A schoolmaster abolishing homework?
Vattel on Peacemaking and Peace Treaties.

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ABSTRACT

Between the end of the Middle Ages and the late 17th century, peace treaties became far more elaborate and detailed. Doctrine lagged behind somewhat. The Italian civil lawyers Pierino Belli (1502-1575), Alberico Gentili (1552-1608) and the Dutch humanist Hugo Grotius (1583-1645) were among the first of the early modern authors of the law of nations to cover peace treaties in a somewhat systematic way. After Grotius, doctrine did not dramatically evolve.

In his famous treatise on the law of nations of 1758, the Swiss diplomat Emer de Vattel (1714-1767) devoted four chapters out of 68 to the subject. In relation to peacemaking and peace treaties, he followed closely in the footsteps of Christian Wolff (1679-1754).

Vattel, even more than Wolff, shed the forms and constrictions of civil jurisprudence. More than anyone before, he made reference to recent and current practice. This, and his concision and clarity of style allowed him to expose the *ius ad pacem* in terms of generally applicable principles and rules, of a true voluntary law of peacemaking, which was helpful to interpreting contemporary peace treaties.

Vattel’s most significant contribution to the law of peacemaking stems from his relating peacemaking and peace treaties expressly to the doctrines of just and legal war and of sovereign equality. The underlying ideas and assumption were not new – Wolff and he drew heavily on Grotius’s conceptions of war and peace –, but Vattel expounded them far less apologetically and far more straightforwardly than any of the older writers. Because Vattel made the doctrine of sovereignty the basic tenet of the law of peacemaking and set out a systematic exposition of compromise peace – which, I propose to call ‘formal peace’ as opposed to ‘just peace’ – he seemed to have made ‘formal peace’ into an autonomous category, which many later international lawyers used as platform to divorce peacemaking altogether from morals and justice. But in fact, Vattel did not divorce formal peace completely from justice. First, apart from formal peace, Vattel also spoke of just peace. Second, both interacted with one another. Third, even on the level of formal peace, Vattel’s work was as much prescriptive as it was descriptive of general State practice. The leading principle behind it was ‘equity’ or fairness. Peace treaties ought to be fair in the sense of reciprocal and *bona fide*.

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Since ancient times, the conclusion of a peace treaty has been the common way to end hostilities and to restore peaceful relations after war. Nevertheless, in Early Modern Europe, peace treaties became more crucial instruments of international relations than ever before. From the 14th century to the great peace conferences of the late 17th and early 18th centuries, peace treaties became more extensive, more elaborate and more detailed. They made a significant contribution to the formation of the *ius publicum Europaeum*, the classical law of nations, from which sprang modern international law.

Generally speaking, early modern peace treaties include three major categories of stipulations. First, there were the political concessions made and won by the treaty partners. In these, the claims for which the war had been waged were settled, or reserved for future settlement by peaceful means. The settlement exhausted the former belligerents’ right to resort to warfare over these issues in the future. The second and third category regulated the return from the state of war to the state of peace. The second category dealt with wartime events and their legal consequences. The third organised the state of peace for the future. Under this category fall stipulations about the mutual rights and obligations of the former belligerents and their subjects during peacetime as well as specific guarantees to ensure the upholding of the treaty and the stability of the peace. Some articles of the third group combine these two roles. It was the second and third categories that grew increasingly elaborate. It was the dramatic change the conception of war underwent at the start of the Early Modern Age – apart from the intensification of trade relations – that explained this evolution in peacemaking.

In its late medieval conception, war was conceived of as an instrument of law enforcement, a substitute for legal trial in the hands of a sovereign to enforce his just and

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rightful claims upon an enemy who had allegedly injured these rights. In this sense, and regardless of the different types and scales of it, war was conceived of as limited in its scope and operation by its cause – the vindication of a particular right against the perpetrators of the injury. It was legally perceived of as a set of separate acts of war, which did not, at least not necessarily, disrupt all normal relations between the belligerents and their vassals, subjects and adherents. The just war, particularly in the views of scholastic theologians and canonists, was discriminatory. On principle, only one side could have justice on its side and be fighting a just war. Consequentially, the benefits of war – the iura belli, as the right to conquer or plunder – only befell one side. Also, a just belligerent could only take from the enemy that to which he held a claim of restitution, compensation or retribution.³

The growing scale of armies and warfare and the gradual monopolisation of war and external relations by central governments during the 16th and 17th centuries changed the legal conception of war. Apart from the concept of just war, which proved resilient both in the doctrines and practices of Early Modern Europe, a second conception of war emerged: that of war in due form – solemn war as Hugo Grotius (1583-1645) would have it –, which I propose to call legal war.⁴ For a war to be legal, it sufficed that it was waged under a sovereign authority and that it had been formally declared. Behind this last condition lurked its ratio existendi. Whereas the justice of war was by and large a matter of religious morality as well as political propaganda, its legality had roots and ramifications in the practice of warfare. The declaration of war by a sovereign prince, having the authority to do so, indicated that from now on, a legal state of war reigned between the belligerents and their subjects.


⁴ H. Grotius, De jure belli ac pacis libri tres (Paris 1625, edn 1646, transl. Francis W. Kelsey, The Classics of International Law), 2 vols., Washington, Carnegie Institution, 1913, 1.3.4.1, 3.3.4-5 and 3.3.12-13. It is a war which allows the benefits of the ius in bello to both sides and is in accordance with the voluntary law of nations, but not necessarily with the natural law of nations. Therefore the term, legal war as opposed to just war, is appropriate.
consequence, the laws of peace – or at least, many of them – were superseded by the laws of war, and for third parties, of neutrality. Indeed, by the early 17th century, war was no longer perceived of as a set of separate acts of hostility but as a condition, a state, highly different from the state of peace that suspended most if not all normal relations between the belligerents. The state of war was to be ruled by the laws of war and neutrality, which were much more encompassing than the iura belli of the medieval ius gentium. Moreover, legal war was not discriminatory. The laws of war benefited all sides, as the war could well be legal on all sides, as long as they were sovereign and the war had been declared.5

During the Early Modern Age, declarations of war often included, or were followed up by measures that regulated the ending of peaceful relations and stipulated the consequences of war. Enemy subjects found within one’s own lands were apprehended or expelled; their property was confiscated or sequestered. Commercial and other economic relations were partially or wholly severed. By consequence, peace treaties had to include, or be followed up by, elaborate regulations to end the state of war and restore as well as define the state of peace. From the late 17th century onwards, a separate treaty of friendship and commerce, regulating future trade relations, seconded many peace treaties.6 By the middle of the 18th century, some common clauses from peace and commercial treaties were standardised, abridged, and sometimes, even left out altogether because they were now generally accepted to be implicit.

Questions of peacemaking and peace treaties held a place in the writings of medieval theologians, canon and civil lawyers. In their commentaries and consilia, several civil and


canon lawyers included fragments relating to particular questions of peacemaking. During the Late Middle Ages, very few self-standing treatises on treaties, let alone on peace treaties, were written, the most famous exception being that by the 15th-century Italian canon lawyer Martinus Garatus Laudensis. A few civil lawyers, Odofredu de Denariis (d. 1265) and Baldus de Ubaldis (1327-1400) most particularly, wrote a commentary on the Peace of Konstanz of 1183, a text that had found its way into the *Volumen parvum* of the medieval version of the Justinian collection. But all in all, the treatment was far from comprehensive. Most authors restricted themselves to the same traditional issues. Moreover, as the *ius gentium* was not an autonomous discipline but was inextricably bound up with civil and canon law as well as theology, peacemaking was neither an autonomous subject. Public and private peace were not separated from one another.

