The Mutual Guarantee of the Peace of Westphalia in the Law of Nations and Its Impact on European Diplomacy

Patrick Milton

University of Cambridge

plm29@cam.ac.uk

Received: 25 April 2018; Revised: 14 March 2019; Accepted: 17 June 2019;

Published online: 13 March 2020

Abstract

This paper seeks to investigate how the mutual guarantee clauses of the treaties of Westphalia, which ended the Thirty Years War in 1648, affected European diplomacy until the late eighteenth century. It will first analyse the reception and impact of the guarantee of the Peace of Westphalia in the European Law of Nations and in subsequent treaty law. Secondly, it will assess the practical impact of this feature of the Law of Nations on European diplomacy, and how this influence changed over time. This will also include an analysis of how diplomacy and shifting power-political currents altered the content of the guarantee in the Law of Nations. In analysing the guarantee's influence on diplomacy, the paper places a particular emphasis on Franco-Imperial and Swedish-Imperial relations, as well as the perception of the guarantee among diplomats and other political actors during political, constitutional and confessional conflicts within the Holy Roman Empire.

Keywords

Peace of Westphalia – treaty guarantee – European international relations – Holy Roman Empire

1 Introduction

The guarantee of the Peace of Westphalia remains one of the more under-researched aspects of the treaties of Münster and Osnabrück (*Instrumentum Pacis Monasteriensis*, IPM and *Instrumentum Pacis Osnabrugensis*, IPO), which were signed on 24 October 1648 and which ended the Thirty Years War.¹ Apart from some informative essays which resulted from research conducted on the basis of the scholarly editing of the diplomatic correspondence surrounding the congress negotiations at Westphalia – the *Acta Pacis Westphalicae*² – and which include useful material on the negotiations leading up to the final guarantee clauses,³ little has been published on the guarantee, and specifically on how it operated in practice during the subsequent 150 years. Among the post-1800 literature, the only two essays which specifically address the Westphalian guarantee were published in the 1930s and 1940s, and these also remained limited to focussing on the guarantee's theoretical foundations in the Law of Nations.⁴ This is surprising, not least because the literature on almost all aspects of the Peace of Westphalia is immense.⁵ For, as will be argued in this essay, it was the guarantee which not only made Westphalia particularly influential in the subsequent Law of Nations, but also ensured that it would have such a great impact on European diplomatic history.

In the nineteenth century German literature – which was largely aimed at legitimising the Borussian *kleindeutsch* project of unification and thereby

- 1 On the position of Westphalia, as well as previous international treaties in the history of international law, see Lesaffer, Randall. 'The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Treaties Prior to 1648'. *Grotiana* 18 (1997), 71–95; idem., 'The International Dimension of the Westphalia Peace Treaties: A Juridical Approach', in *350 años de la Paz de Westfalia: Del antagonismo a la integración en Europa*, ed. Fernando Villaverde (Madrid: Biblioteca Nacional – Fundación Carlos de Amberes, 1999), 291–310.
- 2 Vereinigung zur Erforschung der Neueren Geschichte / Zentrum für Historische Friedensforschung, Bonn, *Acta Pacis Westphalicae* (multiple volumes, Münster: Aschendorff, 1962–present) [hereafter APW].
- 3 Braun, Guido. 'Die französische Diplomatie und das Problem der Friedenssicherung auf dem Westfälischen Friedenskongress', in *Assecuratio Pacis: Französische Konzeptionen von Friedenssicherung und Friedensgarantie 1648–1815*, ed. Guido Braun (Münster: Aschendorff Verlag, 2011), 67–130; Brunert, Maria-Elisabeth. 'Friedenssicherung als Beratungsthema der protestantischen Reichsstände in der Anfangsphase des westfälischen Friedenskongresses', in *Frieden und Friedenssicherung in der Frühen Neuzeit: Das Heilige Römische Reich und Europa*, eds. Guido Braun and Arno Strohmeier (Münster: Aschendorff Verlag, 2013), 229–258.
- 4 Wehberg, Hans. 'Die Schieds- und Garantieklausel der Friedensverträge von Münster und Osnabrück'. *Die Friedens-Warte* 48(6) (1948), 281–289; Toscano, Mario. 'Sicurezza collettiva e garanzie internazionali nei trattati di Vestfalia', in *Rivista Storica Italiana* 56 (1939), 387–414.
- 5 For material published before 1996, see Duchhardt, Heinz, Eva Ortlieb and Matthias Schnettger, eds. *Bibliographie zum Westfälischen Frieden* (Münster: Aschendorff Verlag, 1996).

delegitimising the old Austrian-led Empire – the guarantee was portrayed as one of the worst aspects of an already regrettable peace treaty, which supposedly surrendered the Empire's statehood and subjected it to permanent French control.⁶ In the more recent historiography, the guarantee is portrayed as having been ineffective and irrelevant in practice, and it is argued that the external guarantors, France and Sweden, simply abused their roles and thereby permanently discredited the guarantee.⁷ The argument posited here is that this is largely an oversimplification. An analysis of the practical application of this aspect of the Law of Nations reveals that it did have a significant impact on European diplomacy, and that it was not only abused by the external guarantors.

As is well known, the Peace of Westphalia occupies a special place in the disciplines of political science and the history of international law, which portray the peace as a watershed that supposedly established a system of sovereign nation states, based upon the principle of legal equality and non-intervention in domestic affairs.⁸ While some historians make similar claims,⁹ on the whole specialists in early modern European history have decisively rejected this

6 E.g. Treitschke, Heinrich von. *Deutsche Geschichte im 19. Jahrhundert* (Leipzig: Hirzel, 1879), 12; von Ranke, Leopold. *Französische Geschichte, vornehmlich des 16. und 17. Jahrhunderts* (Stuttgart: Koehler, vol. 2, 1954), 359–360.

7 Schmidt, Georg. 'Der Westfälische Friede als Grundgesetz des komplementären Reichs-Staats', in 1648. *Krieg und Frieden in Europa. Textband 1, Politik, Religion, Recht und Gesellschaft*, eds. Klaus Bussman and Heinz Schilling (Münster and Osnabrück, 1998–1999), 447–454, at 449; Osiander, Andreas. 'Sovereignty, International Relations, and the Westphalian Myth'. *International Organization* 55(2) (2001), 251–287, at 266; Croxton, Derek and Anuschka Tischer. *The Peace of Westphalia: A Historical Dictionary* (Westport and London: Greenwood Press, 2002), 14–15.

8 E.g.: Gross, Leo. 'The Peace of Westphalia 1648–1948'. *American Journal of International Law* 42(1) (1948), 20–41; Münkler, Herfried. *Der Dreissigjährige Krieg. Europäische Katastrophe, deutsches Trauma, 1618–1648* (Berlin: Rowohlt, 2017), 22–31, 36–39, 817–843; Philpott, Daniel. *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: 2001), 4, 30, 85; Fowler, Michael Ross and Julie Marie Bunck. *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park, PA: 1995), 65; Luard, Evan. *The Balance of Power: The System of International Relations, 1648–1815* (Basingstoke: 1992); McGraw, Anthony. 'Globalization and Global Politics', in *The Globalization of World Politics*, eds. John Baylis, Steve Smith et al. (Oxford: 2011), 23; Jackson, Robert. *The Global Covenant. Human Conduct in a World of States* (Oxford: 2000), 385, 398.

9 E.g. Beales, Derek. *Joseph II* (Cambridge: Cambridge University Press, 2 vols., 1987–2009), vol. 2, 410–11; Weber, Wolfgang Eduard Josef 'Von der normativen Herrschaftspflicht zum interessenpolitischen Instrument. Zum Konzept der Protektion in der politischen Theorie der Frühen Neuzeit', in *Protegierte und Protektoren*, eds. Tilman Haug et al. (Vienna, Cologne, Weimar: Böhlau, 2016), 31–48, at 44–45; Hughes, Michael. *Law and Politics in Eighteenth-Century Germany: The Imperial Aulic Council in the Reign of Charles VI* (Woodbridge: Boydell, 1988), 16–17; Sheehan, James J. *German History 1770–1866* (Oxford: Oxford University Press, 1994), 16.

