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The Westphalian model and sovereign equality

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Abstract. Although the Westphalian model takes many forms the association of Westphalian and sovereign equality is a prominent one. This article argues firstly that sovereign equality was not present as a normative principle at Westphalia. It argues further that while arguments for sovereign equality were present in the eighteenth century they did not rely on, or even suggest, a Westphalian provenance. It was, for good reasons, not until the late nineteenth century that the linkages of Westphalia and sovereign equality became commonplace, and even then sovereign equality and its linkage with Westphalia were disputed. It was not until after the Second World War, notably through the influential work of Leo Gross that the linkage of Westphalia and sovereign equality became not only widely accepted, but almost undisputed until quite recently. The article concludes by suggesting that not only did Gross bequeath a dubious historiography but that this historiography is an impediment to contemporary International Relations.

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The Westphalian model is one of the most widespread and widely accepted reference points in the study of International Relations. Frequently cursory allusion to it is taken as sufficient to indicate the benchmark against which the significance of some recent development is to be assessed.[1] It even appears almost in the form of a parody in the titles of journal articles.[2] More substantively it serves as a summary of an international system of some 300 years duration beyond which the world may now be moving.[3] On the other hand, a small group of historians has denied that this model has much, if anything, to do with the peace of Westphalia of 1648 from which the model derives its name. This is most strikingly put in the title of an article by one of these critics, Andreas Osiander:

[1] It is almost invidious to single out any particular text but see the important work by Robert Jackson, *The Global Covenant* (Oxford: Oxford University Press, 2000), pp. 385, 398.

[2] Thus Simon Philpott, 'East Timor's Double Life: Smells Like Westphalian Spirit', *Third World Quarterly*, 27 (2006), pp. 135–59 or, more seriously, Susan Strange, 'The Westfailure System', *Review of International Studies*, 25 (1999), pp. 345–54; Tom Ginsburg, 'Eastphalia as the Perfection of Westphalia', *Indiana Journal of Global Legal Studies*, 17 (2010), pp. 27–45.

[3] A full list would exhaust the word limit of this article but again a title of a much cited work will suffice: Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia?* (Baltimore: John Hopkins, 1995).

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'Sovereignty, International Relations and the Westphalian Myth'.[4] While some have accepted the verdict of the critics and a few have openly rebutted their claims, most continue to invoke the Westphalian model and its presumed provenance in the peace of Westphalia of 1648.[5] Occasionally the work of these critics is even referenced for aspects of the historical record while their broader purpose and critical intent is largely ignored.[6]

Part of the problem here is that exactly what is being invoked or criticised is sometimes unclear or is diverse and fluctuating. The Westphalian model sometimes stands for an account of the presumed basic units of the international system and the pattern of behaviour they exhibit with varying emphasis upon either the nature of those units or the international system which induces or compels them to act in certain ways. From this perspective the emphasis is likely to fall upon the idea of the existence of territorial states and the balance of power.[7] Alternatively, it may stand for a set of normative assertions. From this perspective the emphasis is likely to fall upon the ideas of sovereignty, equality and non-intervention.[8] Such normative assertions may be taken to be, or at least to have been, largely honoured, though never perfectly so. They may also be taken to have been so systematically violated that they amount to, as the catching subtitle of Krasner's study puts it, 'organized hypocrisy'.[9] Somewhere between these two positions, the model may stand for the collective effort of states to create or impose an international system and to regulate membership of that system.[10]

These various positions designate points along a spectrum, clearly distinguishable at the extremes but only at the extremes, with most accounts of or allusions to the Westphalian model fusing explanatory and normative elements. Some such fusion is inevitable. So far as possible, however, this article will focus on normative claims about the equality of sovereign states and the linkage of those claims to the peace of Westphalia. This focus is motivated in part by the fact that it is central to the most widely cited authority for the Westphalian model, where, that is, it is thought necessary to cite any authority, namely the 1948 article by Leo Gross. According to Gross

> 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 [. . .] 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 a multitude of states, each sovereign within its territory, equal to one another, and free from any external sovereignty.[11]

[4] Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth', *International Organization*, 55 (2001), pp. 251–87.
[5] For a recent explicit rebuttal see Sasson Sofer, 'The Prominence of Historical Demarcations: Westphalia and the New World Order', *Diplomacy & Statecraft*, 20 (2009), pp. 1–19.
[6] For example by Philip Bobbitt, *The Shield of Achilles* (London: Penguin, 2003), pp. 501–20, apart from the brief response in a footnote on p. 866.
[7] For a classic emphasis on the territorial state see Hans J. Morgenthau, *Politics Among Nations* (New York: Knopf, 1967), p. 264; for the balance of power see Robert Gilpin, *War and Change in World Politics* (Cambridge University Press 1981), p. 29.
[8] See the typical reference to the 'Westphalian norm of nonintervention' in J. Bryan Hehir, 'Intervention: From Theories to Cases', *Ethics and International Affairs*, 9 (1993), p. 5.
[9] Stephen D. Krasner, *Sovereignty. Organized Hypocrisy* (Princeton: Princeton University Press, 1999)
[10] See Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), pp. 51–70.
[11] Leo Gross, 'The Peace of Westphalia, 1648–1948', *The American Journal of International Law*, 42 (1948), pp. 28–9. Gross's article is still described as 'the most authoritative legal commentary on the treaty' by Bobbitt, *Shield of Achilles*, p. 866.

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There are two other reasons for choosing this focus. The first is that it facilitates addressing the striking neglect of the periodisation of International Rrelations that has been identified as a weakness by Barry Buzan and Richard Little, albeit not on the scale of world history which they deal with.[12] The point here is to consider not just when the idea of sovereign equality became a dominant norm but when it became linked to the peace of Westphalia and why that linkage occurred when it did and hence what function or purpose was served by that linkage. The second reason is that while there are good and recent surveys of sovereignty, the same cannot be said of sovereign equality. Discussion of sovereignty, of course, usually entails some reference to equality but studies specifically of sovereign equality are comparatively rare.[13]

The argument will proceed in the following sections. The first section will argue that those who negotiated and commented upon the peace of Westphalia in the seventeenth century did not see it as introducing or consolidating the norm of sovereign equality. They saw the peace as restorative not innovative. The concept of sovereignty in something like its modern form was available but not dominant and the notion of sovereign equality, so far as it was recognised at all, was explicitly rejected. The normative structure of this world in the eyes of its inhabitants was hierarchical. The second section considers eighteenth century perspectives. It will argue that hierarchy was still the dominant motif. The Holy Roman Empire was still seen as a viable, non-egalitarian structure. The peace of Westphalia was ascribed some significance but not seen as an epochal turning point. Stronger advocacy of sovereign equality was evident but it was counterfactual, being far from the prevailing consensus. Moreover its advocates had no need to turn to the peace of Westphalia to anchor their conception of sovereign equality and would have weakened the force of their advocacy in their own eyes had they done so. The third section considers developments from the early nineteenth century through to the interwar years of the twentieth. It will argue that notions of sovereign equality were more widespread but still had to contend with the perceived reality of hierarchy, initially in the form of the Great Power Concert, and theoretical counter-arguments. Nevertheless, by the turn of the century a confluence of intellectual and political developments had brought about the linkage of sovereign equality and the peace of Westphalia, understood as an epochal turning point. Ironically, it was now possible to look back over the preceding centuries and see the nineteenth century as an aberration, a period of the attempted assertion of hierarchy, interrupting a presumed consensus about sovereign equality that dated back to 1648. The fourth, briefer, section will consider debates surrounding the creation of the UN and the tercentenary of the peace of Westphalia in which year Leo Gross published his influential article. It will argue that there was now much less resistance to the kind of claim he made. The linkage of sovereign equality and the peace of Westphalia had finally triumphed. Throughout, the arguments of lawyers, diplomats, publicists and occasionally statesmen will form the sources of the argument. Lawyers figure prominently because they were more likely to pay

[12] Barry Buzan and Richard Little, *International Systems and World History* (Oxford: Oxford University Press, 2000).