It would stand to reason that, as peace treaties became more elaborate in practice during the Early Modern Age, they would become a more important subject for legal scholars. They did, but far less than the *ius ad bellum* and *ius belli*. Among the first writers of the Early Modern Age who treated the subject of peace treaties in a somewhat systematic way, two Italian civilians stand out. The first was Pierino Belli (1502-1575), who served in the armies of Charles V and his son Philip II of Spain (1555-1598) in Italy as military judge and counsellor of war (1535-1561), later to enter the service of the Duke of Savoy (1561-1575). In his treatise of the laws of war of 1563, he included two chapters on peacemaking. Belli, a former law student at Perugia, heavily drew on the authority of Justinian law, the great Italian commentators – including Baldus’s writings on peace – as well as medieval canon law and theology. But, under the influence of humanism, he also included many historical – ancient and recent – *exempla* as well as references to classical literature. Belli focused on two issues which were certainly relevant to contemporary practice: the restitution of property and the effects of treaties on subjects, adherents and allies. Albeit not comprehensive, by casting his

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8 G. Dolezalek, ‘I commentari di Odofredo e Baldo alla pace di Constanza,’ *in*: *La pace di Costanza*, Bologna, Cappelli, 1985, pp. 59-75. Also particularly relevant is one of Baldus’ *Consilia*, II.195.

net widely, under the second heading he included many of the topics, which the civilians, foremost Baldus, had covered. Particularly in relation to the first issue, his views were at times far removed from the realities of contemporary peace treaty practice. On the whole, Belli was more concerned with questions of military justice than of peacemaking in general. Also, he did not deal with the subject in terms of an autonomous law of nations as he did not separate peacemaking between sovereigns from peacemaking between private persons. To a much larger extent than the next author, Belli still belonged to the medieval tradition of *ius gentium*.

The second was Alberico Gentili (1552-1608), also an alumnus of Perugia, who became Regius professor of civil law at Oxford (1587). Both his general conception of peace and his treatment of the more juridical-technical aspect of peacemaking were guided by his political agenda. They were also heavily weighed down by late medieval – again Baldus must be mentioned in this regard – and, less so, humanist jurisprudential tradition. These influences surely told in the selection of issues he dealt with. He did heed the concerns of contemporary practice, particularly in the final three chapters to the book, but – just like Belli – he time and again indulged in casuistry and debating the opinions of medieval and humanist civilians to the extent of drifting beyond what was relevant to practice. In all, his work was more relevant to the political concerns of his protectors than to the general concerns of contemporary peace treaty practice. Gentili had, however, cast out private peacemaking and restricted himself by and large to peacemaking between sovereigns.

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Petrus Gudelinus (1550-1619), a Leuven professor of civil law and a representative of the Leuven school of moderate humanist jurisprudence, wrote a treatise on peace treaties for the purpose of his lectures on the *Pax Constantiae*. His work was more straightforward and as such, more relevant to contemporary practices. It did not influence, however, any of the later writers of international renown.\(^{11}\)

Apart from dispersed fragments relevant to treaty law in general and to his theoretical conception of peace, in his *De iure belli ac pacis* of 1625, Hugo Grotius (1583-1645) devoted the larger part of one of his final chapters to juridical-technical aspects of peacemaking and peace treaties.\(^{12}\) Though briefer than Gentili’s, Grotius’s treatment of the subject was somewhat more relevant and comprehensive as to the main contemporary concerns of peace treaty practice than Gentili’s. Between Grotius and Wolff, no author did better than Grotius had in terms of systematic and comprehensive treatment of the subject and many took inspiration from him.

Gentili and Grotius had made the law of peacemaking, into the logical third component of their laws of war: *ius ad bellum*, *ius in bello* and *ius post bellum*. Gentili distinguished two major forms of peacemaking: by the dictate of the victor – the *ius victoriae* – or through an agreement, laid down in a peace treaty, which I propose to call the *ius ad pacem*.\(^{13}\) As in the treatises of the 17\(^{th}\) century the laws of war expanded into the law of nations, the *ius post bellum*, and particularly the *ius ad pacem*, remained part and parcel of them. By the second half of the 17\(^{th}\) century, most but not all treatises on the laws of nations included one or more separate chapters on peace treaties, apart from chapters on treaty law in general and on treaties concluded between belligerents during war, particularly truces. Many authors who came after Grotius, however, dealt with the subject more briefly and less comprehensively than Gudelinus and Grotius had.

All in all, early modern literature gave far less attention to the laws of making peace than to the laws of war. The selection of subjects covered remained in part dictated by tradition and their treatment was often fragmentary. Some of the subjects had already been

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\(^{12}\) In particular 3.20, see also 3.25, on treaty law in general see 2.15.

\(^{13}\) Gentili, *De iure belli*, 3.1.473.
under dispute in late medieval and Renaissance scholarship. Others were directly inspired by recent and contemporary practice. Among the first category was the application of the *ius postliminii*, the right of sovereigns to dispose of their territories and of their subject’s property, the problem of a captive king, the position of hostages, the question whether one could make peace with heretics and rebels, the binding force of treaties on successors and the question whether duress applied to peace treaties. Among the second category were the position of mediators and guarantors, the ratification and publication of the peace and its consequences, amnesty and restitution, and the inclusion of allies and adherents in the treaty.¹⁴

Among the treatises on the law of nations of the 17th and 18th centuries, those of Emer de Vattel (1714-1767), and his inspirer Christian Wolff (1679-1754) were surely among the most extensive in their coverage of the law of peace treaties. In their selection of topics, they heavily drew on Grotius, but expanded upon his work.¹⁵ Vattel devoted the first four chapters of the ⁴th and final book of his *Le droit des gens ou principes de la loi naturelle* of 1758 to the subject of peace treaties.¹⁶ The other five chapters of this book, entitled ‘Du rétablissement de la Paix, & des Ambassadeurs’, covered diplomatic law. In several chapters of the three previous books, Vattel dealt with related issues. Chapter 21 of the first book discussed the question of the alienation of public property, including territory, by the sovereign to foreign powers. The chapters 12 to 17 of the second book covered treaties and treaty law in general, while the ¹⁸th chapter of that same book addressed the peaceful settlement of disputes. In the

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¹⁵ Compare Grotius, *De jure belli ac pacis*, 3.20.

¹⁶ This was four chapters out of a grant total of 68 for the whole work, or 54 paragraphs out of 1,068 paragraphs.
16th chapter of the third book, the one on the laws of war, wartime treaties with the enemy were discussed.  

In relation to this subject, Vattel followed closely in the footstep of Christian Wolff – whose work and thought he aspired to make more accessible –, only making few amendments, additions or omissions. He did, however, subdivide the materials Wolff had covered in one chapter over four and rearranged some of the subjects according to the logic of this division, thus making the discussion (to appear) more systematic and logical. The main difference between Wolff and Vattel was that the latter was often briefer and more to the point than the former. Vattel lived up to the promise he made in the preface to his book to offer a more systematic survey of the law of nations than Wolff had. 

