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Published in:

Proceedings of the Eleventh International Congress of Medieval Canon Law.

Publication date:

2006

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):

Lesaffer, R. C. H. (2006). The influence of the medieval canon law of contract on early modern treaty law. In M. Bellomo, & O. Condorelli (Eds.), *Proceedings of the Eleventh International Congress of Medieval Canon Law*. (pp. 449-467). Biblioteca Apostolica Vaticana.

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The Influence of the Medieval Canon Law of Contract on Early Modern Treaty Law¹

by RANDALL LESAFFER

The earliest agreements between political entities which can be considered to be treaties date back from the third millennium B.C.² Throughout history treaties have continuously been prime instruments for organising relations between autonomous powers. Within the context of the modern law of nations as it emerged in Europe from the sixteenth century onwards, treaties have played a central role in the law making process.

The modern law of nations – or the classical law of nations as paradoxically it is often called by German scholars –, which has to be situated between the seventeenth and the early twentieth centuries, was based on the principles of the sovereignty and equality of states.³ Sovereign states were considered to be the sole subjects of international law, both to the detriment of the elder medieval universal powers as the Emperor or the Pope and of the individual as a subject of law within the international legal order. By consequence, the states themselves monopolised both the processes of the formation and of the enforcement of international law. From the seventeenth century on, this led to the articulation of doctrines that by the nineteenth century had embraced complete voluntarism or positivism. According to these doctrines, no rules of international law could be imposed upon states without their consensus. This finally brought nineteenth century positivists to reject the existence of natural law as well as to deny any law making power to the international community.⁴ Consensus between states was considered to materialise in an express way in treaties or in a silent way through customary law. During the twentieth century the emergence of international organisations and international tribunals as well as the revaluation of the position of the individual, among others through the international protection of human rights, brought a thorough change. Though state sovereignty continues to be one of the leading principles of international law,⁵ the principle of voluntarism has lost much of its absolute

¹ This is a slightly adapted version of the article 'The Medieval Canon Law of Contract and Early Modern Treaty Law' which was published in *Journal of the History of International Law* 2 (2000) 178-98.

² K.-H. Ziegler, *Völkerrechtsgeschichte. Ein Studienbuch* (Munich 1994) 15.

³ W.G. Grewe, 'Was ist klassisches, was ist modernes Völkerrecht?', in A. Böhm, K. Lüdersen and K.-H. Ziegler, ed., *Idee und Realität des Rechts in der Entwicklung internationaler Beziehungen. Festgabe für Wolfgang Preisler* (Baden Baden 1983) 111-31.

⁴ W.G. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden Baden 1984) 591-601 (English translation by M. Byers, New York etc. 2000); Ziegler, *Völkerrechtsgeschichte* 233-38. – One must however be careful not to interpret the doctrines on the law of nations of the seventeenth and eighteenth centuries as one-sidedly positivistic. E.g. Cornelius van Bynkershoek (1673-1743) who is traditionally considered as one of the first positivists: K. Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law* (The Hague etc. 1998) esp. 174-79.

⁵ Art. 2 (1) of the United Nations Organisation Charter (E. Suy, ed., *Corpus Iuris Gentium*, Leuven 1991, 14).

claims. The concept of *ius cogens* allows for the international community to impose international legal rules upon reluctant states. Under the so called general principles of international law and the idea of inviolability and inalienability of human rights lurks the rebirth of natural law. Nevertheless, consensualism and voluntarism continue to play an important role as treaties even more than before are used as instruments of law creation and as many international organisations have not overstepped the line of unanimity in the decision making process.⁶

I. *Pacta sunt servanda* as a basic principle of modern international law

Since the end of the nineteenth century the writings of the Spanish neo-scholastics such as Francisco de Vitoria (ca. 1480-1546) and Francisco Suarez (1548-1617) have been considered to mark the very beginning of the modern international legal literature.⁷ Vitoria has since come to challenge the position of the Dutch humanist Hugo Grotius (1583-1645) as the acclaimed father of international law.⁸

The significance of medieval writings for the neo-scholastic and later doctrines of international law has not been taken much into account both by historians of international law nor by medieval scholars. James Muldoon has repeatedly deplored that the influence of medieval canon law on early modern international law doctrine has seldom if not been explored in modern scholarship.⁹ While the impact of Roman private law has been assessed by some authors as being important,¹⁰ the significance of classical canon law has only enjoyed very lean interest.¹¹ Among others Brian Tierney

⁶ On the emergence and disappearance of the classical/modern system of international law: R. Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', *British Yearbook of International Law* 73 (2002) 103-39.

⁷ James Brown Scott was among the first and foremost to revalue the Spanish neo-scholastics: J.B. Scott, *The Spanish Origin of International Law. Lectures on Francisco de Vitoria (1480-1546) and Francisco Suarez (1548-1617)* (Washington 1928); Idem, *The Spanish Conception of International Law and Sanctions* (Washington 1934); Idem, *The Catholic Conception of International Law. Francisco de Vitoria, founder of the modern law of nations. Francisco Suarez, founder of the modern philosophy of law in general* (Washington 1934); Idem, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Oxford 1934). – See: C. R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (The Hague etc. 1998).

⁸ W.G. Grewe, 'Hugo Grotius – Vater des Völkerrechts?', *Der Staat* 23 (1984) 161-78; Ziegler, 'Hugo Grotius als Vater des Völkerrechts', in P. Schmer and I. von Munch, ed., *Gedächtnisschrift für Wolfgang Martens* (Berlin 1987) 851-58.

⁹ J. Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', *Traditio* 28 (1972) 483-497; Idem, 'Medieval Canon Law and the Formation of International Law', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* 81 (1995) 64-82.

¹⁰ H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London 1927) 8-37; Ziegler, 'Die römische Grundlagen des europäischen Völkerrechts', *Ius Commune* 4 (1972) 1-27; Idem, 'The influence of medieval Roman law on peace treaties', in R. Lesaffer, ed., *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge 2004) 147-61.

¹¹ See, however, most recently: D. Bauer, 'The importance of medieval canon law and the scholastic tradition on the emergence of the early modern international legal order', in R. Lesaffer, ed., *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge 2004) 198-221 as well as A. Wijffels, 'Martinus Garatus Laudensis on Peace Treaties' in the same, 184-97.

and James Muldoon himself have remedied to that in their both extensive and thorough writings on certain issues as the emergence of natural or individual's rights and the juridical position of the new world.¹² Regarding the doctrine of just war, the significance of classical canon law doctrine has been recognised and studied quite well, even by specialists of modern international law such as Peter Haggemacher.¹³

The ideas of consensualism and voluntarism and the relation between positive and natural law held a central place in international law doctrine since its emergence in the sixteenth century. The principle of *pacta sunt servanda* was recognised by most early modern writers as the very cornerstone whereupon the building of any kind of positive or human law of nations could be constructed. It was generally recognised to be a basic principle of natural law. Niccolo Machiavelli (1469-1527), Thomas Hobbes (1588-1679) or Baruch Spinoza (1632-1677) who only recognised the binding force of treaties insofar as their upholding continued to be in the interest of the parties concerned, rejected at the same time the existence of an enforceable positive law of nations.¹⁴

The accentuation of the principle of *pacta sunt servanda* in the early modern doctrine of the law of nations has to be explained as a reaction to the collapse of the medieval international order of the *respublica christiana* and the emergence of the sovereign state. The medieval order of Europe was based on the idea that Latin Christianity was a religious, cultural and to a certain extent political and juridical unity under the supreme sovereignty of the Emperor and the Pope. Within this system, Roman, canon and feudal law were universally recognised and thus offered an elaborate system of rules to base relations between different monarchs and political entities on. The affirmation of the sovereign state and the collapse of Christian unity led to a long and severe crisis of the European legal order from the sixteenth century to the second half of the seventeenth century. The emergence of international law doctrine was an attempt of the intellectual elite to remedy this.

