Collana Ravenna Capitale

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Ravenna Capitale

From International Treaties to the Binding Nature of Contract. A Historical and Comparative Study

Collana **Ravenna Capitale**

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Il n'y a que le provisoire qui dure: early eighteenth-century preliminary articles and conventions in doctrine and practice

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Summary: 1. Doctrine – 1.a. Treaty – 1.b. Process of Treaty-Making – 2. Cases – 2.a. Preliminary Articles of Peace – 2.b. Armistice and Evacuation – 2.c. Determining the Border – 3.d. Capitulations as Treaties

In the history of the law of nations, the early eighteenth century can be considered as the high tide of "classical" treaty collections (encompassing various types of positive law)[2] and the start of the Enlightened school of natural law.[3] A treaty can be envisaged as a contract between sovereign actors who decide to settle a quarrel that has arisen between them (to take the definition in Book IV of Vattel's *Le droit des gens*).[4] Quite logically, one would immediately refer to solemn moments of pacification, as the Peace of Münster and Osnabrück (1648), that of Utrecht (1713) or that of Paris (1763). However, many territorial disputes were never finally settled by a

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[1] My thanks go to Prof. Elisabetta Fiocchi Malaspina (Zürich) and Simona Tarozzi (Bologna), as well as to the participants of the online seminar *From rules of international treaties to binding nature of contractual terms* (26 February 2021), Stefano Cattelan, Yves Deroubaix, Arno Swyngedouw and research students Evelien De Greef, Edo De Gryse, Iris Van de Velde, Nies Van Duffel, Lentl Vanhouche and Julie Vermeersch for their kind remarks and considerate suggestions.

[2] B. Durst, *Archive des Völkerrechts: gedruckte Sammlungen europäischer Mächteverträge in der Frühen Neuzeit*, Berlin, 2016, *Colloquia Augustana*.

[3] S. Zurbuchen (ed.), *The Law of Nations and Natural Law 1625-1800*, Leiden/Boston, 2019, *Early Modern Natural Law*.

[4] E. de Vattel, *Le droit des gens, ou, Principes de la loi naturelle, appliqués à la conduite & aux affaires des nations & des souverains*, À Londres (Neuchâtel), s.n., 1758, B. IV, Ch. II, § 19; F. Dhondt, *Peace and Law* in *Handbuch Frieden im Europa der Frühen Neuzeit. Peace in Early Modern Europe. A Handbook* (I. Schmidt-Voges et al., eds.), Berlin, 2020, 113-130.

'*convention principale*',[5] but rather governed by capitulations, provisional treaties or preliminary articles which were supposed to lead to the conclusion of a final treaty that never arose. The scope of the present contribution is to highlight the treatment of these documents in doctrine (I) and treat some cases of the very rich state practice between 1700 and 1740 (II). For the former purpose, I will use Emer de Vattel's *Le droit des gens* (1758)[6] and Gaspard Réal de Curban's *La science du gouvernement*'s fifth book (1764).[7] These works were innovative within the school of natural law, since they used contemporary state practice, rather than examples from Antiquity or the Bible, to provide a *corpus* of casuistic arguments to the reader.[8]

The growing autonomisation of public law-legal reasoning throughout the quarrel on the partition of the Spanish composite monarchy, from 1659 to 1713, gave rise to a situation whereby conventions or agreements between states were increasingly seen as based on different premises from those concluded between private persons. Most importantly, the rejection of French private law-based arguments to contest the exclusion of Queen Maria Teresia (1638-1683), Louis XIV's spouse, had clearly established the separation between a treaty (concluded to safeguard stability or avoid a war), on the one hand, and, on the other, agreements between private persons (subjected to the jurisdiction of a sovereign, who could decisively settle quarrels between them).[9] One should however not mix up rule and exception. Wherever they were found to be compatible with the political situation at hand, private law arguments, logically mostly from the law of obligations, were taken as the basis for reasoning in debates between diplomats, who often solicited the advice of domestic lawyers.[10]

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[5] H. Grotius, *Le droit de la guerre et de la paix*, Amsterdam, De Coup, 1724, B. III, Ch. XX, §1.

[6] Vattel, *Le droit des gens…*; E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique*, Paris, 1998, *Publications de la Revue Générale du Droit International Public; Nouvelle Série*; E. Fiocchi Malaspina, *L'eterno ritorno del Droit des gens di Emer de Vattel (secc. XVIII-XIX). L'impatto sulla cultura giuridica in prospettiva globale*, Frankfurt am Main 2017, *Global Perspectives on Legal History.* See recently P. Schröder (ed.), *Concepts and Contexts of Vattel's Political and Legal Thought*, Cambridge, 2021.

[7] G. Réal de Curban, *La science du gouvernement, t. 5: contenant le droit des gens, Qui traite les Ambassades; de la Guerre; des Traités; des Titres; des Prérogatives; des Prétentions, & des Droits respectifs des Souverains*, Paris, Les libraires associés, 1764.

[8] I. Hunter, *Law, War, and Casuistry in Vattel's Jus Gentium* in *Parergon*, 28, 2011, 87-104; F. Dhondt, *History in Legal Doctrine. Vattel and Réal de Curban on the War of the Spanish Succession*, in *Rechtsgeschiedenis op nieuwe wegen. Legal history, moving in new directions* (D. De ruysscher et al. eds.), Antwerpen, 2015, 367-394.