[13] As pointed out by Thomas H. Lee, 'International Law, International Relations Theory and Preemptive War: The Vitality of Sovereign Equality Today', *Law & Contemporary Problems*, 67 (2004), p. 147.

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attention to notions of sovereign equality and lawyers eventually espoused the linkage, often in clipped formulations of the kind that found their way into Leo Gross's article and formed the sources for the claims he made. The conclusion will suggest the influence of this powerful image of Westphalia and sovereign equality is not only bad history but is also a hindrance to the contemporary study of International Relations.

The peace of Westphalia and the seventeenth century

As Christian Reus-Smit and Richard Ned Lebow have argued, seventeenth century international society, and seventeenth century society more generally, was hierarchical.[14] Social and international standing was central. Defence of honour and the pursuit of glory were more or less taken for granted. In diplomacy that meant protracted and bitter disputes over precedence; the negotiations leading up to the treaties of Osnabrück and Münster provided ample evidence of such behaviour. Of course, as especially the smaller states sought to enhance their status this could lead to claims to something that might appear to an expression of a demand for equality, either with larger states or amongst themselves. The French delegation complained with evident exasperation, on both counts, of the demands of the smaller states, especially of 'their very unjust demands [. . .] desiring to receive from us the same honours that they grant us [. . .] The Dutch, for example, refuse to see us if we make any difference between them and the Venetian delegates. The envoy of Savoy intends to adopt the same stance if we do not treat him like the Dutch.'[15] This was not, however, an equality based upon a general principle but a clamour by each for enhancement of its own status, preferably at the expense of others, in an international hierarchy. The extent and limits of Dutch ambition were recorded in another French note: 'When we ask them if, therefore, they mean to aspire to any equality with the king, they say no, but also that we would do them a greater injustice if we made any difference between them and Venice or if we introduced any equality between them and a vassal of the Empire, who recognizes even the electors as his superiors.'[16] According to a modern historian, the Dutch, amongst the most vociferous in their concern for their own dignity, 'requested incorporation into the hierarchy of states in a position immediately below the Emperor and the kings, but above the electoral princes, dukes and counts'.[17]

[14] Christian Reus-Smit, *The Moral Purpose of the State* (Princeton: Princeton University Press, 1999), pp. 87–115; Richard Ned Lebow, *A Cultural Theory of International Relations* (Cambridge: Cambridge University Press, 2008), pp. 262–304.

[15] Quoted in Osiander, *The States System of Europe, 1640–1990* (Oxford: Oxford University Press, 1994), p. 84.

[16] Osiander, *States System of Europe*, pp. 84–5.

[17] Thus Simon Groenveld, 'The Treaty of Münster as the Culmination of a Progressive Revolution', in Klaus Bussmann and Heinz Schilling (eds), *1648. War and Peace in Europe. Essay Volume 1. Politics, Religion, Law and Society* (Münster: Westfälisches Landesmuseum, 1998), p. 129. On these issues more widely, under the subheading 'The great preoccupation; ceremonial and procedure', see M. S. Anderson, *The Rise of Modern Diplomacy 1450–1919* (London: Longman, 1993), pp. 56–68. This is not inconsistent with Dutch insistence on equality with Spain, their former overlord from whom they sought independence after eighty years of intermittent war.

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As already indicated the settlement was perceived as restorative not innovative. According to Osiander, '[t]here was a consensus [. . .] that the settlement should bring a return to the *status quo ante bellum*'.[18] Appeal to tradition was a common, and often effective, rejoinder to such innovations as were suggested. The French, for example, sought to smuggle in a significant change, abolishing the election of an emperor-designate in the lifetime of the existing ruler on the pretence that this was compatible with tradition, only for the German Electors to dismiss the suggestion as blatantly contrary to tradition.[19] Insofar as one can discern some sense of innovation, namely in restricting the rights of rulers to determine the religion of their subjects, the treaties can only be seen as an impediment to their authority.[20]

It has been claimed that Article 64 of the Treaty of Münster is 'remarkable in its sweep' in that, by recognising the rights of the states to conclude alliances with other states outside the Empire, 'the article recognized a crucial prerogative of independent, sovereign states'.[21] Yet this claim is faulty on two grounds. In the first place, it is faulty because this was not a new right at all but one of the rights which was being reaffirmed.[22] It is faulty more importantly because it presumes a linkage between a right to conclude treaties, the state and sovereignty which was far from established in the middle of the sixteenth century. As the German historian Hainhard Steiger has pointed out 'Sovereignty was not, in 1648, the presupposition of capacity in international law and membership in a European order of states.'[23] Indeed, at this point, even beyond the confines of the Empire, capacity in international law was so far from being a monopoly of states that it could be recognised as adhering to the great trading companies, including the rights to conclude treaties, make war and conquer territory.[24] Against this backcloth, in which states were far from having such a monopoly, in law as well as fact, deducing sovereignty from the possession of one of these rights is simple anachronism.

Something similar can be said for the term and concept of sovereignty itself. The concept in something akin to its modern form was known but not necessarily accepted as universally applicable. Indeed according to Derek Croxton, amongst the negotiators in Münster and Osnabrück, the French alone had a clear concept of sovereignty but were not inclined to extend it to the others, save for tactical reasons.[25] In the latter case, when the French did suggest insertion into the treaties

[18] Osiander, *States System of Europe*, p. 44.
[19] Osiander, *States System of Europe*, p. 45.
[20] This restriction was not accepted as applying to the hereditary lands of the Emperor. See Article 5 of the Treaty of Osnabrück.
[21] Thus Daniel Philpott, *Revolutions in Sovereignty* (Princeton: Princeton University Press, 2001), p. 85.
[22] Osiander, 'Sovereignty', p. 273. See also, Ernst-Wolfgang Böckenförde, 'Der Westfälische Frieden und das Bündnisrecht der Reichstände', *Der Staat*, 8 (1969), pp. 449–78.
[23] Heinhard Steiger, 'Der Westfälische Frieden – Grundgesetz für Europa?', in H. Duchhardt (ed.), *Der Westfälische Frieden* (Oldenbourg: Historische Zeitschrift, Beihefte 26, 1998), pp. 68–9. For the complications see also the discussion of the right to send legations in, Johann Wolfgang Textor, *Synopsis of the Law of Nations* [1680] vol. 2 (Washington: Carnegie, 1916), pp. 138–9.
[24] See Janice E. Thomson, *Mercenaries, Pirates and Sovereigns* (Princeton: Princeton University Press, 1994), pp. 35–6. See also, A. H. L. Heeren, *A Manual of the History of the Political System of Europe and its Colonies* (London: Bohn, 1873), p. 160.
[25] Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', *The International History Review*, 21 (1999), pp. 587–8.

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of a reference to '*tous les autres droits de Souveraineté*' the offer was declined.[26] The Latin term that appeared in the treaties, in provisions relating to the affairs of the Holy Roman Empire, not Europe as a whole, was '*ius territoriale*', translated into German as *Landeshoheit*, as 'Territorial Right in an English translation of 1710, and, more literally as 'territorial jurisdiction'.[27] These distinctions are not terminological quibbles. They are different attempts to capture an evolving package of rights, about which there is some disagreement, though it is clear that *Landeshoheit* did not amount to sovereignty. According to the later German constitutional theorist, Herbert Krüger, the term indicated 'the sum of powers of domination, which is united in the hands of a territorial lord', whose individual powers were characterised by the term *Regalien*. Between these individual *Regalien*, there was no 'logical or inherent connection'. Attempts to induce some kind of conceptual order did not extend beyond distinctions between higher and lower *Regalien*.[28] Only in retrospect did *Landeshoheit* come to be seen as something more coherent, as 'the entire extent of that which belongs to the government of a territory'.[29] Even that understanding of *Landeshoheit* did not amount to sovereignty as was acknowledged by those who put it forward.