The Florentine Machiavelli has as no other before or after him sketched the consequences of the changes of his times by acclaiming the absolute autonomy of the prince towards Christian morality and by rejecting the binding force of a given word.¹⁵ More generally, the rise of the sovereign state and the disappearance of any

¹² B. Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta 1997) 43-77; J. Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian World 1250-1550* (Philadelphia 1979).

¹³ P. Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris 1983) esp. 74-357; R. Regout, *La doctrine de la guerre juste, de saint Augustin à nos jours d'après les théologiens et les canonistes catholiques* (Paris 1935); F.H. Russell, *The Just War in the Middle Ages* (Cambridge 1975) 55-212; A. Vanderpol, *Le droit de guerre d'après les théologiens et les canonistes du moyen âge* (Paris and Brussels 1911).

¹⁴ Grewe, *Epochen* 408-10; H. Lauterpacht, 'Spinoza and International Law', E. Lauterpacht, *International Law, Being the Collected Papers of Hersch Lauterpacht* (Cambridge, 1970) 1.92-95; R. Lesaffer, *Europa: een zoektocht naar vrede? (1453-1763 en 1945-1997)* (Leuven 1999) 346-47; Hans Wehberg, 'Pacta sunt servanda', *The American Journal of International Law* 53 (1959) 777-84.

¹⁵ 'Quanto sia laudabile in uno principe il mantere la fede... nondimanco si vede per esperienza ne' nostri tempi quelli principi avere fatto gran cose, che della fede hanno tenuto poco conto'; Niccolò Machiavelli, *Il principe* 18 (Alessandro Capata, ed., *Machiavelli. Tutte le opere storiche, politiche e letterarie*, Milano 1998, p. 37).

supranational authority called for a new basis on which to build the European legal order. The answer was found by the neo-scholastics in the old, medieval concept of natural law which held universal validity, independent from any human authority. Next to this universal natural law, these neo-scholastics could not deny the existence of a human made or positive *ius gentium*. Though a certain gradual evolution from Vitoria to Suarez can be discerned on this point, the Spanish neo-scholastic theologians did not consider consent or the human will to be a sufficient basis for the creation of legal rules. According to Vitoria and Suarez, the positive law of nations were rules in accordance with and inherent to natural law, that became part of positive law through the consensus of the political entities which constituted the international community.¹⁶

Although authors like Jean Bodin (1530-1596) or Hugo Grotius gave positive law a far greater autonomy in relation to natural law than most of the neo-scholastic Spanish writers had, they continued to base the validity and universal application of the positive law of nations upon natural law. While he won everlasting fame as one of the most staunch defenders of state sovereignty, Bodin expressly defended the upholding of treaties as the basis of the international legal order.¹⁷ Grotius distinguished a *ius gentium naturale* which was derived from natural law from a *ius gentium voluntarium* based on consensus and expressed in treaties and custom. In the absence of any supranational authority to legitimise or enforce agreements between sovereigns, Grotius had to establish a link between the *ius gentium naturale* and *voluntarium*. This he found in the principle of *pacta sunt servanda*. The upholding of one's promises and pacts was a universal duty under natural law and thereby offered a undeniable binding power to all positive law, including the consensual *ius gentium voluntarium*.¹⁸ After Grotius *pacta sunt servanda* became generally accepted as a basic principle of natural law and thereby of the international legal order, even by the so called positivists of the seventeenth and eighteenth centuries.¹⁹

The principle of *pacta sunt servanda* implies that each agreement, regardless its form, has binding power within the international legal system. Thus, it constitutes a clear breach with the formalism of classical Roman law and many medieval customary law systems, including common law. The theory that the classical canon law doctrine stimulated the rise of consensualism in early modern contract law has long been generally accepted by modern scholarship. However, the link between the medieval

¹⁶ Grewe, *Epochen* 224-27; Lesaffer, *Europa* 70 and 85-89; G. Otte, *Das Privatrecht bei Francisco de Vitoria* (Cologne and Graz 1964) 24-27; E. Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis* (Freiburg and Munich 1957) 1.279-88 and 1.313-31; J.B. Scott, *Law, the State and the International Community* (New York 1939) 1.310-32 and 1.558-69; A. Truyol y Serra, *Histoire du droit international public* (Paris 1995) 50-55.

¹⁷ J. Bodin, *Les six livres de la République* 5.6 (Corpus de oeuvres de philosophie en langue française, Paris 1986, 5.169-230); J. Gardot, 'Jean Bodin. Sa place parmi les fondateurs du droit international', *Recueil des Cours de l'Académie de Droit International*, 50 (1934) 601-10 and 644-53.

¹⁸ 'Deinde vero cum iuris naturae sit stare pactis, (necessarius enim erat inter homines aliquis se obligandi modus, neque vero alius modus naturalis fingi potest), ab hoc ipso fonte iura civilia fluxerunt': H. Grotius, *De Iure Belli ac Pacis libri tres*, Prol. 15 (Robert Feenstra et alii, edd., Aalen 1993, 11).

¹⁹ Akashi, *Cornelius van Bynkershoek* 174-76; Lauterpacht, *Private Law Sources and Analogies* esp. 19-22 and 33-37; Hans Wehberg, '*Pacta sunt servanda*' 777-84.

canon law principle of *pacta sunt servanda* and the principle of early modern international law has not clearly been studied or established.²⁰ This is all the more surprising as the law of treaties only started to become articulated out of the general theory of contract from the seventeenth century on. Also in reality even if not in doctrine, until the seventeenth or even eighteenth centuries treaties have more to be considered as *pacta* or *conventiones* between rulers than as *foedera* between political entities.

The interrelation between the canon doctrine of contract and early modern treaty law will be the scope of the rest of this article. Firstly, a brief survey of the classical canon doctrine of contract will be given. Secondly, the influence of this doctrine on some early modern writers of international law will briefly be assessed. Thirdly, and most importantly, the influence of the canon law concepts on early modern treaty practice will be looked at.

II. *The canon law of contract*

The principle of consensualism in medieval canon law was rooted in the Christian moral precept of truthfulness. The earlier Fathers of the Church already referred to Matthew 5, 34-37 for this. Gratian incorporated the precept into his *Decretum* and thereby laid down the foundations for the canon doctrine of contract.²¹ From the twelfth century onwards, the canonists modelled this moral precept into the principle that all promises, regardless of any formalities, were binding. This was of course valid for reciprocal promises as well as for unilateral ones. In the *Liber Extra* the idea that all pacts were binding was expressed.²² Consent became the central criterion for the creation of a juridical obligation.²³

The canon law of contract opposed the formalism of classical Roman law. Though since late Antiquity most of the practical impediments for a general recognition of the binding force of pacts were taken down through the broad possibilities of the *stipulatio* – on of the forms of contract that allowed parties a very extensive liberty to the contents of their agreements –, the disappearance of the quite strict *formula*

²⁰ J. Bärmann, 'Pacta sunt servanda. Considérations sur l'histoire du contrat consensuel', *Revue internationale de droit comparé* 13 (1961) 35-36; Jean Bart, 'Pacte et contrat dans la pratique française', in J. Barton, ed., *Towards a General Law of Contract* (Berlin 1990) 125; R. Feenstra and M. Ashmann, *Contract. Aspecten van de begrippen contract en contractsvrijheid in historisch perspectief* (Deventer 1988) 12-14; R. H. Helmholz, 'Contract and the Canon Law. Possible points of contact between England and the Continent', in J. Barton, ed., *Towards a General Law of Contract* (Berlin 1990) 50; R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford 1996) 542.

²¹ 'ita quoque in verbis nostris nullum debet esse mendacium': C.22 q.5 c.12 (A. Friedberg, ed., *Corpus Iuris Canonici*, Graz 1959, 1.886).

