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## **Philosophical Foundations of International Criminal Law: Correlating Thinkers**

Morten Bergsmo and Emiliano J. Buis (editors)



## E-Offprint:

Elisabetta Fiocchi Malaspina, ““The friend of all nations”: Punishment and Universal Jurisdiction in Emer de Vattel’s *Law of Nations*”, in Morten Bergsmo and Emiliano J. Buis (editors), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-117-4 (print) and 978-82-8348-118-1 (e-book)). This publication was first published on 30 November 2018. This e-offprint was released with a new copyright page on 16 December 2022.

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**Front cover:** *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

**Back cover:** *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

## “The friend of all nations”: Punishment and Universal Jurisdiction in Emer de Vattel’s *Law of Nations*

Elisabetta Fiocchi Malaspina\*

### 10.1. Introduction

Francis Stephen Ruddy argued that the acceptance of Emer de Vattel’s *Law of Nations* is mainly due to three factors:

The first was his readability, which was the vehicle whereby the Law the Nations gained a popular significance it had never entertained before and [...] left the narrow circle of the doctrinaire to enter the wide and more influential circle of the man of letters. The second factor was the relevance of his work to the political facts of the day, especially state sovereignty, and the third factor was the system borrowed almost *in toto* from Wolff, whereby Vattel’s system was given coherence as well as grace and relevance.<sup>1</sup>

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<sup>1</sup> Francis Stephen Ruddy, *International Law in the Enlightenment: The Background of E. de Vattel’s ‘Le Droit des Gens’*, Oceana Publications, New York, 1975, pp. 309–10; Francis Stephen Ruddy, “The Acceptance of Vattel”, in Charles Henry Alexandrowicz (ed.), *Grotian Society Papers: Studies in the History of the Law of Nations*, Martinus Nijhoff, The Hague, 1972, pp. 177–96. See also: Charles G. Fenwick, “The Authority of Vattel”, in *The American Political Science Review*, 1913, vol. 7, no. 3, pp. 395–410; Charles G. Fenwick, “The Authority of Vattel”, in *The American Political Science Review*, 1914, vol. 8, no. 3, pp. 375–92; Paul Guggenheim, *Emer de Vattel et l’étude des relations internationales en*

The ‘legibility’, clarity and apparent linearity are reflected in the elaboration of fundamental concepts concerning both the State, as the need to have a constitution, and the international community, represented by the principle of balance of international power and the war in due form.<sup>2</sup>

One of the unique aspects of the treatise lies in its extraordinary ability to regulate the State: political power – especially in the first book dedicated to the nation – is the result of many legal mechanisms of ‘governability’, taking place in the relation between the sovereign and his citizens at a national level and among sovereigns at the international level, through what Michel Foucault calls ‘bio-competency’.<sup>3</sup> Vattel organises the social realm of the nation by promoting research for good government, for its own perfection and happiness, which coincides with the maintenance of security and welfare of its citizens.<sup>4</sup>

There is a need to have laws able to create life without repressing it. This principle, applied at the international level, is based on rules to be respected both in times of peace and war, as they are simultaneously functional and vital to the survival of each nation. Constitutional law, domestic and international law are held together by the need to write for practical application, exclusively for the sovereigns and for those who, like diplomats and practitioners, need to address issues related to the law of nations on a daily basis:

The law of nations is the law of sovereigns. It is principally for them and for their ministers that it ought to be written. All mankind are indeed interested in it; and, in a free country, the study of its maxims is a proper employment for every citizen: but it would be of little consequence to impart the

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*Suisse*, Georg et Cie, Geneva, 1956, p. 23; Henri Thévenaz, “Vattel ou la destinée d’un livre”, in *Schweizerisches Jahrbuch für Internationales Recht*, 1957, vol. 14, pp. 9–16.

<sup>2</sup> Vincent Chetail, “Vattel and the American Dream: An Inquiry into the Reception of the Law of Nations in the United States”, in Pierre-Marie Dupuy and Vincent Chetail (eds.), *The Roots of International Law: Liber Amicorum Peter Haggemacher*, Martinus Nijhoff, Leiden, 2014, p. 295.

<sup>3</sup> Michel Foucault, in François Ewald, Alessandro Fontana and Michel Senellart (eds.), *Nascita della biopolitica: Corso al Collège de France (1978-1979)*, Mauro Bertani and Valeria Zini trans., Feltrinelli, Milan, 2005, p. 221.

<sup>4</sup> Emanuelle Jouannet, “What is the Use of International Law?”, in Hélène Ruiz Fabri, Emanuelle Jouannet and Vincent Tomkiewicz (eds.), *Select Proceedings of the European Society of International Law, Volume 1, 2006*, Hart Publishing, Portland, 2008, p. 58.

knowledge of it only to private individuals, who are not called to the councils of nations, and who have no influence in directing the public measures. If the conductors of states, if all those who are employed in public affairs, condescended to apply seriously to the study of a science which ought to be their law, and, as it were, the compass by which to steer their course, what happy effects might we not expect from a good treatise on the law of nations!<sup>5</sup>

According to Vattel, the *Law of Nations* serves as a compass for those who have roles in the government, since the principles of a State are crucial to the development of subsequent rules in international relations. Studying Vattel’s theories, the importance of constitutional and national law becomes evident as the prerequisite from which international law follows as an inevitable consequence.

In 2008, on the occasion of 250<sup>th</sup> anniversary of the publication of the *Law of Nations* (1758–2008), there was a veritable ‘bloom’ of monographs, papers and conferences about his person, his work and his thought.<sup>6</sup> This is not to mention the international seminars, workshops and

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<sup>5</sup> Emer de Vattel, “Preface”, in Bela Kapossy and Richard Whatmore (eds.), *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Liberty Fund, Indianapolis, 2008, p. 18.

<sup>6</sup> Among many contributions: Vincent Chetail and Peter Haggenmacher (eds.), *Vattel’s International Law in a XXI<sup>st</sup> Century Perspective: Le droit international de Vattel vu du XXI<sup>e</sup> Siècle*, Brill, Leiden, 2011; Christoph Good, *Emer de Vattel (1714–1767) – Naturrechtliche Ansätze einer Menschenrechtsidee und des humanitären Völkerrechts im Zeitalter der Aufklärung*, Dike, Zurich, 2011; Tetsuya Toyoda, *Theory and Politics of the Law of Nations: Political Bias in International Law Discourse of Seven German Court Councilors in the Seventeenth and Eighteenth Centuries*, Brill, Leiden, 2011, pp. 161–90; Yves Sandoz (ed.), *Réflexions sur l’impact, le rayonnement et l’actualité du ‘Droit des gens’ d’Emer de Vattel: Reflections on the Impact, Influence and Continuing Relevance of the ‘Law of Nations’ by Emer de Vattel*, Bruylant, Brussels, 2010. See also Béla Kapossy (ed.), in *Grotiana*, 2010, no. 31 dedicated to Vattel. In 2008, Richard Whatmore and Béla Kapossy republished the English edition of Vattel’s treatise of 1797, providing a dense introductory note in Vattel, 2008, p. ix–xx, see *supra* note 5; in the same year a Portuguese edition was published, with an introductory essay written by Francesco Mancuso in Emer de Vattel, *O direito das gentes ou Principios da lei natural applicados à condução e aos negócios das nações e dos governantes*, in Francesco Mancuso (ed.), Unijuí, Ijuí, 2008, pp. 17–67; in 2011, the English version of the treatise curated by Chitty in 1834 was republished: Emer de Vattel, *The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, new edition, Joseph Chitty (ed.), Cambridge University Press, Cambridge, 2011 (1834).

conferences organised in Switzerland and other European countries on the occasion of Vattel's 300 years anniversary (1714–2014).<sup>7</sup>

International lawyers, legal historians and historians of international relations have reconstructed the historical and political context in which Vattel wrote. They have critically provided a re-reading of the *Law of Nations*, bringing out the decisive features of the work for the creation of international law during the eighteenth and nineteenth centuries.

In fact, in the last decade, interest in Vattel has increased incredibly, and publications – mainly in the form of articles – have surged around the world. The result is an extraordinary and vibrant array of studies surrounding Vattel's thinking. There has been, for example, extensive research on the various readings of the book,<sup>8</sup> on the concept of legal entity of the State,<sup>9</sup> on the reason of State,<sup>10</sup> on good government,<sup>11</sup> on the system of the *Law of Nations*,<sup>12</sup> on war,<sup>13</sup> on the enemy,<sup>14</sup> on the right of re-

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<sup>7</sup> There were several conferences and seminars, for example the Neuchâtel encounter of 30 April 2014 “*Neuchâtel La genèse et l'impact du Droit des Gens. A l'occasion du 300<sup>ème</sup> anniversaire de la naissance d'Emer de Vattel*” (organised by André Bandelier and Yves Sandoz). See also the newspaper articles: Harro von Senger, “Schweizer Gesetzestexte China”, in *Neue Zürcher Zeitung*, 22 April 2014, p. 22; Harro von Senger, “Un Neuchâtelois adopté par l'Empire du Milieu”, in *Le Temps*, 25 April 2014, p. 12.

<sup>8</sup> Béla Kapossy, “Rival Histories of Emer de Vattel's Law of Nations”, in *Grotiana*, 2010, vol. 31, no. 1, pp. 5–21.

<sup>9</sup> Ben Holland, “The Moral Person of the State: Emer de Vattel and the Foundations of International Legal Order”, in *History of European Ideas*, 2011, vol. 37, no. 4, pp. 438–45.

<sup>10</sup> Marti Koskeniemi, “International Law and *Raison d'État*: Rethinking the Prehistory of International Law”, in Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, Oxford University Press, Oxford, 2011, pp. 297–339; also Richard Devetak, “Law of Nations as Reason of State: Diplomacy and the Balance of Power in Vattel's Law of Nations”, in *Parergon*, 2011, vol. 28, no. 2, pp. 105–28.

<sup>11</sup> Santiago Legarre, “Police and Police Power: Domestic and International Law at the Crossroads”, in Luigi Nuzzo and Miloš Vec (eds.), *Constructing International Law: The Birth of a Discipline*, Klostermann, Frankfurt am Main, 2012, p. 431–45.

<sup>12</sup> Marti Koskeniemi, “International Community from Dante to Vattel”, in Vincent Chetail and Peter Haggénmacher (eds.), *Vattel's International Law in a XXI<sup>st</sup> Century Perspective, Le droit international de Vattel vu du XXI<sup>e</sup> Siècle*, Brill, Leiden, 2011, pp. 51–75.

<sup>13</sup> Gabriella Silvestrini, “Giustizia della guerra e disuguaglianza: Vattel, l'aggressore ingiusto e il nemico del genere umano”, in *Filosofia politica*, vol. 22, no. 3, pp. 381–400; Gabriella Silvestrini, “Justice, War and Inequality. The Unjust Aggressor and the Enemy of Human Race in Vattel's Theory of the Law of Nations”, in *Grotiana*, 2010, vol. 31, no. 1, pp. 44–68; also Simone Zurbuchen, “Vattel's Law of Nations and Just War Theory”, in *History of European Ideas*, 2009, vol. 35, no. 4, pp. 408–17; see also the writings of Hunter: Ian

sistance,<sup>15</sup> on trade,<sup>16</sup> on non-intervention,<sup>17</sup> on colonialism,<sup>18</sup> on the reception in the United States,<sup>19</sup> on international treaties,<sup>20</sup> on the role of

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Hunter, "Law, War, and Casuistry in Vattel's *Jus Gentium*", in *Parergon*, 2011, vol. 28, no. 2, pp. 87–104; Ian Hunter, "Vattel's Law of Nations: Diplomatic Casuistry for the Protestant Nation", in *Grotiana*, 2010, vol. 31, no. 1, pp. 108–40.