'Westphalian myth' as being anachronistic by back-projecting much later developments and theories associated primarily with Vattel.¹⁰ Despite its incredible tenacity,¹¹ this Westphalian myth has already been thoroughly debunked, both with regard to its 'internal-constitutional' variety (which asserts that the treaties granted the Imperial Estates full sovereignty),¹² and with regard to its 'international' variety (which claims that the peace established the sovereign nation-state model).¹³ The relevant point here is that by granting France and Sweden a qualified right to intervene in the Empire, it was specifically the guarantee clauses which contributed, along with other features, to an *increased* scope for intervention in the internal affairs of other rulers, as opposed to an alleged curbing of such interference. Also, contrary to the Westphalia of myth, it cannot be regarded as the foundation of a balance-of-power system, because its restrictions on the Emperor's and the princes' choices of alliance were incompatible with alliance fluidity which a balance-of-power system requires.¹⁴

- 10 Pitts, Jennifer. 'Intervention and Sovereign Equality: Legacies of Vattel', in *Just and Unjust Military Intervention. European Thinkers from Vitoria to Mill*, eds. Stefano Recchia and Jennifer M. Welsh (Cambridge: Cambridge University Press, 2013), 143; Simms, Brendan. 'A False Principle in the Law of Nations': Burke, State Sovereignty, [German] Liberty and Intervention in the Age of Westphalia', in *Humanitarian Intervention: A History*, eds. Brendan Simms and David J. B. Trim (Cambridge: Cambridge University Press, 2011), 89–110; Kampmann, Christoph. 'The English Crisis, Emperor Leopold, and the Origins of the Dutch Intervention in 1688'. *The Historical Journal* 55 (2012), 521–532; idem., 'Das "Westfälische System", die Glorreiche Revolution und die Interventionsproblematik'. *Historisches Jahrbuch* 131 (2011), 65–92.
- 11 It is sometimes reasserted in spite of all evidence to the contrary: Sofer, Sasson. 'The Prominence of Historical Demarcations: Westphalia and the New World Order'. *Diplomacy and Statecraft* 20(1) (2009), 1–19.
- 12 Burkhardt, Johannes. 'Der Westfälische Friede und die Legende von der landesherrlichen Souveränität', in *Landes- und Reichsgeschichte: Festschrift für Hansgeorg Molitor zum 65. Geburtstag*, eds. Jörg Engelbrecht and Stephan Laux (Bielefeld: Verlag für Regionalgeschichte, 2004), 199–220.
- 13 E.g.: Duchhardt, Heinz. 'Das "Westfälische System": Realität und Mythos', in *Akteure der Außenbeziehungen. Netzwerke und Interkulturalität im Historischen Wandel*, eds. Hillard von Thiesen and Christian Windler (Cologne: Böhlau, 2010), 393–402; Beaulac, Stephane. 'The Westphalian Legal Orthodoxy - Myth or Reality?'. *Journal of the History of International Law* 2(2) (2000), 148–177; Croxton, Derek. 'The Peace of Westphalia of 1648 and the Origins of Sovereignty'. *International History Review* 21(3) (1999), 569–591; Wilson, Peter H. *Europe's Tragedy: A New History of the Thirty Years War* (London: Penguin Books, 2010), 776–778; Schmidt, Georg. 'Der Westfälische Frieden – eine neue Ordnung für das alte Reich?', in *Wendemarken in der Deutschen Verfassungsgeschichte: Tagung der Vereinigung für Verfassungsgeschichte*, ed. Reinhard Mußnug (Berlin: Duncker & Humblot, 1993), 45–84.
- 14 Repgen, Konrad. 'Der Westfälische Friede und die Ursprünge des europäischen Gleichgewichts', in *Von der Reformation zur Gegenwart. Beiträge zu Grundfragen der*

Although many of the traditional assumptions relating to Westphalia in the history of international law are misguided, Westphalia was in many ways absolutely seminal in the Law of Nations, as will be argued here.

As the topic at hand is the guarantee of an international peace treaty this essay will focus on that sphere of the Law of Nations in which it was most influential, namely the positive treaty-law, as opposed to the natural law based writings of jurist-philosophers. This is not to deny that both positive treaty law and the academic works of jurists and political philosophers had an impact on practical diplomatic relations, and indeed that they both evolved synergetically, as well as the fact that the authors were often instrumental in defining a consensus on contested issues in international law. Nevertheless, positive law as contained in treaties and constitutional documents were more important in justifying and legitimating policies and decisions by rulers and diplomats. Ultimately the practitioners were the authors of the treaties-based Law of Nations which provided the framework for their co-existence, along with the mutual recognition of living in a shared Christian culture regulated by norms of princely conduct.¹⁵

This article argues that, contrary to the way the guarantee is commonly – and cursorily – portrayed in the existing literature, the mutual guarantee of Westphalia was neither irrelevant nor was it completely ineffective, despite its deficiencies, both conceptually and in practice. It succeeded in ensuring that the Holy Roman Empire was not drawn back into the ongoing war between Spain and France, and it also helped to ensure that many of the rights (both subjects' and princes') were upheld. Numerous diplomatic steps and actual interventions were justified on the basis of the guarantee, which gave such measures a higher degree of legitimacy than they otherwise would have possessed. It therefore had a tangible practical effect. Considering the extent to which the guarantee was effective or successful is less important for the purposes of this article than demonstrating that this instrument of the Law of Nations had a long-lasting impact on European diplomacy and geopolitics. However, in determining and reassessing the success of the guarantee – which is usually underestimated in the existing literature – the relevant criterion is simply the extent to which it contributed to its professed aims. These were chiefly the security of the peace, most importantly the shielding of the Empire

neuzeitlichen Geschichte, ed. Klaus Gotto and Günter Hockerts (Paderborn: Schöningh, 1988), 53–66.

15 Tischer, Anuschka. *Offizielle Kriegsbegründungen in der Frühen Neuzeit. Herrscherkommunikation in Europa zwischen Souveränität und korporativem Selbstverständnis* (Münster: Lit, 2012), 58–78 et passim.

from the ongoing Franco-Spanish War in the short term, and in the medium and longer term the defence of a catalogue of confessional, corporate and princely political rights, as well as the maintenance of the religious peace and the general constitutional framework within the Empire. According to these criteria, the guarantee was by no means a failure, despite episodic abuses or the inability of one or more of the guarantors to carry out their responsibilities under the guarantee.

The Westphalian guarantee was arguably much more impactful and successful than other early modern treaty guarantees, such as the guarantee of the Treaty of Oliva (1660), which failed to prevent or censure the violation of Protestant rights in the Polish-Lithuanian Commonwealth during a crisis in 1724–1725, or the semi-guarantor status over Christian subjects in the Ottoman Empire granted to Russia at the Treaty of Kuchuk-Kainarji in 1774. The Westphalian guarantee was also more effective than the Russian guarantee of the Treaty of Teschen of 1778 (itself sometimes interpreted as an extension of the Westphalian guarantee), which did little to uphold ‘German Liberties’ in the Empire, and instead merely geopolitically instrumentalised the guarantee in support of Russia’s Austrian ally.¹⁶

2 The Establishment of the Mutual Guarantee Clauses

The question of how to secure and safeguard the peace through a guarantee (*assecuratio pacis*) played an important role in the five years or so that it took to negotiate the peace at Münster and Osnabrück.¹⁷ Even before the congress was opened, it was considered by the French premier Cardinal Richelieu to be one of the most crucial elements in ensuring that French security would be preserved after the conclusion of a peace, not least because of the dimensions and multitude of interlocking conflicts characterising the Thirty Years War. According to his early conception of the securing or safeguarding of the peace, two leagues were to be established for Italy and Germany, whereby all contracting parties would immediately enforce the peace terms collectively if a breach had taken place. Richelieu therefore envisioned a system of collective

16 Milton, Patrick, ‘Debates on Intervention against Religious Persecution in the Polish-Lithuanian Commonwealth: European Reactions to the Tumult of Thorn, 1724–1726,’ in *European History Quarterly* 47(3) (2017), 405–436; Duchhardt, Heinz. *Balance of Power und Pentarchie 1700–1785* (Paderborn: Ferdinand Schöningh, 1997), 404; von Aretin, Karl Otmar. ‘Russia as a Guarantor Power of the Imperial Constitution under Catherine II.’ *Journal of Modern History* 58 (1986), 141–160.

17 Dickmann, Fritz. *Der Westfälische Frieden* (Münster: Aschendorff, 1998), 332–343.

security for Europe.¹⁸ Under the new head of the French government, Cardinal Mazarin, this conception of guaranteeing the peace was retained, and although the solution adopted was slightly different, the key notion that each party should mutually and reciprocally guarantee every treaty term was achieved.¹⁹ The reason France pushed so emphatically for a mutual guarantee was that its leading statesmen mistrusted Habsburg Spain (and to a lesser extent Emperor Ferdinand III of the Austrian branch of the Habsburgs) so deeply, that they feared having to face them alone in case of the expected post-war Habsburg attempt at revanchism.