²² 'Universi dixerunt, pax servetur pacta custodiantur': X. 1.35.1 (A. Friedberg, ed., *Corpus Iuris Canonici*, Graz 1959, 2.204).

²³ See e.g. the definition of Bernardus Papiensis († 1213): 'Pactum est plurium in idem dandum vel faciendum consensus', *Summa Decretalium* 1.26.1 (E. A.T. Laspeyres, ed., *Bernardi Papiensis Faventini episcopi Summa Decretalium ad Librorum Manuscriptorum Fidem cum aliis eiusdem scriptoris anecdotis*, Graz 1956, 21).

procedure and its replacement by the less formal procedures of the *cognitio extraordinaria*, and finally the introduction of new forms of contract, Roman law did not accept the enforceability of *pacta nuda*.²⁴

The canonists were, however, aware of the lures and dangers of an unlimited consensualism. Most of all they took into account the risk that the absence of any formalities could encourage people to bind themselves too light-heartedly. Therefore, the concept of *causa* was introduced. To be legally binding and enforceable, a contract needed to be based on a cause. The range of possible *causae*, however, was very wide. Under the influence of scholastic Thomism, both Aristotelian commutative justice as well as liberality came to be recognised so that, next to reciprocal contracts, unilateral promises kept their binding power.²⁵

This condition, however, did little to limit the wide possibilities canon consensualism offered in the matter of entering legally sanctioned relations. The access to ecclesiastical jurisdiction for disputes about promises and contracts was further restricted by the canonists themselves. For a promise to be enforceable before an ecclesiastical court, the promise had to be strengthened by an oath. Thereby, the religious character of the promise was stressed. Perjury was considered to be a serious sin which was curbed by the ecclesiastical courts since the earlier days. The jurisdiction of the Church here reigned supreme *ratione peccati*.²⁶ Thereby the same distinction between binding and actionable contracts was introduced in canon law as existed in Roman law with its concept of *obligatio naturalis*.

During the thirteenth century, two different opinions were formed in the canonistic literature on the enforceability of contracts. Johannes Teutonicus († 1245/1246) defended the position that all promises and contracts were actionable in the ecclesiastical courts.²⁷ Pope Innocent IV (1243-1254) however did not accept the enforceability of all contracts, but referred to the disciplinary measures of the Church, up to interdict and excommunication. The vast majority of thirteenth, fourteenth and fifteenth centuries canonists flocked to the standard of Teutonicus, though some writers like cardinal Zabarella (1335-1417) or Imola († 1436) adhered to Innocent.²⁸

²⁴ Bärmann, 'Pacta sunt servanda' 21-33; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999) 8-10; M. Kaser, *Römische Privatrecht* (Munich 1971) 1.474-527; Zimmermann, *The Law of Obligations* 1-5 and 508-36.

²⁵ J. Gordley, 'Natural Law Origins of the Common Law of Contract', in J. Barton, ed., *Towards a General Law of Contract* (Berlin 1990) 372-82; Idem, *The Philosophical Origins of Modern Contract Doctrine* (Oxford 1991) 49-50; Zimmermann, *The Law of Obligations*, 551.

²⁶ J. Gaudemet, 'Le serment dans le droit canonique médiéval', in R. Verdier, ed., *Le Serment* (Paris 1991) 2.66-67.

²⁷ Under the *condictio ex canone*, a general *actio* for the enforcement of obligations where no specific rules or means of enforcement were provided, cfr. *condictio ex lege* in Roman law: Zimmermann, *The Law of Obligations* 543.

²⁸ F. Spies, *De l'observation des simples conventions en droit canonique. Etude suivie de quelques recherches concernant l'influence du principe canonique de l'observation des simples conventions sur le droit coutumier français* (Paris 1928) 92-108. On the classical canon law doctrine of contract in general: Bärmann, 'Pacta sunt servanda' 35-43; J.-P. Baud, 'Contrats nommés et contrats innommés en droit savant', *Studia Gratiana* 19 (1976) 33-57; M. de Taube, 'L'inviolabilité des traités', *Recueil des Cours de l'Académie de droit international* 32 (1930) 347-49; G. Chevrier, *Essai sur l'histoire de la cause dans les obligations*

The glossators and the commentators of Roman law did a lot to break down the formalism of Roman contract law. Bartolus (1314-1357) and most of all Baldus de Ubaldis (ca. 1327-1400) tried to narrow the gap between the canon and Roman law of contract. The commentators distinguished between *pacta vestita* and *pacta nuda*. The contracts under the last category were not enforceable and were considered to constitute at the most a natural obligation. Baldus however introduced the idea that a cause sufficed as a *vestimentum*. Though thereby the practical implication of canon and roman law doctrine could not differ much any longer, the principle of consensualism was not accepted into Roman law by the commentators.²⁹ The difference between canon law and Roman law concerned thus foremost the original point of departure of the system of contract law, but the gap had been almost closed by the end of the Middle Ages. Nevertheless, the theoretical differences would continue to be recognised and even stressed by early modern doctrine.

III. *The early modern doctrine on contract and treaty*

The modern doctrine of treaty law only very gradually emerged from the general private law doctrines of contract during the seventeenth, eighteenth and nineteenth centuries. Herein, doctrine matched treaty practice as during the Middle Ages and the early modern period, treaties were mostly signed by monarchs and presented as agreements not between states, but between rulers. Even in the case of Republics like the United Provinces or Venice, a certain personification was upheld in the references to the treaty parties.³⁰ Only in the eighteenth century this started to change, as for instance monarchs were not longer referred to by their names but by their titles in the preambles of treaties.³¹

Here, as on other issues of the law of nations, Hugo Grotius has often been named as the first to elaborate an autonomous and systematic doctrine of the law of treaties.³² One should be careful with of this assessment. On the one hand, this statement

(*droit savant du Moyen-Age – ancien droit français*) (Paris 1929) 140-83; J. Gordley, 'Good faith in contract law in the medieval *ius commune*', in R. Zimmermann and S. Whitakker, ed., *Good Faith in European Contract Law* (Cambridge 2000) 93-117; Helmholz, 'Contract and the Canon Law', 50-53; K.-P. Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (Munich 1985) 52-55; J. Roussier, *Le Fondement de l'Obligation contractuelle dans le Droit classique de l'Eglise* (Paris 1933); W. Scherrer, *Die Geschichtliche Entwicklung des Prinzips des Vertragsfreiheit* (Basel 1948) 17-27; L. Seuffert, *Zur Geschichte der obligatorischen Verträge* (Nördlingen 1881) 53-67; Spies, *De l'observation des simples conventions* 1-116; Zimmermann, *The Law of Obligations* 542-44.

²⁹ Chevrier, *Essai sur l'histoire de la cause* 120-139; Gordley, *The Philosophical Origins* 30-68; A. Söllner, 'Die Causa im Konditionen- und Vertragsrecht bei den Glossatoren, Kommentatoren und Kanonisten', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, 77 (1960) 212-47; Zimmermann, *The Law of Obligations* 538-41 and 552.

³⁰ By referring to the Estates-General in the case of the Republic or the doge in the case of Venice. Lesaffer, *Europa: een zoektocht naar vrede* 142-43.

³¹ Grewe, *Epochen* 421; Lesaffer, *Europa: een zoektocht naar vrede* 132-43 and 396-403.