[9] F. Dhondt, *From Contract to Treaty: the Legal Transformation of the Spanish Succession, 1659-1713* in *Journal of the History of International Law - Revue d'histoire du droit international*, 13-2, 2011, 347-375.

[10] E.g. abbot Dubois's mission in London in the run-up to the Treaty of the Quadruple Alliance, whereby advice was sought from lawyers. See letter from Dubois to Godefroy, Calais,

1. Doctrine

1.a *Treaty*

In the second Book of *Le droit des gens*, dedicated to relationships between '*Nations*' or states, Emer de Vattel defines a treaty as follows:

«Les Pactes qui ont pour objet des affaires transitoires, s'appellent Accords, Conventions, Pactions. Ils s'accomplissent par un acte unique […] se consomment, dans leur exécution, une fois pour toutes».[11]

The first kind of pacta (in the Roman Law-sense) envisaged by Vattel concerns thus 'transitory' matters. A simple 'Convention' is accomplished in a 'single act', and 'consumed', as soon as it is executed. We will come back on such a specific example, namely the Convention signed on 14 March 1713 between Philip V of Spain (represented by Louis XIV's plenipotentiary ministers at the Congress of Utrecht) and Emperor Charles VI of the Holy Roman Empire. It will become clear that practitioners did not stick to the strict separation indicated by Vattel above.

In the ensuing paragraph, Vattel indicates that the terms used were strictly applicable to sovereigns or "Puissances supérieures" or "Souverains", entering into a contract "on behalf of the State".[12] This becomes even clearer when we turn our eyes to Book IV (on the means to re-establish peace after a conflict):

«L'Accord, ou le Contrat, dans lesquelles [les Puissances] stipulent les Conditions de la paix, et règlent la manière dont elle doit être rétablie & entretenue.»[13]

At first sight, one could deduce *a contrario* that any treaty whereby the parties do not stipulate the "conditions" of peace and the way to restore it, cannot be a peace treaty. The question would of course then be what one would understand under "restoration" of peace. Historian Stella Ghervas has recently established a typology of peacemaking, ranging from a simple cease-fire to an institutionalised international organisation.[14] We will see below that this applies very well to the broad range of instruments used in practice.

Réal de Curban, who wrote in the same era as Vattel, is lesser-known. His colossal *Science du Gouvernement* was highly appreciated in the Jesuit *Journal de Trévoux* and had been translated into English, German and Spanish. Various nine-

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26 September 1717, AMAE, CP, Angleterre, vol. 301, f. 90r; Letter by Dubois to Le Roy, *ibid*., f. 91r.

[11] Vattel, *Le droit des gens…,* B. II, Ch. XII, § 153.

[12] *Idem,* B. II, Ch. XII, § 154.

[13] *Idem*, B. II. Ch. II, §9.

[14] S. Ghervas, *Conquering peace: from the Enlightenment to the European Union*, Cambridge (MA), 2021, 8-9.

teenth century treatises on international law cited his work, but he did not know the same success as the more fluent (and Protestant) Vattel.[15] Yet, Réal's work did devote specific attention to preliminary articles, as opposed to

«Des transactions qui terminent les guerres des Etats, & qui établissent des loix que leurs propres peuples doivent observer, pour vivre ensemble tranquillement.»[16]

The normative dimension of these words is evidently different from that of Vattel. Réal sees peace treaties as immediately relevant to the domestic legal order: they establish laws (loix) by mutual transaction and do not merely stipulate reciprocal conditions between sovereigns. Réal adds that

«Les préliminaires d'un Traité de Paix ont souvent coûté plus de tems que le Traité même».[17]

This latter indication is highly relevant, and leads us to an examination of the process of negotiation, wherein the legal outcome is dependent on a long-ranging exchange of arguments.

1.b *Process of Treaty-Making*

Preliminary articles, provisional treaties and capitulations are the results of a process of negotiation, whereby the two (or more) parties involved go through successive stages in the juridification of their relationship. The content of an agreement between states is an obligation to do, to give or to abstain. Vattel remarks that events in the run-up to the conclusion of a treaty (in the pre-contractual stage) can give rise to problems of validity. Chapter XII of Book II contains a reminder that parties ought to respect 'equity', but this cannot be seen as more than a moral incitement.[18] At the level of execution, Vattel distinguishes perfect obligations and imperfect ones. For the latter, the emphasis is on those obligations that can collide with every state's mandatory law of nature-obligation of self-preservation. An obligation cannot be executed if it leads to the '*ruine de la nation*'.[19]

In practice, some treaties contained a dissolution clause, or made an allusion to an implicit *clausula rebus sic stantibus*, which could undermine the fundamental principle of *pacta sunt servanda*. What *ratio* would subsist, for instance, if the Grand Alliance of The Hague (1701) had obtained the '*aequa et rationi conven-*

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[15] F. Siam, *« Une soumission éclairée n'en est que plus prompte et plus sincère » : souveraineté et bonheur public chez le jurisconsulte Gaspard de Réal de Curban (1682-1752) (diss. lic.)*, Genève, Université de Genève, 2000.

[16] Réal de Curban, *Droit des gens...*, Ch. III, V, I.

[17] *Idem*, Ch. III, V, II.

[18] Vattel, *Le droit des gens,* B. II, Ch. XII, § 159.