2. War and peace in Vattel’s system

Before turning to Vattel’s treatment of the *ius ad pacem* in its technical aspects, first his general conception of peace will be analysed. As with all of his predecessors, Vattel’s conception of peace was determined by his conception of war. In the key-passage to his conception of peace, he stated that

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19 A good example of this is the discussion on the question about ‘things not included in the compromise or amnesty’. While a few lines sufficed for Vattel to indicate all the rules and practices in relation to property, debt and damages (4.2.22), Wolff needed five distinct paragraphs (8.992-996).

[a] treaty of peace can be nothing more than a compromise. Were it necessary to frame the treaty according to the principles of strict and rigorous justice, peace would be impossible of attainment.21

Vattel, as Wolff had done, acknowledged that, in the realities of his day and age, peace between sovereigns was almost always a political compromise, and not an act of justice.22 This outcome was the logical complement to the solution to the dilemma of just and legal war they and most early modern writers of the law of nations clung to.

As Wolff had done,23 Vattel distinguished four different categories of ‘law of nations’. First, there was the natural or necessary law of nations. This was the law of nature as applied and adapted to nations. Second, there was the voluntary law of nations. It was general in application, common to all States. Vattel ranked this together with the other two categories, as positive law, but it was not truly that. It found its expression in the common behaviour of States, but it was also constrained by natural law. Its legal basis was the common consent of States, which was presumed, not established. It could modify and thus deviate from the necessary law of nations, but it could not contradict it. If it did, consent could not be presumed, so Vattel implied.24 Next came the two categories of arbitrary law of nations, which were particular in application: conventional law of nations, to be found in treaties, and customary law of nations. These were truly positive law as they were based on the free arbiter of States.25

Both the necessary and the voluntary law of nations were general law, and were ultimately based on human nature. But still, they were distinct. Natural law, and the natural law as applied to nations, dictated that human beings and nations should mutually assist one another. That was the purpose of the existence of natural society, that of men as well as that of

21 Vattel, *Le droit des gens*, 4.2.18: ‘Le Traité de Paix ne peut être qu’une Transaction. Si l’on devoit y observer les règles d’une Justice exacte et rigoureuse, ensorte que chacun reçût précisément tout ce qui lui appartient, la Paix deviendroit impossible’. The same line of thought is to be found with Wolff, *Jus gentium*, 8.986.

22 See for a similar statement the note of Jean Barbeyrac (1674-1744) at Grotius, *De jure belli ac pacis*, 3.20.14.


nations. But the duty of each nation towards its peers was superseded by its duty to its own. As each nation was free and independent, and no other nation could judge in its place over what its duty to itself commanded, ‘it [was] for each nation to decide what its conscience demand[ed] of it, what it [could] or [could] not do.’

Yet, this did not mean that nations were completely powerless in the face of other nations’ encroachment upon their rights. Here, Vattel referred to the classical distinction between internal and external obligations. Whereas internal obligations only bound someone in conscience – *in foro interno* – external obligations bestowed a right upon another. The external obligations and the corresponding rights were to be subdivided into perfect, enforceable ones and imperfect, unenforceable ones. Because they were free and independent, nations were free to judge on their own obligations under the natural or necessary law of nations. But because they were equal, they could not judge on one another. By consequence, when nations chose not to fulfil their moral obligations of mutual assistance, other nations had to suffer this injustice. However, the society of nations dictated that all nations also held ‘a perfect right to whatever [was] essential to their existence’, and could thus demand respect for these right from their peers. These perfect, enforceable rights pertained to the voluntary law of nations. At the end of his *Préliminaires*, Vattel summed it all clearly up:

In order from the start to lay down the broad lines for the distinction between the necessary law and the voluntary law we must note that since the necessary law is at all times obligatory upon the conscience, a Nation must never lose sight of it when deliberating upon the course it must pursue to fulfill its duty; but when there is

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28 Vattel, *Le droit des gens, Préliminaires*, par. 16: ‘que c’est à chaque Nation de juger de ce que sa Conscience exige d’elle, de ce qu’elle peut ou ne peut pas.’


question of what it can demand from other States, it must consult the voluntary law, whose rules are devoted to the welfare and advancement of the universal society.31

In other words, nations held no enforceable right to assistance from others, but they did have an enforceable right to have their own rights respected.

Wolff and Vattel applied the distinction between necessary and voluntary law of nations to the distinction between just and legal war. Both writers took the classical just war doctrine as their point of departure. Nations had a natural right to use force in order to repel, sanction or prevent an act of wrongdoing against their perfect rights. For a war to be just, it had to be fought in reaction to or prevention of an injury committed or threatened by another nation against one’s perfect rights. Its purpose, therefore, was to repel, sanction or prevent such a wrongful act. As such, war was a an instrument of justice. Objectively speaking, war could not be just on both sides.32 But like most of their predecessors since the 16th century, Wolff and Vattel recognised that this had become impractical in a context where there was no impartial, higher authority to judge on the claims of the belligerents. Both accepted therefore


that between sovereign States, the judgment on the justice of the war in many cases had to remain in the balance. Both made a brief genuflexion to the argument, forwarded by among others the Spanish neo-scholastic theologian Francisco de Vitoria (c. 1480-1546) and adopted by Grotius. Drawing on concepts from Roman private law – which in themselves had long made their way into the canon and theological discourse – Vitoria had claimed that the actions of an unjust belligerent who acted in good faith were covered and excused by an invincible error about the injustice of his cause.\textsuperscript{33} Whereas Wolff made a quite explicit reference to the concept of \textit{error}, Vattel only mentioned ‘good faith’ in passing. But with both authors, the focus was on the impracticality of justice among equal sovereigns.\textsuperscript{34} Vattel was, however, more vocal on this than his inspirer:

\begin{quote}
Since, therefore, Nations are equal and independent (…), and can not set themselves up as judges over one another, it follows that in all cases open to doubt the war carried on by both parties must be regarded as equally lawful, at least as regards its exterior effects and until the cause is decided.\textsuperscript{35}
\end{quote}

Hereby, the distinction between just and legal war was introduced and at one and the same time explained. The justice of the war pertained to the field of internal rights and obligations and to the necessary law of nations; its legality to the field of external rights and obligations and to the voluntary law of nations. This classification had already been Grotius’s solution to the dilemmas of justice, war and sovereignty.\textsuperscript{36} Distinguishing two spheres of law and war, the \textit{forum internum} and the \textit{forum externum}, lay in the line of the distinction between objective and subjective justice of the Neo-Scholastic School.


\textsuperscript{34} Wolff, \textit{Jus gentium}, 6.634-635; Vattel, \textit{Le droit des gens}, 3.3.40.

\textsuperscript{35} Vattel, \textit{Le droit des gens}, 3.3.40: ‘Puis donc que les Nations sont égales & indépendantes (…), & ne peuvent s’ériger en juges les unes des autres; il s’ensuit que dans toute cause susceptible de doute, les armes des deux parties qui se font la Guerre doivent passer également pour légitimes, au moins quant aux effets extérieurs, & jusqu’à-ce que la Cause soit décidée’. Compare Wolff, \textit{Jus gentium}, 7.888.