There were considerable disagreements over who the guarantors should be. According to the initial Swedish proposal of 1644, the guarantors would be able to immediately intervene militarily if a breach of the treaty terms was believed to have occurred, but the proposed guarantors would be limited to France, Sweden and their allies among the German princes – which would have rendered the guarantor powers largely Protestant. France on the other hand wanted all signatories of the eventual treaties to be granted guarantor status in order to further the goal of a system of collective security. The Emperor, on the other hand, found it hard to accept the French and Swedish demands that the Imperial Estates – the Emperor's subjects – be included as guarantors.²⁰ However, the Emperor was not opposed to the guarantee in principle – indeed, according to Vienna its scope did not go far enough because of the omission of Habsburg Spain from the list of guarantors.²¹

The guarantee was also discussed extensively by the envoys of the Imperial Estates. Interestingly, many of the German princes were hardly enthusiastic about the prospect of granting the foreign crowns a right to intervene in the Empire, and were also wary about shouldering the international duties of becoming guarantors in their own right. Many of the Catholic princes and the

18 Dickmann, Fritz. 'Rechtsgedanke und Machtpolitik bei Richelieu. Studien zu neu entdeckten Quellen', in *Friedensrecht und Friedenssicherung. Studien zum Friedensproblem in der Geschichte*, ibid. (Göttingen: 1971), 36–78; Weber, Hermann. "Une bonne paix". Richelieu's Foreign Policy and the Peace of Christendom', in *Richelieu and His Age*, eds. Joseph Bergin and Lawrence Brockliss (Oxford: Oxford University Press), 45–69.

19 See the main French instructions for its plenipotentiaries at Münster: APW I 1, ed. Fritz Dickmann et al. (Münster: Aschendorff, 1962), 58–123.

20 Braun, 'Die französische Diplomatie' 2011 (n. 3).

21 *Acta Pacis Westphalicae* II A 9, May–August 1648, ed. Stefanie Fraedrich-Nowag (Münster: Aschendorff, 2013), 332. This shows that there was not much opposition to the notion of treaty enforcement and the concomitant risk of intervention in principle; instead the actors wished to create opportunities for legally-grounded interventions by presumed allies, as they assumed that the power-political alignments of the Thirty Years War would probably persist in post-war geopolitical constellations.

Emperor were also reluctant to give the foreign crowns a legal title to intervene in the Empire as guardians of the Imperial constitution. The early signalling of France that it was determined to place the treaty under a general, mutual guarantee, was crucial in persuading many of the smaller princes, especially the Protestants, that a settlement was viable, because it would help ensure that the Catholics and the Emperor would not renege on their confessional concessions. For France, conversely, the guarantee ensured that a collective effort could be launched against the Emperor if he violated the 'non-assistance clause' by giving aid to his Spanish cousins in the ongoing Franco-Spanish War. Both crowns saw their ability to safeguard princely liberties as enshrined at Westphalia, and the Imperial constitution in general, as essential to preventing the establishment of Habsburg absolutism in the Empire, the perceived threat of which had led to their interventions in this Imperial civil war in the first place.²²

The adopted guarantee clauses (IPO Article 17, §§ 4–5; IPM §§ 115–116) stated that each contracting party, namely France, Sweden, the Emperor and the Empire, in other words the Imperial Estates, was obliged as a guarantor to uphold each and every aspect of the peace settlement, even those that did not directly affect them.²³ The peace which was being guaranteed formally re-established the 'Eternal Territorial Peace', which had outlawed inter-territorial violence in the Empire since 1495. Before the guarantee could be exercised by force, the offended or injured party would need to seek redress through amicable settlement or litigation, and to wait three years before calling upon the guarantors to exercise the guarantee. The Emperor managed to insert the three-year waiting period expecting this would ensure that most of the anticipated disputes over Westphalian terms within the Empire would be litigated at the Imperial courts under his judicial authority in the first instance. This rather impractical sequence of steps ensured that the guarantee was never implemented in the manner exactly stipulated, but as we shall see, several de facto guarantor interventions were carried out, and its deterrent effect was considerable. While it did not create a 'universal' system of collective security covering all of Christian Europe as Richelieu had originally intended, it did safeguard the central European theatre as a shared space and security zone under the supervision of the mutual guarantors. The mutuality and reciprocity

22 Brunert, 'Friedenssicherung als Beratungsthema' 2013 (n. 3); Ruppert, Karsten. *Die kaiserliche Politik auf dem Westfälischen Friedenskongreß (1643–1648)* (Münster: Aschendorff, 1979), 107, 117.

23 For the treaty text, see Internet-Portal Westfälische Geschichte, http://www.lwl.org/westfaelische-geschichte/portal/Internet/finde/langDatensatz.php?urlID=741&url_tabelle=tab_quelle.

of the guarantee of all clauses was an effective means of adequately addressing the contracting parties' security fears of being attacked or undermined again post-war, at a time when mutual trust was lacking.²⁴

3 The Impact of the Guarantee on the Law of Nations

The guarantee was very innovative. Guarantees themselves were not new. But according to theorists of the Law of Nature and Nations, and also inter-state practice, a guarantor should be a neutral third party seen as higher ranking than the actual treaty signatories, for example the Pope.²⁵ At Westphalia, for the first time, the warring parties and treaty signatories themselves guaranteed their own peace treaty, including the lower-ranking Imperial Estates who lacked full sovereignty. The reciprocal and mutual nature of the guarantee was also an innovation, although it was to some extent unevenly reciprocal in the sense that it provided for a one-sided intervention in internal affairs affecting the Empire only. Also, France, for example, was guaranteeing the religious rights of Germans that it was denying its own subjects.

Fundamentally, the external guarantee tied the public law of the Holy Roman Empire to the Law of Nations, by creating an international responsibility to uphold the Imperial constitution. This is because the Westphalian treaties were simultaneously a fundamental constitutional law for the Empire, and an international peace treaty. The guarantee therefore anchored German constitutional law to a collective enforcement and compliance mechanism under international law. The guarantee added a further level to the legal hierarchy of Imperial Estates subordinated to the Emperor and Empire, by bestowing the external guarantors with a duty and right to uphold the recalibrated Imperial constitution. Thus, the guarantee granted the 'external' guarantors a legal right

24 This has also been pointed out by Christoph Kampmann in his unpublished paper 'Impulsvortrag zu Beginn des Werkstattgesprächs "Westphalia for the Middle East"' presented on 31 August 2016 in Berlin at the German Foreign Office.

25 This traditional view persisted in many post-1648 works by natural law theorists writing on the Law of Nations: Pufendorf, Samuel. *The Whole Duty of Man According to the Law of Nature*, eds. Ian Hunter and David Saunders, trans. Andrew Tooke (Indianapolis: Liberty Fund, 2003), 244; Wolff, Christian. *Grundsätze des Natur- und Völkerrechts, worinn alle Verbindlichkeiten und alle Rechte aus der Natur des Menschen in einem beständigen Zusammenhange hergeleitet werden* (Halle: Renger, 1754), 837–838; de Vattel, Emer. *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, eds. Béla Kapossy and Richard Whitmore (Indianapolis: Liberty Fund, 2008), 396.

to intervene in the domestic affairs of another state under certain circumstances. This was unprecedented in European history.²⁶

Legal scholars particularly German writers in the public law tradition, generally held the guarantee in high regard, just as they did the peace settlement in general. Johann Stephan Pütter, for example, described the guarantee provision as 'highly praiseworthy'.²⁷ Natural law authors exhibited a greater awareness of the shortcomings of the guarantee clauses, such as the lack of provision for an adjudicating body to determine whether a breach of treaty terms had in fact taken place. Many writers' interpretations of the guarantee were naturally influenced by current events. Under the impression of the ascendancy of Louis XIV, Samuel Pufendorf lamented how France was abusing the guarantee. At a later stage, authors such as Johann Jacob Moser and Johann Christoph Steck, without denying the laudable nature of the guarantee, sought to set limitations to the ways in which it could be applied, such as by insisting that an appeal by an injured party was necessary for the guarantee to be activated, and by underlining that any exercise of the guarantee would have to be in conformity with universally valid principles of natural law.²⁸

In terms of positive treaty law, Heinhard Steiger has demonstrated that Westphalia cannot be viewed as a fundamental basic law of Europe, contrary to the Westphalian myth. However, it is undeniable that the peace left a clear imprint on subsequent treaty law, as a basic instance that was continuously referred back to.²⁹ Prominent innovations of Westphalia in the Law of Nations such as the instrument of the multilateral congress and the neutralisation of religious canon law do not concern us here, as they were not directly related to the guarantee. It is important to note that it was the guarantee which largely ensured that the treaties' immediate legal effects had a broader European

26 For the use of legal and other argumentation in governments' justifications of interventions in other states' domestic affairs, see Tischer, Anuschka. 'Grenzen der Souveränität: Beispiele zur Begründung gewaltsamer Einmischung in "innere Angelegenheiten" in der Frühen Neuzeit'. *Historisches Jahrbuch* 131 (2011), 41–64.