[19] *Idem*, B. II, Ch. XII, § 160.

iens satisfactio' it fought for?[20] Ten years later, the United Kingdom deserted its allies, since it thought the occupation of the bulk of Spanish possessions in Italy as well as the major part of the Spanish Low Countries was enough.

Whereas one could argue that the preceding formulation was probably not intended to allow for a unilateral breach of treaty on the part of the United Kingdom, the possibility of a party's invocation of the mere passing of time as a reason to escape treaty obligations, was literally invoked in the treaty of alliance between Louis XIV and the Catholic Swiss Cantons, concluded on 9 May 1715:

«Le tems aportant [sic] un changement en toutes choses, & que pouvant arriver, que par des variations inévitables, ou par des explications différentes, les anciens Traitez ne soient pas religieusement observez dans tous leurs Points…»[21]

For the preceding clauses, the proof of the cake, if this vulgar expression is permitted, was a matter of interpretation. All treaty parties could try to give a meaning or significance to the wording of their earlier agreement, ex post (after minds had met to form the agreement). Vattel explained this process as follows:

«Si les idées des hommes étoient toujours distinctes & parfaitement déterminées, s'ils n'avoient pour les énoncer que des termes propres, que des expressions également claires, précises, susceptibles d'un sens unique; il n'y auroit jamais de difficulté à découvrir leur volonté dans les paroles par lesquelles ils ont voulu l'exprimer; il ne faudroit qu'entendre la langue.»[22]

If the language used by the contracting parties was often unclear, this could also concern the essence of peace treaties. It was very well possible that parties concluded a peace treaty with the intention to 'agree to disagree'. Putting an end to the armed confrontation was more essential than actually extinguishing the cause for which the war had started.[23] Vattel realistically added to the 'abolition' of the cause of war, that 'perpetual peace' often did not mean anything else than an agreement not to fight again over the same issue. Réal de Curban went further in his appreciation:

«Si la Trève enfin, est pour plusieurs années, de quinze, de vingt ans, elle est une espèce de paix pour le tems qu'elle doit durer, & une paix d'autant plus solide, que les Trèves sont ordinairement mieux exécutées que les Traités qui portent le nom de Paix.»[24]

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[20] Art. II, Treaty of alliance between Emperor Leopold I, William III of England, Scotland and Ireland and the Lords Estates-General of the Dutch Republic, The Hague, 7 September 1701, *CUD* VIII/1, nr. XIII, 89-92: *judicaverunt ad eam* [tranquillitas generalis totius Europae] *stabiliendam nihil efficacius futurum, quam procurando Caesareae sae Majestati ratione praetentionis suae in Successionem Hispanicam satisfactionem aequam & rationi convenientem*.

[21] Treaty of alliance between Louis XIV and the Catholic Swiss cantons, 9 May 1715, *CUD* VIII/1, nr. CLXXVII, 448.

[22] Vattel, *Le droit des gens…,* B. II, Ch. XVII, § 262.

[23] *Idem*, B. IV, § 19.

[24] Réal de Curban, *Droit des gens*…, Ch. III, S. II, § I.

2. Cases

2.a *Preliminary Articles of Peace*

By preliminary articles of peace, we designate in the present paper a set of basic principles for the conclusion of a 'final' peace treaty. Two possibilities arose in practice. First, the case where belligerents agreed on broad lines to step up the wartime negotiation process and start a plenary congress. Second, to avoid the outbreak of war over pending questions, mediators could initiate a congress between all parties involved in safeguarding European tranquillity. In some cases, these preliminary articles did indeed capture the essence of the diplomatic *contentieux* between the major European powers, but failed to lead to a final treaty.

This was for instance the case with the Treaty of the Quadruple Alliance, concluded in London on 2 August 1718 between France, Britain and the Emperor in order to rearrange the balance of Italy.[25] Spain was forced to adhere to the treaty's conditions in February 1720.[26] The ensuing multilateral congress of Cambrai (1722-1725), where France and Britain acted as mediators, did not lead to a final treaty.[27] The Emperor and Spain concluded a separate bilateral peace, brokered by the Dutch adventurer Ripperda.[28] This peace gave rise to a period of two years where two blocs faced each other: the League of Vienna (around Spain and the Emperor) and the League of Hanover (around the disappointed mediators France and Britain).

However, an all-out confrontation was avoided. France and Austria managed to bring everyone back to the negotiating table. The preliminary articles of Paris (31 May 1727)[29] called for a new conference in Soissons (1728-1730).[30] This, again, did not lead to a full multilateral treaty, but the preliminary articles' essen-

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[25] Treaty of alliance concluded between Emperor Charles VI, George I and Louis XV, London, 2 August 1718, *CUD* VIII/1, nr. CCII, 531.

[26] Declaration of accession to the Treaty of London by Philip V, Madrid; Acceptation of the latter declaration by the plenipotentiaries of Charles VI, George I and Philip V, The Hague, 17 February 1720, *CUD* VIII/2, nr. XI, 26-27. See F. Dhondt, *Balance of Power and Norm Hierarchy. Franco-British Diplomacy after the Peace of Utrecht*, Leiden/Boston, 2015, 177-183, *Legal History Library; Studies in the History of International Law*.

[27] *Ibid.*, 253-372.

[28] J. Albareda Salvadó, *En torno a la paz de Viena (1725): grandes expectativas para una «vacilante monarquía*, in *La reconstrucción de la política internacional española: El reinado de Felipe V* (J. Albareda, N. Sallés Vilaseca, eds.), Madrid, 2021, p. 19-38, *Collection de la Casa de Velázquez*.