\textsuperscript{36} Grotius, \textit{De jure belli ac pacis}, 3.3.12, also 1.3.4.1, 2.1.2.2. and 2.23.13 and 3.3.4-5.
The distinction between ‘just’ and ‘legal’ war did not only pertain to the legitimacy of the war itself – the domain of the *ius ad bellum* – but also to the way it was waged – the *ius in bello*. The just war was limited in its scope and operation by its just causes and purpose. Under the rules of the just war, the just belligerent could only indulge in actions of violence and plunder which were necessary to win the war and to attain its purpose. Thus, the just belligerent’s right to take the enemy’s property was vested either in his just claim to that property, in a claim for indemnification for the damages inflicted during the war by the, of necessity, unjust actions of the other, unjust belligerent, in his right to punish an unjust belligerent, or in the necessity to weaken the enemy by taking away the means to continue the war. The other, unjust belligerent had strictly speaking no rights to any of the just belligerent’s property.37 The just war was discriminatory. Both the necessary as well as the voluntary law of nations set limits to what the just belligerent could and could not to. Whereas the necessary law of nations dictated that the just belligerent should evaluate each and every time whether an action was necessary under the circumstances, the voluntary law laid down general rules about what kinds of actions were considered to permissible because they were deemed necessary, irrespective of the particular circumstances of the case.38 For both categories of laws, the condition of necessity linked the laws of war back to the justice of the war itself. They both thus discriminated between the just and unjust belligerents.

The independence and equality of nations prevented, however, that wars were waged according to the rules of necessity and of a strict and rigorous justice. The observance of this justice had, in the absence of an impartial authority, to be left to the conscience of the sovereigns. In the field of external law, another set of rules regulated the conduct of sovereign belligerents. These rules, which formed part of the voluntary law of nations only, needed to be ‘of more certain and easy application’,39 and would apply to all sides in a ‘regular’ or ‘formal’ war.40 Under this – second – dimension of the voluntary laws of war, both sides held certain


40 For a war to be ‘legitimate’ or ‘in due form’ (‘guerre légère & dans les formes’), it needed to be waged by sovereigns and it needs to be formally declared. Vattel made reference, here, to Grotius’s concept of formal war, ‘bellum solemne’. Vattel, *Le droit des gens*, 3.4.66. See Grotius, *De jure belli ac pacis*, 1.3.3.4-5 and 3.3.12.
perfect rights to use force, to plunder and to conquer, irrespective of the justice of their cause. These laws of war did not free the sovereign belligerents of their moral duty to fight the war in a just way. But absent a judgment on the justice of the war itself, they were the only laws to have externally enforceable legal effects.\footnote{Wolff, \textit{Jus gentium}, 7. 777-778, 781-792, 886-892; Vattel, \textit{Le droit des gens}, 3.12.}

This mitigation of the laws of war was absolutely necessary to control and limit the horrors of war. As sovereigns would never concede the injustice of their cause, short of total defeat, a war fought for the enforcement of justice would be almost interminable. The mitigation of the rigours of justice was, therefore, necessary, ‘if a door is to be left at all times open for the return of peace’.\footnote{Vattel, \textit{Le droit des gens}, 3.12.190: ‘laisser une porte toûjours ouverte au retour de la paix’.

As this remark shows, Vattel’s dual conception of just and legal war spilled over into his theory of peace – just as it had with Wolff. Under the classical just war doctrine, a just war should logically end with a just peace. This had also been the view of the Spanish neo-scholastics and of Grotius.\footnote{Vitoria, \textit{De iure belli}, 3 in fine 60; Grotius, \textit{De jure belli ac pacis}, 3.6.1 and 3.15.1} Just peace implied that the peace treaty would indicate the just and unjust belligerents and rule on the justice of their claims. Wolff and Vattel spelled out the multiple, far reaching consequences thereof. First, it meant that the unjust belligerent lost his claim to the object for which the war was fought. Second, he was liable for all the damages and costs suffered by the just belligerent because of the war.\footnote{These idea about proportional justice to be meted out by the just belligerent went back to late medieval canon law and theology, Haggenmacher, \textit{Grotius et la doctrine de la guerre juste}, pp. 263-268.} Third, also the just belligerent was accountable for his unjust wartime actions, that is actions that went in against the necessary laws of war:

\begin{quote}
In the first place, with respect to the cause which gave rise to the war, it would be necessary for one of the parties to recognize himself as in the wrong and condemn his own unjust pretensions, which he would hardly do unless reduced to the last extremity. But if he were to confess the injustice of his cause, he must condemn whatever he has done in support of it; he must restore what he has unjustly captured, must indemnify the enemy for the cost of the war, and repair the damage occasioned by it. And how shall a just estimate be formed of the damage done? (...) Nor is that all. Strict justice
\end{quote}
would further require that the author of an unjust war should be subjected to a penalty proportionate to the injuries for which he owes satisfaction and of a character to insure the future security of the Nation he has attacked. How shall the nature of that penalty be determined or the extent of it to be precisely fixed? Finally, even the sovereign whose cause was just may have exceeded the limits of justifiable self-defense, may have carried to excess hostilities begun for a lawful purpose, and may thus be guilty of wrongs for which strict justice would demand satisfaction.45

Both just war and just peace belonged to the necessary law of nations, and were thus only operative in foro interno. As, in foro externo, claims to justice were to be considered irrelevant to the conduct of the war, logically, they were also irrelevant when making peace. The non-existence of an impartial authority to render judgment over the justice of the war – both in terms of ius ad bellum and ius in bello – made it undesirable as well as impossible to construe peace as an act of justice.46 It could not be but a political compromise, an agreement between equal partners the validity of which did not lie in its justice, but in their consent. Under the voluntary laws of nations, the ius ad pacem could no but take into account the very basic assumptions that underlay war ‘in due form’: that, in terms of its external effect, it was to be considered ‘just’ on both sides; that both parties had the same rights; and that the voluntary law of nations granted impunity to the unjust side.47 Both just war as well as legal

45 Vattel, *Le droit des gens*, 4.2.18: ‘Premièrement, à l’égard du sujet même qui a donné lieu à la Guerre, il faudroit que l’un des Partis reconnût son tort, & condamnât lui-même ses injustes prétensions; ce qu’il fera difficilement tant qu’il ne sera pas réduit aux dernières extrémités. Mais s’il avoue l’injustice de sa Cause, il doit passer condamnation sur tout ce qu’il a fait pour la soutenir: Il faut qu’il rende ce qu’il a pris injustement, qu’il rembourse les frais de la Guerre, qu’il répare les dommages. Et comment faire une juste estimation de tous les dommages? (…) Ce n’est pas tout encore. La Justice rigoureuse exigerait de plus, que l’Auteur d’une Guerre injuste fût soumis à une peine proportionnée aux injures, dont il doit une satisfaction, & capable de pourvoir à la sûreté future de celui qu’il a attaqué. Comment déterminer la nature de cette peine, en marquer précisément le dégré? Enfin celui-là même, de qui les armes sont justes, peut avoir passé les bornes d’une juste défense, porté à l’excès des hostilités, dont le but etoit légitime; autant de torts, dont la justice rigoureuse demanderoit la réparation’. Compare Wolff, *Jus gentium*, 8.986.

46 See quote at note 17.

war had their complement: just peace and compromise peace, which I propose to call formal peace.