- <sup>14</sup> Francesco Mancuso, "*Le Droit des gens* come apice dello *jus publicum europaeum*? Nemico, guerra, legittimità nel pensiero di Emer de Vattel", in *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, 2009, vol. 38, no. II, pp. 1277–310; and also the more recent contributions: Francesco Mancuso, "L'altro, il selvaggio, il pirata: Emer de Vattel e l'eccezione del 'politico'", in *Iura and legal systems*, 2015, vol. 2, pp. 65–81; Francesco Mancuso, "Vattel: l'altro, il selvaggio, il pirata, il nemico, la costituzione", in Giuseppe Foscari (ed.), *L'Europa e la scoperta dell'Altro*, Ipermedium Libri, S. Maria Capua Vetere, 2012, pp. 29–51; and Michel Senellart, "La qualification de l'ennemi chez Emer de Vattel", in *Astérion*, 2004, vol. 2.
- <sup>15</sup> Alberto Carrera, "Il diritto di resistenza nella dottrina giuridica di Emer de Vattel", in Alberto Sciumè (ed.), *Il diritto come forza, la forza del diritto: Le fonti in azione nel diritto europeo tra Medioevo ed età contemporanea*, Giappichelli, Torino, 2012, pp. 81–109.
- <sup>16</sup> Isaac Nakhimovsky, "Vattel's Theory of the International Order: Commerce and the Balance of Power in the Law of Nations", in *History of European Ideas*, 2007, vol. 33, no. 2, pp. 157–73; Ileana Porras, "Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations", in *Leiden Journal of International Law*, 2014, vol. 27, no. 3, pp. 641–60.
- <sup>17</sup> Simone Zurbuchen, "Vattel's 'Law of Nations' and the Principle of Non-Intervention", in *Grotiana*, 2010, vol. 31, no. 1, pp. 69–84; Jennifer Pitts, "Intervention and Sovereign Equality: Legacies of Vattel", in Stefano Recchia and Jennifer M. Welsch (eds.), *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill*, Cambridge University Press, Cambridge, 2013, pp. 132–53.
- <sup>18</sup> Georg Cavallar, "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?", in *Journal of the History of International Law*, 2008, vol. 10, no. 2, pp. 181–209; Antony Anghie, "Vattel, Internal Colonialism, and the Rights of Indigenous Peoples", in Robert Nichols and Jakeet Singh (eds.), *Freedom and Democracy in an Imperial Context*, Routledge, New York, 2014, pp. 81–99; Antony Anghie, "Vattel and Colonialism: Some Preliminary Observations", in Vincent Chetail and Peter Haggemacher (eds.), *Vattel's International Law in a XXIst Century Perspective, Le droit international de Vattel vu du XXIe Siècle*, Brill, Leiden, 2011, pp. 237–53.
- <sup>19</sup> Brian Richardson, "The Use of Vattel in the American Law of Nations", in *The American Journal of International Law*, 2012, vol. 106, no. 3, pp. 547–71, in particular pp. 548–50; Ian Hunter, "A *Jus gentium* for America. The Rules of War and the Rule of Law in the Revolutionary United States", in *Journal of the History of International Law*, 2012, vol. 14, no. 2, pp. 173–206; Chetail, 2014, see *supra* note 2.
- <sup>20</sup> Pierre-Marie Dupuy, "Vattel et le droit des traités", in Vincent Chetail and Peter Haggemacher (eds.), *Vattel's International Law in a XXIst Century Perspective, Le droit international de Vattel vu du XXIe Siècle*, Brill, Leiden, 2011, pp. 151–66; Randall Lesaffer, "A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties", in Vincent Chetail and Peter Haggemacher (eds.), *Vattel's International Law in a XXIst*

different translations of the work<sup>21</sup> and on the comparison of its theories with important eighteenth century jurists as well as philosophers.<sup>22</sup>

In addition, there have been important and relevant monographs focusing on delicate topics, thus highlighting Vattel's contribution in rela-

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*Century Perspective/Le droit international de Vattel vu du XXI<sup>e</sup> Siècle*, Brill, Leiden, 2011, pp. 353–84.

<sup>21</sup> On the spread of the *Law of Nations*, for example, in the Italian peninsula of the eighteenth century and the first Italian edition of 1781 see Antonio Trampus, “Il ruolo del traduttore nel tardo illuminismo: Lodovico Antonio Loschi e la versione italiana del *Droit de gens* di Emer de Vattel”, in Antonio Trampus (ed.), *Il linguaggio del tardo illuminismo. Politica, diritto e società civile*, Edizioni di storia e letteratura, Rome, 2011, p. 89; Antonio Trampus, “The Circulation of Vattel's *Droit des gens* in Italy: the Doctrinal and Practical Model of Government”, in Antonella Alimento (ed.), *War, Trade and Neutrality: Europe and the Mediterranean in Seventeenth and Eighteenth Centuries*, Franco Angeli, Milan, 2011, pp. 217–32; Antonio Trampus, “La traduzione toscana del *Droit des gens* di Emer de Vattel (circa 1780): contesti politici, transferts culturali e scelte traduttive”, in Giulia Cantarutti and Stefano Ferrari (eds.), *Traduzione e Transferts nel XVIII secolo tra Francia, Italia e Germania*, Franco Angeli, Milan, 2013, pp. 153–74. See the following contributions on Vattel's international system: Antonio Trampus, “Dalla libertà religiosa allo Stato nazione: Utrecht e le origini del sistema internazionale di Emer de Vattel”, in Frédéric Ieva (ed.), *I trattati di Utrecht: una pace di dimensione europea*, Viella, Rome, 2016, pp. 93–106; on Vattel and Italian constitutions before Cadiz: Antonio Trampus, “Le costituzioni italiane prime di Cadice: Vattel e le radici democratiche italiane”, in Fernando Garcia Sanz et al. (eds.), *Cadice e oltre: costituzione, nazione e libertà. La carta gaditana nel bicentenario*, Istituto per la Storia del Risorgimento italiano, Rome, 2015, pp. 161–72; and for the *Law of Nations* in Europe of the eighteenth century: Koen Stapelbroek and Antonio Trampus, “Vattels *Droit des gens* und die europaischen Handelsrepubliken im 18. Jahrhundert”, in Olaf Asbach (ed.), *Der moderne Staat und 'le doux commerce': Politik, Ökonomie und internationale Beziehungen im politischen Denken der Aufklärung*, Nomos, Baden-Baden, 2014, pp. 181–206.

<sup>22</sup> Frederik Dhondt, “Historical Exempla in Legal Doctrine, Vattel and Réal de Curban on the War of the Spanish Succession”, in Dave De Ruyscher et al. (eds.), *Rechtsgeschiedenis op nieuwe wegen: Legal History, moving in new directions*, Maklu, Antwerp, 2015, pp. 367–94; Frederik Dhondt, “Vattel's *le Droit des gens*”, in Serge Dauchy et al. (eds.), *The Formation and Transmission of Western Legal Culture*, Springer, Heidelberg, 2016, pp. 285–88. See also: Ian Hunter, “Kant and Vattel in Context: Cosmopolitan Philosophy and Diplomatic Casuistry”, in *History of European Ideas*, 2013, vol. 39, no. 4, pp. 477–502; and Nardin's subsequent response: Terry Nardin, “Historian or Philosopher? Ian Hunter on Kant and Vattel”, in *History of European Ideas*, 2014, vol. 40, no. 1, pp. 122–34. On Rousseau and Vattel see Theodore Christov, “Vattel's Rousseau: *Ius gentium* and the Natural Liberty of States”, in Quentin Skinner and Martin van Gelderen (eds.), *Freedom and the Construction of Europe: Free Persons and Free States, Volume II*, Cambridge University Press, Cambridge, 2013, pp. 167–87; and Gabriella Silvestrini, “Vattel, Rousseau et la question de la justice de la guerre”, in Vincent Chetail and Peter Haggemacher (eds.), *Vattel's International Law in a XXI<sup>st</sup> Century Perspective, Le droit international de Vattel vu du XXI<sup>e</sup> Siècle*, Brill, Leiden, 2011, pp. 101–29.



tion to his predecessors, his contribution to modern public international law, the dualism in the *Law of Nations*,<sup>23</sup> the attention to humanitarian law,<sup>24</sup> Vattel’s revolutionary perspective in his attempt to rationalise international relations,<sup>25</sup> the dynamics related to the *Law of Nations* which lasted until the twentieth century<sup>26</sup> and the complex and very current concept of enemy of mankind.<sup>27</sup>

These pages aim to contextualise and analyse Vattel’s thought with respect to the development of international criminal law. Vattel’s position, as it will be demonstrated, is particularly interesting for its elaboration of ‘crime against the law of Nations’ and the possibility of ‘universal jurisdiction’ to be resorted to by any nation, without territorial limitations.

This chapter will present Vattel’s theories as they emerged both in practice and in the doctrine of international law: the first section is dedicated to contextualising Vattel’s life and thought. The second section will show Vattel’s theories on punishment and his idea of universal jurisdiction that he developed in his *Law of Nations*. The analysis will concentrate on studying the development of his theories taking into consideration the thoughts of his predecessors and the legal and philosophical sources of his theories, and also studying how the idea of nation and State elaborated by Vattel is important for understanding the concept of ‘universal jurisdiction’.<sup>28</sup> A conclusive section will investigate how Vattel’s theories contributed to the development of a modern doctrine of *jus cogens*, war crimes and crimes against humanity and to the doctrine of military inter-

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<sup>23</sup> Emmanuelle Jouannet, *Emer de Vattel et l’émergence doctrinale du droit international classique*, Pédone, Paris, 1998. See also: Emmanuelle Jouannet, “Les dualismes du droit des gens”, in Vincent Chetail and Peter Haggenmacher (eds.), *Vattel’s International Law in a XXIst Century Perspective, Le droit international de Vattel vu du XXIe Siècle*, Brill, Leiden, 2011, pp. 133–50; Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations. A History of International Law*, Christopher Sutcliffe trans., Cambridge University Press, Cambridge, 2012; Emmanuelle Jouannet, “Emer de Vattel (1714–1767)”, in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford, 2012, pp. 1118–21.

<sup>24</sup> Good, 2011, see *supra* note 6.

<sup>25</sup> Francesco Mancuso, *Diritto, Stato, Sovranità: Il pensiero politico-giuridico di Emer de Vattel tra assolutismo e rivoluzione*, Edizioni Scientifiche Italiane, Naples, 2002.

<sup>26</sup> Diego Lazzarich, *Stato moderno e diritto delle genti. Vattel tra politica e guerra*, Edizioni Labrys, Benevento, 2012.

<sup>27</sup> Walter Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security*, Brill, Leiden, 2013.

<sup>28</sup> *Ibid.*

vention for humanitarian purposes, looking at some recent examples in the practice of international law.

## 10.2. Vattel's Life: The Historical and Intellectual Context

Emer de Vattel was born in Couvet, in Neuchâtel, on 25 April 1714,<sup>29</sup> to David, a minister of the Protestant Church and Marie de Montmollin, daughter of Jean, *receveur à Valangin* and sister of Emer de Montmollin, one of the most zealous supporters of the Prussian government of which he became Councillor and Chancellor.<sup>30</sup> He began to follow in his father's footsteps by studying theology in Basel and even though he performed brilliantly on the exams for his admission to the faculty of theology, he declined this opportunity, deciding to enrol at the Academy of Geneva to devote himself to the study of law instead.