27 Pütter, Johann Stephan. *Der Geist des Westfälischen Friedens; nach dem Buchstaben und Sinn desselbigen* (Göttingen: Vandenhoeck und Ruprecht, 1795), 543. See also Moser, Johann Jacob. *Von der Garantie des Westphälischen Friedens; nach dem Buchstaben und Sinn desselbigen* (Stuttgart: 1767).

28 See Milton, Patrick. 'Guarantee and Intervention: The Assessment of the Peace of Westphalia in International Law and Politics by Authors of Natural Law and of Public Law, c. 1650–1806', in *The Law of Nations and Natural Law, 1625–1850*, ed. Simone Zurbuchen (Leiden: Brill, 2018).

29 Steiger, Heinhard. 'Der Westfälische Frieden – Grundgesetz für Europa?', in *Der Westfälische Friede. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte*, ed. Heinz Duchhardt (Munich: Oldenbourg Verlag, 1998), 33–80.

scope than the internal constitutional matters of the Empire with which the peace primarily dealt. For it was precisely in their capacity as *guarantors* of the peace that the signatories referred back to Westphalia and its guarantee when they concluded subsequent peace treaties, especially those involving the Empire. This was the case, for example, in the treaties of Nijmegen in 1679, Ryswick in 1697, Rastatt/Baden in 1714, and Teschen in 1779. Through these references, the basic order of Westphalia was reaffirmed by its guarantors as the 'foundation', 'fundamental norm' or 'unchangeable basis' of relations among them and within the Empire, following a temporary suspension during the preceding wars.³⁰

Taking a longer-term perspective, it can plausibly be argued that by placing the confessional rights of religious groups under international guarantee, the peace of Westphalia and its guarantee clauses helped to establish the principle of internationally guaranteed minority rights as a part of the positive Law of Nations.³¹

4 The Impact of the Guarantee on European Diplomacy

4.1 *The Rhenish Alliance, 1658–1668*

For the first two decades after the conclusion of the peace settlement, the guarantee was crucial in maintaining the order of peace established for central Europe, and in preventing the Empire being drawn back into the ongoing Franco-Spanish War. In 1658, both external guarantors concluded the cross-confessional Rhenish alliance, or *Rheinbund*, with numerous German princes, while excluding the Emperor. It was under the framework of this alliance that the external guarantors, and especially France under Cardinal Mazarin, first exercised considerable influence in the Empire in this new capacity of a guarantor.³²

Being more or less on the losing side in 1648, the Emperor was perceived as a continuing threat to the stability and peace of the Empire, as well as to princely prerogatives, as it was widely believed that he wanted to renege on the concessions forcefully extracted from him. The peace settlement had crucially

30 Steiger, Heinhard. 'Konkreter Friede und allgemeine Ordnung – Zur rechtlichen Bedeutung der Verträge vom 24. Oktober 1648', in *1648: Krieg und Frieden in Europa*, eds. Klaus Bußmann and Heinz Schilling (Münster: Aschendorff, 1998), 137–146.

31 Steiger, 'Grundgesetz' 1998 (n. 29), 78.

32 Schnur, Roman. *Der Rheinbund von 1658 in der deutschen Verfassungsgeschichte* (Bonn: Schöningh, 1955); Peters, Martin. 'Interpretationen des Rheinbundes im Wandel der Zeit', in *Der Erste Rheinbund (1658)*, <https://www.historicum.net/purl/1e2/>.

stipulated that the Austrian Habsburgs were prohibited from assisting their Spanish Habsburg cousins in the Franco-Spanish War. It was the well-founded apprehension among the princes at the seeming willingness of Austria to provide this assistance that pushed the princes and France closer together. The princes along the Rhine were particularly concerned that such help could spread disturbances to their territories and suck the Empire back into war, given that Spain retained the southern Netherlands. This explains why the Rhenish mutual defence alliance grounded itself so consciously in the Peace of Westphalia, and particularly in its guarantee clauses. The treaty text stated that the alliance was conceived as a measure to ensure the implementation of 'the general guarantee as instructed by the Peace of Westphalia, for the maintenance of peace'.³³ The alliance can be seen as the continuation of the so-called 'Third Party' of princes that had emerged in the later stages of the Westphalian congress. It had consisted of a cross-confessional grouping of middling princes willing to compromise purely for the sake of peace.³⁴ The Archbishop-Elector of Mainz, Johann Philipp von Schönborn, who was the chief architect of the alliance, argued that 'this alliance is nothing other than the implementation of ... the Peace of Münster and its general guarantee'.³⁵ When looking at the archival material of the Elector of Mainz from this period, it is striking how often reference is made to the guarantee which was seen as absolutely crucial in maintaining the hard-won peace.³⁶

The formation of the alliance and especially the inclusion of France as a guarantor did indeed have a pacifying and stabilising effect in the west of the Empire. It isolated Spain and it represented a clear message and articulated

33 Haus-, Hof- und Staatsarchiv, Vienna (hereafter HHStA), Allgemeine Urkundenreihe, 1658 VIII 14: 'zu Erhaltung des Friedens ... die general guarantie nach anleitung des Instrumentum Pacis ... eingerichtet werden möge'.

34 Westphal, Siegrid. *Der Westfälische Frieden* (Munich: C. H. Beck, 2015), 88–90; Tischer, Anuschka. 'Die Vorgeschichte des ersten Rheinbunds von 1658', in *Der Erste Rheinbund (1658)*, <https://www.historicum.net/purl/1dy/>.

35 HHStA, Mainzer Erzkanzler Archiv (hereafter MEA), Reichstag 204: Princes and Electors of the Rhenish alliance to Emperor Leopold I, Frankfurt, 18 January 1659 and Draft notes on the public notifications and diplomatic justifications of the alliance, by Mainz, n.p., n.d. [early 1659]: 'diese alliance nichts anders ist, als die Wercklichkeit der executions ordnung, Creis verfassung ... und der Muensterische Friedensschluss, und dessen general und special guarantiae'.

36 E.g., HHStA, MEA, Reichstag 205, Electoral Mainz envoy Philipp von Vorburg to Johann Philipp, Elector of Mainz, Frankfurt, 26 August 1659, and protocol of Deputation Diet at Frankfurt, 19 March 1659; HHStA, MEA, Reichstag 204, Johann Philipp, Elector of Mainz to Bernhard Christoph von Galen, Prince-Bishop of Münster, 10 June 1659.

threat to the Emperor, that the other Westphalian signatories were determined to activate the guarantee if he were to help his Spanish relatives. This threatened implementation of the guarantee thereby obliged him to keep his conduct within the bounds of his treaty obligations. The prestige which France as the chief guarantor enjoyed in this period is clear from the decision of various German princes to appeal to Paris, rather than Vienna, in such cases as dynastic disputes and inter-territorial squabbles, matters which the office of the emperorship was formally more authorised to deal with.³⁷ This was a clear illustration of the political and diplomatic impact of the guarantor status. Before shifting towards a policy of aggressive expansionism in the late 1660s, therefore, Louis XIV was viewed as an alternative protector to the Emperor.³⁸

4.2 *The Wars of Louis XIV*

From 1648 and up to the end of the eighteenth century, French diplomats viewed their king's guarantee as one of the most important jewels in his crown. They viewed the guardianship over the Imperial constitution that went with it as key to preventing the emergence of a centralised Imperial monarchy capable of external power-projection, which would have catastrophically undermined French security. It is striking that well into the eighteenth century, French diplomats stressed the crucial importance of the guarantee both in public justifications of alliances and other policies towards Germany, and in confidential internal diplomatic correspondence.³⁹

For the guarantors to effectively carry out their role, however, their policies would have to respect the Imperial constitution as the guarantee applied to it above all. Under the personal rule of Louis XIV, the opportunities of the guarantee were squandered with an aggressive policy of military conquest towards the Rhine. The fact that Louis half-heartedly tried to use his guarantor status as a pretext for self-aggrandisement had a particularly deleterious effect on the reputation of the external guarantee among Germans in the late seventeenth