Wolff and Vattel were not innovative in applying the distinction between just and legal war, or in confining each of them to their own category of law of nations. Grotius as well as some writers since had already done so. A dual conception of just and formal peace was a logical complement thereto. But although some of Wolff’s and Vattel’s precursors seem to have some notion of these two concepts of peace, they were the most explicit, the most elaborate, and the most consistent in developing a theory of just and formal peace.48

The demise of the final vestiges of ‘universal’ authority after the Reformation and the rise of the sovereign, dynastic State had struck at the very heart of the just war doctrine. Under the doctrine, war was to be considered discriminatory, both in terms of its causes as well as of its effects. As such, it needed to end in a just peace, which rendered justice to the just belligerent and sanctioned the unjust one, both for waging the war as for its actions during it. During the Early Modern Age, the doctrine had fallen under great pressure from reality. Among European sovereigns, there was not a single peace treaty during the Early Modern Age that attributed responsibility, let alone guilt, for the war to one of the belligerents. Concessions were never based on the justice of the other side. Claims for indemnification for wartime actions were systematically waived.49

In this light, the endeavours of the great authors of the law of nations from the 16th to the 18th centuries looked like a battle in retreat from ideal to reality. One is bound to ask why these authors, up to Vattel, felt induced to spare the classical just war a spot? Why did they try to escape from the dilemma of justice and sovereignty by making the distinction between just and legal war? Why did they, as well as Grotius and most early modern writers, not drop the just war from their theories altogether?

48 Grotius, *De jure belli ac pacis*, 3.20.15, 17 and 19 and 3.25.2-6; Lesaffer, ‘Defensive Warfare’, pp. 111-123; Neff, *War and the Law of Nations*, pp. 95-119. Already the late medieval civil lawyers held a concept of ‘legal war’ in which the *iura belli*, as the right to plunder and ransom, benefited both sides. Also, the canon lawyers of the Late Middle Ages had already held divergent views on the effects of just war in *foro interno* and *externo*. Haggenmacher, *Grotius et la doctrine de la guerre juste*, pp. 203-209, 263-274 and 279-288. See also the immediate predecessors of Grotius who stood more in the tradition of Roman law: Ayala, *De jure et officiis bellicis*, 1.2.34-35; Gentili, *De iure belli*, 3.2-6; Gudelinus, *De jure pacis* 3.1-4.

49 Fisch *Krieg und Frieden*, pp.92-112.
The probable answer is double. First, the ideals of natural law and just war were not devoid of meaning for most of these authors. They may have been relayed to the world of conscience, but in the Christian Europe of the Early Modern Age, this still counted for a lot. The whole demarche of the Modern School of Natural Law, which in one way or another had its impact felt on many writers of the late 17th and 18th centuries, was idealistic. It was to articulate a law, which would stand to reason and to justice. Moreover, as far as Wolff and Vattel were concerned and as will appear from the following, although just and legal war, just and formal peace were distinguished and were made into largely autonomous categories, their mutual autonomy was not complete. Second, the dichotomy between just and legal war did nothing but reflect State practice. Whereas early modern peace treaties made no reference to the justice of war and peace, princes and republics did justify their actions at the inception of war or during it. When making war, States claimed to make a just war. When making peace, they claimed to end a legal war. Many alliance treaties, both defensive and offensive ones, appealed to the justice of the cause for waging war or helping an ally at war. From the 16th to the 18th century, most belligerents took great trouble in justifying their actions through the publication and distribution of often very elaborate declarations and manifestos of war. Therein, the language of the classical just war doctrine was almost always operated. In other words, in devising the distinction between the justice and the legality of war and peace, the writers of the early modern law of nations did nothing but follow the practice of States.


3. **The art of peacemaking**

a) **The natural duty to cultivate and promote peace**

The dictates of sovereignty might have stood in the way of making peace just, they did not make natural law and justice irrelevant to the process of peacemaking. In the first chapter of the four Vattel devoted to peacemaking, entitled ‘Peace, and the Obligation to cultivate it’, Vattel explained his view on the natural laws of peace. To Vattel, as to Wolff, it pertained to ‘the sacred duties’ of nations ‘imposed upon them by nature’ to cultivate peace. As opposed to what Thomas Hobbes (1588-1679) had claimed, peace, not war was the natural state of man. By nature, man was in constant need of intercourse with and the assistance by his peers, and, to this, peace was necessary. This natural duty to promote and preserve peace had been bestowed upon the sovereigns, who held public authority within the nation. They held a double obligation: towards their own subjects as well as towards other nations. After all, under the necessary law of nations, they were bound to help and assist one another. To be a peacemaker was therefore one of the highest services a sovereign could render to other nations and to the whole world. Disturbers of the peace, for their part, were to be considered ‘cruel enemies of the human race’, because of the evil they wrought on their own and the enemy’s subjects, but also upon third nations. War disrupted commerce and was, therefore, to the detriment of all. By consequence, all nations held a right to unite against a disturber of the peace and punish him. With these remarks, Vattel relegated the law of peacemaking to the ultimate purpose of all nations, and of the society of nations and its law: the perfection and happiness of mankind.

But the natural duty to preserve peace did not impair upon the right of nations to go to war if this was necessary to preserve their rights. As Vattel had already explained at the

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52 ‘De la Paix, & de l’obligation de la cultiver’.


inception of his work, the duty of a nation to itself outweighed its duty to others. Nevertheless, a war, even if started out of necessity, only remained just as long as its continuance was necessary. Vattel proposed four rules concerning the limitation of war in time. Primo, a war was just if it was necessary to obtain justice and to secure the State for the future. Once these goals were achieved, hostilities had to stop. Secundo, if the justice of the cause was in doubt – which was almost always the case among sovereigns – war had to be stopped as soon as a ‘fair compromise’ was proposed or consented to by the enemy.58 Tertio, only when dealing with ‘a perfidious enemy’ who could not be trusted to uphold the compromise, could the war be continued until his ‘excessive and dangerous power’ was broken.59 Quarto, if the enemy refused to accept fair terms, then the war could also be fought until final victory. The third and fourth rules were particular applications of the first and second, respectively.

The second rule was the most relevant to the realities of Vattel’s day and age, in which the sovereignty of the nations impeded them to judge over each other’s claim to justice. At the end of a war stood a fair compromise. According to Vattel, the rigours of justice had to cede for the dictates of reality. But they also had to do so because of the natural duty of nations to promote peace. Here the natural law of nations dictated the limits within which the voluntary laws of war and peace had to operate:

Since, therefore, it would be dreadful to continue the war indefinitely, or to pursue it until one of the parties has been completely annihilated, and since, however just our cause may be, we must after all look to the restoration of peace and direct our efforts constantly to that salutary object, the only resource is to compromise the claims and grievances on both sides, and to put an end to all differences by as fair an agreement as can be reached.60

58 Vattel, Le droit des gens, 4.1.6: ‘Transaction équitable’.

59 Vattel, Le droit des gens, 4.1.6: ‘Ennemi perfide’ and ‘puissance excessive & dangereuse’. Wolff at this point had not spoken of ‘a perfidious enemy’, but had applied the same rule to a disturber of the peace. As it was the natural duty of nations to quell disturbers of the peace, breaking their power so as to secure peace and security for the future, was a service rendered to all nations, Jus gentium, 8.971, also 8.965-968.

60 Vattel, Le droit des gens, 4.2.18: ‘Puis donc qu’il seroit affreux de perpétuer la Guerre, de la pousser jusqu’à la ruine entière de l’un des partis, & que dans la Cause la plus juste, on doit penser enfin à rétablir la paix, & tendre
Moreover, the third and fourth rule showed how failure of the one side to abide by his natural obligation to promote peace and security revived the right of the opposite side to enforce its perfect rights towards itself unto final victory.

