may be said, by way of summary, that on the threshold of the modern era of international relations there were two doctrines with respect to the binding force of international law and the existence of an international community of states. The doctrine of Victoria is characterized by an objective approach to the problem of the binding force of international law and by an organic conception of the international community of states. The other doctrine, characterized by the voluntaristic conception of the binding force of international law, is adumbrated in the work of Suarez.^{72a} It is developed in the writings of Gentili, Grotius and Zouche, and it breaks to the fore in the work of Vattel who, emphasizing the independence rather than the interdependence of states, wrote the international law of political

⁷² Emphasizing the destructive character of Vattel's elegant doctrine of the law of nations, Van Vollenhoven concludes: "Henceforth, there will be not merely no positive law, even on a limited scale, there will be not merely the claims of the governments to a limitless sovereignty; from that time onward there will be a nominal law of peace, exacting in character, elaborated in detail, full of celestial principles and unctuous rhetoric, but one that is rendered utterly futile by the reservation, ceaselessly reiterated, that it is for the sovereign states to judge the extent to which those principles and that rhetoric shall bind them in the sphere of reality." *The Law of Peace*, p. 107 f. See also J. L. Brierly, *The Law of Nations*, 1936 (2d ed.), p. 32.

^{72a} Joseph Delos, *La Société Internationale et les Principes du Droit Public*, 1929, p. 229 f: *Considérable dès son vivant, traditionnelle aujourd'hui encore, l'oeuvre de Suarez a dépassé de beaucoup le cercle des théologiens. Suarez est, lui aussi, l'un des Fondateurs du Droit International, le plus connu peut-être, et l'un de ceux qui ont le plus influé sur les destinées de la doctrine. Son rôle dans le conflit du Droit à fondement objectif et du Droit subjectif, nous semble avoir été décisif à plus d'un égard. Son oeuvre offre de plus le cas topique que nous cherchions: elle permet de saisir, à un moment donné, et particulièrement important, puisqu'il se place aux origines mêmes du monde moderne, la cause du mal dont souffre la science politique internationale: la substitution du point de vue volontariste au point de vue du Droit à fondement objectif.*

liberty.^{72b} The growth of the voluntaristic conception of international law is accompanied by a weakening of the notion that all states form and are part of an international community. It is still very strong in the writings of Suarez and Gentili, although it seems to have assumed a character different from that attributed to it by Victoria. The test of the strength of the community doctrine may be said to have come in the seventeenth century. The liquidation of the universalistic claims of the Empire and the recognition of a multiplicity of states wielding the same powers as those hitherto reserved for the Emperor should have created a political and juridical condition favorable for the establishment of a genuine society of states. The opportunity which may have existed at the end of the Thirty Years' War for substituting a new order based on the impersonal supremacy of international law for the old order based on the personal supremacy of the Empire, was not, however, utilized. Instead of creating a society of states, the Peace of Westphalia, while paying lip service to the idea of a Christian commonwealth, merely ushers in the era of sovereign absolutist states which recognized no superior authority. In this era the liberty of states becomes increasingly incompatible with the concept of the international community, governed by international law independent of the will of states. On the contrary this era may be said to be characterized by the reign of positivism in international law. This positivism could not admit the existence of a society of states for the simple reason that it was unable to find a treaty or custom, proceeding from the will of states, which could be interpreted as the legal foundation of a community of states. In the nineteenth century, after the Napoleonic wars, there may be discerned in the Congress and Concert system the beginning of a conscious effort to establish a community of states based on the will of all states or at least on the will of the Great Powers. The Hague Peace Conferences, the League of Nations and, we may confidently assert, the United Nations are further stages in this development cognizable by positive international law.

This reaction against the unrestrained liberty of states, recognized as self-destructive in its ultimate implications was accentuated by a reaction against the prevailing voluntaristic conception of international law. The attempts to provide international law with an objective foundation, without, however, abandoning altogether the will of states doctrine, are illustrated by Bergbohm's and Triepel's theory of the *Vereinbarung*. A radical departure from the consensual view of international law is characteristic of Kelsen's theory of the initial hypothesis, and of the recent revival of natural law thinking in the field of international law. Other writers follow this trend away from the purely consensual nature of international law by emphasizing the role of *pacta sunt servanda* as the fundamental norm in international law. Others still suggested that international law

^{72b} Lapradelle, as cited, pp. liv, lv.

is based on the maxim *voluntas civitatis maximae est servanda*.⁷³ The sociological interpretations of the binding force of international law should not be forgotten in this connection. It is common to all these schools of thought that they strive to vindicate for international law a binding force, independent of the will of the states and to substitute for the doctrine that international law is a law of coordination, the old-new doctrine, that international law is, and, if it is to be law, must be, a law of subordination, that is, a law above states.

An international law thus conceived could be interpreted as a law of an international community constituting a legal order for the existing states. It would seem doubtful, however, whether this result can be achieved without the creation of some new institutions or the strengthening of existing institutions. It was pointed out that the efforts to establish the binding force of international law independent of the will of states are bound to cause international lawyers to advocate the creation of an international legislature or, as a very minimum, of an international tribunal endowed with compulsory jurisdiction over disputes between states. While the creation of an international legislature would be concomitant with the formation of a super-state "the objective ascertainment of rights by courts is one (manifestation of the legal nature of international law) which could be effected within the frame of the existing practice and doctrine of international law."⁷⁴ The absence of an international court of justice with compulsory jurisdiction over disputes between states does not merely strain the legal character of international law to the breaking point.⁷⁴ In truth, it would seem to jeopardize altogether the conception of international law as a body of rules governing the conduct of states.

The history of the past three hundred years tends to show that international law, increasingly separated from its roots in right reason and natural law and deprived of its sources of objective and heteronomous validity, could but inadequately perform the task which devolved upon it following the disappearance of the secular rule of the Empire and its aspiration to be the Universal Monarchy envisioned by Dante. Such an international law, rugged individualism of territorial and heterogeneous states, balance of power, equality of states, and toleration,—these are among the legacies of the Settlement of Westphalia. That rugged individualism of states ill accommodates itself to an international rule of law reënforced by necessary institutions. It would seem that the national will to self-control which after a prolonged struggle first threw off the external shackles of Pope and Emperor is the same which *mutatis mutandis* persists today in declining any far-reaching subordination to external inter-

⁷³ H. Lauterpacht, *The Function of Law in the International Community*, 1933, p. 421. A brief survey of recent doctrines on international law will be found on p. 415.

⁷⁴ Lauterpacht, p. 426.

national controls. It was one of the essential characteristics of the League of Nations and it is one of the chief weaknesses of the United Nations.

The approaching tercentenary of the Peace of Westphalia would seem to invite a thorough reëxamination of the foundations of international law and organization,⁷⁵ and of the political, economic, ideological and other factors which have determined their development. It may not be unreasonable to believe that such a broad inquiry, along with important insights into the forces which have shaped in the past and which shape at present the course of international law and organization, might also yield some precise data regarding the ways and means of harmonizing the will of major states to self-control with the exigencies of an international society which by and large yearns for order under law.

⁷⁵ Such a revision has been proposed by Dr. Lauterpacht in a different context: p. 437.