37 E.g., *ibid.*, Eberhard, Duke of Württemberg, to Johann Philipp, Elector of Mainz, n.p., 17 June 1659.

38 Schnur, *Rheinbund* 1955 (n. 32), 73–83.

39 See, for example, the diplomatic instructions for Duc de Richelieu, Marly, 28 March 1725, in *Recueil des Instructions données aux Ambassadeurs et Ministres de France depuis les Traités de Westphalie jusqu'à la Révolution Française*, ed. Albert Sorel (Paris: vol. 1, 1884), 208, and the instructions for Michel de Vilebois from 1 July 1729, in *Recueil des Instructions données aux Ambassadeurs et Ministres de France depuis les Traités de Westphalie jusqu'à la Révolution Française. Vol. XXVIII, États Allemands, Part 1, L'Électorat de Mayence*, ed. Georges Livet (Paris: 1962), 138–150.

century.⁴⁰ About a century later, a member of the French foreign ministry reminisced: 'One no longer saw the king as a guarantor of the peace of Westphalia, but as the most dangerous enemy of German Freedom'.⁴¹

Emperor Leopold I, on the other hand, eschewed such rapacious great-power politics within the Empire, and largely followed the traditions and precepts of Imperial law, thereby gradually establishing himself as the more reliable guarantor of Westphalia, and defender of the Imperial constitution against French aggression.⁴² From the 1670s, the Emperor and the Most Christian King therefore switched roles in the eyes of many German princes. It was especially during the Dutch War, when both external guarantors were at war with the Empire, that the guarantee was viewed most suspiciously. Political pamphlets appeared at this time, bearing such titles as 'Considerations on how both crowns France and Sweden favour highly disadvantageous things for the Empire under the pretext of the guarantee of Westphalia' (1676).⁴³

4.3 *The Resurgence of the External Guarantee under Sweden's Charles XII*

Sweden's role as a guarantor had been rather low-key for most of the second half of the seventeenth century. This changed dramatically when King Charles XII burst onto the scene during the Great Northern War and carried out a spectacular intervention in 1707 against Emperor Joseph I, on the basis of the guarantee of Westphalia. Lutheran Sweden had been instrumental in securing princely and Protestant rights in the treaties of Westphalia.⁴⁴ But its

40 Tischer, *Offizielle Kriegsbegründungen* 2012 (n. 15), 141. See also Wrede, Martin. *Das Reich und seine Feinde. Politische Feindbilder in der reichspatriotischen Publizistik zwischen Westfälischem Frieden und Siebenjährigem Krieg* (Mainz: Philipp Zabern, 2004).

41 Quoted in Externbrink, Sven. 'Staatsystem und kulturelles Gedächtnis. Frankreich, das Alte Reich und Europa (17.–18. Jh.)', in *Kulturelles Gedächtnis und interkulturelle Rezeption im europäischen Kontext*, eds. Eva Dewes and Sandra Duhem (Berlin: Akademie Verlag, 2008), 89–102, at 93 ('on ne vit plus dans le Roi, garant de la paix de Westphalie, que l'ennemi le plus dangereux de la liberté Germanique').

42 Aretin, Karl Otmar von. *Das Alte Reich, 1648–1806* (vol. 1, Stuttgart: 1993).

43 Archistor, Philaethus. *Raisonnement. Reiff-erwogenes Staats-Bedencken, wie beede Cronen Franckreich und Schweden unter dem Praetext der im Instrumento Pacis ihnen überlassenen Garantie dem Römischen Reich höchstnachteilige Dinge favoriren; wie solche durch Ihre Entreprises sattsam erkannt, und mit was für Raison und Glück sie bißhero werckstellig gemacht und fortgesetzt worden* (1676), also in *Materialien und Beyträge zur Geschichte, den Rechten und deren Litteratur*, ed., Carl Friedrich Häberlin (Erlangen: Band 2, 1785), 206–231.

44 Langer, Herbert. 'Der Westfälische Frieden und Schweden', in *Friedenssicherung. Bd. 3 Historische, politikwissenschaftliche und militärische Perspektiven*, ed. Manfred Spieker (Münster: Aschendorff, 1989), 37–56.

reputation as a guarantor had suffered among Protestants, not only by its periodic alignment with Louis XIV, but also on account of its failure to act when the Protestant party at the Reichstag appealed to Sweden as a guarantor against the Treaty of Ryswick in 1697 which undermined Protestant Westphalian rights.⁴⁵ Charles XII's highly effective intervention in Habsburg Silesia directly led to a resurgence of the esteem in which Sweden's Westphalian guarantee was held among Protestant princes and inhabitants of Germany.

Although most of the Habsburg Emperor's hereditary lands had been exempted from the confessional rights granted to subjects in the rest of the Empire, the Lutherans of Silesia were given some limited concessions, which were (however) increasingly disregarded. The intervention occurred when the Emperor was busy fighting France in the West, and while the formidable Swedish army was menacingly poised towards Silesia and Bohemia in neighbouring Saxony. This enabled the Swedish king to extort the convention of Altranstädt from Emperor Joseph I, thus securing Silesian religious rights.⁴⁶ The entire publicity campaign orchestrated around the intervention emphasised its legality under international law, on the basis of Sweden's guarantor status, and the fact that the Silesian subjects had appealed to Sweden for support.⁴⁷ One contemporary governmental pamphlet noted that Sweden had acted 'out of the possessed guarantee of the Peace of Westphalia, and according to its instructions', adding that 'the Swedish crown, as a guarantor, remains authorised to intervene and intercede for the freedom of religion'. The legal status of a guarantor was deemed to make the intervention defensible to the European princely public, as reflected in the chosen strategy of public legitimisation. Such arguments were also used in private, for example when the Swedish chief minister wrote to Austrian officials that his king was 'obliged

45 Corpus Evangelicorum to Sweden, 31 May 1697, in *Vollständige Sammlung aller Conclusorum ... des hochpreisslichen Corporis evangelicorum*, ed. Eberhard von Schaubroth (Regensburg, 4 vols., 1751–1786), vol. 3, 208.

46 Goll, Jaroslav. *Der Vertrag von Alt-Ranstaedt. Österreich und Schweden 1706–1707. Ein Beitrag zur Geschichte der österreichischen Politik während des nordischen Krieges* (Prague: 1879); Conrads, Norbert. *Die Durchführung der Altranstädter Konvention in Schlesien 1707–1709* (Cologne and Vienna: Böhlau, 1971).

47 Exhortations by the Protestant princes to the Emperor to ensure the correct implementation of the convention in Silesia were printed as pamphlets and distributed at the Imperial Diet, where the news of the convention was received with satisfaction among most Protestant envoys. See the report from the Diet in HHStA, MEA, Reichstag 332, envoy Ignaz Otten to Lothar Franz, Archbishop-Elector of Mainz, Regensburg, 12 September 1707.

by his conscience and by his guarantee to maintain' Protestant rights in the Empire.⁴⁸

4.4 *The Practical Role of the Guarantee in Imperial Politics, 1710s–1720s*

The early eighteenth century can provide a good snapshot of the diplomatic role of the guarantee. Although no armed guarantor intervention occurred, the period is still of interest as the guarantee was readily discussed as a possible remedy to perceived legal-political and confessional grievances in the Holy Roman Empire.

In the context of the German confessional crisis of 1719,⁴⁹ the Protestants appealed to France for support in upholding Westphalian rights.⁵⁰ Vienna kept a close eye on France's stance during this crisis, and the minutes of privy council meetings in Vienna reveal that the Imperial ministers would have been at a loss to effectively counter Paris, had France decided to support the Protestants on the basis of the guarantee.⁵¹ Britain was more activist and supportive of the Protestants at this time, as Andrew Thompson has demonstrated, and even considered the possibility of acquiring the status of a guarantor of Westphalia in order to better legitimate British intercessions in the Empire.⁵²

In the context of the Emperor's deposition of the Duke of Mecklenburg in 1728, as a result of the latter's contumacy and violent excesses during his conflict with his estates, various leading princes discussed an appeal to the

48 *An Ihro Roem. Kayserliche ... Majestät Josephum I. Der Augspurgischen Confessions-Verwandten Churfürsten/ Fürsten und Stände ... Fernere Intercessionales, für Ihre Glaubens=Genossen im Herzogthum Schlesien* (Regensburg: 5 June 1708). A copy is in HHStA, Staatenabteilungen [hereafter SA], Schweden 11, fos. 115–116: 'aus obhabender Garantie des Westphaelischen Friedens / nach Anleitung desselben', 'die Cron Schweden als garant ... pro libertate Religionis zu interveniren u. Intercediren ... befugt bleiben'; HHStA, SA, Schweden 11, Swedish envoy Strahlenheim to Imperial officials of Austrian Silesia, Breslau, 27 Jan. 1708, fols. 117–141; Piper to Wratislaw, 10 August 1707, printed in Goll, *Alt-Ranstaedt* 1879 (n. 46), 5: 'est oblige en conscience et par sa garantie de maintenir'.