Two additional remarks have to be made in relation to the third rule. First, Vattel took the rule from Wolff, but construed it in a different way. 61 Both associated it to the collective interest in upholding the balance of power. 62 To Wolff, it had been the logical complement to his remarks on the right to collectively wage war on ‘disturbers of peace’ in order the ensure security for the future by curbing their power. Vattel for his part directed it at ‘perfidious enemies’ whose ‘excessive and dangerous power’ needed to be broken. Vattel’s reference to ‘perfidy’ and the grave consequences he attached thereto made sense in terms of the internal consistency of his work, due to the enormous significance he attributed throughout his work to good faith as a primary duty under the necessary law of nations and which had its impact felt all throughout the three categories of positive law of nations. 63 Second, Vattel’s choice of words allowed for the rule easily to be read as applicable to Frederick II of Prussia (1740-1786) – as prince of Neuchâtel Vattel’s remote sovereign –, who in 1756 had, not for the first time, invaded the Electorate of Vattel’s employer, Augustus III of Saxony (1733-1763). 64 It certainly brought justification to the clauses from the Alliance Treaty of Versailles of 1 May 1757 between Austria and France to weaken and dismember Prussia because of its new

61 Wolff, Jus gentium, 8.971. See also Gentili, De Iure Belli, 3.1 and 13.
62 Vattel nor Wolff considered the growth and expansion of a neighbouring power a just cause for war. For Vattel, there also needed to be evidence of a will to do injury or to dominate. Apart from other indication, even the slightest wrong to any state could suffice as evidence and thus trigger a just war. Vattel, Le droit des gens, 3.3.42-46; Wolff demanded that a wrong, however small, had been committed first, Jus gentium, 8.646-651.
63 Vattel, Le droit des gens, 2.12.163-4, 2.15.218-222, 3.10.174-7, see also Neff, ‘Vattel and the Laws of War’ in this volume.
64 In 1747, Vattel had been made the diplomatic representative of Augustus in Bern. After the publication of Le droit des gens, he would be made member of the Privy Council of the King-Elector. De La Pradelle, ‘Introduction’, pp. iv-v.
aggression and its disturbance of ‘public tranquillity’. Whether Vattel did this consciously or not, can not be established but it is a tempting possibility.

b) On peace treaties

With the second chapter, ‘Treaties of Peace’, Vattel moved to the world of State practice and the voluntary law of nations. He defined a peace treaty as ‘the agreement or compact in which [two powers which were at war] settle the terms of peace and regulate the manner in which it is to be restored and maintained’ after ‘they have agreed to lay down their arms’. Vattel’s definition indicated the three main categories of stipulation of which early modern peace treaties consisted: the settlement of the disputes underlying the war, the settling of the state of war and the organisation of the state of peace and its preservation.

Next, Vattel moved to the question of who held the authority to make peace and enter peace treaties. The authority to make peace logically belonged to the same authority as held the power to make war, in most States the sovereign ruler. However, this did not imply that the ruler enjoyed an unrestricted right to make all sorts of concessions. Vattel acknowledged that in some States, the ‘fundamental laws’ of the State could impose limitations upon the ruler. Here, Vattel made reference to a cause célèbre from the Renaissance: the French claim that King Francis I (1515-1547) had overstepped his authority in ceding part of the realm at the Peace of Madrid (1526) to the Emperor Charles V (1519-1558). In some States, as in Sweden or England, the king could not declare war, and consequently agree to a peace treaty, without the consent of the Estates or Parliament. In such a case, Vattel considered it prudent for the treaty partners to demand that the Estates or Parliament would confirm the treaty. Returning to the Peace of Madrid, Vattel criticised Charles V for not having had the Treaty ratified by the Estates-General of the Kingdom of France and the Estates of the Duchy of Burgundy before he released the captive Francis I.

66 ‘Des Traité de Paix’.
67 Vattel, Le droit des gens, 4.2.1: ‘Quand les Puissances qui étoient en guerre, sont convenuës de poser les armes; l’Accord, ou le Contrat, dans lequel elles stipulent les Conditions de la paix, & règent la manière dont elle doit être rétablie & entretenue, s’appelle le Traité de Paix’.
The following, likewise traditional, subject to which Vattel turned, was the question whether the ruler could alienate parts of the realm. Earlier in his work, Vattel had rejected the notion of patrimonial monarchy. A prince could never be considered the owner of the State, as his power was not given to serve his own interest, but that of his subjects. Consequently, a ruler could never alienate his State or part of it by giving it away and subjecting it to another nation. A nation was a body politic that had constituted itself in order to live under its own laws. The ruler has received his powers from the nation to uphold the nation and serve the common good. He could not alienate the nation, or part of it, without its consent. Only in case of extreme necessity, when dictated so by the exigencies of self-preservation, could a nation cede part of its territory and its people.\(^{68}\) The consent of the nation was necessary, however. In a State where the sovereign prince enjoyed absolute power and in which the constitution did not make the cession conditional upon express consent by the nation, cession by the prince had to be considered valid. If the nation did not actively oppose the cession, it was considered to have silently consented. This rule even applied to France, where the Estates-General had not convened since many decades (actually, since 1614). For the cession in a peace treaty of territories that had already been occupied by the enemy, no consent of the nation, in whatever form, was deemed necessary. In this case, the decision to cede the territory or not was a matter of war and peace. In an absolute monarchy, it was beyond doubt that it pertained to the prince to decide whether to give up the territory and make peace or to try to recover it by continuing the war effort. In case the monarchy was not absolute, the prince still had the right to promise that he would not resort to armed force to reconquer it. The necessity, which allowed the prince to cede a part of his State also allowed him to dispose of the private property or even the persons of his subjects. The *dominium eminens* of the sovereign granted him the right to dispose of the assets of all people subject to his sovereignty for the common good.\(^{69}\) However, the subjects held a right to indemnification from the treasury.

Next came the issue of the authority to make peace with princes who were minors, of unsound mind or had been taken captive. The captivity of Francis I had made the latter question one of the traditional issues debated in early modern literature. To Vattel, it was clear that princes from the first two categories could not make peace. He did not offer any argument for this.\(^{70}\) On the point of captivity, Vattel parted ways with Wolff. As opposed to Vattel,

\(^{68}\) Vattel, *Le droit des gens*, 1.5.61 and 69 and 1.21.263.

\(^{69}\) See also Vattel, *Le droit des gens*, 1.20.244.

\(^{70}\) Wolff went deeper into the subject: *Jus gentium*, 8.980-981.
Wolff accepted the notion of a patrimonial kingdom. For him, a captive prince who ruled a patrimonial kingdom had, as the owner of the realm, the right to dispose of it.\(^\text{71}\) For Vattel, a captive sovereign could in no way make peace for the nation. As he was entrusted with his authority to serve the interest of the nation, and as captivity prevented him from doing so freely, a captive prince could not exercise his rights. Vattel conceded that the prince could personally commit to a treaty, but he could no commit the nation to it. However, according to Vattel, it was the duty of the nation to do everything possible and make great sacrifices to ensure the release of the captive prince. Only the preservation of the nation took precedence. Here, for once he quoted an example from ancient history. Vattel saw no qualms in making peace with a usurper. Once he had been recognised by the people, it was not a foreign ruler’s place to meddle in the internal affairs of the State. A foreign prince could, however, take up the cause of the former ruler because he considered it just. In that case, he declared war on the nation, which had recognised the usurper. The laws of war and peace would then apply as between sovereigns in general.