³² As recently by Ziegler, *Völkerrechtsgeschichte* 156. While at the same time he was often reproached of not doing this sufficiently: Lauterpacht, *Private Law Sources and Analogies* 159.

undervalues the influence previous writers had on Grotius. On the other hand, it also an overstatement to assert that Grotius had an autonomous theory of treaty law. It is true that Grotius distinguished public treaties from treaties entered by rulers that only dealt with private matters.³³ Grotius referred to great Roman jurist Ulpian († 223) and associated public treaties with the *foedera* from the classical Roman *ius fetiale*, the closest thing the Roman had to a body of public international law.³⁴ Grotius also distinguished between real and personal treaties. Treaties entered into by republics were always real, while in the case of treaties signed by monarchs it depended on their contents.³⁵ With real treaties other rules than the general rules of contract law were applied for some matters. These special rules concerned among others the binding force of treaties for the successors of the original signatory parties. Also Christian Wolff (1679-1754) and Emerich de Vattel (1714-1767) recognised the same categories and attached similar consequences to them. Obligations from real treaties, which necessarily could imply both obligations *dando et faciendo*, were considered binding upon successors and were thus not *intuitu personae*.³⁶

Grotius and the other great theorists of international law of the seventeenth and eighteenth centuries clearly considered treaties as an integral part of the broad category of contracts, certainly inasmuch as their creation was concerned. This was true for the theorists from the school of natural law such as Pufendorf or Wolff. Starting from the universal all-embracing rules of natural law, the natural lawyers could not but encompass both civil law contracts and international treaties under the same basic rules about the creation of obligations. According to sir Hersch Lauterpacht (1897-1960), even the more staunch positivists of the nineteenth century were not able to completely separate treaties from the influence of the general principles of the private law of contract.³⁷

³³ 'Publicas ergo conventiones eas intellegit quae nisi iure imperii maioris aut minoris fieri nequeunt, quae nota differunt non tantum a contractibus privatorum, sed et a contractibus regum circa negotia privata': Grotius, *De Iure Belli ac Pacis* 2.15.1 (389).

³⁴ See on Roman treaty law and the Roman 'public international law' in general: C. Baldus, 'Vestigia pacis. The Roman peace treaty: structure or event?', in R. Lesaffer, ed., *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge 2004) 103-46; J. Plescia, 'The ius pacis in Ancient Rome', *Revue internationale des droits de l'antiquité*, 3rd series 41 (1994) 301-51; K.-H. Ziegler, 'Das Völkerrecht des römischen Republik', in H. Temporini, ed., *Aufstieg und Niedergang der römischen Welt* (Berlin 1972) 1.68-114; Idem, 'Kriegsverträge im antiken römischen Rechts', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, 115 (1985) 40-89; idem, 'Friedensverträge im römischen Altertum', *Archiv des Völkerrechts*, 27 (1989) 45-62.

³⁵ E.g. a treaty on dynastic marriages was to be considered personal. Grotius, *De Iure Belli ac Pacis* 2.16.16 (416-17).

³⁶ Grotius, *De Iure Belli ac Pacis* 2.16.16-18 (416-18); C. Wolff, *Jus gentium methodo scientifica pertractatum* 8.1017 (J. H. Drake, ed., *The Classics of International Law* 13, Oxford and London 1934, 1.365); E. de Vattel, *Le droit des gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* 2.12.187-88, 191 and 197 (A. de La Pradelle, ed., *The Classics of International Law* 4, Washington 1916, 1.394, 1.396-97 and 1.403-04).

³⁷ 'Some positivist writers, although acknowledging the contractual nature of treaties, emphatically deny the private law character of the institution of contract. It belongs, they say, to the domain of general jurisprudence. There would be no objection to basing both contracts and treaties on the wider basis of universal conception if it were not the fact that the 'conception of general jurisprudence' is here frequently used for the purpose of explaining away an otherwise insurmountable difficulty, namely, how it can be that

Lauterpacht rightly considered natural law, or even the 'general jurisprudence' – which according to him served with the positivists as a substitute for the natural law whose existence they denied – as the bridge between private and international law. In any case, all this proves that it is inevitable to look at the doctrine of contracts of the 'classics of international law' if one claims to grasp their doctrines on treaties and explain their origins. Or to quote Lauterpacht:

Natural law performed, in the older days, the function of a bridge between international and private law; it was the cover under which international law drew from the rich source of private, notably Roman, law. In the days of the predominance of positivist tendencies it is 'general jurisprudence' which is fulfilling this function.³⁸

As is not surprising from a jurist coming from the civil law tradition living and working in a common law country, Lauterpacht mostly considered the significance of Roman law when he mentioned private law. In his two extensive publications on the formation of the modern doctrine of contract, James Gordley tried to prove that, firstly, the theories of the epitomisers of the school of natural law like Hugo Grotius or Samuel Pufendorf (1632-1694) were strongly dependent on the writings of the neo-scholastic theorists of contract law such as Domingo de Soto (1495-1560), Diego de Covarrubias (1512-1577), Luis Molina (1535-1600) or Leonardus Lessius (1554-1623), and, secondly, that through them, the influence of medieval, Thomistic scholastic thought on modern contract law is predominant.³⁹ Nevertheless, Gordley's work clearly shows the quite extensive use the neo-scholastics made of Roman law and medieval Romanist doctrine in their writings on the subject. As far as Gordley's publications are concerned, canon law is far less if not referred to.

The influence of scholastic theology on the neo-scholastic theory of contract is obvious. The Thomists as well as the neo-scholastics asserted the binding force of contracts on the Christian duty of speaking truth. The reasoning behind this was that the duty of speaking the truth implied the binding force of promises and as contracts were the exchange of promises, they were to be considered binding on the sole basis of making a mere promise, apart from any formalities. In stating this, they did of course nothing else than Gratian (ca. 1100-1160) and medieval canonists had done. However, where they emphasized the fact that both onerous contracts as well as voluntary transactions were binding, they did this in the context of the Aristotian-Thomistic views on commutative justice and liberality. According to Saint Thomas Aquinas (1225-1274) this also implied that breaking a mutual contract did not only constitute a

the free consensus of the parties is not essential in international treaties. It is simply being pointed out that the requirement of free will is nothing short of an inadmissible analogy to private law, and that contract being a 'universal conception' it may be looked upon as dispensing, in international law, with the free declaration of the parties as an essential condition of the validity of the compact': Lauterpacht, *Private Law Sources and Analogies* 160-61.

³⁸ Lauterpacht, *Private Law Sources and Analogies* 34-35.

³⁹ Gordley, 'Natural Law Origins of the Common Law of Contract'; Idem, *The Philosophical Origins of Modern Contract Doctrine*.

sin against the precept of truthfulness or *honestas*, but also against the virtue of justice, or more specifically, *fidelitas*.⁴⁰ The binding force of mere promises, and by consequence reciprocal promises or conventions, was asserted by Aquinas and his neo-scholastic followers. No formalities were demanded in the domain of natural justice.⁴¹

The neo-scholastic approach was a reaction to the nominalist philosophy that defended the principle of voluntarism in God, creation and man.⁴² The neo-scholastics as their Thomist predecessors claimed the reason and intelligibility of creation and nature and the universality and exchangeability of natural law precepts. Roman rules were, in the words of Gordley, 'dismissed as mere pragmatic deviations from true principle'.⁴³ Distinctions between *pacta vestita et nuda* or nominate and innominate contracts as well as the formalities of Roman law were accepted to be valid in the field of positive law, but did nothing to diminish the general validity of mere promises and agreements under natural law. In reality, the influence of Roman law concepts on the natural law doctrines of contract and treaties became not insignificant thereby. To the neo-scholastics as to Hugo Grotius Roman law in fact continued to be a source of information about what rules were general enough to be precepts of natural law. The whole theory of *error*, *fraus* and *metus* in contract law and the discussion on the application of duress (*metus*) in treaty law offer examples of the ongoing significance of Roman law.⁴⁴ Rightly, Gordley spoke of it a synthesis between Roman law and Aristotelian-Thomistic philosophy.⁴⁵

Out of all this, the question arises what the significance of canon law has been on the neo-scholastic and later theorists in the emergence of consensualism to the detriment of the more formalistic approach of Roman law. Firstly, there is little or nothing within the Thomistic approach to the problem that opposes the canonistic doctrines in such a way that it should exclude influence of canon law. Quite to the contrary, the reference to the moral duty of truthfulness by Aquinas was also made by Gratian and was the very foundation of the binding power of promises and of consensualism in canon law as well. The only real difference was that the Thomistic tradition also included lavish references to Aristotle and Cicero,⁴⁶ while the canonists limited themselves to Bible texts and the writings of the Church Fathers.⁴⁷

⁴⁰ Thomas Aquinas, *Summa theologiae* II-II, qu.110, a.3, ad 5 (Maastricht 1952, 3.725-26, Biblioteca de Autores Cristianos). Gordley, 'Natural Law Origins of the Common Law of Contract' 374.