In conclusion, there was little trace of sovereign equality in the peace of Westphalia or indeed of a modern conception of sovereignty at all. The peace itself was restorative not innovative in the eyes of its creators. Contemporaries were aware of the centrifugal tendencies in the Empire. After the devastation of the Thirty Years War they could hardly be unaware of them. But they did not approve of such tendencies, let alone justify them by reference to a conception of sovereign equality.[30]

Eighteenth century views

The eighteenth century saw a diminution in the obsessive concern with precedence and ceremony evident in the negotiations leading to the peace of Westphalia. Even from the perspective of the late eighteenth century, however, it appeared that the 'time is not, however, long past, since the different Courts of Europe plunged into the warmest altercations on this account, and have quarrelled like madmen, or pouted like children, not because their *Equality* was invaded, but because their *pre-eminence* was not allowed'.[31] Eighteenth century society was still predominantly

[26] Bardo Fassbender, 'Die verfassungs- und völkerrechtsgeschichtliche Bedeutung de Westfälsichen Friedens von 1648', in Ingo Erberich et al. (eds), *Frieden und Recht* (Stuttgart: Boorberg, 1998), pp. 29–30. See also, Steiger, 'Der Westfälische Frieden', p. 68.

[27] Various editions of the treaties are available at: {http://www.pax-westphalica.de/ipmipo/index.html}. For the literal translation see Osiander, 'Sovereignty', p. 272.

[28] Herbert Krüger, *Allgemeine Staatslehre* (Stuttgart: Kohlhammer, 1964), pp. 824–5.

[29] Thus the eminent German publicist, Johann Stephan Pütter, writing in 1795, as quoted by Fassbender, 'Die verfassungs- und völkerrechtsgeschichtliche Bedeutung', p. 31. Böckenförde seems to transpose this later understanding back to 1648, but quotes late eighteenth century sources in support of the more coherent concept, 'Der Westfälische Frieden', pp. 472–3.

[30] See Samuel Rachel, *Dissertation on the Law of Nature and of Nations* [1676] vol. 2 (Washington: Carnegie, 1916), pp. 224–5. This also applies to Samuel Pufendorf, *The Present State of Germany* (Indianapolis: Liberty Fund, 2007).

[31] Robert Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe*, vol. 2 (Dublin: Wogan, 1795), p. 219.

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hierarchical. Glory and honour still counted for a great deal. Hierarchy was assumed to be the normal condition by Prince Kaunitz, Austrian foreign minister for most of the second half of the century. In his circular note of July 1791, on the eve of the collapse of the eighteenth century order amidst the French Revolution, Kaunitz sought to rally 'the senate of the powers' in order to shield their people from 'the contagion of discontent, insubordination and revolt' in the interests of the 'community of institutions of all kinds, of internal administration, of gentle and tranquil manners, of enlightened opinion and of a beneficent and pure religion, which united them all in a single family of nations'.[32]

Although publicists sought, with some success, to extol the cause of interest against the passions, as providing a more stable guide for rulers and states, and although the more specific doctrine of *raison d'état* was gaining ground, considerations of precedence still impressed themselves upon those who sought to advise their rulers.[33] Near the beginning of the century François Callières, a former French diplomat, published his *De la manière de négocier avec les souverains* which became an instant success and required reading for diplomats for the rest of the century.[34] In it, he recalled that 'Some other crowns attempted, during the negotiation of the peace of Münster, to introduce a pretended equality among all the Kings of Europe, but, notwithstanding that innovation, which was ill grounded, and unheard of till that time, France has remained in possession of its ancient right of pre-eminence [. . .]'.[35] Later he observed that while princes were governed by the same passions as other men 'their greatness, and the real effective power which is annexed to their rank, gives them ideas different from those of common mortals'.[36] Little had changed by the middle of the century when Rousset de Missy opened another highly influential guide to diplomatic practice with the warning that 'The point of honour, rank, precedence, are the most delicate article of the political faith. Princes cede towns, even provinces, but it is not possible with all the skill of the most adroit negotiators to persuade them to cede a rank which they believe they are due.'[37]

Yet the eighteenth century did witness increased advocacy of the principle of the equality of states. The most influential statement, in the long run, came from Emer de Vattel:

> Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this

[32] Alfred Ritter von Viventot, *Quellen zur Geschichte der deutschen Kaiserpolitik Oesterreichs während der französischen Revolutionskriege 1790–1801*, vol. 1 (Vienna: Braumüller, 1873), pp. 208–10.
[33] For the contrast between interest and passions more generally see Albert O. Hirschman, *The Passions and the Interests* (Princeton: Princeton University Press, 1977); for *raison d'état* see Frederick Meinecke, *Machiavellism* (New Brunswick: Transaction, 1998) and Jonathon Haslam, *No Virtue Like Necessity* (New Haven: Yale University Press, 2002).
[34] On the importance of the text and his life see H. M. A. Keen-Soper and Karl W. Schweizer, 'Introduction', in H. M. A. Keen-Soper and Karl W. Schweizer (eds), *François de Callières. The Art of Diplomacy* (New York: Leicester University Press, 1983), pp. 1–54.
[35] Ibid., pp. 125–6.
[36] Ibid., p. 139.
[37] Jean Rousset de Missy, *Mémoires sur le rang et la préséance entre les souverains de l'Europe* (Amsterdam: L'Honoré, 1746), p. 3.

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respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.[38]

Nor was Vattel alone. Dickinson's extensive study of the doctrine of the equality of states, published in 1920, ascribed significant weight to the lectures of Thomas Rutherforth, published in 1754–1756, two years before Vattel's *Law of Nations*.[39] Rutherforth argued along similar lines to Vattel: 'The law of nations considers each civil society as a moral person, and all the several societies as so many distinct persons in a state of nature.'[40]

Two reservations must be entered about the status and nature of this argument. First, it was counterfactual. It was counterfactual not just in the sense that Vattel noted, namely that this normative equality stood in contrast to inequalities of power or nature. It was counterfactual in that it did not accord with widespread perceptions and practices in his own day. Vattel knew this. That is evident in his comments on the relationship between one small republic, his native Switzerland, and a powerful kingdom, France.[41] Yet this did not affect the force of his argument which was, as he explicitly stated, a natural law argument. Similarly, Rutherforth explicitly rejected 'mere usage'.[42] Neither had any need to turn to an historic event, not even the 'famous peace of Westphalia' as Vattel called it, in order to assert the principle of equality. Relying primarily on a contingent historical fact, upon 'mere usage', would have weakened their cause not strengthened it.[43]

A further obstacle to linking the peace of Westphalia with a general principle of equality was eighteenth century perceptions of the Holy Roman Empire. Most eighteenth century commentators did not perceive a conglomeration of independent and equal states under the shadow of the empty shell of a former empire as later interpretations would see it. That is consistent with the extensive survey of eighteenth century German conceptions by Bernd Kremer. According to Kremer the typical stance of eighteenth century German publicists was represented by the assertion of Johann Jakob Moser in 1773: 'If a German regent should allow the title of sovereign to be bestowed upon him, the Imperial Court is fully authorised to strike down such self-description as contrary to the Imperial Constitution.'[44] A little earlier Johann Jakob Schmauss sought to curtail the implications of the Imperial Estates' right of consultation by arguing that this no more made them co-rulers than the estates' right of consultation within the individual territories made them co-rulers.[45] The corollary of the supposed triumph of the principle of the sovereign territorial state is, of course, the supposition that after 1648 the Empire no longer qualified as a state. But Kremer argues that this involves a projection backward of later concerns. The eighteenth century question in German