[29] *Articuli Præliminares Pro obtinenda in Europa Generali Pacificatione, Parisiis die 31. Maji 1727. Subscripti*, Viennae, 1729.

[30] F. Dhondt, '*Bringing the divided Powers of Europe nearer one another'. The Congress of Soissons, 1728-1730* in *Nuova Antologia Militare* (forthcoming).

tial points were not altered afterwards. In the end, the Italian articles of the Treaty of London would become the object of the War of the Polish Succession (1733-1738). However, the continued diplomatic process from 1718 to 1733 averted a war and served as the frame of reference for negotiations. Neither the Emperor nor the King of Spain, the main antagonists, could suffer to be seen as infractors of the arrangement's main pillars. Charles VI had to renounce his claims to the crown of Spain, whereas Philip V had to confirm his earlier resignation to the crown of France, in exchange for the establishment of a new branch of the House of Bourbon in Parma, Piacenza and Tuscany.[31] Conversely, although the Imperial Chancery, led by Vice-Chancellor of the Empire Karl Friedrich von Schönborn, created many legal obstacles, Emperor Charles VI was obliged to issue an expectative letter of eventual investiture to ensure Philip V's son don Carlos of the succession once the ruling families in the Italian duchies would have become extinct.

The main peace treaties of the first quarter of the century were those concluded at Utrecht (March-April 1713), Rastatt (March 1714) and Baden (September 1714). Interestingly, they were a more detailed version of the blueprint agreed between France and Britain in October 1711.[32] The so-called 'preliminary articles of peace' of London foresaw a partition of the Spanish monarchy. France had to accept that Philip V nor his descendants would ever be able to combine the crowns of France and Spain.[33] Due to Britain's maritime and financial weight in the alliance against Louis XIV, this agreement was the only one that could effectively force the other parties to stop the war. The principle of partition implied that Spanish public law would be partly pushed aside: the unity of the Spanish composite monarchy had to be abandoned, for the sake of the balance of power. Moreover, French public law, which called all 'sons of France' to the succession, had to be partly ignored as well, through renunciations. This central theme resurged in diplomatic conversations for more than ten years to come.[34]

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[31] P. Massuet, *Histoire de la dernière guerre et des négociations pour la paix. Enrichie des Cartes nécessaires. Pour servir à l'Histoire de la Guerre Présente. Avec la Vie du Prince Eugène de Savoye*, vol. 2, Amsterdam, 1736.

[32] Preliminary articles given by Louis XIV by Nicolas Mesnager, to serve as basis of the general peace, London, 8 October 1711, *CUD* VIII/1, nr. CXIX, 280. L. Bély, *Espions et ambassadeurs au temps de Louis XIV*, Paris, Fayard, 1990, 41.

[33] A. Baudrillart, *Examen des droits de Philippe V et de ses descendants au trône de France, en dehors des renonciations d'Utrecht* in *Revue d'histoire diplomatique*, 3, 1889, p. 161-191, 354-384.

[34] F. Dhondt, *La représentation du droit dans la communauté des diplomates européens des « Trente Heureuses* in *Tijdschrift voor Rechtsgeschiedenis / Revue d'Histoire du Droit / The Legal History Review*, 81/3-4, 2013, 595-620.

2.b *Armistice and Evacuation*

Italy

One of the most curious texts concluded at the Utrecht peace conference was the convention of 14 March 1713 for the evacuation of Catalunya and the neutrality of Italy.[35] The preamble of the relatively short document indicated that terminating the war required an agreement on the evacuation of 'Catalunya, the isles of Mallorca and Ivica [Ibiza], as well as the establishment of an armistice in the whole of Italy and the Isles situated on the Mediterranean, just as in the lands of His Royal Highness the Duke of Savoy.'[36]

Emperor Charles VI's ministers plenipotentiary (or plenipotentiaries) walked out of the peace conference afterwards. As a consequence, Charles VI did not sign a final peace treaty at Utrecht. This was important since Charles VI had effectively occupied the Duchy of Milan and the Kingdom of Naples. A final peace treaty between Charles VI and Louis XIV was concluded after yet another military campaign in Rastatt (March 1714). A final treaty between the Empire and France could only be signed in September 1714.[37]

Since a final bilateral peace treaty between Philip V of Spain and Charles VI, the main protagonists in the question of the Spanish Succession, had been impossible, this created a security risk in Italy. Philip V could be invited by several smaller rulers (e.g. the Duke of Parma) to intervene against the formidable Imperial presence in the peninsula (Milan, Naples, Tuscan presidia, Sardinia).[38] During the War of the Spanish Succession, the Emperors had behaved very aggressively towards rulers such as the Duke of Mantua, whose duchy had simply been confiscated as a punishment for his felony (allying himself with Philip V of Spain).[39]

Articles XI and XII of the Convention settled the status for the lands of the Duke of Savoy between France and the Emperor. An armistice and cessation of arms would enter into force forty days after the signature for all possessions in

[35] Convention between Charles VI and Louis XIV (on behalf of Philip V), Utrecht, 14 March 1713, *CUD* VIII/1, nr. CXLVIII, 327.