We do not know the reasons for his decision, maybe his refusal was linked to the excessive length of theological studies, or perhaps more likely it was the premature death of his father in April 1730, which motivated his change of mind.<sup>31</sup> He then moved to Geneva, where he dedicated himself to legal-philosophical studies through the works of Leibniz, Wolff and Barbeyrac, having probably as master Jean Jacques Burlamaqui.<sup>32</sup> After

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<sup>29</sup> The most important text on Vattel's life is the contribution of Béguelin: Edouard Béguelin, "En souvenir de Vattel (1714–1767)", in Faculté de droit et des sciences économiques, Université de Neuchâtel (ed.), *Recueil de travaux offert par la Faculté de Droit de l'Université de Neuchâtel à la Société Suisse de Juristes à l'occasion de sa reunion à Neuchâtel, 15–17 Septembre 1929*, Imprimerie P. Attinger s. a., Neuchâtel, 1929, pp. 35–176. Among many writings about the life of Vattel: Paul Guggenheim, "Emer de Vattel und das Völkerrecht", in Emer de Vattel, *Das Völkerrecht oder Grundsätze des Naturrechts, angewandt auf das Verhalten und die Angelegenheiten der Staaten und Staatsoberhäupter*, Wilhelm Euler trans., J.C.B. Mohr, Tübingen, 1959, pp. XV–XXXII; Johannes Jacobus Manz, *Emer de Vattel: Versuch einer Würdigung unter besonderer Berücksichtigung seiner Auffassung von der individuellen Freiheit und der souveränen Gleichheit*, Schulthess Polygraphischer Verlag, Zurich, 1971, pp. 9–54; Jouannet, 1998, pp. 13–14, see *supra* note 23; Jouannet, 2012, pp. 1118–21, see *supra* note 23. See also: Stéphane Beaulac, "Emer de Vattel and the externalization of Sovereignty", in *Journal of the History of International Law*, 2003, vol. 5, no. 2, pp. 237–92, in particular pp. 242–47; Stéphane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia*, Martinus Nijhoff, Leiden, 2004, pp. 128 ff.; Vattel, 1758, pp. IX–XX, see *supra* note 5. On the context of Neuchâtel and the Principality: Tetsuya Toyoda, "La doctrine vattelienne de l'égalité souveraine dans le contexte neuchâtelois", in *Journal of the History of International Law*, 2009, vol. 11, no. 1, pp. 103–24.

<sup>30</sup> Toyoda, 2011, pp. 166 ff., see *supra* note 6.

<sup>31</sup> Béguelin, 1929, p. 40, see *supra* note 29.

<sup>32</sup> *Ibid.*

his studies, in 1741, he published his first philosophical essay, *La défense du système leibnizien*, in which he firmly supported Leibniz and his thoughts.<sup>33</sup> The text was dedicated to Frederick II, in the hope perhaps to receive support for his diplomatic career – a path which he was unable to pursue for the time being. Béguelin describes Vattel’s arrival in Berlin in March 1742 as “sur l’invitation de l’ambassadeur de France et dans l’Espoir d’y trouver quelque employ”.<sup>34</sup> He was hosted by Jean Henry Samuel Formey, a friend with whom he would maintain an epistolary relationship for a lifetime.<sup>35</sup>

However, Vattel did not find a lucrative job in Berlin and therefore changed his perspective and – as a Prussian subject – moved to Dresden and the home of Count Heinrich von Brühl, the Prime Minister of the Electorate of Saxony, where he obtained temporary employment, and was awarded with the title of *conseiller d’ambassade*.<sup>36</sup> In 1747, he was sent on a diplomatic mission to Berne, as *ministre accrédité du Grand Electeur de Saxe*.<sup>37</sup> Unfortunately, this assignment brought him no financial gain and he was therefore forced to return to Neuchâtel.<sup>38</sup>

For Vattel the saddest time was, when he was living in Berlin, Dresden and Neuchâtel, as Béguelin describes: the work was precarious, and the salary was paltry and sporadic,<sup>39</sup> although other sources claim that

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<sup>33</sup> On the essay see Simone Zurbuchen, “Die schweizerische Debatte – die Leibniz–Wolffsche Philosophie und ihre Bedeutung für Emer von Vattels philosophischen Werdegang”, in Patrick Von Coleman and Anne Hofmann (eds.), *The Swiss Enlightenment: Re-conceptualizing Science, Nature, and Aesthetics*, Slatkine, Geneva, 1998, pp. 91–113; Simone Zurbuchen, “Das Prinzip des Naturrechts in der *école romande du droit naturel*”, in B. Sharon Byrd, Joachim Hruschka and Jan C. Joerden (eds.), *Jahrbuch für Recht und Ethik*, Duncker & Humblot, Berlin, 2004, vol. 12, pp. 189–211.

<sup>34</sup> Béguelin, 1929, p. 44, see *supra* note 29.

<sup>35</sup> *Ibid.*

<sup>36</sup> Toyoda, 2011, p. 169, see *supra* note 6.

<sup>37</sup> *Ibid.*

<sup>38</sup> The Mission in Bern lasted very short: according to letters sent to both Formey and Brühl it did not last more than four months: Béguelin, 1929, p. 77, see *supra* note 29.

<sup>39</sup> *Ibid.*, p. 49.

in those years Vattel led a comfortable life;<sup>40</sup> although, despite the living conditions he carried on writing even more exquisite literary texts.<sup>41</sup>

In 1758, however, after the publication of the *Law of Nations* his success was considerable to his own surprise: he was called to Dresden in 1759 to take up the diplomatic position he had envisioned for a long time and was appointed by Augustus III, King of Saxony, as his private advisor on Foreign Affairs.<sup>42</sup> This was the only and long-awaited opportunity for Vattel to demonstrate his abilities in the diplomatic sphere: strongly influenced from his new work, he published an essay on natural law in 1762 entitled *Questions de Droit Naturel*.<sup>43</sup> The work, in fact, was finished in March 1753 even before the publication of the *Law of Nations*. The delayed publication of *Questions de Droit Naturel* was mainly due to the difficulties of Vattel in finding a publisher and was also related, according to some sources, to Wolff's death which occurred in 1754.<sup>44</sup>

The essay is not a diatribe, rather, it presents a constructive critique towards the *Jus naturae* by the German philosopher, indeed “comme un commentaire, destiné à rendre [le] Traité [de M. Wolff] plus utile”.<sup>45</sup> All reflections and observations on Wolff's doctrine that the jurist of Neuchâtel developed over the years are collected in these pages: “à mesure que j'avançois, et que je les voyois s'étendre sur des matieres intéressantes, je commençai à penser, qu'il ne seroit peut-être pas inutile de les donner au

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<sup>40</sup> Philippe Godet, “Emer de Vattel”, in Société d'histoire et d'archéologie du canton de Neuchâtel (ed.), *Musée Neuchâtelois: Recueil d'histoire nationale et d'archéologie XXXme année*, Imprimerie de H. Wolfrath & Cie, Neuchâtel, 1893, pp. 221–22; also Manz, 1971, p. 16, fn. 15, see *supra* note 29.

<sup>41</sup> It should be noted also that between 1746 and 1761 he published several literary essays: *Loisir philosophique, ou pièces diverses de Philosophie de Morale et d'Amusemens* in 1747 (place was stated as Geneva, but was actually Dresden) and in 1757 *Poliergie au mélange de littérature et de poesie* (in Amsterdam). At that time Vattel also wrote: *Mélanges de littérature, de morale et de politique*, published in 1760, which had a further reprint in 1765, with the title *Amusemens de littérature, de morale et de politique*: Béla Kapossy, Richard Whatmore, “Emer de Vattel's *Mélanges de littérature, de morale et de politique* (1760)”, in *History of European Ideas*, 2008, vol. 34, no. 1, pp. 77–103.

<sup>42</sup> Béguelin, 1929, p. 49, see *supra* note 29.

<sup>43</sup> Emer de Vattel, *Questions de droit naturel et observations sur le Traité du droit de la Nature de M. le Baron de Wolff*, Société typographique, Berne, 1762, p. 439.

<sup>44</sup> André Bandelier, *Emer de Vattel à Jean Henry Samuel Formey: Correspondance autour du Droit des gens*, Honoré Champion, Paris, 2012, pp. 52–53.

<sup>45</sup> De Vattel, 1762, *Avertissement*, VIII, see *supra* note 43.

public”.<sup>46</sup> Vattel’s stated purpose was to try to refine and clarify the discipline of natural law on the basis of the definitions provided by Wolff,<sup>47</sup> and accordingly to achieve “une petite remarque ce qui peut prévenir mal”.<sup>48</sup> The essay is dedicated to a young audience and Vattel puts a purely didactic intent into it, using many examples, clear and precise logical reasoning, however it did not have the resonance of the *Law of Nations*.<sup>49</sup>

In 1764, already of mature age, he married Marie-Anne de Chêne, a young woman descended from a noble French family. They moved to Dresden and from their marriage Charles Adolphe Maurice de Vattel was born in Dresden, on January 30 1765.<sup>50</sup>

Maybe the efforts or attention required by his challenging assignment as Advisor of Augustus III caused the deterioration of his health to such an extent that he wrote to Formey: “l’air de Dresde ne me convient pas [...], et je ne suis point content de ma santé. Depuis huit ou neuf mois, [des incommodités] me tracassent et commencent à m’affaiblir. Cela, joint à mes occupations de devoir, me laisse à-peine le temps de jeter quelquefois les yeux sur Homère et Cicéron”.<sup>51</sup>

He returned to his hometown, when he perhaps already sensed that he was losing his strength and on 28 December 1767, at only 53 years, he died.<sup>52</sup> The death of the jurist of Neuchâtel did not diminish his fame, which instead carried on growing, with unique characteristics and peculiarities.

### **10.3. The *Law of Nations*: National and International Order to Achieve Security and Peace**

The genesis of the *Law of Nations* was in the year 1747, eleven years before its actual publication: all the steps, hesitations and difficulties are enclosed in correspondence, now available in print, between Vattel and

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<sup>46</sup> *Ibid.*, III. See also Beaulac, 2003, p. 246, see *supra* note 29.

<sup>47</sup> De Vattel, 1762, *Avertissement*, IV–V, see *supra* note 43.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, III.

<sup>50</sup> Béguelin, 1929, pp. 62–63, see *supra* note 29.

<sup>51</sup> *Ibid.*, p. 64.

<sup>52</sup> *Ibid.*, pp. 65, 140, fn. 191.



Jean Henry Samuel Formey,<sup>53</sup> who was likewise busy writing an essay on natural law.<sup>54</sup> Both, Formey and Vattel, argued the need for the renowned jurist of Halle, Christian Wolff, to be appreciated in francophone countries and aimed to spread his thought. In June 1749, in the footsteps of Jean Barbeyrac, Vattel suggested translating and adapting into French Wolff's just published *Ius gentium methodo scientifica pertractatum*, transforming it to make the theories of Wolff accessible to a wider audience.<sup>55</sup>

However, the project was unexpectedly set aside. The perception of translation as 'manipulative' choice that circulated in the so-called *Ecole Romande* did not seem apt for Vattel's objectives. Vattel wanted his own law of nations.<sup>56</sup>

The work published at Neuchâtel in 1758, under Vattel's eyes, saw many editions, which, as we will see hereinafter, are inextricably linked with the concepts of crime and universal jurisdiction.

The heart of Vattel's theories includes the creation of an interstate juridical order with certain principles: it presupposes a deep and analytical constituency of everything that belongs to a State and to a nation. Vattel builds up a concept of nation, including strict precepts to govern the life of the State and its citizens. Vattel's profound attention to detail even assumes for the individual a pronounced political connotation that allows him to contribute to his own wealth along with the communal one, thus creating an analogy between the private and public sphere comparable to the state regarding his internal and external actions.<sup>57</sup>

According to Jouannet:

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<sup>53</sup> Bandelier, 2012, see *supra* note 44; also André Bandelier, "De Berlin à Neuchâtel: la genèse du Droit des gens d'Emer de Vattel", in Martinus Fontius and Helmut Holzhey (eds.), *Schweizer im Berlin des 18. Jahrhunderts*, De Gruyter, Berlin, 1996, pp. 45–56.

<sup>54</sup> Samuel Henri Formey, *Principes du droit de la nature et des gens, Extrait du grand ouvrage latin de Mr de Wolff*, Rey, Amsterdam, 1758.