[38] Emer de Vattel, *The Law of Nations* (Indianapolis: Liberty Fund, 2008), Preliminaries, p. 75.
[39] Edwin DeWitt Dickinson, *The Equality of States* (Cambridge: Harvard University Press, 1920), p. 85.
[40] Thomas Rutherforth, *Institutes of Natural Law*, vol. 2 (Cambridge: Bentham, 1756), p. 512.
[41] Vattel, *The Law of Nations*, Book 4, chap. 6, para. 79, pp. 695–6.
[42] Rutherforth, *Institutes of Natural Law*, vol. 2, p. 470.
[43] Vattel has often been portrayed as a proto-positivist. For correction of this see Simone Zerbuchen, 'Vattel's *law of nations* and just war theory', *History of European Ideas*, 35 (2009), pp. 409–10.
[44] Quoted in Bernd Mathias Kremer, *Der Westfälische Friede in der Deutung der Aufklärung* (Tübingen: Mohr, 1989), p. 68.
[45] Ibid., p. 72.

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minds was not, had the Empire ceased to be a state, but did the territories qualify as states, a question which was answered in the affirmative but without assuming this amounted to an assertion of the equality of all states.[46]

It was, moreover, not only the ambitious and competing rising powers within the Empire that could cause a threat and elicit condemnation. Thus, another eminent eighteenth century German publicist, Johann Stephan Pütter, concluded his historical survey of the Empire with the crisis of the Bavarian succession and the defeat of Habsburg schemes to acquire Bavaria and wreck the balance within the empire in the process. Subsequent scheming after the formal end of the crisis induced the formation of a 'defensive League', initially consisting of 'the three Electoral Courts of Saxony, Brandenburg, and Hanover' which, according to Pütter, 'has only the preservation of the constitution for its object, which ought to be held sacred, not only by the supreme Head, but by every individual Member of the Empire'.[47] Pütter concluded his account with effusive praise of none other than Frederick II of Prussia in his role as saviour of the Imperial constitution.[48] The presumption here is not that the Empire was free of centrifugal, or centralising, conflicts but that it was a viable, if complex, structure whose constitutional provisions were meaningful. It was a presumption made by Edmund Burke, on the understanding that others would share it, when he invoked the condition of the Empire 'not for an exact resemblance, but as a sort of middle term, by which India might be approximated to our understandings, and if possible to our feelings'.[49]

There is somewhat more evidence of a perception of the unusual significance of the peace of Westphalia in the context of the genre of histories of treaties and diplomacy that emerged in the wake of the peace. This was encouraged by the publication of copies of the treaties of the peace and the increasingly commercial dissemination of such texts as well as the professionalisation of diplomacy.[50] Gabriel Bonnot de Mably, for example, confidently proclaimed in his *Le droit de l'Europe fondé sur les traits* that practically nothing prior to Westphalia played any significant role in contemporary Europe.[51] Jean Dumont also began his *Nouveau recueil des traits* of 1710 in 1648. However, the same author's *Corps universel diplomatique*, the text which dominated the field for much of the century, began in 800.[52] Even where chronology might suggest pivotal importance of the peace of Westphalia care needs to be taken. Thus, when Charles Jenkinson, later Earl of

[46] Ibid., pp. 68–91.
[47] John Stephen Pütter, *An Historical Development of the Present Political Constitution of the German Empire*, vol. 3 (London: Payne, 1790), p. 223.
[48] Ibid., pp. 223–4. See also, with reference to an earlier date, the assertion by John Campbell that the King of Prussia 'considers himself as the Guardian of the Germanick Constitution', *The Present State of Europe* (London: Thomas Longman, 1750), p. 139 and the depiction of the conflict in Germany during the Seven Years War as a civil war by Israel Mauduit, *Considerations on the Present War in Germany* (London: John Wilkie, 1760), p. 19, a tract described by Anderson as 'the most influential English pamphlet of the period', *The Rise of Modern Diplomacy*, p. 173.
[49] In his speech on Fox's India Bill (1783), in David P. Fidler and Jennifer M Welsh (eds), *Empire and Community. Edmund Burke's Writings and Speeches on International Relations* (Boulder: Westview Press, 1999), p. 176. For French views see Joseph de Rayneval, *Institutions du droit public d'Allemagne* (Leipzig: Maison des Orphelins et de Fromman, 1766), especially pp. 462–8.
[50] On the production of histories of treaties see Mario Toscano, *The History of Treaties and International Politics* (Baltimore: John Hopkins, 1966).
[51] Gabriel Bonnot de Mably, *Collection complète des oeuvres*, 5 (Aaalen: Scientia 1977), p. 238.
[52] Toscano, *The History of Treaties*, pp. 60–6.

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Liverpool, began his compilation with 1648 he did so not because of the Peace of Westphalia of October 1648 but because of the Treaty of Münster of January 1648 which set the seal on Dutch independence and because of the British interest in 'raising an independent state in the Netherlands, out of the Austrian dominions; which became at once the means of lessening the interest of that House, and of raising up a firm and stable ally'.[53] More broadly, as Iain Hampsher-Monk has pointed out: 'The historical periodization "Westphalian" requires caution. For writers of Burke's generation, the watershed treaty in establishing the new order of state-integrity and a balance of power was the Peace of Utrecht (1713).'[54] Continental commentators were more disposed to look to Westphalia. For those directly affected by the Thirty Years War and the peace that ended it anything less would be surprising. Again, however, caution is needed. When the French diplomat Joseph Rayneval described the peace of Westphalia as the basis of the 'fundamental law of Europe' he did so in the context of an account of a series of attempts to put an end to a history of conflict and diversity that was coterminous with the existence of the Holy Roman Empire. Rather than marking a revolutionary breakthrough it brought some calm to the troubled empire, albeit without extinguishing the longstanding animosities to which it was subject.[55]

In conclusion, almost none of the elements of the image of the peace of Westphalia as an epoch making transition to a world of sovereign equal states stands up to scrutiny let alone the concatenation required to generate that image. The obstacles to it are clear: a predominantly hierarchical view of international society in which so far as notions of equality were asserted at all they were derived from natural law doctrines; the perceived persistence of a viable German Empire rather than a collection of sovereign states; lack of consensus about the periodisation of European history and the lack of any perception of a revolutionary transition let alone of one dating from 1648 and constituting a modern era in some form or another. By the same token it is not difficult to see what would probably be needed to facilitate the emergence of the image: greater doctrinal insistence on equality that could find firmer footing in diplomatic practice; considerable slackening in the dominance of natural law arguments and the emergence of a historical sociology of law; greater consensus about the universality of a clear concept of sovereignty; the disappearance or marginalisation of structures that would be seen as manifestly incompatible with the image; some sense of a unified modern epoch in international relations. It was precisely such

[53] Charles Jenkinson, *A Collection of All the Treaties of Peace, Allaince, and Commerce between Great-Britain and Other Powers* (London: Debrett, 1785), p. 1. On the customary and misguided conflation of Dutch independence and the peace of Westphalia see Osiander, 'Sovereignty, International Relations and the Westphalian Myth', p. 268.

[54] Iain Hampsher-Monk, 'Edmund Burke's Changing Justification for Intervention', *The Historical Journal*, 48 (2005), p. 66.