[36] *Ibid.*

[37] Treaty of Peace between Charles VI, the Holy Roman Empire and Louis XIV, Baden (Aargau), 7 September 1714, *CUD* VIII/1, nr. CLXXIV, 436. R. Stücheli, *Der Friede von Baden (Schweiz) 1714: ein europäischer Diplomatenkongress und Friedensschluss des «Ancien Régime»*, Freiburg, 1997, *Historische Schriften der Universität Freiburg Schweiz*.

[38] É. Bourgeois, *La Diplomatie secrète au XVIIIe siècle, ses débuts. II. Le Secret des Farnèse, Philippe V et la politique d'Alberoni*, Paris, 1909.

[39] M. Schnettger, *Das Alte Reich und Italien in der Frühen Neuzeit. Ein institutionsgeschichtlicher Überblick*, in *Quellen und Forschungen aus Italienischen Archiven und Bibliotheken*, 1999, 344-420.

Italy, in the Mediterranean, as well as those held by the Duke of Savoy on the French side of the Alps. Military commanders on the ground would be ordered to execute this principle and sanction as well as "repair in good faith" any contravention. As for the 'neutrality' of Italy, the definition was very rudimentary:

"Les choses demeureront en Italie pendant le présent Armistice en l'état où elles sont présentement, & l'on remet à les ajuster à la Négociation de la Paix».

The 'neutrality' of Italy mentioned in the Convention at Utrecht, was given more specific content in Art. XXX of the Peace of Baden, a year and a half later:

«Sa Majesté Tres Chrétienne promet & s'engage de laisser jouir Sa Majesté Impériale tranquillement et paisiblement de tous les Etats & Lieux qu'Elle occupe actuellement en Italie, & qui ont été cy-devant possédez par les Rois de la Maison d'Autriche […] Sa Majesté Impériale promet réciproquement, & engage sa parole Imperiale de ne point troubler ladite Neutralité & le repos d'Italie; et par conséquent d'employer la voye des Armes pour quelque cause ou à quelque occasion que ce soit […] Sadite Majesté Imperiale laissera jouir tranquillement tous les Princes d'Italie, des Etats qu'ils possedent [sic] actuellement.»

Article XXXI contained an ensuing promise:

«il sera aussi rendu bonne & prompte justice par Sa Majesté Imperiale aux Princes & Vassaux de l'Empire, pour les autres Pays & Lieux d'Italie qui n'ont point été possedez par les Rois d'Espagne de la Maison d'Autriche, & sur lesquels lesdits Princes pourroient avoir quelque legitime prétention ou action; sçavoir au Duc de Guastalle, & Pico de la Mirandole & au prince de Castiglione.»

This status obliged the Emperor to keep a maximum of 20 000 troops in his Italian dominions. Recourse to the "voie des armes" was forbidden, just as keeping winter quarters.[40] Ironically enough, this incomplete state of affairs would be seized by the King of Spain to invade Sardinia in 1717. Philip V proclaimed that a 'pre-emptive strike' was necessary to prevent… a violation of the neutrality of Italy by Charles VI, with whom he still had not been able to conclude a final peace treaty.[41] The Austrian position in the peninsula was seen as the greatest danger for "la liberté de toute l'Europe"[42]: Charles VI and George I of Great Britain had agreed to exchange the Kingdoms of Sicily (held by the House of Savoy) and Sardinia (held by the Emperor).

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[40] Mémoire pour servir d'Instruction au s^r^ abbé du Bois C^r^ d'Estat ord^re^…, Paris, 10 September 1717, AMAE, CP, Angleterre, vol. 301, f. 11v°.

[41] Memorandum by Spanish ambassador Beretti Landi, The Hague, 21 September 1717, *Idem*, f. 79r. N. Sallés Vilaseca, *La política exterior de Felipe V entre 1713 y 1719: un desafío al sistema de Utrecht*, in *El declive de la monarquía y del imperio español. Los tratados de Utrecht (1713-1714)* (J. Albareda, ed.), Barcelona 2015, 277-317.

[42] Instructions Dubois, ff. 10v-11r.

Even from Paris, this was presented as "une entiere oppression", harming "the necessary equilibrium" of the treaties of Utrecht, as well as the "repos et la seureté publique".[43] Unless, of course, France, Spain and Savoy would be allowed to participate in a multilateral final settlement for Italy. The unfinished business of 1713 had created a situation whereby, without a new treaty, the neutrality and balance of Italy could be brandished against reconfiguration attempts that excluded France and Spain. In the end, Dubois and Stanhope managed to impose their joint engineering in the Treaty of London, to which Savoy and Spain were forced to adhere by the circumstances.

Catalunya

The clauses concerning the evacuation of Catalunya were the following. First, all 'German and allied troops' (meaning the troops which sustained the candidacy of the Austrian archduke Charles) had to leave the principality of Catalunya as well as the isles of Mallorca and Ibiza. Fifteen days after notification of the agreement to the armies on the ground, an immediate ceasefire on land and sea had to start. As a security for Philip V of Spain, either Barcelona or Tarragona had to be left in the physical control of the former, until the evacuation would have been complete. The latter was defined as the status whereby "the court currently sojourning in Catalunya, all of its suite and other persons desiring to follow it with their belongings, whatever their Nation and condition might be, Spanish or otherwise, military men or not, would have entirely left".[44]

Britain, which had acted as a mediator for the evacuation, had to send a fleet to accompany Charles's court, without any obstacle by France and her allies, under the obligation of the French crown to welcome any vessel from the convoy in case of distress. Besides a general "amnesty and oblivion" (art. VIII)[45] for those who had supported Charles's cause during the war, the agreement stated that:

«Du côté de la France & de ses Alliez on a remis à la conclusion de la Paix future, cette affaire en son entier, Sa Majesté Britannique a fait une déclaration réitérée qu'Elle empoyeroit ses offices les plus efficaces, tant à la Cour de France que par tout ailleurs où il en seroit besoin, afin que dans la suite les Catalans puissent jouïr de leurs Priviléges, à quoi les susdits Ministres Plénipotentiaires de la Puissance qui évacuë la Catalogne ont acquiescé, que le Roy Très-Chrétien lui-même auroit fait déclarer par ses Ministres Plénipotentiaires qu'il concourroit à la même fin.»[46]

[43] *Idem*, f. 15r.