49 Milton, Patrick. 'The Early Eighteenth-Century German Confessional Crisis: The Juridification of Religious Conflict in the Re-Confessionalised Politics of the Holy Roman Empire'. *Central European History* 49(1) (2016), 39–68.

50 Reported in HHStA, Reichskanzlei, Prinzipalkommission, Berichte 43b, Reichstag envoys to Charles VI, Regensburg, 26 Dec. 1719, fos. 639–647.

51 HHStA, Reichskanzlei, Vorträge 6c, Privy conference reports, 1, 2, and 9 July 1720.

52 Thompson, Andrew C. *Britain, Hanover and the Protestant Interest, 1688–1756* (Woodbridge: Boydell, 2006), 71, 74, 92, 96.

guarantors to intervene against the Emperor in defence of princely rights.⁵³ These and other examples show that there was a belief that the external guarantors performed an important function in the Imperial constitutional framework, namely the safeguarding of the existing legal parameters and the protection of weaker members of the Empire, thereby complementing, or at times replacing, the role of the Emperor in this regard. That this function was also seen as a *duty* is reflected in the Hanoverian and Prussian strategy of justifying their annexation of Sweden's possessions in Germany during the later stages of the Great Northern War – it was precisely Sweden's alleged neglect of this Westphalian duty which was argued to justify its expulsion.⁵⁴ When it suited them, the Prussians had no qualms about flipping the argument around, as in 1718, when they opposed the plans to eject the army of its Russian ally from Mecklenburg, by arguing rhetorically 'that without Sweden and France the religion and freedom of Germany would not have been preserved. Why should one not use the tsar in a similar fashion henceforth?'⁵⁵ Although such arguments were made cynically, the underlying assumption of the legitimacy of intervention by the guarantors for the preservation of German liberty was evidently widespread among German diplomats and statesmen.

4.5 *Implementation: The Seven Years War*

The exercise of the guarantee against Frederick the Great of Prussia in 1757 during the Seven Years War, was an almost textbook-case implementation against a violator of the peace. It is the only example of a multilateral execution of the guarantee by *all* guarantors, France, Sweden, the Emperor and the princes, against a repeat-offender who, by launching unprovoked attacks within the Empire, was riding roughshod over its order of peaceful legality. The participation of France in the war against Prussia was justified explicitly on the basis of the guarantee of Westphalia, not the recently concluded

53 Landesarchiv Nordrhein-Westfalen, Abteilung Rheinland, Standort Düsseldorf, Kurköln VI, 1411, Clemens August, Archbishop-Elector of Cologne to Karl Philipp, Elector-Palatine, Bonn, 3 August 1728, fo. 40r.

54 Niedersächsisches Landesarchiv – Hauptstaatsarchiv Hannover (hereafter NHStAH), Hann. 92, 2179, Frederick William I to Von Schwerin (Prussian envoy in Vienna), Berlin, 2 April 1718, fos. 104–105; Pamphlet: *Memorial, die nordische Unruhe betreffend* (n.p., 1716), in NHStAH, Cal. Br. 11, 2968 (3).

55 NHStAH, Hann. 92, 2198, privy councillor Eltz to Hanoverian chief minister Andreas Gottlieb von Bernstorff, Berlin, 28 January 1718, fo. 43r: 'daß ohne Schweden undt Franckreich die Religion undt Freyheit Teutschlandes nicht erhalten wäre. Warum man denn nicht auch nunmehr den Czaaren dazu gebrauchen sollte?'

Austro-French alliance, and Sweden also emphasised its guarantor status.⁵⁶ In 1756 Austria formally appealed to the external guarantors and requested their intervention, and next year the Reichstag voted to carry out a so-called 'Imperial execution' against Prussia. Sweden and France then announced that they would join the execution, thereby exercising the guarantee.⁵⁷ Of course this was less a purposeful implementation of Imperial and treaty law than a fortuitous convergence of the law with geopolitical interests. Nevertheless, for many of the princes, Prussia's actions did appear menacing and outright criminal, and it was on the basis of the patent violation of the peace that they participated in the exercise of its guarantee.

5 Conclusion

When considering the impact of the guarantee on European diplomacy, one should recognise that 'Westphalia' was perceived differently over the course of the period between 1648 and 1806 when it ceased to have legal validity with the end of the Empire. By the eighteenth century it not just seen as a treaty with specific stipulations and provisions; instead it soon came to represent a whole constitutional-political system for the Empire, based on an interpenetrating amalgam of rights, privileges and laws, which safeguarded the continued autonomous existence of individual territories, the rights of subjects within these, as well as the overarching framework, while simultaneously integrating the system into the broader international order of Europe – chiefly through the external guarantee. This changing perception is reflected in the shifting importance attached to the guarantee and changing assessments of it, in response to new circumstances in the international context: in the aftermath of the Thirty Years War, the chief importance ascribed to it was preventing the resumption of war by shielding the Empire from the ongoing Franco-Spanish War and the Northern War. The guarantee was thus seen as a mechanism to help maintain the Empire as a neutralised security zone, removing it from continuing geopolitical rivalry. The mutuality of the guarantee helped turn Westphalia into a holistic legal-political argument and a community of fate, in which the whole

⁵⁶ Externbrink, Sven. 'Frankreich und die Reichsexekution gegen Friedrich II. Zur Wahrnehmung der Reichsverfassung durch die französische Diplomatie während des Siebenjährigen Krieges', in *Altes Reich, Frankreich und Europa. Politische, philosophische und historische Aspekte des französischen Deutschlandbildes im 17. und 18. Jahrhundert*, eds. Olaf Asbach, Sven Externbrink and Klaus Malettke (Münster: Aschendorff, 2001), 221–253, at 250.

⁵⁷ Externbrink, 'Staatsystem und kulturelles Gedächtnis' 2008 (n. 41), 95–96.

settlement seemed threatened if any particular aspect of it was undermined. In the first two decades after the war, the last-resort nature of implementing the guarantee (with its impractical three year waiting period) seemed appropriate so as to avoid that small violations and disputes within the Empire lead to a resumption of general war. But by the eighteenth century, the three-year grace period increasingly appeared excessive and cumbersome. Under the impression of renewed confessional strife (especially in the early and mid-eighteenth century), and particularly the Prussian assault on Saxony in 1756, some legal scholars and jurists as well as practitioners began to argue that this feature of the guarantee was outdated and that the spirit rather than letter of the law ought to be respected.⁵⁸

Because the Emperor himself could not be forced to adhere to Imperial law through the provisions of internal judicial mechanisms, the addition of the external guarantee was widely seen, especially among Protestants in the Empire, as a welcome complement to the Imperial hierarchy. This additional level and mechanism of external control encouraged a degree of restraint on the part of both Emperor and princes, deterring obvious breaches of the peace and of the law, and adding an incentive to respect the confessional rights and princely prerogatives stipulated at Westphalia. In this sense, the guarantee was a stabilising factor – but, this system of a pacific and pacifying, non-expansionary European centre policed by flanking guarantor powers, depended on the guarantors not abusing their role for the advancement of their own power-political interests. Louis XIV and later Tsarina Catherine II failed in this, whereas Mazarin and Emperor Leopold I had succeeded. This points to a broader problem of integrating the Empire – a subset of the international system operating according to principles of legality, hierarchy and peace – into the more *Realpolitik*-driven relations of the Great Powers: a correct exercising of the guarantee depended to some extent on matching geopolitical interest on the part of the guarantors. When this convergence was in place – which it often was as France and Sweden both had a vested interest in the defence of the decentralised constitutional structure – then the guarantee as a feature of the Law of Nations had the greatest impact on diplomacy and politics.