[55] Rayneval, *Institutions du droit public d'Allemagne*, pp. 1–13, 59–69. For the caution expressed by other French authors see Charles-Frédéric Necker de Custrin, *Description du gouvernement present du corps Germanique* (Whitefish, MT: Kessinger Publishing 2009[1741]), pp. 290–6 and Louis-Pierre Anquetil, *Motifs des guerres et de traits de paix de la France pendant les règnes de Louis XIV, Louis XV et Louis XVI* (Paris: Lerguillez, 1798), pp. 60–4.

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developments that took place in nineteenth century, though unevenly, gathering pace towards the end of the century but still facing considerable obstacles and doctrinal resistance.[56]

Nineteenth and early twentieth century views

It is natural to look to the impact of the French Revolution and Napoleon as an explanation of an abrupt transition. Martin Wight put it thus: 'The levelling of the international community was completed by the French revolutionary and Napoleonic Wars.'[57] While it is true that these upheavals were seen as putting an end to at least elements of the old order, not least, of course, by bringing an end to the Holy Roman Empire, the notion that they issued, either during these wars or after, in the triumph of sovereign equality is dubious.[58] Revolutionary rhetoric of equality was almost immediately contrasted with French hegemonic ambitions and the impact of Napoleon was ambiguous. The ambiguity was well put from the perspective of the end of the nineteenth century by a German theorist: 'An attempt to revive the forms of the old Europe for the new Europe came from the man who had reduced the old world to ruins. Vassalage appeared to Bonaparte as the appropriate form to maintain in dependence some small principalities bestowed by him on relatives and favourites.'[59] Moreover, the Napoleonic system never lost a sense of impermanence.[60] Even more important, it was the settlement at the end of the Napoleonic wars that shaped impressions of the international system for most of the century.

As is well known, the Congress of Vienna showed little respect, either in the conduct of the Congress or in its outcome for principled equality of states.[61] It produced what Gerry Simpson has aptly summarised as a form of 'legalized hierarchy'.[62] It is true that the French Foreign Minister Talleyrand invoked the principle of equality, but only as a ploy to win French access to the deliberations of the Great Powers after which he promptly abandoned the idea.[63] The fact that he thought it worth invoking at all though is not without significance. Similarly,

[56] The consolidation of the image was undoubtedly aided by other developments associated with the Westphalian model. As noted above these are deliberately excluded from consideration here. It is worth noting that one such development is the emergence of the concept of territoriality as central to the modern state. Thus Georg Jellinek, who included territory as one of his three 'elements' of the state claimed that the first text to pronounce territory to be essential to the concept of the state did not appear until 1817: *Allgemeine Staatslehre* (Berlin: Julius Springer, 1929), p. 395.

[57] Martin Wight, *Systems of States* (Leicester: Leicester University Press, 1977), p. 136.

[58] Oddly, Reus-Smit quotes this with approval, *The Moral Purpose of the State*, p. 102. Amidst the upheavals Georg Friedrich von Martens regarded whether or not the French Revolution would inaugurate a new epoch, the fifth, in international law as an open question, *Einleitung in das positive Europäische Völkerrecht* (Göttingen: Dieterich, 1796), p. 8.

[59] Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Goldbach: Keip 1996 [1882]), pp. 145–6.

[60] As emphasised by Metternich. See Henry Kissinger, *A World Restored* (London: Weidenfeld & Nicolson, 1957), p. 21.

[61] See the still valuable study by Genevieve Peterson, 'Political Equality at the Congress of Vienna', *Political Science Quarterly*, 60 (1945), pp. 532–54.

[62] Gerry Simpson, *Great Powers and Outlaw States* (Cambridge: Cambridge University Press, 2004), pp. 67–76, 93–115.

[63] Peterson, 'Political Equality', pp. 538–9 and 541–2; Kissinger, *A World Restored*, pp. 151–2 and 167; Harold Nicolson, *The Congress of Vienna* (New York: Grove, 1946), pp. 141–3.

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the British Foreign Minister Castlereagh made some concession to the notion of equality in suggesting that the lesser powers should be provided with the pretence of their participation and consent.[64] The principle that animated the Congress, so far as principle did at all, was well formulated long before the Congress met, at the height of Napoleon's power, by Friedrich Gentz:

> In every well ordered state the collective body of citizens, and in every well ordered commonwealth of nations the collective body of states should be *equal in their rights*, (that is) their *rights* should be *equally respected*; but it by no means follows that they should have the *same rights*, that is, *rights of equal quality and value*. True *equality*, and the only equality attainable by legitimate means, consists, in both cases, in this, that the smallest as well as the greatest is secured in the possession of *his right*, and that is can neither be forced from him nor encroached upon by *lawless* power.[65]

This qualified sense of equality was quite compatible with hierarchy and was to become a recurrent reference point in the arguments of those who were critical of more expansive concepts of equality. Ironically, this qualified sense of equality arguably could have been linked to 1648 but Gentz made no such move; producing instead a nuanced interpretation of the peace of Westphalia that emphasised its limitations.[66]

A less qualified notion of the principle of sovereign equality did gain ground throughout the nineteenth century. One of the bluntest early assertions came from Chief Justice Marshall in 1825: 'No principle is more universally acknowledged, than the perfect equality of nations.'[67] But initially, where any argument was offered for this equality it took the form of the natural law argument already set out by Vattel. Indeed Vattel's argument was so influential that one late nineteenth century author rehearsed it, including the claims about the equality of the giant and the dwarf, without even bothering to mention Vattel by name.[68] At about the same time James Lorimer, the most prominent critic of the doctrine of equality, complained of that 'most baseless' yet 'prevalent theory of the equality of all powers [. . .] which at the present day you will find set forth in all the books'. He added that Heffter 'who as a German might be expected to be free from the confusion of mind on the subject of equality generally found in French writers since the Revolution' was in fact a prime example of such confusion.[69] Arguments for the principle were in fact quite diverse but typically not based on positive law.

The widely accepted view of the nineteenth century as the century of legal positivism, let alone the legal positivism of Austin, is an oversimplification. As Martti Koskenniemi has argued it is misleading to speak of the international lawyers of this period as '"positivists" who were enthusiastic about "sovereignty"'.[70] It is notable that when the self-avowed positivist Lassa Oppenheim

[64] Peterson, 'Political Equality', pp. 536–7.
[65] Friederich Gentz, *Fragments upon the Balance of Power in Europe* (London: Peltier, 1806), pp. 57–8.
[66] Friederich Gentz, *On the State of Europe before and after the French Revolution* (London: Hatchard, 1802), pp. 10–13.
[67] 'The Antelope', *US Reports*, 23 (1825), p. 122.
[68] Giuseppe Carnazza-Amari, *Traité de droit international public en temps de paix*, vol. 1 (Paris: Larose, 1880), p. 379.
[69] James Lorimer, *The Institutes of the Law of Nations*, vol. 1 (Edinburgh: Blackwood, 1883), pp. 170–2. See also the extensive list of authors cited by Ernest Nys, *Études de droit international et de droit politique* (Brussels: Alfred Castaigne, 1901), pp. 9–13.
[70] Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2002), p. 4.

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proclaimed 'the downfall of the theory of the Law of Nature, which after many hundreds of years has al last been shaken off during the second half of this century' he struggled to find many unalloyed positivist accounts of international law, identifying the 'first real positivist treatise' as a German text of 1874, Hall's English work of 1880 and then a cluster of texts appearing between 1895 and 1907.[71] Nevertheless, there was an increasing disposition to turn from natural law to what amounted to some kind of historical sociology. It is consistent with this trend that the Swiss international lawyer and delegate to the Hague Conference of 1907, Max Huber, produced the 'first serious sketch for a historical sociology of law' in 1910.[72] From this perspective the historical record was no longer an uncertain realm of contingency but could be construed as exhibiting evolutionary breakthroughs amongst which the peace of Westphalia was a potential candidate. That possibility was arguably reinforced by the conception that international law was strictly European in origin and in some respects in the extent of its application. That supposition was embodied in the titles of two early influential texts: Klüber's *Droit des gens moderne de l'Europe*, first published in 1819, and Hefter's *Das europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*, first published in 1844.[73] If international law was an evolutionary product of European law and if the principle of equality was a key principle of that law then it made sense to look for some point or period at which this principle had been adopted or had crystallised in European public consciousness.