[44] Convention between Charles VI and Louis XIV (on behalf of Philip V), Utrecht, 14 March 1713, *CUD* VIII/1, nr. CXLVIII, 327. See A. Alcoberro, *El primer gran exilio político hispánico: el exilo austracista* in *El declive de la monarquía...* (Albareda ed.), 173-224.

[45] *Idem*, 328.

[46] *Ibid.*

In other words, the British mediator inserted a unilateral statement in a document signed by Louis XIV and Charles VI, according to which Britain would "use its most efficient offices" in order to make sure the "Catalans enjoyed their Privileges". The "plenipotentiaries of the Power which evacuated Catalunya" acquiesced, since Louis XIV himself would have had declared by his own delegation, that he would help with the same objective. Three sovereigns promised that they would thus use everything in their power to bring Philip V of Spain, who was not a party to this convention, to respect local privileges in Catalunya!

The ultimate article stated that "general amnesty, conservation of goods, benefits, charges, pensions & other advantages, in favour of the Italians as well as the Flemings which had adhered to either of both parties, or would do so in the future", had been postponed to the final treaty.[47] Days after the conclusion of the peace of Baden, on 11 September 1714, Barcelona was taken by Philip V of Spain after a bloody siege. This ended Catalan autonomy, and showed the lack of reliability of the French plenipotentiaries' promise in Utrecht.[48]

However, according to the French legal scholar Réal de Curban, the issue at stake was a legal one. Charles VI did not conclude an ensuing final peace treaty. The convoluted wording of the evacuation clause was not respected: this would have required sufficient good faith on the count of all contracting parties: Starhemberg, Charles VI's commander, would have deliberately created a power vacuum, which allowed the local Estates to seize power and fight Philip V's army.[49] Unsurprisingly, this very reproach was used by Philip V at his invasion of Sardinia in 1717.[50] Four years later, when military events would have allowed for a French invasion of Catalunya and an insurrection against Philip V, the French Regent (Philip of Orléans), refused to take up the matter again.[51]

2.c *Determining the Border*

A classical problem of peace treaties was that they determined borders according to an underlying feudal reality. The peace treaties concluded at the end of the

[47] *Idem*, 329.

[48] J. Albareda i Salvadó, *La guerra de sucesión de España, 1700-1714*, Barcelona, 2010, *Serie Mayor*.

[49] Réal de Curban, *Droit des gens*… p. 564,565; Dhondt, *Balance of Power…,* 158-159, note 591.

[50] *Idem*, 111.

[51] In the run-up to the Treaty of London, the Regent opposed the inclusion of a clause promising the restitution of 'rights, communities, universities and corpses', as this could implicitly be exploited by the Catalans. NA, SP, 78, 161, f. 311v°, Stair to James Stanhope, Paris, 12 June 1718, cited in *Idem*, 158, note 592.

War of the Spanish Succession were not different from those of the preceding wars of Louis XIV. What precisely constituted a "dépendance" or an "appartenance" connected to a place ceded or retroceded, was a matter for experts in feudal law, who could advise diplomats appointed by the contracting parties.

For the delimitation of the border between France and the Austrian Low Countries, a border conference met in Lille in 1716.[52] As shown in the manuscript memorandum drafted by French foreign affairs archivist Nicolas-Louis Le Dran, the exchanges between the Council of Regence in Paris and the plenipotentiaries are a testimony to the all-pervading presence of civil law reasoning.[53] The plenipotentiaries had to interpret not only facts (maps, feudal, fiscal links), but also had to make use of general reasoning formulas, as *accessorium sequitur principale*, or *a contrario*-reasoning. The main objective of the French delegation was free navigation on the Scarpe and the Scheldt, two vital rivers for trade and economy in French Flanders. Louis XIV had obtained the latter, French-speaking part of the country of Flanders at the peace treaties of Aix-la-Chapelle (1668) and Nijmegen (1678).

Unfortunately, the treaties of Utrecht, Rastatt and Baden had left a question unresolved. The fief of Mortagne, which bordered on the Scarpe, had been allotted to France "sans dépendances".[54] Mortagne consisted in nothing more than 'a castle, some houses and a bit of land'.[55] The interpretation of the dependencies of Mortagne, however, could create a situation whereby Charles VI, as count of Flanders, could erect toll offices and thus create an obstacle to trade and navigation between Condé (acquired by France in 1678) and Douai (acquired in 1668). The text of the treaty seemed to preclude such an operation. If dependencies existed, the French cause was lost. Yet, the *Conseil de Guerre* (one of the councils active in France under the Regency) thought that:

«On ne devoit pas s'en tenir rigoureusement à la lettre d'un article qui ne se trouvoit pas suffisamment eclairci.»