⁴¹ Gordley, 'Natural Law Origins of the Common Law of Contract' 370-78; Idem, *The Philosophical Origins of Modern Contract Doctrine* 73-81.

⁴² Gordley, 'Natural Law Origins of the Common Law of Contract' 369-70; Idem, *The Philosophical Origins of Modern Contract Doctrine* 23-26.

⁴³ Gordley, 'Natural Law Origins of the Common Law of Contract' 377.

⁴⁴ Lauterpacht, *Private Law Sources and Analogies* 14 and 161-67.

⁴⁵ Gordley, *Philosophical Origins of Modern Contract Doctrine* 69.

⁴⁶ 'Fundamentum autem est iustitiae fides, is est dictorum conventorumque constantia et veritas': Cicero, *De officiis* 1.7.23 and 3.15.61 (Walter Miller, ed., Loeb Classical Library, London 1990, 24 and 330). Gordley, 'Natural Law Origins of the Common Law of Contract' 375.

⁴⁷ The Thomistic and legistic lines of thought could of course not be separated as the Aristotelian tradition had already influenced classical Roman law and as the Thomistic-scholastic tradition was not unknown to the medieval Romanists. H. Coing, 'Zum Einfluss der Philosophie des Aristoteles auf die

The more specific aristotelic-thomistic ideas on commutative justice and liberality did not throw such a long and all-clouding shadow over the further development of contract doctrine as the idea of the binding force of promises in itself. The seventeenth and eighteenth centuries saw a revival and recuperation of the nominalist tradition in the theories of among others Francis Bacon (1561-1626), Thomas Hobbes and John Locke (1632-1704) with their attack on the existence and relevance of general categories and 'about the outside world that went beyond one's experience'.⁴⁸ Though this did not cause, as Gordley rightly assessed, authors like Pufendorf or Jean Barbeyrac (1674-1744) to break with the neo-scholastic contract doctrine,⁴⁹ it did something to stress the role of the free will in human relations and thus in contract theory.

This shift came already to light in the discussion about the question whether a promise had to be accepted to be binding. While Aquinas had already asserted this, some neo-scholastics like Covarruvias, Soto and Molina rejected this. Molina argued that as in Roman law the *pollicitatio* or promise was binding before acceptance and as Roman law could not be in contradiction to natural law, natural law could not demand acceptance.⁵⁰ Only Lessius held to the view of Aquinas.⁵¹ Grotius and Pufendorf did not hesitate to assert the necessity of acceptance⁵² and thereby stressed the consensus of the wills of the parties as the central element in the creation of obligations.⁵³ To reach that consent, the expression of the will in whatever way became essential. Grotius and Wolff clearly started from the idea that the upholding of one's word was a precept of natural law and the foundation of the law of obligations.⁵⁴ Thereby, they traced back their steps to what had been the point of departure in both canonistic and Thomistic doctrine. This does not allow us to conclude in any way that they willingly or even knowingly approached the classical canon law doctrine, but it shows that the

Entwicklung des römischen Rechts', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, romanistische Abteilung, 69 (1952) 24-59; Gordley, *The Philosophical Origins of Modern Contract Doctrine* 31-68.

⁴⁸ Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 114.

⁴⁹ Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 112-33.

⁵⁰ Luis de Molina, *De iustitia et iure tractatus, opera omnia in quinque tomos distribuita* disp. 263 (Cologne 1733, 2.25).

⁵¹ Gordley, 'Natural Law Origins of the Common Law of Contract' 380-81.

⁵² Grotius, *De Iure Belli ac Pacis* 2.11.14-16 (335-36); S. Pufendorf, *De Jure Naturae et Gentium libri octo* 3.6.15 (C.H. Oldfather and W.A. Oldfather, ed., *The Classics of International Law* 17, Oxford and London 1934, 1.287-89). Also: 'Cum in promissione in promissarium transferatur jus exigendi praestationem promissam, ad translationem vero juris requiratur acceptatio': C. Wolff, *Institutiones juris naturae et gentium* 381 (M. Thomann, ed., Olms 1969, 200).

⁵³ 'The debate was also significant because of the way it ended. The need for an acceptance came to be regarded as a natural condition for a promise to be binding rather than as a special requirement for onerous contracts. It was a doctrine rooted in the will of the parties, and not in commutative justice': Gordley, 'Natural Law Origins of the Common Law of Contract' 381-82.

⁵⁴ Grotius, *De Iure Belli ac Pacis* 2.11.1 and 10 (326-28 and 334-35). Pufendorf however started right away from the idea that if agreements were not upheld the benefits of mutual exchange would be lost: Pufendorf, *De Jure Naturae et Gentium* 3.4.1-2 (1.257-58). Wolff from the other side stressed the importance of truthfulness: 'Fides dicitur constantia voluntatis alteri verbi declaratae de eo, quod facere, vel dare velimus. Fides igitur supponit, ut moraliter vera loquaris, aut moraliter falsa dicta mutato animo in moraliter vera vertas': *Institutiones* 389 (204). Diesselhorst, *Die Lehre von Hugo Grotius vom Versprechen*, 34-35.

canon law was as much an inextricable part of the medieval inheritance the school of natural law benefited from as Thomistic theology as far as consensualism was concerned, or Roman law as far as the more technical aspects of law were concerned. Later theorists of treaty law such as Vattel would hardly deem it necessary to do anything more to sustain the binding power of all treaties than with a simple reference to the concept of promise.⁵⁵

Secondly, the neo-scholastics were not blind themselves to the significance of consensualism in canon law doctrine. Molina offers the best example for this. Where he discussed *pacta nuda*,⁵⁶ he confronted the general binding force of contracts under natural justice with them not being actionable under civil or Roman law. Here, he introduced the discussion between Pope Innocent IV and the majority of canonists about the being actionable of *pacta nuda* under canon law.⁵⁷ Molina adhered to the *communis opinio*. Where he stated that an oath made a *pactum* actionable under civil law, he mentioned the similarity with canon law.⁵⁸ The theorists of the seventeenth and eighteenth centuries considered a breach of a treaty as an injustice that gave the injured party the right to enforce its claims under the treaty or to claim damages.⁵⁹ In the absence of any supranational authorities, this meant the waging of a war. Therefore at first sight, the line between the 'civil' enforcement of the treaty or the punishment of the perpetrator, which had divided canonists over centuries, could seem to have become very thin. This is not however all together correct, as the theorists of the eighteenth century such as Vattel were quick to stress the non-punitive character of peace agreements between sovereign and equal powers.⁶⁰ As Albericus Gentilis (1552-1608) had already stated, a war had to be compared to a civil and not a penal trial.⁶¹ In all, very little attention was devoted to the matter of obtaining damages in case of a breach of treaty. The theorists of treaty law were more concerned with the question whether the injured party could consider his obligations under the treaty terminated if the other party had breached one clause.⁶²

Thirdly, one of the main points where early modern treaty doctrine contradicted contemporaneous contract law was in the discussion on the *clausula rebus sic stantibus*. Whereas Grotius still opposed the *clausula* which has been defended by Albericus Gentilis, most authors on international law after Grotius came, even is often grudgingly, to accept the inevitability of the clause in the reality of international

⁵⁵ Vattel, *Le droit des gens* 2.13 (1.200)

⁵⁶ 'Pactum nudum... est, quod neque in contractum transit nominatum, neque una cum eo intervenit factum, aut causa, ex parte alterius': Molina, *De iustitia et iure*, disp. 253 (2.9).