Principle and public conscience could be held up against the positive law and diplomatic practice of a world of states that was still characterised by hierarchy and by the legacy of the European concert that originated at Vienna. It was precisely in this sense that Ernst Nys proclaimed the necessity 'to denounce the illegitimacy of the pretensions of the European concert'.[74] Yet others could take comfort from signs of resistance to the claims for hierarchy, including rights of intervention and rights to regulate membership of the world of states through the doctrine of constitutive recognition.[75] The culmination of such trends came with the Second Hague Conference of 1907. There an intense debate arose over the composition of a proposed Permanent Court of Arbitral Justice, in which considerations of the principled equality of states were prominent.[76] The occasion for the dispute was a proposal that while all states would have a right to appoint a judge to the court only the judges of the great powers would sit permanently.

[71] Lassa Oppenheim, *International Law*, vol. 1 (London: Longmans, 1912), pp. 100–1.
[72] Koskenniemi, *Gentle Civilizer*, p. 227. See also, Oliver Diggelmann, *Anfänge der Völkkerechtssoziologie* (Zürich: Schultess, 2000).
[73] Jean Louis Klüber, *Droit des gens moderne de l'Europe* (Stuttgart: Cotta, 1819) and August Wilhelm Hefter, *Das europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (Berlin: Müller 1888 [1884]). On this trend see Onuma Yasuaki, 'When was the Law of International Society Born?', *Journal of the History of International Law*, 2 (2000), pp. 37–8. The presumption has been extensively criticised by Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004). See also the work of Lauren Benton, most recently, *A Search for Sovereignty* (Cambridge: Cambridge University Press, 2010)
[74] Nys, *Études*, p. 46.
[75] Neither of these aspects can be followed up here but see Martha Finnemore, *The Purpose of Intervention* (Ithaca: Cornell University Press, 2003), pp. 1–51 and Carl Schmitt, *The Nomos of the Earth* (New York: Telos, 2003), pp. 304–8.
[76] See Simpson, *Great Powers*, pp. 132–64 and Reus-Smit, *The Moral Purpose*, 140–5.

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Against this proposal, the Brazilian delegate, Rui Barbosa, launched an impassioned defence of equality, protesting 'that if the States excluded from the First Peace Conference have been invited to the Second, it is not with a view to having them solemnly sign an act derogatory to their sovereignty by reducing them to a scale of classification which the more powerful nations would like to have recognized.'[77] The sovereign equality demanded by Barbosa went far beyond the qualified equality conceded at the beginning of the preceding century by Gentz. For Barbosa it was necessary not only that all have the same right but also that all should exercise that right equally. Conversely, 'If, perforce, we insist upon referring to this condition of things as conditions of exercise, it will certainly be necessary to confess that there are conditions of exercise that may affect the very existence of the right and annul that right. The conditions of exercise respect the equality of right only when they are *equal* for those possessing the right.'[78] The bare right to appoint judges was worthless unless all judges enjoyed the same conditions of that appointment, that is, unless they all sat for the same period.

Such doctrines were meant to apply, of course, only amongst the civilised states of Europe and by extension the Americas, with a handful of recent exceptions on other continents. A kind of doctrinal apartheid helped to maintain the contrast between a world of sovereign states and a world of colonies, protectorates and *terra nullius*. Within the heart of Europe the apparent triumph of nationalism and especially German unification seemed to simplify the mental map. German jurists remained sensitive to the complexities and ambiguities of the federal *Reich* founded in 1871 but such concerns increasingly came to be seen as archaic.[79]

While any one of these developments, the diminution of overt doctrines of natural law and the emergence of a historical sociology of law, doctrinal insistence on the equality of states and claims made on the diplomatic stage, the apparent simplification of the juristic map of the world, could promote the association of sovereign equality and Westphalia, the combination of them probably accounts for the linkage which became a central element of the Westphalian model. For it is precisely towards the end of the nineteenth century and the early decades of the twentieth that linkage of Westphalia and sovereign equality comes to be asserted typically in clipped formulations devoid of either supporting commentary or quotation from the treaties in which sovereign equality was supposedly enshrined. Thus T. J. Lawrence bluntly asserted that 'The principles of the territorial character of sovereignty and the equality of states before the law were involved in the arrangements it made.'[80] At the turn of the century the American jurist and diplomat Hannis Taylor asserted 'that all states are formally equal and that territory and jurisdication are coextensive – was made the basis of the settlement embodied in the Peace of Westphalia'.[81] Slightly earlier the Frenchman Frantz

[77] James Brown Scott (ed.), *The Proceedings of the Hague Peace Conferences. The Conference of 1907*, vol. 2 (New York: Oxford University Press, 1921), p. 620. The majority of those excluded from the First Conference but present at the Second were Latin American, Simpson, *Great Powers*, p. 135.
[78] Scott (ed.), *The Proceedings*, p. 628.
[79] See the judgement of Rupert Emerson that they were 'disguising the new as adequately as possible in the juristic trappings of the old', *State and Sovereignty in Modern Germany* (New Haven: Yale University Press, 1928), p. 128.
[80] T. J. Lawrence, *Essays on Some Disputed Questions in Modern International Law* (Cambridge: Deighton, 1885), p. 206.
[81] Hannis Taylor, *A Treatise of International Public Law* (Chicago: Callaghan, 1901), p. xv.

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Despagnet proclaimed that Westphalia established 'the basis of the modern doctrine of international law' including 'the principle of the juridical equality of states'.[82] Another Frenchman praised Westphalia for bringing forth the 'principle of the independence and equality of sovereign states'.[83] Lassa Oppenheim added that with the Peace of Westphalia the 'theory of the unity of the civilised world under the German Emperor and the Pope as its temporal and spiritual heads was buried for ever. A multitude of recognised independent States formed now a community on the basis of equality of all its members.'[84] Assertions of this nature were repeated with such frequency that by the end of the 1920s an Italian, Andrea Rapisardi Mirabelli, devoted a doctorate to the Peace of Westphalia – a text upon which Leo Gross drew heavily – and proclaimed that Westphalia established the equality of states and '*territorial sovereignty*' as the '*veritable essence* of the new order of things'.[85] For Mirabelli Westphalia was not the product of the vision or prudence of the authors of the treaties but an historical necessity. Given the rise of nationalism and the fragmentation of Europe the only alternative to war, since the restoration of some kind of superior authority was inconceivable, was the Westphalian system.[86]

It is evidence of the unsettled nature of the debate that both the general trends of the age and the specific significance of the dispute at the Hague elicited quite diverse judgements. Thus, to many commentators of this period, some kind of superior authority was conceivable, though the conclusions they drew from this in terms of Westphalia and sovereign equality varied. In part this depended upon what they saw as the challenge to the doctrine of equality. There were two distinct challenges, though they could be elided. The first was the European concert or system of great powers. As already indicated Ernst Nys saw the European concert, rooted in the settlement at the end of the Napoleonic wars as a threat to the equality consecrated at Westphalia and as something that was inherently illegitimate.[87] Some even took the debate about equality and the proposed Permanent Court at the Hague as a worrying sign of an attempt to revive the detested Holy Alliance.[88] The second challenge, sometimes fused with the tradition of the European concert, came from the growth of international agreements of which the Hague formed a prominent part. Thus Lawrence had already concluded before the Second Hague Conference that recent developments 'can have no other meaning than that the doctrine of Equality is becoming obsolete and must be superseded by the doctrine that a Primacy with regard to some important matters is vested in the foremost powers of the civilized world. Europe is working round again to the old notion of a common superior, not indeed a Pope or an Emperor, but a Committee, a body of representative of her leading states.'[89] After the Second Hague Conference he again proclaimed the imminent end of equality but now on