[52] Nicolas-Louis Le Dran, Mémoire sur les limites entre la france et les Pays bas autrichiens depuis le traité de paix de Bade du 7. 7.bre 1714 jusqu'en l'année 1721, s.l. (Versailles ?), 31 December 1732, AMAE, M&D, Pays-Bas, vol. 4, ff. 153-174. I discuss this more in detail in CORE Working Paper 2021-1 (DOI 10.17605/OSF.IO/X3ZS9).

[53] Le Dran compiled his exhaustive memoranda using French diplomatic correspondence and memoranda kept in the archives of the *bureaux des affaires étrangères* (in this case that of the French envoys to a border conference in Lille in 1716, Bernières and Doujat). His incredibly rich activity resulted in hundreds of volumes. See C. Fournier, *Etude sur Nicolas-Louis Le Dran, 1687-1774, un témoin et historien des Affaires Étrangères*, s.l., 2015.

[54] Art. XX, Treaty of Peace between Louis XIV and Queen Anne, Utrecht, 11 April 1713, *CUD* VIII/1, nr. CLVI, 368; art. XX, Treaty of Peace between Charles VI and Louis XIV, Rastatt, 6 March 1714, *Idem*, 418; art. XX, Treaty of Baden, *Idem*, 439.

[55] Le Dran, *Mémoire sur les limites*, f. 164v°.

If Louis XIV had ceded the dependencies, they needed to be reasoned away by his diplomats, to ensure that control of Mortagne alone also ensured control of the Scarpe. The goal of Louis XIV's diplomats was 'qu'il n'y eût point d'enclavemens dans un Pays, qui devoit être tout au Roy'.[56] This required a rhetorical achievement: convincing the Austrian counterparts that a prima facie clearly libelled article in fact wasn't all that clear, and, on the contrary, required a modification through application of the *accessorium sequitur principale*-principle. If the intention of the contracting parties in Utrecht, Rastatt and Baden had been to pacify bilateral relations, this could not have implied anything else but free navigation on the Scarpe, just as on the Scheldt, two vital rivers for the economic organisation of French Flanders. To bridge the gap between the clause formulated in the main treaties and the French objective, Louis XV's envoys were entitled to offer two villages (Nezon and Bramenil), with "possibly some other villages on the right side of the road from St Amand to Lille."[57] In *Le droit des gens*, Vattel mentioned that it was notorious how parties tried to bribe each other's commissioners at border conferences, in order to gain a couple of kilometres. As illustrated here, the economic impact of a de facto modification of an initial peace treaty could be considerable. In order to reach such a substantial modification, however, it was necessary to convince one's counterpart that the actual modification was not a modification at all, but a consequence of the principles underpinning the previous major treaty.[58]

2.d *Capitulations as Treaties*

Finally, Vattel grants some scant attention to capitulations concluded during wartime. In his view, a full transfer of sovereignty can only take place when a peace treaty is concluded.[59] Capitulations are merely provisional and generate the advantage for the population of an occupied country that they will not be made subject to pillage or contributions, but to regular taxes, usually according to their own freedoms, immunities and privileges, as stipulated in those very capitulations.[60]

During the War of the Spanish Succession (1702-1713/1714), the loss of the battle of Ramillies (23 (May 1706) brought the Duchy of Brabant and most of

[56] *Idem*, f. 170v°.

[57] *Idem*, f. 169r.

[58] «On a vu aussi des commissaires travailler à surprendre, ou à corrompre ceux d'un état voisin, pour faire injustement gagner à leur maître quelques lieues de terrein [sic].» VATTEL, *Le droit des gens*, B. II, Ch. VII, §92.

[59] *Ibid.*, B. III, Ch. XVI, § 212.

[60] *Ibid.*, B. III, Ch. XIII, § 199.

the important cities of the County of Flanders (with the exception of Ypres and Nieuport) under control of the Grand Alliance. The English commander, the Duke of Marlborough, welcomed a delegation of the Estates of Flanders, the representative body of the County, in his army camp near Aarsele on 7 June 1706. In the Duchy of Brabant, Antwerp was about to fall into allied hands. In Flanders, conquests were speedily progressing towards the West.[61] Formally acting in the name of Charles of Habsburg, the Austrian pretender to the Spanish throne, English and Dutch delegates accepted their allegiance to a new sovereign, recognising the old rights and privileges of the Estates.

The delegates of the Flemish Estates carried a resolution adopted unanimously in Ghent the preceding day.[62] The members of the Estates,[63] at first sight, seem to unilaterally recognise Charles of Habsburg as Charles III of Spain, and thus also Count of Flanders, 'submitting themselves as good and loyal subjects'.[64] This is, however immediately followed by the 'assurance that H.M. will maintain this province in all its Privileges, Usages and Customs, as well for spiritual as for temporal matters. As Count of Flanders, H.M. will not suffer any modification or diminishing on this point.'

The next paragraphs are concerned with institutional and taxation matters: the new Count had to agree to the existing institutional framework of courts of law, regional, urban and countryside authorities ("*Châtellenies*"), official positions and subaltern places, as well as to the private collection of taxes ("*Fermes des Finances*") and any kind of public debt, in order to ensure legal certainty for both the commonwealth and individual debt holders.