<sup>55</sup> Bandelier, 2012, p. XII, see *supra* note 44. See Vattel's letter to Formey of 27 June 1749, transcribed in *ibid.*, pp. 103–05.

<sup>56</sup> *Ibid.*, p. XIII.

<sup>57</sup> Francesco Piro, "Leibniz tra i due Thomasius. Identificare o differenziare 'Honestum' e 'Justum'?", in Giuseppe Cacciatore *et al.* (eds.), *La filosofia pratica tra metafisica e antropologia nell'età di Wolff e Vico*, Guida, Naples, 1999, pp. 441–43; Francesco Piro, "Il corpo politico dell'Europa: da Leibniz a Vattel", in Lorenzo Bianchi and Alberto Postigliola (eds.), *Un 'progetto filosofico' della modernità: 'Per la pace perpetua' di Immanuel Kant*, Liguori, Naples, 2000, pp. 65–94; Italo Birocchi, *Alla ricerca dell'ordine: Fonti e cultura giuridica nell'età moderna*, Giappichelli, Torino, 2002, p. 219, fn. 342.

En 1758, émerge réellement le droit des gens classique au sens d'un ensemble de règles individualisées et autonomisées, destinées à régir une société internationale non hiérarchisée dont le fondement est la notion de souveraineté étatique et dont la finalité est d'assurer le respect d'un certain nombre de droits et devoirs parfaits des États.<sup>58</sup>

He uses some of the theories on the law of nations developed by his predecessors. He establishes and 'endorses' with the *Law of Nations* a legal dialogue with political power. There are a few key words in Vattel's book that anticipate the themes and concepts of the nineteenth century: think of the distinction between State and nation, the Constitution, in its singular meaning, as 'fundamental rules' and the rights and obligations of a State towards its citizens. At the same time there is the creation of a specific international language in relation to universal jurisdiction, to the war in due form, and to the enemy of mankind. Paradoxically there is an innovation starting from the tradition; tradition marked by natural law and enlightenment *topoi*, but thanks to Vattel, they assume a completely different significance as they are distinguished by a more marked political and legal connotation.

In this sense, Norberto Bobbio's idea which characterises the diffusion of natural law theories of the eighteenth century through their exit from the strictly doctrinal sphere is instructive: "the doctrine of natural law, closed in universities, academics, and relegated to become massive textbooks or manuals, far from the social and political problems (think of Grotius, Thomasius, Hobbes), was a dead culture. Montesquieu, Voltaire, Rousseau, the Encyclopaedia was the living culture. Although the tools they used were mostly the same, the spirit had changed".<sup>59</sup> Vattel falls within this 'live culture'. His fame is mainly due to the development of the concepts of sovereignty, independence, equality of States and of bal-

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<sup>58</sup> Jouannet, 1998, p. 419, see *supra* note 23.

<sup>59</sup> Author's translation:

[L]a dottrina del diritto naturale, chiusa ormai nelle Università, diventata togata ed accademica, relegata in voluminosi trattati o in manuali istituzionali ad uso delle scuole, lontana dai problemi sociali e politici da cui da cui era pure sorta (si pensi a Grozio e ad Hobbes), era una cultura morta. Montesquieu, Voltaire, Rousseau, l'Enciclopedia rappresentavano la cultura viva. Anche se gli strumenti che essi adoperavano erano gran parte gli stessi, lo spirito era cambiato.

See Norberto Bobbio, *Il Giusnaturalismo moderno*, in Tommaso Greco (ed.), Giappichelli, Torino, 2009, p. 265.

ance of power; even if all these definitions have not been ‘created’ newly, he specified many of them in content and spread them through the *Law of Nations*.

The increased accessibility of legal theories, in this case the theories of natural law and law of nations, is not synonymous with ‘simplicity’ and ‘spread’ but with attention to a change, even judicial, which takes place in a particular historical and social context affecting both European and global levels.

It is not about having outlined *tout court* the political and legal characteristics, but to have given rise to a real need that began to take its shape in the eighteenth century with the *Law of Nations*. Vattel writes for those who are called to exercise a role in political power: it is an important awareness, his message is intended for those who govern, and therefore the language is structured in a very incisive way, and this is evident from the very beginning of the book.

In this respect, it should be noted that the historical context had a decisive influence on the *Law of Nations*: the work, as illustrated by Tetuya Toyoda, was written during the seven years’ war, which took place between 1756 and 1763 and involved the major European powers of the time, including Great Britain, Prussia, France, Austria and Russia.<sup>60</sup> On 28 February 1757, Vattel sent an open letter to *Avoyer et Conseil* of Berne to protest against the invasion of Saxony by Prussia;<sup>61</sup> later he wrote to Count Henrich Brühl saying that there was a precise passage in his work, in which he illustrated the obligation of all powers to come together to stop anyone who wanted to introduce “baleful [international] practices”;<sup>62</sup>

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<sup>60</sup> Toyoda, 2011, pp. 178–79, see *supra* note 6.

<sup>61</sup> “C’est un principe reconnu de toute la Terre, et sur lequel repose la sûreté et la tranquillité des Nations, que quand un Souverain croit avoir quelque sujet de plainte contre un autre, il doit proposer ses griefs, faire ses demandes, avant que de courir aux armes, et c’est seulement après qu’on lui a refusé une juste satisfaction, ou lorsqu’il ne peut raisonnablement l’espérer, que naît pour lui le droit de faire la guerre: Ou si le cas pressant l’oblige de pourvoir sans délai à sa sûreté, au moins doit-il être toujours prêt à accepter les conditions équitables qui lui seront offertes. La Saxe avoit désarmé, bien loin de faire des préparatifs menaçants. Le Roi de Prusse ne se plaignoit de rien; il faisoit des protestations d’amitié et de bon voisinage au moment qui a précédé son invasion dans ce pays. Il a requis même le passage”, see letter edited in Béguelin, 1929, pp. 172–73, see *supra* note 29; now also edited in Bandelier, 2012, pp. 181–84, see *supra* note 44.

<sup>62</sup> “Il se trouve justement dans mon Droit des Gens, un passage où je fais voir que toutes les Puissances doivent se réunir pour châtier celle qui veut introduire des coutumes si funestes”, see Béguelin, 1929, p. 57, see *supra* note 29. For Vattel’s reference on his passage

and it is precisely through the explicit position taken by Vattel to support Saxony that a year after the publication of his *Law of Nations*, in 1759, he was appointed private advisor to Augustus III and in 1763 he was transferred to the foreign affairs department in Dresden.<sup>63</sup>

From a formal point of view, there is a long *Preface* introducing the four books of the *Law of Nations* (dedicated to the Nation, the relations between them, war and peace); it contains the main principles of doctrine and sources, through a brief *excursus* on the various theories of the law of nations made by his predecessors.<sup>64</sup> Central and illuminating is the definition which Vattel gives of the law of nations, intended as “a particular science, consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns”.<sup>65</sup> The law of nations, to be defined as such, regulates the ‘affairs’ and the conduct of nations and sovereigns, before reaching the international level, even within the State itself.

According to Vattel, however, the law of nations has not been approached with the necessary care and was bound to a vague and imprecise notion, stating that in all prior and contemporaneous treatises before his own, the law of nations was “confused” with the natural law and therefore (those books) are not sufficient to define it in a legal sense.<sup>66</sup>

The main source of the *Law of Nations* is the doctrine of Wolff on which the law of nations is based. Vattel, in fact, stresses that he never would have thought of drafting such a book if he didn’t had the honour to study the work of Wolff, which clarified the scope of the foundation of the

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related to the chapter entitled “Of the Right of War, with regard to things belonging to the Enemy”, see Vattel, 2008, Book III, chap. IX, sect. 168, pp. 571–72, see *supra* note 5.

<sup>63</sup> Count Brühl on 15 January 1759 wrote to Vattel:

Sa Majesté agréee de vous employer dorénavant à la Chancellerie du Conseil privé pour des expéditions françaises (letter transcribed into).

Béguelin, 1929, pp. 131–32 fn. 156, see *supra* note 29. Vattel answered the 8 October 1759:

Je ne trouve point de termes, Monseigneur, pour vous bien exprimer toute l’étendue de ma reconnaissance. [...] Daignez, Monseigneur, assurer Sa Majesté de toute ma fidélité et du zèle qui me feroit exposer mille fois ma vie avec joie, pour son service.

Letter (1929), transcribed in *ibid.*, p. 132, fn. 156.

<sup>64</sup> See the analysis of the *Preface* written by Mancuso: Mancuso, 2002, pp. 248 ff., see *supra* note 25.

<sup>65</sup> Vattel, 2008, *Preface*, p. 5, see *supra* note 5.

<sup>66</sup> *Ibid.*

law of nations and the concept of natural law.<sup>67</sup> Accordingly, Vattel resumes in his *Preface* what he had confided to his friend Formey, that he writes the *Law of Nations* along the lines of Wolff's work, taking as corollaries his definitions and general principles, but at the same time, however, he points out that from the very moment he decided to write his treatise, he had diverged from Wolff's thinking, thus avoiding to simply translate the work of the German jurist into French.<sup>68</sup>

At the base of the thought of the German jurist there is the classical parallel between natural society of individuals and of States: "natura civitates diversae inter se spectantur tanquam personae liberae"<sup>69</sup> and "ad eadem officia tum erga se ipsas, tam erga gentes alias obligantur, qua singuli singulis tenentur".<sup>70</sup> Consequently, States focus on natural law, which is by definition immutable and perfect. However, as it happens among men, who are otherwise imperfect, a right with the intrinsic characteristics

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<sup>67</sup> *Ibid.*, pp. 10–11:

This glory was reserved for the baron de Wolff. That great philosopher saw that the law of nature could not, with such modifications as the nature of the subjects required, and with sufficient precision, clearness, and solidity, be applied to incorporated nations or states, without the assistance of those general principles and leading ideas by which the application is to be directed;—that it is by those principles alone we are enabled evidently to demonstrate that the decisions of the law of nature respecting individuals must, pursuant to the intentions of that very law, be changed and modified in their application to states and political societies,—and thus to form a natural and necessary law of nations: whence he concluded, that it was proper to form a distinct system of the law of nations,—a task which he has happily executed.

<sup>68</sup> *Ibid.*, p. 13:

From Monsieur Wolff's treatise, therefore, I have only borrowed whatever appeared most worthy of attention, especially the definitions and general principles; but I have been careful in selecting what I drew from that source, and have accommodated to my own plan the materials with which he furnished me. Those who have read Monsieur Wolff's treatises on the law of nature and the law of nations, will see what advantage I have made of them. Had I every-where pointed out what I have borrowed, my pages would be crowded with quotations equally useless and disagreeable to the reader. It is better to acknowledge here, once for all, the obligations I am under to that great master. Although my work be very different from his (as will appear to those who are willing to take the trouble of making the comparison), I confess that I should never have had the courage to launch into so extensive a field, if the celebrated philosopher of Halle had not preceded my steps, and held forth a torch to guide me on my way.

<sup>69</sup> Christian Wolff, *Institutiones iuris naturae et gentium in quibus ex ipsa hominis natura continuo nexu omnes obligationes et iura omnia*, officina Rengeriana, Halae-Magdeburgicae, 1750, pars III, sectio II, caput I, sect. 977, p. 600.