This points to the question of whether the existence of the guarantee as a status and institution under the Law of Nations simply served as legalistic

58 Moser, *Von der Garantie* 1767 (n. 27), 49, 57. This coincided with writers of the Enlightenment criticising the treaties' religious clauses on the basis of a lacking toleration, see Kremer, Bernd Mathias. *Der Westfälische Friede in der Deutung der Aufklärung. Zur Entwicklung des Verfassungsverständnisses im Hl. Röm. Reich Deutscher Nation vom Konfessionellen Zeitalter bis ins späte 18. Jahrhundert* (Tübingen: Mohr, 1989), 132–152.

ammunition for justifications of policies that would have been pursued for power-political purposes anyway. The guarantee had the effect of legally regulating and delineating the state practice of intervention, thereby causing a 'juridification' of the destructive interventions of the Thirty Years War that had led to the Peace of Westphalia in the first place. Tilman Haug has shown that after 1648, the older semantics of *protection royale* started to give way to references to the guarantor status on the part of French foreign policy, while the substance of protective patronage remained.⁵⁹ One could argue that in many cases the guarantee, along with other features of international law was cynically instrumentalised as little more than propaganda, such as under Louis XIV, and again on the part of France and Sweden during the Seven Years War. However, although the Law of Nations was not fixed or clearly codified, rulers and political actors were nonetheless highly cognisant of living under a mutually binding legal and normative framework, an international society in the sense of the English School of International Relations,⁶⁰ which in the case of the Holy Roman Empire was normatively even more integrated than the broader European arena. In this sense, a clear-cut stipulation under international law such as the guarantee did indeed set limits and provide opportunities to acceptable geopolitical action, as seen by the intense and successful pressure on the Emperor not to provide aid to Spain after 1648, as well as the great lengths that governments and their diplomats went to in order to justify policies according to legal precepts. Later in the eighteenth century, the guarantee retained real practical significance within the Empire as a catch-all byword for the protection of prerogatives and liberties, and an instance of appeal designed to defend the overall constitutional order. In both the Empire and to a lesser extent in Europe as a whole, the highly juridified political culture ensured that the guarantee would remain politically and diplomatically salient until the end of the eighteenth century.

59 Haug, Tilman. *Ungleiche Außenbeziehungen und grenzüberschreitende Patronage. Die französische Krone und die geistlichen Kurfürsten (1648–1679)* (Cologne, Weimar, Vienna: Böhlau, 2015).

60 Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 2nd edn., 1995), 13: 'A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions'.

Bibliography

- Aretin, Karl Otmar von. 'Russia as a Guarantor Power of the Imperial Constitution under Catherine II'. *Journal of Modern History* 58 (1986), 141–160.
- Aretin, Karl Otmar von. *Das Alte Reich, 1648–1806* (Stuttgart: 4 vols., 1993).
- Beales, Derek. *Joseph II* (Cambridge: Cambridge University Press, 2 vols., 1987–2009).
- Beaulac, Stephane. 'The Westphalian Legal Orthodoxy – Myth or Reality?'. *Journal of the History of International Law* 2(2) (2000), 148–177.
- Braun, Guido. 'Die französische Diplomatie und das Problem der Friedenssicherung auf dem Westfälischen Friedenskongress', in *Assecuratio Pacis: Französische Konzeptionen von Friedenssicherung und Friedensgarantie 1648–1815*, ed. Guido Braun (Münster: Aschendorff Verlag, 2011), 67–130.
- Brunert, Maria-Elisabeth. 'Friedenssicherung als Beratungsthema der protestantischen Reichsstände in der Anfangsphase des westfälischen Friedenskongresses', in *Frieden und Friedenssicherung in der Frühen Neuzeit: Das Heilige Römische Reich und Europa*, eds. Guido Braun and Arno Strohmeyer (Münster: Aschendorff Verlag, 2013), 229–258.
- Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 2nd edn., 1995).
- Burkhardt, Johannes. 'Der Westfälische Friede und die Legende von der landesherrlichen Souveränität', in *Landes- und Reichsgeschichte: Festschrift für Hansgeorg Molitor zum 65. Geburtstag*, eds. Jörg Engelbrecht and Stephan Laux (Bielefeld: Verlag für Regionalgeschichte, 2004), 199–220.
- Conrads, Norbert. *Die Durchführung der Altranstädter Konvention in Schlesien 1707–1709* (Cologne and Vienna: Böhlau, 1971).
- Croxtan, Derek. 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', in *International History Review* 21(3) (1999), 569–591.
- Croxtan, Derek and Anuschka Tischer. *The Peace of Westphalia: A Historical Dictionary* (Westport and London: Greenwood Press, 2002).
- de Vattel, Emer. *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, eds. Béla Kapossy and Richard Whitmore (Indianapolis: Liberty Fund, 2008).
- Dickmann, Fritz. 'Rechtsgedanke und Machtpolitik bei Richelieu. Studien zu neuentdeckten Quellen', in *Friedensrecht und Friedenssicherung. Studien zum Friedensproblem in der Geschichte*, *ibid.* (Göttingen: 1971), 36–78.
- Dickmann, Fritz. *Der Westfälische Frieden* (Münster: Aschendorff, 1998), 332–343.
- Duchhardt, Heinz, Eva Ortlieb and Matthias Schnettger, eds. *Bibliographie zum Westfälischen Frieden* (Münster: 1996).

- Duchhardt, Heinz. *Balance of Power und Pentarchie 1700–1785* (Paderborn: Ferdinand Schöningh, 1997).
- Duchhardt, Heinz. 'Das "Westfälische System": Realität und Mythos', in *Akteure der Außenbeziehungen. Netzwerke und Interkulturalität im Historischen Wandel*, eds. Hillard von Thiesen and Christian Windler (Cologne: Böhlau, 2010), 393–402.
- Externbrink, Sven. 'Frankreich und die Reichsexekution gegen Friedrich II. Zur Wahrnehmung der Reichsverfassung durch die französische Diplomatie während des Siebenjährigen Krieges', in *Altes Reich, Frankreich und Europa. Politische, philosophische und historische Aspekte des französischen Deutschlandbildes im 17. und 18. Jahrhundert*, eds. Olaf Asbach, Sven Externbrink and Klaus Malettke (Berlin: 2001), 221–253.
- Externbrink, Sven. 'Staatsystem und kulturelles Gedächtnis. Frankreich, das Alte Reich und Europa (17.–18. Jh.)', in *Kulturelles Gedächtnis und interkulturelle Rezeption im europäischen Kontext*, eds. Eva Dewes and Sandra Duhem (Berlin: Akademie Verlag, 2008).
- Fowler, Michael Ross and Julie Marie Bunck. *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park, PA: 1995).
- Goll, Jaroslav. *Der Vertrag von Alt-Ranstaedt. Österreich und Schweden 1706–1707. Ein Beitrag zur Geschichte der österreichischen Politik während des Nordischen Krieges* (Prague: 1879).
- Gross, Leo. 'The Peace of Westphalia 1648–1948'. *American Journal of International Law* 42(1) (1948), pp. 20–41.
- Häberlin, Carl Friedrich, ed. *Materialien und Beyträge zur Geschichte, den Rechten und deren Litteratur* (Erlangen: Band 2, 1785).
- Haug, Tilman. *Ungleiche Außenbeziehungen und grenzüberschreitende Patronage. Die französische Krone und die geistlichen Kurfürsten (1648–1679)* (Cologne, Weimar, Vienna: Böhlau, 2015).
- Hinsch, Wilfried and Dieter Janssen. *Menschenrechte militärisch schützen. Ein Plädoyer für Humanitäre Intervention* (Bonn: C.H. Beck, 2006).
- Hughes, Michael. *Law and Politics in Eighteenth-Century Germany: The Imperial Aulic Council in the Reign of Charles VI* (Woodbridge: Boydell, 1988).
- Jackson, Robert. *The Global Covenant. Human Conduct in a World of States* (Oxford: Oxford University Press, 2000).
- Kampmann, Christoph. 'Das "Westfälische System", die Glorreiche Revolution und die Interventionsproblematik'. *Historisches Jahrbuch* 131 (2011), 65–92.
- Kampmann, Christoph. 'The English Crisis, Emperor Leopold, and the Origins of the Dutch Intervention in 1688', in *The Historical Journal* 55 (2012), 521–532.
- Kremer, Mattias. *Der Westfälische Friede in der Deutung der Aufklärung. Zur Entwicklung des Verfassungsverständnisses im Hl. Röm. Reich Deutscher Nation vom Konfessionellen Zeitalter bis ins späte 18. Jahrhundert* (Tübingen: Mohr, 1989).