In most peace treaties since the 16\(^{\text{th}}\) century, the signatory parties had their allies included. While not amounting to full accession, in terms of their effects these inclusions were rather vague and varied. In general, they amounted up to a promise of peace and friendship – \textit{pax et amicitia}. \textit{Amicitia} entailed a promise not to harm one another of one another’s subjects and to uphold normal, peaceful relations. Vattel and Wolff tried their hand at a sort of general definition of inclusion. To them, inclusion applied to auxiliaries – Vattel and Wolff did not use the term –, ‘those who have given (…) help, without taking a direct part in the war’.\(^\text{72}\) This referred to the early modern practice of States to support their allies with money and troops, without themselves entering the war as belligerents.\(^\text{73}\) In reality, inclusions also extended to third powers, which had done less than that. The inclusion came down to a promise by the signatory of a peace treaty not to wage war on his treaty partner’s auxiliaries or supporters of whatever sort because of the past war. This was indeed the main function of inclusion clauses, although in practice, the obligation was normally mutual, a point Vattel did not make. Both Wolff and Vattel strongly urged belligerents to make a provision of inclusion for their allies, to safeguard them against a possible revenge of the enemy. Vattel called it a ‘it

\(^{\text{71}}\) Wolff, \textit{Jus gentium}, 8.982.


\(^{\text{73}}\) See on this Wolff, \textit{Jus gentium}, 8.1009.
a necessary precaution’ and he clearly considered a matter of good faith of the belligerent towards his allies.\textsuperscript{74}

Vattel went on to state that the ally for his part did not commit himself to the treaty itself, except if the ally had granted his principal a full power to negotiate in his place. Allies, who had openly broken with the enemy and had become belligerents themselves, had to make their own, separate peace treaty. Furthermore, Vattel included a reference to the multilateral peace conferences of Nimègue, Ryswick and Utrecht, which indeed had produced a series of bilateral peace treaties between all the belligerents.\textsuperscript{75}

Vattel’s analysis was largely in accordance with practice. Indeed, the inclusion did not amount up to a full accession. Peace treaties almost always demanded that the included allies would accept and ratify the inclusion and not the treaty, thus committing them to the peace but not to the peace treaty. Thus they undertook to uphold peace and friendship with their principal’s former enemy, without, however, committing themselves to the full extent of the peace treaty itself.\textsuperscript{76}

After briefly mentioning and applauding the role of mediators,\textsuperscript{77} Vattel made his central statement on the character of peace as a political compromise. In the reality of his day and age, peace could not be but a political compromise. According to Vattel, this had a triple effect: \textit{Primo}, no attribution of guilt was included in the treaty. \textit{Secundo}, the claims for which the war had been waged were not settled in terms of their justice but of their expediency. \textit{Tertio}, no claims were made about what had transpired during and because of the war.

(...) the original grounds for the war are left unsettled, as well as any controversies which the various acts of hostility may have given rise to; neither of the parties is

\textsuperscript{74} Vattel, \textit{Le droit des gens}, 4.2.15: ‘UNE PRÉCAUTION NÉCESSAIRE’.

\textsuperscript{75} The first of the great multilateral peace conferences ending in a multilateral peace treaty was that of Aachen of 1748, ending the War of Austrian Succession, see Krystyna Marek, ‘Contribution à l’étude de l’histoire du traité multilatéral’, \textit{in:} Emanuel Diez et alii (eds.), \textit{Festschrift für Rudolf Bindschedler zum 65. Geburtstag}, Bern, Stämfli and Cie, 1980, pp. 17-39.


\textsuperscript{77} Already covered in Vattel, \textit{Le droit des gens}, 2.18.328.
condemned as unjust, a proceeding which scarcely any sovereign would submit to; but an agreement is reached as to what each belligerent shall receive in settlement for all his claims.\textsuperscript{78}

Might, not right, could dictate the terms under which the belligerents settled their claims in a peace treaty, the settlement was nevertheless final. What distinguished a peace treaty from a truce was the fact that the settlement extinguished all claims for which the war had been waged and which had not been recognised in the treaty.\textsuperscript{79} This was the meaning of the term ‘perpetual peace’, which since the 16\textsuperscript{th} century was a term commonly used in peace treaties.\textsuperscript{80}

It had long been established in doctrine that peace treaties, as opposed to truces, should entail a definitive settlement of the controversies underlying the war. Gentili considered a peace without such as settlement to be nothing but an indefinite truce, with all the uncertainties thereof. Drawing on Bartolus (1314-1357) and Baldus, Belli and Gentili had also pointed out that resort to war for a new cause did not constitute a breach of the peace treaty, thus suggesting, if one takes this \textit{a contrario}, that a peace settlement exhausted the right of the former belligerent to resort to force for the same cause. Wolff and Vattel set this last point out unequivocally.\textsuperscript{81} Moreover, Vattel, like Wolff, advised treaty partners to be careful to exclude all future claims on a certain object of contention as well. If not, the settlement would only exhaust the ceded claims, and not apply to new claims on the same objects. Vattel remarked that treaty partners normally took great care in doing exactly this.\textsuperscript{82}

\textsuperscript{78} Vattel, \textit{Le droit de gens}, 4.2.18: ‘On n’y décide point la Cause même de la Guerre, ni les controverses, que les divers actes d’hostilités pourroient exciter; ni l’une, ni l’autre des Parties n’y est condamnée comme injuste; il n’en est guères qui voulût le souffrir; Mais on y convient de ce que chacun doit avoir, en extinction de toutes ses préétensions’.

\textsuperscript{79} Wolff, \textit{Jus gentium}, 8.987; Vattel, \textit{Le droit des gens}, 4.2.19.


\textsuperscript{82} Wolff, \textit{Jus gentium}, 8.987; Vattel, \textit{Le droit des gens}, 4.2.19.
As said, in peace treaties the signatories also settled all claims regarding what had transpired during the war. These stipulations regulated the transfer from the state of war to the state of peace. Almost all early modern peace treaties held an amnesty clause, mostly in one of the first articles of the peace instrument. Vattel defined amnesty as ‘a complete forgetfulness of the past’. As the Swiss diplomat stated, these clauses were indeed commonly included in the peace treaties of his day and age. They had been so since the 15th century. Amnesty, or oblivion, implied that all claims – civil as well as criminal – for actions during and because of the war were extinguished. According to Vattel, the amnesty pertained to the very nature of peace, so it had to be considered implicitly included even if it was not expressed. Already Gudelinus and Grotius had made the same claim.

The amnesty clause was the logical complement to the doctrine of legal war. As it was impossible to judge on the justice of the belligerent’s cause, it was to be presumed that both had held a right to wage a war. As there was no judgment on the justice or injustice of a belligerent’s cause, his wartime actions could not be validated nor invalidated by it either. By consequence, it was impossible to judge whether a belligerent’s actions had been in accordance with the discriminatory, necessary and voluntary, parts of the ius in bello or not. But the amnesty clause also extended to injuries against the non-discriminatory, voluntary ius in bello. This was not an inevitable outcome of the logic of legal war. It was dictated by the logic of sovereignty and was thus a matter of expediency. Taking any other road would lead to all kind of problems on the implementation and execution of the treaty.