<sup>70</sup> *Ibid.*, pars IV, caput I, sect. 1088, p. 679.



of immutability and perfection is not in itself enough to regulate all human relationships. Accordingly, it is necessary to have a law between States that is less strict than *ius naturae* and can therefore better adapt to the complexity of international relations. This right has a very different origin from 'States' consensus' worked out by Grotius: to Wolff, the law of nations does not derive from either an agreement or a custom, but by the fact that people find themselves in a sort of *civitas gentium maxima*, which imposes certain standards of conduct.<sup>71</sup>

According to Wolff, this society derives from the need to "gather the forces" in order to reach their own perfectibility "cum gentes conjunctis viribus se statumque suum perficere obligentur; ipsa natura societatem quandam inter gentes instituit, in quam ob obligationis naturalis indispensablem necessitatem consentire tenetur, ut quasi pacto contracta videatur".<sup>72</sup>

As argued by Scipione Gemma, in the theory of Vattel the so-called voluntary right is such only in name, while in substance it has almost all characteristics of a right of nature such as necessity and absoluteness.<sup>73</sup> Not necessary and at the same time not absolute, it is a law based on consensus. This consensus can be explicit such as in law of nations treaties "jus quod ex pactis oritur inter gentes diversas initis cum obligationibus

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<sup>71</sup> *Ibid.*, sect. 1090, pp. 680–81. On the concept of *civitas maxima*, see: James Leslie Brierly, *The Law of Nations*, 6th edition, Oxford University Press, Oxford, 1967, pp. 38–40; Nicholas Greenwood Oluf, "Civitas Maxima: Wolff, Vattel and the Fate of Republicanism", in *The American Journal of International Law*, 1994, vol. 88, no. 2, pp. 280–303; Nicholas Greenwood Oluf, *The Republican Legacy in International Thought*, Cambridge University Press, Cambridge, 1998, pp. 59 ff.; Mancuso, 2002, pp. 259 ff., see *supra* note 25; Ian Hunter, "Natural law, Historiography, and Aboriginal Sovereignty", in *Legal History*, 2007, vol. 11, no. 2, pp. 146–47; Reinhard Brandt, "Hobbes, Locke, Wolff", in Jean Ecole *et al.* (eds.), *Wolffiana II. Christian Wolff und die europäische Aufklärung, Akten des 1. Internationalen Wolff-Kongresses, Halle (Saale), 4.-8. April 2004. Herausgegeben von Jürgen Stolzenberg und Oliver-Pierre Rudolph. Teil 1: Vorwort, Nachruf auf Hans Werner Arndt, Einleitung, Ehrenpromotion von Jean Ecole, Plenums- und Abendvorträge*, Georg Olms, Hildesheim, 2007, pp. 113–32; Hasso Hofmann, "Sull'idea di legge fondamentale dello Stato", in Agostino Carrino (ed.), *La libertà dello stato moderno: Saggi di dottrina della Costituzione*, Guida, Naples, 2009, p. 116.

<sup>72</sup> Wolff, 1750, pars IV, caput. I, sect. 1090, pp. 680–81, see *supra* note 69.

<sup>73</sup> Scipione Gemma, *Introduzione allo studio del diritto pubblico internazionale considerato nel suo svolgimento scientifico, Fascicolo II: La scuola del diritto naturale*, Zanichelli, Bologna, 1902, p. 16.

respondentibus vel adhaerentibus”,<sup>74</sup> or tacit such as in the formation of the customary law of nations.<sup>75</sup>

Wolff’s legal thought is a corollary of scientific deductions, without an anthropological view, but a socio-political one which must relate to a strictly geometrical setting and is less accessible.<sup>76</sup> Jouannet speaks of a “fixisme méthodologique”, because in her view the entire doctrine can be summarised as an uninterrupted succession of connecting rights and obligations through which the civil law and the law of nations remain anchored to natural law,<sup>77</sup> noting that the law of nations is not a law that regulates relations between nations, but it is the right of States considered first as individuals and only then, consequently, in their external relations.<sup>78</sup>

Namely, Vattel himself places the law of nations at the centre of his work, as law between States; and by placing it in a national and international dimension, the law of nations definitively acquired its classical meaning.<sup>79</sup> In the *Preface*, he criticises his master’s thinking, especially in the classification of different forms of law of nations, stating that Wolff’s law of nations is a kind of civil law, thus dwelling on the concept of *civitas maxima*, which allows to identify in the law of nations (the content of which is natural law), the equivalent of civil law in force within the individual nations.<sup>80</sup> Vattel does not agree with this idea, as he sees nations as

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<sup>74</sup> Wolff, 1750, pars. IV, caput I, sect. 1091, p. 682, see *supra* note 69.

<sup>75</sup> *Ibid.*, p. 683.

<sup>76</sup> Bobbio, 2009, p. 140, see *supra* note 59.

<sup>77</sup> Jouannet, 1998, pp. 129–30, see *supra* note 23.

<sup>78</sup> *Ibid.*, pp. 400–01:

Le droit des gens wolffien possède un champ d’application déjà beaucoup plus étendu que notre droit international public contemporain car même s’il est vrai que le domaine réservé des États varie en fonction de leurs engagements internationaux, une distinction de principe n’en demeure pas moins établie entre ce domaine et celui du droit international. [...] Le droit des gens devient réellement avec Wolff, fondateur à ce titre des grands principes de la vision classique du droit international, un droit autonome, destiné à régir la conduite de ceux qui seront désormais les sujets traditionnels du nouveau droit international, à savoir les États souverains.

<sup>79</sup> *Ibid.*

<sup>80</sup> Vattel, 2008, *Preface*, p. 14, see *supra* note 5.

subjects qualitatively different from individuals because of their perfect independence and therefore their sovereignty.<sup>81</sup>

According to Carl Schmitt, there is a decisive strengthening of awareness and consciousness of modern States in Vattel's work, with State sovereignty taking centre stage.<sup>82</sup> The law of nations, although still anchored to natural law, is the science to be applied exclusively to relations between nations and it is with this claim that Vattel indirectly admits a number of characteristics, as apply to all science: its dynamism, the ability to make 'progress' and its conformation to the contingent historical reality, foreseeing the overcoming and the achievement of its perfectibility. This position allows one to trigger a lot of legal mechanisms which bring the law of nations to its maximum expression, through the construction of nation, which relies *primarily* on the concept of constitution, as an essential precondition for the admission of the same within the international community.

On one side there is the so-called necessary law of nations, which derives from nature and is an inner law and related to consciousness,<sup>83</sup> on the other side stands the voluntary law of nations, subordinate to the first, which recommends the observance "in consideration of the state in which

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<sup>81</sup> Mancuso, 2002, p. 262, see *supra* note 25; Otfried Nippold, "Einleitung", in James Brown Scott (ed.), Christian Wolff, *Jus gentium methodo scientifica pertractatum*, Clarendon Press, Oxford, 1934, p. XLIV:

Gerade so wie im Staate die bürgerlichen Gesetze sich auf die natürlichen zurückführen, und wie dort das Naturgesetz selbst vorschreibt, auf welche Weise dies zu geschehen habe, so müssen auch in der *Civitas Maxima*, in der Staatengesellschaft, aus den natürlichen Gesetzen die bürgerlichen Gesetze abgeleitet werden, auf dieselbe Weise, wie im einzelnen Staate das Naturgesetz dies vorschreibt.

See also: Ian Brownlie, "The Expansion of International Society: The Consequences for the Law of Nations", in Hedley Bull and Adam Watson (eds.), *The Expansion of International Society*, Clarendon Press, Oxford, 1984, pp. 358–69, in particular p. 358; Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, Cambridge, 2005, pp. 76 ff.; also Koskeniemi, 2011, pp. 51–75, see *supra* note 12; Frederick G. Whelan, "Vattel's Doctrine of the State", in Knud Haakonssen (ed.), *Grotius, Pufendorf and Modern Natural Law*, Ashgate, Aldershot, 1999, pp. 403–34, in particular p. 404; Theodore Christov, "Liberal Internationalism Revisited: Grotius, Vattel and the International Order of States", in *The European Legacy*, 2005, vol. 10, no. 6, pp. 561–84, in particular pp. 571 ff.

<sup>82</sup> Carl Schmitt, *Il nomos della terra nel diritto pubblico internazionale dello 'ius publicum europaeum'*, Franco Volpi ed., Emanuele Castrucci trans., Adelphi, Milan, 1991, p. 132.

<sup>83</sup> Vattel, 2008, *Preface*, p. 17, see *supra* note 5.

nations stand with respect to each other, and for the advantage of their affairs”.<sup>84</sup>

Within the voluntary law of nations, there is the arbitrary law of nations that constitutes the law of treaties and customary law contributing decisively, in the words of Francesco Mancuso, to the “consolidation of fundamental legal and political concepts of the contemporary age, both as regards public internal law and in terms of international law”.<sup>85</sup>

Koselleck argues that the division created by Vattel between the necessary and voluntary law of nations was the basis for the rationalisation of the State and of war, appointing “in the primacy of politics the chance that even moral needs [...] would have found their fulfilment”.<sup>86</sup>

In this perspective the duties and the rights of nations are traced, stating that nations are political bodies, societies of man held together in order to get, with such a meeting of forces, their salvation and advantage.<sup>87</sup>

Jouannet investigates the dual tension contained in the *Law of Nations* in its relationship between natural law and positive law and the voluntary law of nations.<sup>88</sup> But the *Law of Nations* locates – and this will be central to the upcoming arguments – additional dualisms: an initial di-

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<sup>84</sup> *Ibid.*

<sup>85</sup> Author’s translation:

[C]onsolidamento di alcuni concetti politico-giuridici fondamentali dell’età contemporanea, sia per quanto riguarda il diritto pubblico interno, sia per quanto concerne il diritto internazionale.

Mancuso, 2002, p. 265, see *supra* note 25. On this topic, see also: Ernst Reibstein, “Die Dialektik der souveränen Gleichheit bei Vattel”, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1958, vol. 19, pp. 607–36; Andrew Linklater, *Men and Citizens in the Theory of International Relations*, Palgrave Macmillan, New York, 1982, pp. 84–95; Timothy J. Hochstrasser, *Natural Law Theories in the Early Enlightenment*, Cambridge University Press, Cambridge, 2000, pp. 176–83; Nakhimovsky, 2007, p. 158, see *supra* note 16.

<sup>86</sup> Reinhart Koselleck, *Critica illuminista e crisi della società Borghese*, Giuseppina Panzieri trans., Il Mulino, Bologna, 1972, p. 46.

<sup>87</sup> Vattel, 2008, Book I, chap. I, sect. 1, p. 81, see *supra* note 5. Rafael Domingo highlights that the structure of the *Law of Nations* can be accessed in a comparative perspective with institutions of Gaius, creating an alternative paradigm to Gaius tripartite with an international scope. It is made up of the State, the relationship between the States and war. See Rafael Domingo, “Gaius, Vattel, and the New Global Law Paradigm”, in *European Journal of International Law*, 2011, vol. 22, no. 3, pp. 627–47, in particular p. 635.

<sup>88</sup> Jouannet, 1998, pp. 85 ff., see *supra* note 23.

chotomy compares the duty of conservation with the duty of perfection; a second one the intra- and inter-nations duties; the third compares a State's rights towards itself and the others; and finally there is a comparison of perfect and imperfect rights and duties (internal and external).<sup>89</sup>

The negation of the *civitas maxima* is an important aspect of divergence from Wolff's thought, but it is necessary to note that the binomial Wolff/Vattel, must be deepened even under a different perspective: that of the similarity between the two books. In 1785, Dietrich Ludwig von Ompteda printed his *Literatur des gesammten positiven Völkerrechts sowohl als positiven Völkerrechts* which was then continued and completed by Karl Albert Kamptz and published in 1817. The author devotes several pages to Vattel's work, focusing especially on comparing the *Law of Nations* with Wolff's work.<sup>90</sup>

Ompteda comprehensively reports the contents of Wolff's work and compares the positions of Wolff and Vattel in a table with reference to chapters of their work, stressing the many areas where the latter has reduced and simplified the work of the former, ordering or grouping the chapters and making them easier to read.<sup>91</sup> Ompteda illustrates how the nine chapters of the *Ius gentium* correspond to the four books of the *Law of Nations*, where the first book coincides with the first chapter, the second with the third, the fourth and fifth chapters; the third with the sixth and seventh chapters and finally the fourth with the remaining chapters of Wolff's treatise.<sup>92</sup>

In fact, Vattel admitted to have written the book along the lines of Wolff's work: he does not hesitate to say that he prefers to specifically acknowledge at the outset his great debt to Wolff's theories, which he has largely drawn upon.<sup>93</sup> He wrote the treatise for the men of government

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<sup>89</sup> Jouannet, 2011, pp. 135–36, see *supra* note 23.