⁵⁷ 'Primo quoniam ex pacto nudo conceditur actio jure canonico... & affirmat communis doctorum sententia': Molina, *De iustitia et iure*, disp. 256 (2.12).

⁵⁸ 'Si pactum nudum Juramento confirmetur, num ex eo oriatur civilis obligatio, & numde jure canonico & civili, detur ex illo actio': Molina, *De iustitia et de iure*, disp. 256 (vol. 2, p. 11).

⁵⁹ Vattel, *Le droit des gens* 2.12.164 and 2.13.200 (1.407); Wolff, *Jus gentium* 4.378 (1.138)

⁶⁰ Vattel, *Le Droit des Gens* 3.3.40 (2.30).

⁶¹ A. Gentilis, *De iure belli libri tres* 1.6 (J. Rolfe, ed., *The Classics of International Law* 16, Washington 1933, 1.46-50).

⁶² Grotius, *De Iure Belli ac Pacis* 2.15.15 and 3.20.34-38 (403-04 and 837-38); Vattel, *Le Droit des Gens* 2.13.202 (1.408-10); Wolff, *Jus gentium* 4.430-32 (vol. 1.159-60).

politics.⁶³ The *clausula rebus sic stantibus* had its roots in Roman moral philosophy. Seneca (4 B.C.-65) had first expressed the idea. The very first mentioning of the doctrine in a legal context was in a gloss on Gratian so that it can be said that as a juridical concept it was introduced into contract law by canonist doctrine.⁶⁴ It was Bartolus who afterwards introduced the idea into the Roman law tradition.⁶⁵

IV. Early Modern Treaty Practice

The significance of canon law was more important and obvious for treaty practice than it was for doctrine. This was however not true for the possibilities canon law offered for consensualism, but quite to the contrary for the forms and guarantees for observance of contracts and treaties.

The early modern treaty practice was far from concerned with the discussion on consensualism that dominated the doctrine of contract law. From Antiquity onwards, treaties had in principle been put in writing and international agreements had been accompanied by all different kinds of formalities. The swearing of an oath, whereby God or the gods were invoked as witnesses and guarantors of the promises made, was customary since Antiquity.⁶⁶ In the context of Christian Europe, the oath had come to take a central place in all kinds of private and public dealings, including international relations. Next to the religious and moral aspects, the code of chivalry as well as feudality did a lot to strengthen the importance of the oath as an expression of a bond of mutual trust and fidelity between persons.⁶⁷ As treaties were in principle agreements between rulers, and not between political entities, there was no difference between an oath as a means of binding two private persons and an oath in the context of international relations.

During the fifteenth and sixteenth centuries, almost all treaties were ratified by oath. Since the later Middle Ages, two techniques of negotiating and signing treaties had been developed. The German scholar Walter Heinemeyer distinguished the '*unmittelbare Vertragsschliessungsverfahren*' from the '*zusammengesetzte Vertragsschlies-*

⁶³ A. Gentilis, *De iure belli libri tres* 3.14 (J. C. Rolfe, ed., *The Classics of International Law* 16, Washington 1933, 1.599); Grotius, *De Iure Belli ac Pacis* 2.16.25 (421-22); Vattel, *Le Droit des Gens* 2.17.296 (1.490). Lauterpacht, *Private Law Sources and Analogies* 167-72; Lesaffer, *Europa: een zoektocht naar vrede* 361-62; A. Nussbaum, 'Forms and Observance of Treaties in the Middle Ages and the Early Sixteenth Century', G.A. Lipsky, ed., *Law and Politics in the World Community. Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (Berkeley and Los Angeles 1953) 193; C.G. Roelofs, 'Grotius and the state practice of his day', *Grotiana*, new series 10 (1989) 5-14.

⁶⁴ '... semper subintelligitur haec conditio, si res in eodem statu manserit'; Johannes Teutonicus, gl. Furens, ad C.22, qu.2, c.14. And not by the glossators as *Oppenheim's International Law* still claims: R. Jennings and A. Watts, ed., *Oppenheim's International Law* (London and New York 1996) 2.1305.

⁶⁵ R. Feenstra, 'Impossibilitas and Clausula rebus sic stantibus', in A. Watson, ed., *Daube noster. Essays in legal history* (London 1974) 81; Zimmermann, *The Law of Obligations*, 579-80.

⁶⁶ D. Bederman, *International Law in Antiquity* (Cambridge 2001) 137-206; Wehberg, 'Pacta sunt servanda' 775-76.

⁶⁷ De Taube, 'L'inviolabilité des traités' 336-45; P. Prodi, *Il sacramento del potere. Il giuramento politico nella storia costituzionale dell'Occidente* (Bologna 1992).

sungsverfahren'. Under the '*unmittelbare Vertragsschliessungsverfahren*' the parties to the treaties, the rulers, exchanged identical documents they signed and thus way directly expressed their agreement on the text they or their ambassadors had negotiated. This method was frequently used during the late Middle Ages, but gradually disappeared from the late fifteenth century on. During the early modern period it was only used when the rulers themselves were present, and even then. By the eighteenth century it was not in use any more. The '*zusammengesetzte Vertragsschliessungsverfahren*' had therefore become the standard method by the beginning of the sixteenth century. Here the role of the ambassadors or plenipotentiaries acting on behalf of the rulers was central. This method implied three consecutive phases: the granting of full powers to the negotiators, the agreeing on a treaty text by the negotiators and the ratification by the rulers themselves. For all of these phases, documents were normally made up and exchanged.⁶⁸

During the late Middle Ages, almost all important treaties were ratified through the taking of an oath. Mostly, this oath was sworn during a religious ceremony in Church and surrounded with material formalities such as the touching of the Gospels or the Holy Cross. It was the oath that was considered to make the treaty really binding upon the treaty parties themselves. In principle, the ceremony was attended by the representatives of the other treaty partner. Nevertheless, documents were made up, signed and sealed in which the taking of the oath was mentioned and described. These documents were originally not much more than evidence for the actual deed of ratification. Until the early sixteenth century, not the documents, but the oath can be considered to be constitutive for the consensus on the treaty. While the swearing of oaths remained customary through the sixteenth and most of the seventeenth century, from about 1530 onwards it started to become gradually accessory and the written ratification became constitutive.⁶⁹

The agreeing on the treaty text by the negotiating diplomats was sometimes, if not often, accompanied by an oath as well. This oath implied that the negotiators promised that the treaty would be accepted, ratified and executed by the treaty partners they represented.⁷⁰

⁶⁸ W. Heinemeyer, 'Studien zur Diplomatik mittelalterlicher Verträge vornehmlich des 13. Jahrhunderts', *Archiv für Urkundenforschung*, 14 (1936) 357-400; Lesaffer, *Europa: een zoektocht naar vrede 148-49*; K. Neitmann, *Die Staatsverträge des deutschen Ordens in Preussen 1230-1449. Studien zur Diplomatie eines spätmittelalterlichen deutschen Territorialstaates* (Cologne and Vienna 1986) 137-50.

⁶⁹ See on that the discussion between Steiger and myself: H. Steiger, 'Bemerkungen zum Friedensvertrag von Crépy en Laonnais vom 18. September 1544 zwischen Karl V. und Franz I', in U. Beyerlin, M. Bothe, R. Hofman, E.-U. Petersmann, edd., *Recht zwischen Umbruch und Bewahrung. Völkerrecht – Europarecht – Staatsrecht* (Berlin etc. 1995) 249-64; Lesaffer, 'Peace Treaties from Lodi to Westphalia' in Idem, ed., *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge 2004) 9-44.