- Langer, Herbert. 'Der Westfälische Frieden und Schweden', in *Friedenssicherung. Band 3 Historische, politikwissenschaftliche und militärische Perspektiven*, ed. Manfred Spieker (Münster: Regensburg, 1989).
- Lesaffer, Randall. 'The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Treaties Prior to 1648', *Grotiana* 18 (1997), 71–95.
- Lesaffer, Randall. 'The International Dimension of the Westphalia Peace Treaties: A Juridical Approach', in *350 años de la Paz de Westfalia: Del antagonismo a la integración en Europa*, ed. Fernando Villaverde (Madrid: Biblioteca Nacional – Fundación Carlos de Amberes, 1999), 291–310.
- Luard, Evan. *The Balance of Power: The System of International Relations, 1648–1815* (Basingstoke: 1992).
- McGraw, Anthony. 'Globalization and Global Politics', in *The Globalization of World Politics*, eds. John Baylis, Steve Smith et al. (Oxford: 2011).
- Milton, Patrick. 'The Early Eighteenth-Century German Confessional Crisis: The Juridification of Religious Conflict in the Re-Confessionalised Politics of the Holy Roman Empire', *Central European History* 49(1) (2016), 39–68.
- Milton, Patrick. 'Debates on Intervention against Religious Persecution in the Polish-Lithuanian Commonwealth: European Reactions to the Tumult of Thorn, 1724–1726', *European History Quarterly* 47(3) (2017), 405–436.
- Milton, Patrick. 'Guarantee and Intervention: The Assessment of the Peace of Westphalia in International Law and Politics by Authors of Natural Law and of Public Law, c. 1650–1806', in *The Law of Nations and Natural Law, 1625–1850*, ed. Simone Zurbuchen (Leiden: Brill, 2018).
- Moser, Johann Jacob. *Von der Garantie des Westphaelischen Friedens; nach dem Buchstaben und Sinn desselbigen* (Stuttgart: 1767).
- Münkler, Herfried. *Der Dreissigjährige Krieg. Europäische Katastrophe, deutsches Trauma, 1618–1648* (Berlin: Rowohlt, 2017).
- Osiander, Andreas. 'Sovereignty, International Relations, and the Westphalian Myth', *International Organization* 55(2) (2001), 251–287.
- Peters, Martin. 'Interpretationen des Rheinbundes im Wandel der Zeit', in *Der Erste Rheinbund (1658)*, <https://www.historicum.net/purl/1e2/>.
- Philpott, Daniel. *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: 2001).
- Pitts, Jennifer. 'Intervention and Sovereign Equality: Legacies of Vattel', in *Just and Unjust Military Intervention. European Thinkers from Vitoria to Mill*, eds. Stefano Recchia and Jennifer M. Welsh (Cambridge: Cambridge University Press, 2013).
- Pufendorf, Samuel. *The Whole Duty of Man According to the Law of Nature*, eds. Ian Hunter and David Saunders (Indianapolis: Liberty Fund, 2003).
- Pütter, Johann Stephan. *Der Geist des Westfälischen Friedens; nach dem Buchstaben und Sinn desselbigen* (Göttingen: Vandenhoeck und Ruprecht, 1795).

- Ranke, Leopold von. *Französische Geschichte, vornehmlich des 16. und 17. Jahrhunderts* (Stuttgart: Koehler, vol. 2, 1954).
- Reppen, Konrad. 'Der Westfälische Friede und die Ursprünge des europäischen Gleichgewichts', in *Von der Reformation zur Gegenwart. Beiträge zu Grundfragen der neuzeitlichen Geschichte*, eds. Klaus Gotto and Günter Hockerts (Paderborn: 1988), 53–66.
- Ruppert, Karsten. *Die kaiserliche Politik auf dem Westfälischen Friedenskongreß (1643–1648)* (Münster: Aschendorff, 1979).
- Rüde, Magnus. *England und Kurpfalz im werdenden Mächteeuropa (1608–1632). Konfession – Dynastie – kulturelle Ausdrucksformen* (Stuttgart: Kohlhammer, 2007).
- Schauroth, Eberhard von, ed. *Vollständige Sammlung aller Conclusorum, Schreiben Und anderer übrigen Verhandlungen des Hochpreißeichen Corporis Evangelicorum*. (Regensburg: 4 vols., 1786).
- Schmidt, Georg. 'Der Westfälische Frieden – eine neue Ordnung für das alte Reich?', in *Wendemarken in der Deutschen Verfassungsgeschichte: Tagung der Vereinigung für Verfassungsgeschichte*, ed. Reinhard Mußgnug (Berlin: Duncker & Humblot, 1993), 45–84.
- Schmidt, Georg. 'Der Westfälische Friede als Grundgesetz des komplementären Reichs-Staats', in *1648. Krieg und Frieden in Europa. Textband 1, Politik, Religion, Recht und Gesellschaft*, eds. Klaus Bussman and Heinz Schilling (Münster and Osnabrück, 1998–1999), 447–454.
- Schnur, Roman. *Der Rheinbund von 1658 in der deutschen Verfassungsgeschichte* (Ludwig Röhrscheid, Bonn: 1955).
- Sheehan, James J. *German History 1770–1866* (Oxford: Oxford University Press, 1994).
- Simms, Brendan. "'A False Principle in the Law of Nations': Burke, State Sovereignty, [German] Liberty, and Intervention in the Age of Westphalia", in *Humanitarian Intervention: A History*, eds. Brendan Simms and David J. B. Trim (Cambridge: Cambridge University Press, 2011), 89–110.
- Sofer, Sasson. 'The Prominence of Historical Demarcations: Westphalia and the New World Order'. *Diplomacy and Statecraft* 20(1) (2009), 1–19.
- Steiger, Heinhard. 'Der Westfälische Frieden – Grundgesetz für Europa?', in *Der Westfälische Friede. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte*, ed. Heinz Duchhardt (Munich: Oldenbourg Verlag, 1998), 33–80.
- Steiger, Heinhard. 'Konkreter Friede und allgemeine Ordnung – Zur rechtlichen Bedeutung der Verträge vom 24. Oktober 1648', in *1648: Krieg und Frieden in Europa*, eds. Klaus Bußmann and Heinz Schilling (Münster: Aschendorff, 1998), 137–146.
- Tischer, Anuschka. 'Grenzen der Souveränität: Beispiele zur Begründung gewaltsamer Einmischung in "innere Angelegenheiten" in der Frühen Neuzeit'. *Historisches Jahrbuch* 131 (2011), 41–64.

- Tischer, Anuschka. *Offizielle Kriegsbegründungen in der Frühen Neuzeit. Herrscherkommunikation in Europa zwischen Souveränität und korporativem Selbstverständnis* (Münster: Lit, 2012).
- Tischer, Anuschka. 'Die Vorgeschichte des ersten Rheinbunds von 1658', in *Der Erste Rheinbund (1658)*, (2008) <https://www.historicum.net/purl/1dy/>.
- Toscano, Mario. 'Sicurezza collettiva e garanzie internazionali nei trattati di Vestfalia'. *Rivista Storica Italiana* 56 (1939), 387–414.
- Treitschke, Heinrich von. *Deutsche Geschichte im 19. Jahrhundert* (Leipzig: Verlag von S. Hirzel, 1879).
- Vereinigung zur Erforschung der neueren Geschichte / Zentrum für Historische Friedensforschung, Bonn, *Acta Pacis Westphalicae* (Münster: Aschendorff, 1962–present).
- Weber, Hermann. "'Une bonne paix". Richelieu's Foreign Policy and the Peace of Christendom', in *Richelieu and His Age*, eds. Joseph Bergin and Lawrence Brockliss (Oxford: Oxford University Press), 45–69.
- Weber, Wolfgang E. J. 'Von der normativen Herrschaftspflicht zum interessenpolitischen Instrument. Zum Konzept der Protektion in der politischen Theorie der Frühen Neuzeit', in *Protegierte und Protektoren*, eds. Tilman Haug et al. (Vienna, Cologne, Weimar: Böhlau, 2016).
- Wehberg, Hans. 'Die Schieds- und Garantieklausel der Friedensverträge von Münster und Osnabrück'. *Die Friedens-Warte* 48(6) (1948), 281–289.
- Westphal, Siegrid. *Der Westfälische Frieden* (Munich: C. H. Beck, 2015).
- Wilson, Peter H. *Europe's Tragedy: A New History of the Thirty Years War* (London: Penguin Books, 2010).
- Wolff, Christian. *Grundsätze des Natur- und Völkerrechts, worinn alle Verbindlichkeiten und alle Rechte aus der Natur des Menschen in einem beständigen Zusammenhange hergeleitet werden* (Halle: Renger, 1754).
- Wrede, Martin. *Das Reich und seine Feinde. Politische Feindbilder in der reichspatriotischen Publizistik zwischen Westfälischem Frieden und Siebenjährigem Krieg* (Mainz: Philipp Zabern, 2004).