<sup>90</sup> Dietrich Heinrich Ludwig Ompteda, *Literatur des gesammten sowohl natürlichen als positiven Völkerrechts*, J.L. Montag, Regensburg, 1785, pp. 339–45; Johann Gottlieb Buhle, *Histoire de la philosophie moderne depuis la renaissance des lettres jusqu'à Kant, Tome Quatrième, Section Quatrième: Histoire de la Philosophie au dix-huitième siècle*, Fournier, Paris, 1816, p. 217.

<sup>91</sup> Ompteda, 1785, p. 345, see *supra* note 90; the table is also listed in the famous text of: Henry Wheaton, *History of the Law of Nations in Europe and America: From the Earliest Times to the Treaty of Washington*, 1842, Gould, Banks & Co., New York, 1845, p. 185.

<sup>92</sup> Ompteda, 1785, p. 345, see *supra* note 90.

<sup>93</sup> Vattel, 2008, *Preface*, p. 17, see *supra* note 5.



and his intent was to create a text that was easy to read and in which all subjects were contained that could serve that purpose. In fact, despite drawing heavily from Wolff's work, he made a significant step forward compared to his predecessors and his teacher. The adaptation of Wolff's theories in a more real and concrete dimension, as Vattel managed, allows him to create a system of rules to be applied both to the State and to relations between other States and consequently to secede inevitably from Wolff's thought.

Furthermore, it is important to note that there are many other passages of the *Law of Nations* borrowed from the works of other natural lawyers. The famous quote, for example, for which Vattel is very often remembered "A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom",<sup>94</sup> is the Latin translation of a quote by Wolff<sup>95</sup> but appears as well in a similar form in the *Principes du droit politique* of Burlamaqui.<sup>96</sup> However, it was Jean Bodin who, much earlier in 1576, affirmed that "un petit Roy est autant souverain que le plus grand monarque de la terre".<sup>97</sup>

Even more popular is the elaboration of the principle of balance of power and the analysis of the situation in Europe during the first half of the eighteenth century. The idea that States should create a society and have to entertain a number of relationships – a specific matter of the law of nations – has been further developed in the *Law of Nations* in the light of historical reality and politics, arguing that Europe serves as an example of a system of independent States, placed together in a political equilibrium. Underlying these theories there is a reasoned position by Vattel, who became aware of the reality of international politics of his time. Conse-

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<sup>94</sup> *Ibid.*, *Preliminaires*, sect. 18, p. 75, see *supra* note 5.

<sup>95</sup> Christian Wolff, "Prolegomena" [Prologue], in *Ius gentium methodo scientifica pertractatum in quo ius gentium naturale ab eo quod voluntarii pactitii et consuetudinarii est, accurate distinguitur*, officina Rengeriana, Halae Magdeburgicae, 1749, p. 13, § 16:

Quemadmodum itaque homo procerissimus non magis homo est, quam nanus; itaque quoque Gens, quantumvis parva non minus Gens est, quam Gens maxima.

See: Toyoda, 2011, p. 162, see *supra* note 6.

<sup>96</sup> Jean Jacques Burlamaqui, *Principes du droit politique*, Zacharias Chatelain, Amsterdam, 1751, vol. 2, part 4, chap. I, sect. 5, p. 3:

Toutes les Nations doivent se regarder comme naturellement égales et indépendantes les unes des autres.

<sup>97</sup> Jean Bodin, *Les six livres de la République*, Du Puys, Paris, 1583, Book 1 ("Livre premier"), chap. II, p. 13.

quently he developed, although in an almost utopian way, the principle of balance of power among nations, which is understood as alliances, created specifically for policy needs.<sup>98</sup>

The system of states is therefore focused on the activities of the sovereigns, built on a plot of uninterrupted negotiations, and creates a kind of Republic, whose members are independent but at the same time linked by the common interest for the preservation of peace and order. The balance of power is based on the principle that there is no a sole authority able to dominate in an absolute and exclusive way in the realm of states.<sup>99</sup>

Vattel is placed at the end and at the same time at the beginning of a new legal concept as much doctrinal as practical. It was noted that while Wolff is the largest epigone of Leibniz's thinking, Burlamaqui is of a Puf-

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<sup>98</sup> Vattel, 2008, Book III, chap. III, sect. 47, p. 496, see *supra* note 5:

Europe forms a political system, an integral body, closely connected by the relations and different interests of the nations inhabiting this part of the world. It is not, as formerly, a confused heap of detached pieces, each of which thought herself very little concerned in the fate of the others, and seldom regarded things which did not immediately concern her. The continual attention of sovereigns to every occurrence, the constant residence of ministers, and the perpetual negotiations, make of modern Europe a kind of republic, of which the members—each independent, but all linked together by the ties of common interest—unite for the maintenance of order and liberty. Hence arose that famous scheme of the political balance, or the equilibrium of power; by which is understood such a disposition of things, as that no one potentate be able absolutely to predominate, and prescribe laws to the others.

The same quote is also present in the edition made by De Felice: Jean Jacques Burlamaqui, *Les Principes du droit de la nature et des gens de J.J. Burlamaqui avec la Suite du Droit de la nature qui n'avait point encore paru, le tout considérablement augmenté par Mr le professeur De Felice*, in Fortunato Bartolomeo de Felice (ed.), Yverdon, 1768, vol. VI, p. 345. It should be noted that Michel Foucault dealing with the balance of power, defined it as a "historically false" practical situation but this idea, in a sense, went beyond the reality becoming a sort of principle, see Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, Palgrave Macmillan, New York, 2010, p. 221. For a complete discussion of the relationship between balance of powers and rights in the eighteenth century, see Dhondt's monograph: Frederik Dhondt, *Balance of Power and Norm Hierarchy: Franco-British Diplomacy after the Peace of Utrecht*, Brill, Leiden, 2015; Frederik Dhondt, "The Law of Nations and Declarations of War after the Peace of Utrecht", in *History of European Ideas*, 2016, vol. 42, no. 3, pp. 329–49; Frederik Dhondt, "Équilibre Et Hiérarchie: L'argument Juridique Dans La Diplomatie Française Et Anglaise Après La Paix d'Utrecht", in Nicolas Drocourt and Eric Schnakenbourg (eds.), *Thémis En Diplomatie: L'argument Juridique Dans Les Relations Internationales De L'antiquité Tardive Au XVIIIe Siècle*, Presses universitaires de Rennes, Rennes, 2016, pp. 67–83.

<sup>99</sup> Vattel, 2008, Book III, chap. III, sect. 47, p. 496, see *supra* note 5.

endorfian tendency, handed down to Switzerland through Barbeyrac's translation and interpretation. And it is in this environment as complex and lively that Vattel seizes a winning bridge through dialogue with political power and through a theoretical and legal construction.<sup>100</sup>

This analysis allows us to narrow down the scope of Vattel's thought to a sustained and substantial group of lawyers, whom he considered valid and esteemed masters and his predecessors from which he drew for his *Law of Nations*, but with whom he did not identify himself completely. The relevant difference becomes apparent at the end of the treatise. Indeed, at the time, Vattel deliberately chose to write a work for those in positions of power. He explains the political and legal strategy, contained mainly in the first book, which aims at sociability and the achievement of happiness of a nation – an objective which was not explicitly pursued by the earlier treatises of natural law, allowing Vattel to distinguish himself also in international criminal law.

#### **10.4. Vattel's *Law of Nations* and his Concepts of International Crimes: Universal Jurisdiction**

Chapter I of book I of the *Law of Nations* deals with the problem of public sovereignty: nations have their own free will and the law of nations sets out their rights and obligations. Every nation that governs itself, in whatever form, republican or monarchy, defines itself as a sovereign State, without being dependent on any other State, having the same rights any other State.<sup>101</sup> Only a sovereign and independent nation, namely governing itself with its own authority and laws can enter and join the society of nations.<sup>102</sup>

By arguing that a State which “has passed under the dominion of another is no longer a state, and can no longer avail itself directly of the law of nations”,<sup>103</sup> Vattel departs once again from Wolff's thought, which on the other hand, had traced the concept of addiction, according to the

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<sup>100</sup> Bobbio, 2009, p. 161, see *supra* note 59.

<sup>101</sup> Vattel, 2008, Book I, chap. I, sect. 4, p. 83, see *supra* note 5.

<sup>102</sup> *Ibid.*:

To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws.

<sup>103</sup> *Ibid.*, sect. 11, p. 85.

“summum imperium” and “rector civitatis”, with special attention to the unequal treaties and federal unions.<sup>104</sup>

If Vattel considers States to be composed of free and independent men, nations must similarly be considered to be free and independent from each other, and it is by this approach that he criticises Wolff’s position on the so-called ‘patrimonial States’. Wolff devoted a lot of space in his work arguing for the existence of States or patrimonial kingdoms, accepting the positions of previous and contemporary authors, without rejecting or correcting them— to use Vattel’s words – by defending such a humiliating theory for humanity,<sup>105</sup> he does not even admit the denomination that is improper, offensive and dangerous in its effects.<sup>106</sup>

Vattel submits that the State cannot possibly be considered as an asset, because any sovereignty has in itself the feature of inalienability; in fact when a Prince elects his successor or when he gives to another his crown, he does nothing else but nominate by virtue of the power conferred upon him either expressly or by implication, the one who will rule in his place.<sup>107</sup> It follows that the State is not an object but a subject and cannot under any circumstances be regarded as an asset in the hands of a sovereign.<sup>108</sup>

Moreover, he outlines the general principles of the duties of a nation to itself, which are included in the binomial “preservation and perfection”.<sup>109</sup> Preservation refers to the duration of the political association that determines the nation. If it ends, the nation or State, according to Vattel, no longer exists, but only individuals of which it was composed do so

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<sup>104</sup> On this topic, see also Hanns-Martin Bachmann, *Die naturrechtliche Staatslehre Christian Wolffs*, Duncker und Humblot, Berlin, 1977, pp. 158 ff.

<sup>105</sup> Vattel, 2008, *Preface*, p. 13, see *supra* note 5.

<sup>106</sup> *Ibid.* See also Mancuso, 2002, pp. 205 ff., see *supra* note 25.

<sup>107</sup> Vattel, 2008, Book I, chap. V, sect. 69, pp. 123–25, see *supra* note 5.

<sup>108</sup> Emmanuelle Jouannet, “Vattel et la sujétion directe de l’état au droit international”, in Simone Goyard-Fabre (ed.), *L’État moderne 1715–1848*, Librairie Philosophique J. Vrin, Paris, 2000, p. 161.