⁷⁰ Treaty of Cambrai of 10 december 1508, oath by the negotiators (P. Mariño and M. Moran, edd., *Tratados internacionales de España. Carlos V*, Madrid 1982, III-1.215-16 – further referred to as Mariño); treaty of Cambrai of 5 August 1529, art. 49 (J. Dumont, *Corps universel diplomatique du droit des gens*, Amsterdam, 1726, IV.2.15 – further referred to as Dumont); treaty of Câteau-Cambrésis of 3 April 1559, art. 41 (Dumont V-1.34).

The ratification through an oath brought the treaty making process and the observance of treaties within the domain of canon law and canon jurisdiction. As was mentioned before, canon legal doctrine itself stated that the taking of an oath made the ecclesiastical courts competent for disputes on a certain agreement. The breaking of an oath was a serious sin and therefore the canonical jurisdiction was invoked. According to canon law, the observance and execution of any treaty ratified by oath was submitted to the jurisdiction of the Church.⁷¹

A distinction has to be made between an oath and the solemn promises princes made on their honour as kings or knights. Oaths implied by definition the invocation of the name of God and thereby made it a religious act. In some treaties and ratifications it was stated that the ruler promised to uphold a treaty on his honour as knight, or as the supreme knight of the realm – the king. Often the reference to the royal or knightly honour was combined with the taking of an oath.⁷²

In many treaties, in one of the final articles, the negotiators expressed the promise that their sovereigns would ratify the treaty by oath. In some cases, it was stated that they would do so while touching the Gospels or the Holy Cross. Mostly, it was stated that the documents giving evidence of the ceremony would be exchanged by a certain date.⁷³

Some treaties of the fifteenth and early sixteenth centuries also included guarantees or provided for sanctions in case of non-observance of the treaty. In treaties in which the French King was involved, the partners pledged their word under the guarantee of all their goods and possessions.⁷⁴ In some important treaties of the fifteenth and early sixteenth centuries, it was expressly stated that the parties recognised the ecclesiastical jurisdiction and that they would submit to the disciplinary sanctions of the Church while promising not to seek dispensation. They sometimes

⁷¹ M. David, 'Parjure et mensonge dans le Décret de Gratien', *Studia Gratiana* 3 (1955) 117-141; Gaudemet, 'Le serment dans le droit canonique médiéval' 68-69.

⁷² Though it was not always expressly stipulated that an oath would be taken: treaty of Arras of 23 December 1482, art. 85 (Dumont III-2.107). Treaty of Barcelona of 19 January 1493, *in fine* (Dumont III-2.301); treaty of Madrid of 14 January 1526, oath of François I (Mariño III-3.172).

⁷³ '... juraverunt, ad Sancta Dei Evangelia tactis Sacris Scripturis...?', peace of Lodi of 9 April 1454, *in fine* (Dumont, III-1.205); '... inivimus, promissimus, condordavimus, firmavimus, & juravimus, inimus, pollicemur, promittimus, concordamus, firmamus, & juramus super Sancta Dei quattuor Evangelia corporaliter & manualiter per nos tacta, bona fide, & in verbo Regio tenere...': treaty of Barcelona of 19 January 1493, *in fine* (Dumont III-2.300-01); treaty of Senlis of 23 May 1493, art. 48 (Dumont vol. III-2.303); treaty of Blois of 22 September 1504, art. 14 and ratifications (Mariño III-1.75, III-1.79-81 and III-1.92); treaty of Cambrai of 10 December 1508, art. 19 and ratifications (Mariño III-1.214 and III-1.217-34); treaty of Madrid of 14 January 1526, art. 46 (Mariño III-3.171); treaty of Cambrai of 5 August 1529, art. 46 (Dumont IV-2.15).

⁷⁴ Until the eighteenth century, such a pledge was included in the ratifications of the French kings. '... sub obligatione & Hipoteca omnium bonorum nostrorum praesentium & futurorum...': treaty of Barcelona of 19 January 1493, *in fine* (Dumont III-2.301); treaty of the Pyrenees of 7 November 1659, art. 124 (C. Parry, ed., *The Consolidated Treaty Series*, Dobbs Ferry 1969, 5.389-90 – further referred to as Parry); ratification by the French king for the treaty of Nijmegen of 10 August 1678 (Parry 14.375); idem for the treaty of Rijswijk of 20 September 1697 (Parry 21.365-66); idem for the treaty of Utrecht of 11 April 1713 (Parry 27.495); idem for the treaty of Aachen of 18 October 1748 (Parry 38.330-32).

even agreed to ask the Pope to confirm the treaty and pronounce an automatic excommunication *nunc pro tunc et tunc pro nunc*.⁷⁵

The significance of the ecclesiastical jurisdiction over treaties may not be underestimated. Though in reality the intervention of the Church, if rather frequent, was seldom efficient, the submission of the treaties to the competence of the Church was a cornerstone in the conceptions ruling treaty practice and thereby international relations. Next to Roman and feudal law, canon law was a universally accepted and applied law system within the *respublica christiana* of the Late Middle Ages and the early sixteenth century. Thereby, it constituted a body of law on which princes and rulers could inspire themselves in the elaboration of rules to organise and govern their relations. At the same time, canon law held, just as Roman law did, an overruling authority to which the princes of Europe were considered to be submitted. The Pope and the papal courts constituted a supranational authority whose superiority was generally recognised in spiritual matters. The *respublica christiana* formed an integrated legal order in which the voluntarism of the mightiest princes was at least on a theoretical level checked by the existence of a body of law independent from their will and by a supranational authority.⁷⁶

The third and fourth decades of the sixteenth century marked the final collapse of this system in Europe. The erosion of the medieval legal order of the *respublica christiana* had already begun during the fourteenth century. The formation of powerful monarchies offered a serious challenge to the already damaged authority of especially the Emperor but also the Pope. During the second half of the fifteenth century and the first decades of the sixteenth century, the spectacular conquests by the Turkish Ottomans that threatened the very heart of the Latin world, led to a resurgence of the ideals of Christian unity and the dream of a crusade. The Renaissance Popes unsuccessfully tried to play a leading role in the organisation of the common defence of Christianity. The election of Charles V (1519-1555) as Roman Emperor marked to many the hope for a new Emperor who would unite Christianity and bring peace to the *respublica christiana* as well as lead the crusade. The constant rivalry between the Habsburgs and the Valois of France shattered the ambitions of Charles V and the

⁷⁵ 'Et insuper uterque Principum praedictorum, infra terminum praedictum, instanter & cum effectu requiret Sacro-Sanctam Sedem Apostolicam, & Summum Pontificem, qui ferat Sententiam Excommunicationis nunc pro tunc & tunc pro nunc': treaty of Etaples of 3 November 1492, *in fine* (Dumont III-2, 294-95); '... & pariter censuris Sanctae Sedis Apostolicae, volentes quod ad majorem firmitatem...Litterae Apostolicae super ipsis fortiores & meliores dictamine sapientum, substantia tamen non mutata, conficiantur...': treaty of Barcelona of 19 January 1493, *in fine* (Dumont III-2, 301); papal confirmation of the treaty of Noyon of 13 August 1516 (Mariño vol. III-2, 130-35); '... se soubmettans quant à ce aux Jurisdictions, coërcitions & Censures Ecclesiastiques, jusques à l'invocation du bras seculier inclusivement...': treaty of Cambrai of 5 August 1529, art. 46 (Dumont IV-2, 15). In the marriage agreement between the Spanish and French kings of 7 November 1659 the Pope was asked to ratify the agreement as well as the oaths: *in fine* (Parry vol. 5, p. 403).