[82] Frantz Despagnet, *Cours de droit international public* (Paris: Larose, 1894), pp. 17–8.
[83] Charles Dupuis, *Le principe d'équilibre et la concert européen* (Paris: Perrin, 1909), p. 20.
[84] Lassa Oppenheim, *International Law*, vol. 1 (London: Longmans, 1905), p. 60.
[85] Andrea Rapisardi Mirabelli, *Le Congrès de Westphalie* (Leyden: Brill, 1929), pp. 14–5.
[86] Mirabelli, *Le Congrès*, p. 29.
[87] Nys, *Études*, pp. 1–46.
[88] Max Huber, 'Die Gleichheit der Staaten', in F. Berolzheimer (ed.), *Rechtswissenschaftliche Beiträge* (Stuttgart: Enke, 1909), p. 118.
[89] T. J. Lawrence, *The Principles of International Law*, 3rd edition (Boston: Heath, 1908), p. 242. The Preface is dated 1900.

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the grounds that 'the society of nations has become self-conscious, and is preparing itself for the performance of legislative, administrative, and judicial functions'.[90] In terms of both challenges however the notion that equality was threatened – whether this was feared or welcomed – was thought to be compatible with the notion that the principle of sovereign equality had been established at Westphalia and had lasted, either to the end of the eighteenth century or until the end of the nineteenth. In both cases the political reality of hierarchy was perceived as resistant to what was taken as the Westphalian promise.

A further barrier came from a group who did not welcome the claims made for equality at the Hague, raised principled objections to equality or at least equality in its unqualified form and cast doubt on the historiography that ascribed sovereign equality to Westphalia. Thus, reflecting on the Hague Conference, Frederick Charles Hicks complained that the presumption of equality, and more specifically equality in voting, had been an arbitrary decision by the Russian Czar. His displeasure was clear in his observation that: 'Nevertheless, no unicameral legislative assembly in the world's history has been organized in a similar manner where not only do all units, great or small, have equal voting power but practical unanimity is required in order to carry a measure.'[91] Nor did he hesitate to quote a report of the *London Times* referring to Barbosa's '"fierce (*farouche*) exposition" of the extreme conception of the equality of all states and governments' and drawing an analogy between such beliefs and 'the old principle of the Polish veto'.[92]

In the most substantive study of the period devoted to the equality of states Edwin de Witt Dickinson insisted that discussion of the issue was typically characterised by a 'remarkable confusion of thought and of statement'.[93] The confusion amounted to a failure to distinguish between the conception of equality that Gentz held to be the only meaningful and practical one and the conception of equality that Barbosa held to be the only conceivable one. As Dickinson put it the distinction lay between equal 'protection of the law or equality before the law' and an 'equal capacity for rights'.[94] By the latter he meant the idea that each legal subject, here states, was supposed to have exactly the same rights and not merely the idea that each legal subject should have such rights as it happened to have protected. He did not reject 'equal capacity of rights' entirely but described it as an aspiration that properly followed the firm establishment of 'equality before the law'. In international doctrine, however, he complained that this natural course of development had been inverted because of the 'extraordinary influence of text-writers upon the law of nations in its formative period'.[95]

As that statement suggests Dickinson did not believe the doctrine of equal capacity for rights could be traced back to the Peace of Westphalia. Indeed he claimed that even in the nineteenth century there 'has been much less said about

[90] T. J. Lawrence, *The Principles of International Law*, 6th edition (Boston: Heath, 1910), p. 288.
[91] Frederick Charles Hicks, 'The Equality of States at the Hague Conferences', *American Journal of International Law*, 2 (1908), p. 538.
[92] Hicks, 'The Equality of States', p. 539.
[93] Dickinson, *The Equality of States*, p. 5.
[94] Ibid., p. 4.
[95] Ibid., p. 5.

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the equality of nations outside the treatises of the publicists than one might reasonably expect'.[96] Scepticism about the Westphalian provenance of the doctrine was also evident in a review of Mirabelli's text. There the reviewer was largely sympathetic, with exception of one major flaw:

> A study of American scholars in the field might have eliminated, for instance, such mistakes as the oft-repeated assumption that the Peace of Westphalia was based upon the theory of the complete equality of states [. . .] The error of asserting that the Peace of Westphalia established equality of states in a family of nations has been too often repeated to be readily corrected, and it is to be regretted that the same illusion is found in the dissertation under review.[97]

For correction of the error he recommended Dickinson who did indeed point out that the peace expressly provided 'for important inequalities of legal capacity in the reconstituted community of nations'.[98]

Yet the reviewer was right that repetition of the error was making it difficult to correct. It was still possible to try to do so. There was sufficient scepticism about the unqualified principle of state equality to call into question its plausibility and desirability as a normative principle as well as to question the linkage of sovereign equality and the Peace of Westphalia. It was not to be until after the Second World War that the linkage acquired such a hold, that, at least until recently, it became nigh on unquestionable.

Mid to late twentieth century views

The debate about equality flared up again at the end of the Second World War, especially in the San Francisco conference that established the UN Charter. That it would do so had been evident as far back as the 1942 Declaration by UN where even in matters of protocol the precedence of the Great Powers was asserted to the annoyance of the lesser powers.[99] On the other hand the Declaration of the Moscow Conference of 1943 proclaimed the 'necessity of establishing at the earliest possible date a general international organization, based on the sovereign equality of all peace-loving states, and open to membership by all such states, large and small'.[100] Some care was even taken in other clauses of the Declaration to mitigate the appearance of great power hegemony.[101] Nevertheless it was impossible to avoid the clash between great power hegemony, built into the Yalta voting formula, and the principle of sovereign equality at the San Francisco conference.[102] At the end of the day it was the blunt insistence by the great powers that there

[96] Ibid., p. 153.
[97] Kenneth Cosgrove, 'Review of *Le Congrès de Westphalie* by Andrea Rapisardi Mirabelli, *American Journal of International Law*, 25 (1931), pp. 184–5.
[98] Dickinson, *The Equality of States*, p. 233.
[99] See Ruth B. Russell, *A History of the UN Charter. The Role of the US 1940–1945* (Washington: Brookings Institution, 1958), pp. 51–6.
[100] Quoted in Russell, *A History*, p. 134.
[101] Russell, *A History*, p. 135.
[102] In addition to Russell, *A History*, see also Simpson, *Great Powers*, pp. 165–93, Stephen C. Schlesinger, *Act of Creation* (Boulder: Westview, 2003), though focusing on disputes between the great powers, and Djura Nincic, *The Problem of Sovereignty in the Charter and Practice of the UN* (The Hague: Martinus Nijhof, 1970), especially pp. 36–135.