<sup>109</sup> Vattel, 2008, Book I, chap. II, sect. 13, p. 85, see *supra* note 5:

A nation is a being determined by its essential attributes, that has its own nature, and can act in conformity to it. There are then actions of a nation as such, wherein it is concerned in its national character, and which are either suitable or opposite to what constitutes it a nation; so that it is not a matter of indifference whether it performs some of those actions, and omits others. In this respect, the Law of Nature prescribes it certain duties.

exist; while the perfection of a nation lies in everything that allows it to reach its end.<sup>110</sup>

The aim of a civil society is understood as being the provision of citizens with all things they need for their convenience and comfort of life and, contributing in a more general way to happiness and – even more important – it is necessary that everyone can enjoy themselves, receive justice through security and defence against any external violence.<sup>111</sup>

To identify the aim of a civil society as the realisation of citizen happiness and as obtaining justice through security provides extremely important principles and contributes to the transition from a conception of a State that imposes itself upon the people, to a State that regulates and enables the lives of its citizens. This means that a set of mechanisms, which was designed in the eighteenth century, and was according to Foucault determined by the principle of “governability”, manifests itself internally and externally, both in the public and private spheres, and allows the State, as an abstract entity, to determine itself and to take substance in the nation.<sup>112</sup>

Vattel’s thought takes strength within this eighteenth century movement: the *Law of Nations* traces the essential features of the Constitution of a State, reaffirming the principle that every society should establish a public authority that organises public affairs and prescribes one’s conduct bearing in mind the public welfare; an authority belonging to the body of the society, although it can be exercised in different ways. The Constitution is a fundamental text for a State which arises from an act of sovereignty of the nation itself, it determines the way through which the public authority must be exercised:

In this is seen the form in which the nation acts in quality of a body-politic, how and by whom the people are to be gov-

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<sup>110</sup> *Ibid.*, sect. 14, p. 86:

We know that the perfection of a thing consists, generally, in the perfect agreement of all its constituent parts to tend to the same end. A nation being a multitude of men united together in civil society, if in that multitude all conspire to attain the end proposed in forming a civil society, the nation is perfect; and it is more or less so, according as it approaches more or less to that perfect agreement. In the same manner its external state will be more or less perfect, according as it concurs with the interior perfection of the nation.

<sup>111</sup> *Ibid.*, sect. 15, p. 86.

<sup>112</sup> Foucault, 2010, p. 89, see *supra* note 98.

erned, and what are the rights and duties of the governors. This constitution is in fact nothing more than the establishment of the order in which a nation proposes to labour in common for obtaining those advantages with a view to which the political society was established.<sup>113</sup>

The Constitution of the State decides its perfection, its ability to attain the aims of society. With its enactment, the foundations for the preservation of the State, its security and happiness are laid down.<sup>114</sup> For the first time, the concept of Constitution is attributed to "an autonomous definition, independent of other contexts, and a new content dimension, although this partly relies on traditional elements such as the form of state, public good, State body, fundamental laws and binding effect".<sup>115</sup>

The public authority establishes laws, some of which regulate relations between individuals and therefore are called civil laws, while others are directly oriented towards the attainment of public welfare. The laws in the latter class were described by Vattel: "those that concern the body itself and the being of the society, the form of government, the manner in which the public authority is to be exerted, those, in a word, which together form the constitution of the state, are the fundamental laws".<sup>116</sup> As stated by Heinz Mohnhaupt, the jurist from Neuchâtel, just as Montesquieu had argued, denies the existence of a constitution that can be valid for all peoples, as adaptation to particular conditions and individual circumstances is an indispensable and necessary requirement.<sup>117</sup>

Vattel specifies his theories stating once again that the State Constitution and its laws are the basis of public tranquillity, "the firmest support of political authority and the pledge of freedom of citizens"; however, its destiny is to remain dead letter, a statue, if not strictly observed. The nation must constantly watch over it, and it must guarantee its respect by both those ruling and the people. Assaulting the Constitution, violating its laws is a "capital crime" against the society and the people who have committed such a crime must be punished.<sup>118</sup>

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<sup>113</sup> Vattel, 2008, Book I, chap. III, sect. 27, pp. 91–92, see *supra* note 5.

<sup>114</sup> *Ibid.*, sect. 28, p. 92.

<sup>115</sup> Heinz Mohnhaupt and Dieter Grimm, *Costituzione: storia di un concetto dall'antichità a oggi*, in Mario Ascheri and Simona Rossi (eds., Italian ed.), Carocci, Rome, 2008, p. 103.

<sup>116</sup> Vattel, 2008, Book I, chap. III, sect. 29, pp. 92–93, see *supra* note 5.

<sup>117</sup> Mohnhaupt/Grimm, 2008, p. 104, see *supra* note 115.

<sup>118</sup> Vattel, 2008, Book I, chap. III, sect. 29, p. 93, see *supra* note 5.

Starting from Vattel's considerations, there is a very important passage of the law, understood as abstract, to the establishment of a State as positive law, that is, as a "réglement fondamental" or as a collection of positive and fundamental laws.<sup>119</sup>

By identifying the constitution as a 'plan', he departs from the conception of a Constitution as a pact of affiliates: the pact for most Naturalists was the instrument by which the social pact was realised and formed, while for Vattel it is the instrument with which civil society determines itself politically and seeks its advantage, its fortune and its happiness in its socialisation.<sup>120</sup> As Hofmann wrote "this is the concretely modern version of the previous conception of the state of nature and of the political association that is realized through the social contract and as an authority free from utilitarian calculations".<sup>121</sup>

Moreover, there is a constant in the drafting of the *Law of Nations*: it is driven by the extraordinary ability to regulate and organise the State which takes form and substance in the nation, and aspires to the creation of a State with a non-repressive, indeed regulative, function. Laws for Vattel are nothing but rules established by the public authorities to be observed by the society and directed to the benefit of the State and its citizens.<sup>122</sup>

The regulation and organisation of society in spatial and social terms is a priority for Vattel and a State can only be considered a nation and converse with others, articulating its international relations, when a State has fulfilled its internal duties. The State represents the abstract entity, the so-called container whose content is the nation itself, which is determined through the promulgation of the constitution, good government, seen as the consequential achievement of happiness and well-being of citizens.

Once the so-called internal system of a State is determined, establishing its sovereignty and Constitution, Vattel illustrates the three main

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<sup>119</sup> Francisco Tomás y Valiente, *Genesi di un costituzionalismo euro-americano, Cadice 1812: Con un'autobiografia dell'autore*, Antonella M. Cocchiara trans., Giuffrè, Milan, 2003, pp. 34–35.

<sup>120</sup> Hasso Hofmann, "Riflessioni sull'origine, lo sviluppo e la crisi del concetto di Costituzione", in Sandro Chignola and Giuseppe Duso (eds.), *Sui concetti giuridici e politici della costituzione dell'Europa*, Franco Angeli, Milan, 2005, p. 231.

<sup>121</sup> *Ibid.*

<sup>122</sup> Vattel, 2008, Book I, chap. III, sect. 29, p. 93, see *supra* note 5.

objectives of good government: the first is to provide the needs of a nation in which the duty is to encourage both labour and industrialisation, the circulation of coins, the cultivation of land (which he considers a duty imposed by nature), freedom of trade and the freedom to refuse foreign trade.<sup>123</sup> Once again it is reaffirmed that the nation must be activated for “providing for all the wants of the people, and producing a happy plenty of all the necessities of life, with its conveniences, and innocent and laudable enjoyments”. He further specifies that “as an easy life without luxury contributes to the happiness of men, it likewise enables them to labour with greater safety and success after their own perfection, which is their grand and principal duty, and one of the ends they ought to have in view when they unite in society”.<sup>124</sup>

The second object is to procure true happiness to the nation through education, love for the country, defined, almost anticipating the nineteenth-century meaning as: “the State where one is a member”.<sup>125</sup> It should be pointed out that the term ‘happiness’ appears many times in the *Law of Nations*, more than fifty times within the four books. This application denotes how ‘happiness’ includes security and well-being and is a focal point for the organisation of the State: anything that can give a man true happiness deserves the most serious attention from the rulers who must long for good government. Happiness is the core to which all the duties of a man and a people should be aligned to and it is also the highest end of the natural law. The desire to be happy is that vigorous force that makes man move and it is up to those who govern to engage and try to realise it, “promoting it through the exercise of their power”.<sup>126</sup>

Also, in this section, Vattel deals with piety and religion, focusing the attention on tolerance;<sup>127</sup> and other means for achieving happiness are

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<sup>123</sup> On the analysis of the relationship between trade, property and common good of the nation, see Porras, 2014, pp. 655 ff., see *supra* note 16.

<sup>124</sup> Vattel, 2008, Book I, chap. VI, sect. 72, p. 126, see *supra* note 5.

<sup>125</sup> *Ibid.*, chap. XI, sect. 122, pp. 153–54.

<sup>126</sup> *Ibid.*, chap. X, sect. 110, p. 145.

<sup>127</sup> *Ibid.*, chap. XII, sect. 125, pp. 155–56:

Piety and religion have an essential influence on the happiness of a nation, and, from their importance, deserve a particular chapter. Nothing is so proper as piety to strengthen virtue, and give it its due extent. By the word piety, I mean a disposition of soul that leads us to direct all our actions towards the Deity, and to endeavour to please him in everything we do. To the practice of this virtue all mankind are indispensably obliged: it is the purest source of their felicity; and those who unite in civil society, are



*justice* and *polity*, which are expressed in terms of the need for a State to have the right laws, and to institute tribunals. Regulations should prescribe anything that aspires to safety, utility and public convenience: “By a wise police, the sovereign accustoms the people to order and obedience, and preserves peace, tranquillity, and concord among the citizens”.<sup>128</sup>

From this definition originate a number of circumstances in which good government is manifested, such as: the reasons leading to the prohibition of the duel; the norms that the sovereign, like a good father, must emanate in order to prevent the subject from being subjected to economic manipulation; the limits of private property and the respect of rules, especially in economic matters; and the repression of commercial monopolies and of all operations that try to increase the prices of food and goods of primary necessity.<sup>129</sup>

Santiago Legarre rightly observed that the focus on the obligation of the sovereign to maintain internal order, had helped decisively the passage between “police into police power – what today is a settled legal category of the constitutional law of the Western states”, elevating it to “one of the great exponents of the idea of police – a domestic concept”.<sup>130</sup>

Carrying on with the illustration of the contents of Vattel’s first, third and last group of items essential to ‘good government’, there is a need for a State “to defend itself with its combined strength against all external insult or violence”, because “if the society is not in a condition to repulse an aggressor, it is very imperfect, it is unequal to the principal object of its destination, and cannot long subsist. The nation ought to put itself in such a state as to be able to repel and humble an unjust enemy: this is an important duty, which the care of its own perfection, and even of its preservation, imposes both on the state and its conductor”.<sup>131</sup> Into this

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under still greater obligations to practise it. A nation ought then to be pious. The superiors intrusted with the public affairs should constantly endeavour to deserve the approbation of their divine master; and whatever they do in the name of the state, ought to be regulated by this grand view. The care of forming pious dispositions in all the people should be constantly one of the principal objects of their vigilance, and from this the state will derive very great advantages.

<sup>128</sup> *Ibid.*, chap. XIII, sect. 174, p. 194.

<sup>129</sup> See *ibid.*, chap. XX, sect. 255, pp. 236–37.

<sup>130</sup> Legarre, 2012, pp. 437–38, see *supra* note 11; Santiago Legarre, “The Historical Background of the Police Power”, in *University of Pennsylvania Journal of Constitutional Law*, 2007, vol. 9, no. 3, pp. 753 ff.

<sup>131</sup> Vattel, 2008, Book I, chap. XIV, sect. 177, p. 198, see *supra* note 5.

category falls everything that competes with the exercise of power as is evident from “the number of the citizens, their military virtues, and their riches”, comprising in turn “fortresses, artillery, arms, horses, ammunition, and, in general, all that immense apparatus at present necessary in war”.<sup>132</sup>

The focus in the following sections is on all that needs to be protected in order to guarantee the best internal security of the nation, including the relationship between a country and the *status* of its citizens, immigrants and exiles. Subsequently, we will consider public goods (that is, State-owned assets) with regard to their alienation and taxes, and finally end with a detailed treatise on the law of the sea, lakes, rivers, and spatial limits of the coastal State over the seas.<sup>133</sup>

In this last section of the book, Vattel deals not only with the question concerning the legality of territorial expansion, but also with the identification of threats to the security of a State, focusing on the concept of interior and exterior enemy, and the enemy of mankind, which is the subject of a recent analysis by Walter Rech.<sup>134</sup>

Enemies are those who violated the law of Nations, and the need to be punished comes directly from a State requirement that extends on the international front: “for Vattel [...] the ultimate essence of law was to preserve the basic conditions without which human society would be impossible, or unthinkable. This utilitarian conception of law – classical, modern and anti-medieval – lies at the basis of Vattel’s theory of international law enforcement”.<sup>135</sup>

Vattel deals with the limits of territorial jurisdiction regarding refugees or exiles in the land of origin: “if an exile or banished man has been driven from his country for any crime, it does not belong to the nation in which he has taken refuge, to punish him for that fault committed in a foreign country. For nature does not give to men or to nations any right to inflict punishment, except for their own defence and safety; whence it follows, that we cannot punish any but those by whom we have been injured”.<sup>136</sup>

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<sup>132</sup> *Ibid.*, sects. 178 ff., pp. 198 ff.