In order to ensure this essential condition of the Estates' 'submission' to their new sovereign, the Duke of Marlborough and the Dutch delegates are explicitly requested to ratify 'what they have already kindly granted to the Colleges and Cities of the Province'. Finally, all inhabitants, ecclesiastical as well as secular, insist on an immediate end to confiscations or temporary seizures of their property. Marlborough and the Dutch delegates accepted this without any alteration. This conditional wording, as well as the acceptance, make clear why capitulations did

[61] *Mercure Historique*, June 1706, 691.

[62] Resolution des Etats de la Province de Flandres, par laquelle ils reconnoissent Sa Majesté Catholique le Roi Charles III pour leur légitime Souverain du 7 juin 1706 and acceptance by the Duke of Marlborough, Ferdinand van Collen, Baron van Renswoude, van Goslinga and Cuyper, Aarsele, 7 June 1706, *CUD* VIII/1, nr. LXVI, 198.

[63] J.P. Zaman, *Exposition des Trois Etats du Païs et Comté de Flandres, scavoir: du clergé, de la noblesse, & des communes*, S.l., s.n., 1711. The three Estates in Flanders consisted of the three main cities (Ghent, Bruges, Ypres) and the top clerics (the bishop, the abbots of the main abbeys, such as St Peter's in Ghent), whereas nobility had been sidelined. In practice, the Estates were '*Le Clergé & les Communes*' or '*Les Ecclesiastiques et Membres*', *Ibid.*, p. 256.

[64] Resolution, *o.c.*

not purely transmit a right of domination from one sovereign to another, but tied the latter's hands at the transfer of power.[65] In the current case, Malborough and the Dutch safeguarded Flemish privileges against a very distant sovereign, who was at the time holding his court in Barcelona. The transaction also highlights the (although limited) agency enjoyed by representative bodies in the county, in the Flemish case mostly the urban patricians.

This capitulation was later on taken over in the so-called Barrier Treaty, the treaty imposed on Charles VI by the maritime Powers (Britain and the Dutch Republic), in the first provision, stating that the Spanish Low Countries would be transferred 'as enjoyed by the late Charles II of Spain, or as he should have enjoyed them'.[66]

This intermediate wartime agreement seemed to be of the greatest possible triviality: nothing was to change with regards to the internal legal status of the Spanish Low Countries. Appearances can, however, be treacherous. In 1787, seventy years later, the Estates of Brabant revolted against Emperor Joseph II (1741-1790) for his overt violation of the *Joyeuse Entrée* of 1356, the constitutional document confirmed by every Duke (or Duchess) at accession. In the County of Flanders, no such formal document existed.

However, the Flemish conservative lawyer Jean-Joseph Raepsaet, one of the best-known erudite persons of his age, exhumed the "capitulation of Aarsele" to prove that all preceding limitations on the count of Flanders' power had been accepted by Joseph when he succeeded his mother Maria Theresia as Count in 1780.[67] Consequently, Flanders, too, could revolt against Joseph II's reforms of the judiciary. In the Spring of 1787, the registrar of the castelny of Audenarde (in the South of the County) exhumed a copy of the allied guaranty given to Flemish privileges in 1706. Raepsaet qualified the passage of a 'full *Joyeuse Entrée* in itself'.[68] He emphasised the "titre synallagmatique, constitutif" of the House of

[65] H. Van Houtte, *Les occupations étrangères en Belgique sous l'Ancien Régime*, Gent, 1930, *Werken uitgegeven door de Faculteit van de wijsbegeerte en letteren*, p. XX, 270-288.

[66] « *comme en a jouï, ou dû jouïr le feu Roy Charles II. de glor. mem. conformément au Traité de Ryswick* » Art. I, Barrier Treaty concluded between Charles VI, George I and the Estates-General of the Dutch Republic, Antwerp, 15 November 1715, *CUD* VIII/1, nr. CLXXX, 458-468.

[67] J.-J. Raepsaet, *Œuvres complètes de J. J. Raepsaet, revues, corrigées et considérablement augmentées par l'auteur, suivies de ses œuvres posthumes*, vol. 6, Mons, Leroux, 1838, I, 402-403.

[68] Remonstrances by the Castelny of Audenarde, 17 April 1787, State Archives Ghent, Estates of Flanders, 7721, 6 May 1787. Source quoted in L. Dhondt, *Verlichte monarchie, Ancien Régime en revolutie: een institutionele en historische procesanalyse van politiek, instellingen en ideologie in de Habsburgse, de Nederlandse en de Vlaamse politieke ruimte (1700/1775-1790)*, Brussel, 2002, p. V, 119, *Studia*.

Habsburg's acquisition of sovereignty in the low countries. The capitulation of Aarsele served as proof to demonstrate that Charles VI's caretakers, the Maritime Powers, had consented from the start to the conservation of the privileges and customs of the county.[69]

List of acronyms

AMAE	Archives Diplomatiques, Ministère de l'Europe et des Affaires Étrangères
CP	Correspondance Politique
CUD	J. Dumont & J. Rousset de Missy (ed.), *Corps Universel Diplomatique du Droit des Gens*, Amsterdam, Janssons à Waesberghe, 1726-1731.
M&D	Mémoires et Documents
NA	The National Archives
SP	State Papers Foreign

[69] *«Une stipulation aussi claire, aussi précise, mit le gouvernement au pied du mur.»* RAEPSAET, *Œuvres complètes,* I, 402-403.