⁷⁶ Joycelyne G. Dickinson, *The Congress of Arras 1435. A Study in Medieval Diplomacy* (Oxford 1955) 71, 76 and 206-207; Allen Z. Hertz, 'Medieval Treaty Obligation', *Connecticut Journal of International Law*, 6 (1991) 431; Neitmann, *Die Staatsverträge des deutschen Ordens* 303-04; Nussbaum, 'Forms and Observance of Treaties'.

dream of peace and unity among Christian princes. Both the failure of the crusade and of the imperial dream of Charles V, or at least of some of his ministers and propagandists, did a lot to discredit the ideal of the *respublica christiana*. The alliance between the Ottoman Sultan and the French King François I (1515-1547) more than symbolised this crisis. After 1520 the Reformation brought an end to the religious unity of Europe. Thereby the universal jurisdiction of the Pope and the Church as well as the universal application of canon law were lost. The international legal order was in full crisis. The European legal system entered an era of chaos that would only really end in the decades of the peace treaties of Westphalia of 1648.⁷⁷

Notwithstanding this, the ratification of treaties by oath only very slowly disappeared. In treaties among Catholic princes formalities such as the touching of the Gospels were still often demanded. Among protestant princes or in treaties where rulers of different religions were involved, the formalities demanded by the treaty were limited to a minimum so that each could swear in the ways of his religion. More important however is that from approximately 1540 onwards all express references to the canonical jurisdiction or sanctions were absent from the treaties, even within the Catholic world. Though the ratification by oath lived on until deep in the seventeenth century, it underwent an process of decanonisation.⁷⁸

The subsistence of the oath allowed however for the gradual emergence of new formalities of ratification. By the late seventeenth century, the ratifications were predominantly done by the signing and sealing of documents. Thereby these documents became clearly constitutive for the ratification, and could not longer be considered to offer mere evidence of it.⁷⁹ The writers on international law of the seventeenth and eighteenth centuries were quite explicit in stating that the oath was not constitutive for the treaty, but that the underlying and naked consensus was enough.⁸⁰ Thereby, consensualism triumphed over the customary oath taking.

V. Conclusion

The theorists of the law of treaties of the early modern period came to accept the consensualism expressed in the maxim *pacta sunt servanda* rather easily. As they adopted the principle of consensualism from their general doctrines of contract, they had to devote little specific attention to it. The debate on consensualism and formalism was of course a historical debate, inherited from the antagonism between canon law

⁷⁷ R. Lesaffer and D. van den Auweele, 'De betekenis van de Renaissance voor het ontstaan van het moderne Europese statensysteem (1450-1600)', in J. Tollebeek, G. Verbeeck, T. Verschaffel, edd., *De lectuur van het verleden. Opstellen over de geschiedenis van de geschiedschrijving aangeboden aan Reginald de Schryver* (Leuven 1999) 477-85; R. Lesaffer, 'Charles V, *monarchia universalis* and the law of nations (1515-1530)', *Tijdschrift voor Rechtsgeschiedenis* 71 (2003) 79-123.

⁷⁸ On that process: Lesaffer, *Europa: een zoektocht naar vrede* 159-160.

⁷⁹ L. Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (Berlin and Leipzig 1924) 1-6.

⁸⁰ Pufendorf, *De jure naturae et gentium* 4.2.6 and 4.2.11 (1.340 and 1.344-46); Vattel, *Le Droit des Gens* 3.15.225 (2.198); Wolff, *Jus gentium* 4.425 (1.157).

and scholastic theology on the one side and the jurisprudence of Roman law on the other side.

These theorists were aware of the fact that in reality treaties were always formal agreements. Nevertheless, the principle of consensualism was important. The general acceptance of the maxim *pacta sunt servanda* was a necessary cornerstone for the survival of a legal system after the collapse of the old European order. Without this, both treaties and custom would lose their juridical dimension and the law would become completely obsolete in the organisation of relations between now truly sovereign princes. It is clear that the princes and rulers of the sixteenth, seventeenth and eighteenth centuries when they signed their treaties implicitly held on to this principle. Though the *clausula rebus sic stantibus* won a lot of ground during the late seventeenth and eighteenth centuries, it still had to be considered an exception and an anomaly of the system.⁸¹ Knowing the realities of international power politics, the parties to treaties included quite some measures to support the observance of treaties and thereby clearly indicated their acceptance of the binding power of those treaties and the importance of them being observed for the peace and order of the European constellation of monarchies.⁸² Though in reality the principle of *pacta sunt servanda* became more and more under pressure, it was never given up. The theorists of the seventeenth century onwards were aware of this as they stressed the importance of the principle in view of the growing dangers and challenges caused by the shifting interests and whims of princes and states.⁸³

The rule of *pacta sunt servanda* therefore survived as a basic and unassailable principle of the international order – together with the recognition of the right of self-defence – the onslaught of the emerging sovereign state and the collapse of religious unity on the medieval legal order of Europe. The public international law of the late seventeenth, eighteenth and nineteenth centuries indeed departed from a strict voluntarism that excluded the formation and imposition of rules of international law without the consent of the relevant powers. This, as Hersch Lauterpacht again rightly stated, did not imply that the international legal order did not recognise the prior existence of rules that escaped the will of the states.⁸⁴

The central place consensualism and the maxim of *pacta sunt servanda* held within the early modern doctrine of international law can therefore be explained by a reaction to the collapse of the medieval international legal system. The recognition of the basic and objective character of the maxim had to save the juridical dimension of all international relations. For that, the neo-scholastics and their successors of the

⁸¹ Lauterpacht, *Private Law Sources and Analogies* 169-72.

⁸² Lesaffer, *Europa: een zoektocht naar vrede* 413-14 and 436-41. An clear indication of this were the references in late seventeenth century and eighteenth century treaties to previous treaties implying these elder treaties were the very basis of the European order: Lesaffer, *Europa: een zoektocht naar vrede*, 424-27; H. Steiger, 'Der Westfälische Friede – Grundgesetz für Europa?', H. Duchhardt, ed., *Der Westfälische Friede. Diplomatie – politische Zäsur – kulturelles Umfeld – Rezeptionsgeschichte* (Munich 1998) 59-66.

⁸³ Very explicitly in Grotius, *De Iure Belli ac Pacis* 2.10.1 (319-21) and in Vattel, *Le Droit des Gens* 2.12.152 (1.368).

⁸⁴ H. Lauterpacht, 'International Law and General Jurisprudence', in E. Lauterpacht, ed., *International Law Being the Collected Papers of Hersch Lauterpacht* (Cambridge 1975) 2.14-15.

seventeenth and eighteenth centuries who wrote on international law, turned to natural law. In fact, they took the maxim from the medieval tradition of contract law and its attempts at consensualism. As James Gordley has elaborately proved, the direct influence of Thomistic theology and thereby Aristotelian philosophy on the contract doctrine of the neo-scholastics was predominant. Nevertheless the significance of the canon law of contract, though much less direct, can not be denied. Firstly, canon law was an integral and inextricable part of the intellectual inheritance of the neo-scholastic theologians and jurists as much as Thomism or Roman law were. Secondly, in the question of consensualism canon law had the same religious and ethical roots as Thomism had. It were much more these primal roots and not the quite extensive elaborations on them of scholastic theologians which were relevant to the construction of the early modern doctrine of treaty law. Moreover, canon lawyers were the first to give the idea of the binding power of promises a juridical dimension. Thirdly, it should be remarked that, though this will not have had any real influence, canon law formed a remarkable parallel to early modern treaty law as it combined doctrinal consensualism with a practice of formality.

The neo-scholastics tried not unsuccessfully to give the international legal order a new universal and unchangeable basis after the collapse of the *respublica christiana* with the re-introduction of natural law. In this way, one can say that natural law came to hold the same place that Roman, feudal and above all canon law had held until the beginning of the sixteenth century. When the theorists of international law of the early modern and modern period started to elaborate this natural law, they very often fell back on the general principles of private law. Natural law thus was a bridge between international law and private law. In the matter of consensualism and contract, this included bridging the distance between international law and canon law.