<sup>133</sup> *Ibid.*, chap. XXIII, sect. 279, p. 416.

<sup>134</sup> Rech, 2013, p. 228, see *supra* note 27.

<sup>135</sup> *Ibid.*

<sup>136</sup> Vattel, 2008, Book I, chap. XIX, sect. 232, p. 227, see *supra* note 5.

He further argues that the right to punish is based solely on the right to security and the maintenance of the latter is nothing else but a task delegated by the citizens to those who govern. The State, as a moral person, must keep security, punish those who offend, and pursue all public offences.<sup>137</sup>

However, the principle of territoriality does not apply in one case, namely the prosecution of those who are identified as enemies of humanity: "Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundations of their common safety".<sup>138</sup>

Similarly, this concept is repeated in the third book dedicated to war: "Assassination and poisoning are therefore contrary to the laws of war, and equally condemned by the law of nature, and the consent of all civilised nations. The sovereign who has recourse to such execrable means, should be regarded as the enemy of the human race; and the common safety of mankind calls on all nations to unite against him, and join their forces to punish him. His conduct particularly authorises the enemy whom he has attacked by such odious means, to refuse him any quarter".<sup>139</sup>

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<sup>137</sup> *Ibid.*, chap. XIII, sect. 169, pp. 190–91:

Now, when men unite in society, as the society is thenceforward charged with the duty of providing for the safety of its members, the individuals all resign to it their private right of punishing. To the whole body, therefore, it belongs to avenge private injuries, while it protects the citizens at large. And as it is a moral person, capable also of being injured, it has a right to provide for its own safety, by punishing those who trespass against it; that is to say, it has a right to punish public delinquents.

<sup>138</sup> *Ibid.*, chap. XIX, sect. 233, p. 228:

Thus pirates are sent to the gibbet by the first into whose hands they fall. If the sovereign of the country where crimes of that nature have been committed, reclaims the perpetrators of them in order to bring them to punishment, they ought to be surrendered to him, as being the person who is principally interested in punishing them in an exemplary manner. And as it is proper to have criminals regularly convicted by a trial in due form of law, this is a second reason for delivering up malefactors of that class to the states where their crimes have been committed.

<sup>139</sup> *Ibid.*, Book III, chap. VIII, sect. 155, p. 562. Also in another point he wrote:

Nations that are always ready to take up arms on any prospect of advantage, are lawless robbers: but those who seem to delight in the ravages of war, who spread it on all sides, without reasons or pretexts, and even without any other motive than their own ferocity, are monsters, unworthy the name of men. They should be considered as enemies to the human race, in the same manner as, in civil society, professed assassins and incendiaries are guilty, not only towards the particular victims of their nefarious deeds, but also towards the state, which therefore proclaims them public enemies. All nations

According to Walter Rech, Vattel presents an analogy between the enemy of the State and the enemy of the entire international community. Vattel argues that the international community is legitimized and is called upon to act in the repression of those who are enemies of humanity, in order to maintain a level of security and tranquillity both nationally and internationally, thus anticipating the delicate issue of universal jurisdiction:

Vattel's advocacy for the repression of the heinous international crimes has, directly or indirectly through the medium of later publicists familiar with it, contributed to the shaping of a modern doctrine of *jus cogens*, war crimes and crimes against humanity and to the doctrine of military intervention for humanitarian purposes.<sup>140</sup>

### 10.5. The Law of Nations Now

In the *Law of Nations* Vattel does not hesitate to praise his native land, Switzerland, proud to have been born there:

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have a right to join in a confederacy for the purpose of punishing and even exterminating those savage nations. Such were several German tribes mentioned by Tacitus, such those barbarians who destroyed the Roman empire: nor was it till long after their conversion to Christianity that this ferocity wore off. Such have been the Turks and other Tartars, Genghis-khan, Tembec or Tamerlane, who, like Attila, were scourges employed by the wrath of heaven, and who made war only for the pleasure of making it. Such are, in polished ages and among the most civilised nations, those supposed heroes, whose supreme delight is a battle, and who make war from inclination purely, and not from love to their country.

*Ibid.*, chap. III, sect. 34, p. 487. And also in the book IV he spoke about the disturbers of the public peace:

But those disturbers of the public peace, those scourges of the earth, who, fired by a lawless thirst of power, or impelled by the pride and ferocity of their disposition, snatch up arms without justice or reason, and sport with the quiet of mankind and the blood of their subjects, those monstrous heroes, though almost deified by the foolish admiration of the vulgar, are in effect the most cruel enemies of the human race, and ought to be treated as such. Experience shews what a train of calamities war entails even upon nations that are not immediately engaged in it. War disturbs commerce, destroys the subsistence of mankind, raises the price of all the most necessary articles, spreads just alarms, and obliges all nations to be upon their guard, and to keep up an armed force. He, therefore, who without just cause breaks the general peace, unavoidably does an injury even to those nations which are not the objects of his arms; and by his pernicious example he essentially attacks the happiness and safety of every nation upon earth.

*Ibid.*, Book IV, chap. I, sect. 5, pp. 653–54.

<sup>140</sup> Rech, 2013, p. 221, see *supra* note 27.

I was born in a country of which liberty is the soul, the treasure, and the fundamental law; and my birth qualifies me to be the friend of all nations.<sup>141</sup>

Vattel defines himself as the “friend of all nations”, meaning that his thoughts are directed towards peace and aimed towards the safety of nations at the national and international levels. All nations have as a goal and obligation to respect the rules of the law of nations “if any one openly tramples it under foot, they all may and ought to rise up against him; and, by uniting their forces to chastise the common enemy, they will discharge their duty towards themselves, and towards human society, of which they are members”.<sup>142</sup>

This idea remained and continues to date, albeit modified in its language and in its manifestations. Types of crimes prosecuted at an international level are clearly changed from the eighteenth century to the present day. States are prosecuting international crimes through new forms of judicial co-operation and an intensive development of international humanitarian law. Matters relating to public security and punishment for crimes against humanity are current topics at the heart of the debate in the international community, especially after the disastrous events of World War II.<sup>143</sup>

Let us only think about the ‘core international crimes’: genocide, crimes against humanity or war crimes. The need to pursue and suppress international crimes has led the international community to take an alternative route, with the participation of the community, the international doctrine, individual States and the European Union.

International criminal tribunals have been created, such as those of Nuremberg (1945–1946) and Tokyo (1946–1948), for the former Yugoslavia (1993–2017) and for Rwanda (1995–2015). In 1998, the diplomatic conference established the International Criminal Court through the Rome Statute, which entered into force on 1 July 2002. There were also the Residual Special Court for Sierra Leone (2002–2013), the Special Panel for

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<sup>141</sup> Vattel, 2008, *Preface*, p. 141, see *supra* note 5; Guggenheim, 1956, p. 24, see *supra* note 1: Fut Emer de Vattel le premier auteur suisse de droit international à être conscient de sa nationalité. Son sens de mesure, sa prudence, mais aussi son amour de l’humanité ont été le précieux héritage qu’il a légué à ceux qui sont venus après lui.

<sup>142</sup> Vattel, 2008, Book I, chap. XXIII, sect. 283, p. 251, see *supra* note 5.

<sup>143</sup> Bartam Brown, “The Evolving Concept of Universal Jurisdiction”, in *New England Law Review*, 2001, vol. 35, no. 2, pp. 383–97.

Serious Crimes in East Timor (2000-2006) and the Extraordinary Chambers in the Courts of Cambodia (2006 and ongoing).<sup>144</sup>

At a doctrinal level, within this conclusive historical excursus, there was an effort made in 2000 by leading experts and lawyers to realise a series of principles of universal jurisdiction, the so-called *Princeton principles on universal jurisdiction*, “for the purposes of advancing the continued evolution of international law and the application of international law in national legal systems”.<sup>145</sup>

Meanwhile, at the national level, a singular example of universal jurisdiction was created in Belgium, which was one of the first European countries to have introduced a specific piece of legislation directed toward universal jurisdiction. On 16 June 1993, the Act concerning Punishment for Grave Breaches of International Humanitarian Law was enacted, later changed in 1999 with the extension of the cases relating to crimes against humanity and genocide, in addition to war crimes. This law had the “compétence de juge interne pour connaître d’une infraction quels que soient le lieu de l’infraction, nationalité de son auteur ou celle de la victime”,<sup>146</sup> but was then restricted and applied only in cases where Belgian nationality applies.<sup>147</sup>

Finally, at the European level, it should be noted as an example that the decision of the European Court of Human Rights relating to universal

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<sup>144</sup> See: Carmelo Domenico Leotta, *Il genocidio nel diritto penale internazionale: Dagli scritti di Raphael Lemkin allo Statuto di Roma*, Giappichelli, Torino, 2013; Chiara Ragni, *I tribunali penali internazionali. Fondamento, giurisdizione e diritto applicabile*, Giuffrè, Milan, 2012; Emanuele Cimiotta, *I tribunali penali misti*, Cedam, Padova, 2009, pp. 293–318; Ornella Ferrajolo, *Corte Penale Internazionale: aspetti di giurisdizione e funzionamento nella prassi iniziale*, Giuffrè, Milan, 2007; Ana Peyro Llopis, *La compétence universelle en matière de crimes contre l’humanité*, Bruylant, Brussels, 2003.

<sup>145</sup> Maria Antonella Pasculli, *Una umanità una giustizia. Contributo allo studio sulla giurisdizione universale*, Cedam, Padua, 2013, pp. 239–41; see also Brussels Group for International Justice, *Brussels Principles Against Impunity and for International Justice*, 2002; and Africa Legal Aid, *Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective*, 2002.

<sup>146</sup> Antoine Bailleux, “L’histoire de la loi belge de compétence universelle. Une valse à trois temps: ouverture, étroitesse, modestie”, in *Droit et Société*, 2005, vol. 59, no. 1, p. 111. See also: Éric David, “La compétence universelle en droit belge”, in *Annales de droit de Louvain*, 2004, vol. 64, no. 1–2, pp. 83–150; Olivier Corten, “De quel droit? Place et fonction du droit comme registre de légitimité dans le discours sur la ‘compétence universelle’”, in *Annales de droit de Louvain*, 2004, vol. 64, no. 1–2, pp. 51–82.

<sup>147</sup> Bailleux, 2005, p. 129, see *supra* note 146.

jurisdiction and compatibility with the European Convention on Human Rights: the judgment of 17 March 2009, through which the Court, for the first time enshrined the principle of universal jurisdiction and the enforcement of the criminal law of the country where the accused is located, specific to cases of torture.<sup>148</sup>

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<sup>148</sup> Gabriele della Morte, *Le amnistie del diritto internazionale*, Cedam, Padua, 2011, p. 200; Velia Corzani, “Giurisdizione universale e amnistia di fronte alla Corte europea dei diritti umani [Nota a sentenza: Corte Europea Diritti dell’Uomo, 17 marzo 2009 (Ould Dah c. Francia)], ricorso n. 13113/03”, in *Diritti umani e diritto internazionale*, 2009, vol. 3, no. 1, pp. 636–39.

Publication Series No. 34 (2018):

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ISBNs: 978-82-8348-117-4 (print) and 978-82-8348-118-1 (e-book).



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