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could be an international organisation with a great power veto, or no international organisation at all, that determined the outcome of the principled argument. As the Prime Minister of New Zealand put it, 'we felt that it was not, in the last degree, a question of the rule of unanimity or a question of the veto, whichever name we care to call it – it was a question of organization; a new world organization or no world organization'.[103] It was still necessary though to provide some reassurance, or at least face-saving facade, for the smaller powers. The reassurance came in the form of the argument that the great powers should have special rights on the grounds of their special responsibilities and that they would exercise the former in exceptional cases with due regard to the interests of the wider community of states.[104] In the language of Dickinson this meant that in matters of the equality of capacity of rights, there would be no equality. Interestingly, the Mexican delegate, García Robles saw in this same distinction 'the juridical principle of correlation between powers and duties which safeguards the basic principle of equal rights of all states'.[105] The doctrine of sovereign equality was to be salvaged amidst its open denial. Before long capacity for rights as a condition for any kind of equality was to be dismissed; being treated as an illegitimate criterion. In Resolution 1514 of 1960 the UN General Assembly proclaimed: 'Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.'[106] Following a similar logic, the new UN abandoned the practice of the League of Nations of making successful applications for membership dependent upon capacity for self-defence.[107]

In the post-war world the discrepancy between the doctrine of equality and the real distribution of powers was as great, if not greater, than ever. To John Herz it had reached 'fantastic proportions'.[108] To Robert Jackson manifest lack of capacity suggested the need to ask what meaning sovereignty could conceivably have.[109] Yet the doctrine of equality, the doctrine of Vattel and the equality of the dwarf and the giant, increasingly triumphed in the sense that the normative presumption in favour of equality largely discredited principled arguments for hierarchy.[110] It was, moreover, an undifferentiated concept of equality that triumphed; one that owed more to the logic of Barbosa than that of Gentz and Dickinson.

It was this changing world in which Leo Gross published his article on the significance of the peace of Westphalia. There is nothing of significance in his account of the peace and its supposed significance that cannot be found earlier,

[103] *Documents of the UN Conference on International Organization*, vol. 11 (London: UN Information Organizations, 1945), p. 170.
[104] There were, of course, numerous other issues. See Simpson, *Great Powers*, pp. 165–93.
[105] *Documents of the UN Conference*, p. 107.
[106] Quoted in William Bain, *Between Anarchy and Society* (Oxford: Oxford University Press, 2003), p. 134.
[107] As noted by John H. Herz, *Politics in the Atomic Age* (New York: Columbia University Press, 1959), p. 78.
[108] John H. Herz, 'The Impact of the Technological Scientific Process on the International System', in A. A. Said (ed.), *Theory of International Relations: The Crisis of Relevance* (Englewood Cliffs: Prentice Hall, 1968), p. 117.
[109] Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990).
[110] For an account of the triumph and its significance see Allan James, 'The Equality of States: Contemporary Manifestations of an Ancient Doctrine', *Review of International Studies*, 18 (1992), pp. 377–91.

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especially in the work of Mirabelli which Gross refereed to so frequently. It is even possible to find, in a text published five years earlier by an Italian lawyer, Angelo Sereni, the following lament: 'it is high time to revise the current opinion that the Peace of Westphalia, in 1648, definitely established the full and exclusive right of the various independent European states over their territories. In most cases, their power was neither absolute nor exclusive nor equal over all parts of their territory'.[111] Sereni and his reservations about Westphalia were not remembered or extensively quoted in the following decades. Leo Gross's article became the standard reference point. There was no flurry of publications calling into question the doctrine of equality as there had been in the 1920s. It was no longer the case that it was merely difficult to correct the error of Mirablli and Gross, it was the case that almost no one even tried to. It is notable that a series of articles on the equality of states published in the *Political Science Quarterly*, beginning in 1945, set out from the Congress of Vienna and that it concluded with a two-part article by Adolf Lande entitled 'Revindication of the Principle of Legal Equality of States, 1871–1914'.[112] The presumption was that the principle of equality had been dominant before it was overturned at Vienna and had been reasserted. The purpose of the article was evident in the final sentence in which Lande asserted that the 'decay of the European Concert [. . .] conforms with the essential character of our international society' and warned both statesmen and commentators against 'drawing too hasty conclusions from the present position of the Great Powers in regard to the validity of the principle of the legal equality of states'.[113]

Conclusion

It has been argued that the claim that the sovereign equality of states was in any way established at the peace of Westphalia is wrong. Seventeenth and eighteenth century international society was essentially hierarchical in the minds of most statesmen and commentators. When the principle of equality did appear it was counterfactual and was espoused on the basis of natural law. The nineteenth century began with assertions of hierarchy, though there were signs of concessions to a qualified conception of equality. Only gradually, and not significantly until the end of the century did the abstract principle of equality, increasingly unqualified, become widespread and come to be linked with Westphalia. Even then and well into the interwar years both the principle and the linkage of sovereign equality and Westphalia met with strong opposition. Only after the Second World War, especially through the seminal article of Leo Gross, did the linkage become the accepted and for many year uncriticised norm. Gross's article is, then, bad history but it is possible to account for why this bad history gained hold when it did.

Yet this is not the only objection to Gross's account and perhaps not even the most important objection. For, as the case of Adolf Lande's article suggests, the

[111] Angel Piero Sereni, *The Italian Conception of International Law* (New York: Columbia University Press, 1943), p. 124.
[112] Adolf Lande, 'Revindication of the Legal Principle of the Equality of States, 1871–1914', *Political Science Quarterly*, 62 (1947), pp. 258–86 and 398–417.
[113] Lande, 'Revindication', p. 417.

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standard account of sovereign equality and Westphalia sets up a norm that fails to account for the behaviour of states and often for the justification of the behaviour. These deviations are then accounted for in terms of the predominance of power over ideas and the ideas, which are presumed to be the standard norm even for statesmen who deviate from them, must then be exposed as expressions of hypocrisy. It is precisely this logic that it is deployed by Stephen Krasner and is evident in his subtitle: *Organized Hypocrisy*. According to Krasner his account of the reality of the Westphalian model and the behaviour of states demonstrates that 'the logics of consequences dominate the logics of appropriateness'.[114] Now, Krasner's book goes far beyond the narrow focus on sovereign equality adopted here, but his own logic is quite plausible and consistent with respect to this focus if, and only if, the presumption of the dominance of the norm of sovereign equality is accepted. For most of the history considered here it has either not been accepted at all or has been contested. Behaviour deviant from the norm of sovereign equality, then, need not signify hypocrisy but simply different, non-egalitarian, norms. Moreover, it is arguable that the current dominance of the norm of sovereign equality and neglect of principled arguments for inequality do not serve us well.

That is suggested by the wide ranging discussion of hierarchy in the context of the idea of American hegemony. As Ian Clark has pointed out the fashionable invocation of American hegemony 'seldom rests on anything more than a view of US primacy, namely that the system is now unipolar, and the US enjoys an unprecedented preponderance of material resources within it'.[115] Against this understanding of hegemony Clark sets the idea of hegemony as '*an institutionalized practice of special rights and responsibilities conferred on a state with the resources to lead*'.[116] Similarly, Torbjørn Knutsen has argued that throughout history hegemony has involved 'pre-eminence which is sustained by a shared understanding among social actors of the values, norms, rules and laws of political interaction; of patterns of authority and the allocation of status and prestige, responsibilities and privileges'.[117] Such statements are closer to the language of the great powers at San Francisoco, Dickinson, Barboasa's opponents at the Hague, Gentz, Kaunitz and even those irritated French negotiators of the peace of Westphalia than to the language of Leo Gross in 1948. The final reason then for seeing the linkage of Westphalia and sovereign equality as what it is, a relatively recent and initially contested product of history, is that it gives us access to a far richer vocabulary for understanding not only the past but also the present.

[114] Krasner, *Sovereignty*.
[115] Ian Clark, 'Bringing Hegemony Back in: The US and International Order', *International Affairs*, 85 (2009), p. 23. See also the same author's 'How Hierarchical Can International Society Be?', *International Relations*, 23 (2009), pp. 464–80 and 'Towards and English School Theory of Hegemony', *European Journal of International Relations*, 15 (2009), pp. 203–28.
[116] Clark, 'Bringing Hegemony Back in', p. 24.
[117] Torbjørn Knutsen, *The Rise and Fall of World Orders* (Manchester: Manchester University Press, 1999), p. 11.

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