Vattel also pointed at the logical relation between amnesty and the clauses regarding private property and assets, which were to be found in most early modern peace treaties. As the war and what had transpired during it were not judged upon in terms of justice or law and, thus, no consequences could emerge from such judgments, it was logical that all things would remain as they were at the end of the war:

Since each of the belligerents claims to have justice on his side, and since there is no one to decide between them (…), the condition in which affairs stand at the time of the treaty must be regarded as their lawful status, and if the parties wish to make a change

83 Vattel, Le droit des gens, 4.2.20: ‘un oubli parfait du passé’.
85 Gudelinus, De jure pacis, 3.1-3; Grotius, De jure belli ac pacis, 3.20.15. Also Wolff, Jus gentium, 8.990.
86 Gentili had made that argument explicitly, De iure belli, 3.3.493.
in it the treaty must contain an express stipulation to that effect. Consequently, all matters not mentioned in the treaty are to continue as they happen to be at the time the treaty is concluded.87

This general rule of *uti possidetis* ran parallel to the effects of amnesty, which impeded all claims for damages for wartime injuries, and thus let things stand as they were. The rule of *uti possidetis* did also extend to rights not pertaining to the war, but to the contrary effect. Pre-war debts and claims to indemnifications, or debts and claims that had emerged during the war but were unrelated to it – the payment of which had often been forbidden under the state of war – were automatically revived as the state of war was ended.88 If an article in the peace treaty stipulated a general restitution of property between the belligerents and their subjects, this only applied to real property. For this, Vattel gave two reasons. First, as opposed to what was the case for realty, the title of ownership to personal was transferred immediately upon capture. Second, as it was much harder to identify and retrieve lost movables, the recovery would be very tedious. With this, Vattel quite accurately set out the general principles and practices of early modern peacemaking. In practice, peace treaties did stipulate a general restitution of seized realty, but not of personal. When no provisions were made, the status quo would apply.89

87 Vattel, *Le droit des gens*, 4.2.21: ‘Chacune des Puissances qui se font la guerre prétendent être fondée en justice, & personne ne pouvant juger de cette prétention (…); l’état où les choses se trouvent, au moment du Traité, doit passer pour légitime, & si l’on veut y apporter du changement, il faut que le Traité en fasse un mention expresse. Par conséquent, toutes les choses, dont le Traité ne dit rien, doivent demeurer dans l’état, où elles se trouvent lors de sa conclusion’. This was established doctrine, see Gudelinus, *De jure pacis*, 3.3-5; Grotius, *De jure belli ac pacis*, 30.22.11.2 and 12.1; Wolff, *Jus gentium*, 8.992.


89 In fact, general restitution of seized realty was, paradoxically, as much consequential to amnesty as the general rule of *uti possidetis* was. Amnesty destroyed the foundations of confiscations, which were ultimately based on a belligerent’s claim to waging a just war. As all claims of justice were left unsettled, to the confiscations lost their ground. It was thus logical for parties to stipulate a general restitution, but it was also necessary that they did so explicitly.
The restitution of enemy property, which had been confiscated during the war, was a major point of concern in most early modern peace treaties, which often took up several if not dozens of articles. By the middle of the 18th century, clauses about restitution had become briefer and more standardised. A general rule of restitution of realty and of non-restitution of personal was common practice, and had been since at least the early 17th century. Vattel treated this major subject in a very concise, but clear way.\footnote{Lesaffer, ‘War, Peace, Interstate Friendship’, p. 103; ‘Peace Treaties from Lodi to Westphalia’, p. 40.}

Traditionally, the question of restitution had also been approached from the perspective of Roman law. The relevant question was whether the \textit{ius postliminii} for property also applied in peacetime (\textit{postliminium in pace}). Some medieval and early modern jurists, building on an interpretation by Accursius († 1263),\footnote{Accursius \textit{ad Digestum novum}, 49.15.5.2 and 49.15.12 pr.} had understood this to mean that restitution would be silently implied in all peace treaties.\footnote{See on the different interpretations of \textit{ius postliminii in pace} in ancient Roman law: Ferdinando Bona, ‘Postliminium in pace’, \textit{Studia et Documenta Historiae et Iuris}, 21 (1955) pp. 249-75; Maria Floriana Cursi, \textit{La struttura del ‘postliminium’ nella Repubblica en nel Principato}, Naples, Jovene, 1996, pp. 126-36; Fernand De Visscher, ‘’Droit de capture et Postliminium in pace’, \textit{Revue Internationale des Droits de l’Antiquité}, 3rd series, 3 (1956) pp. 197-226; Jean Imbert, \textit{Postliminium. Etudes sur la condition juridique du prisonnier de guerre}, Paris, unpublished thesis, 1944; H. Lévy-Bruhl, \textit{Quelques problèmes du très ancien Droit romain. Essai de solutions sociologiques}, Paris, Domat-Montchretien, 1934 and literature there.} Gentili and Gudelinus had expressly rejected it; Grotius had implicitly stated the same.\footnote{Gentili, \textit{De iure belli}, 3.17; Gudelinus, \textit{De jure pacis}, 4.3-5; Grotius, \textit{De jure belli ac pacis}, 3.20.11.2 and 12.1, also 3.9.4. For Belli’s opposite views, \textit{De re militari et bello}, 3.1.8-10.} In his chapter on \textit{postliminium}, Vattel concurred in a few brief words. \textit{Postliminium} only applied during war.\footnote{Vattel, \textit{Le droit des gens}, 3.14.216.} An exception, however, had to be made for prisoners. According to Vattel, prisoners had always to be released, even if no provisions had been made in the peace treaty. Because the war had ended, there was no need any longer to keep them in captivity. If the enemy refused to set them free,
the prisoners of war were still considered to be under the state of war. If they escaped, they would enjoy the full benefits of *postliminium* and be restored to their former condition.\textsuperscript{95}

In his chapter on peace treaties, Wolff had discussed a different aspect of *postliminium*. It concerned the question whether *postliminium* applied to things restored by a peace treaty. His answer was to the affirmative. This implied that things liable to restitution should be restored to their original condition.\textsuperscript{96} Vattel, in his chapter on *postliminium*, took up the matter. His brief statement was more enlightening as to the consequences of the rule than Wolff’s had been. In his view it seemed to mean that when the enemy restored a province, town or territory at the time of peace, the prince was under the obligation to restore it to its previous condition. This clearly meant that it, and all its citizens, regained their previous rights.\textsuperscript{97}

Vattel concluded the chapter on peace treaties with the remark that older treaties to which a new treaty referred and which it confirmed, were considered to be valid as if they had been included in the new treaty ‘word for word’.\textsuperscript{98} In many early modern peace treaties, it was precisely stated in this way.

c) *The execution of peace treaties*

The next chapter, entitled ‘Execution of the Treaty of Peace’,\textsuperscript{99} went into some practical problems regarding the execution and implementation of peace instruments. Vattel held that the treaty, except if it stipulated otherwise, became binding upon the contracting parties themselves – the sovereigns – as soon as it was formally concluded – meaning through its

\textsuperscript{95} Vattel, *Le droit des gens*, 3.14.217; Wolff also claimed that prisoners of war had to be released by the time of peace. He stated that the law of nature superseded the question whether the *ius postliminii* applied to prisoners after the peace treaty and had become irrelevant. Under the law of nature, prisoners of war did not become slaves so that *postliminium* did not apply to them in any case. On this point, Vattel was more traditional. Wolff, *Jus gentium*, 8.1019. See on this issue, Gentili, *De iure belli*, 3.9.535.

\textsuperscript{96} Wolff, *Jus gentium*, 8.1019.


\textsuperscript{98} Vattel, *Le droit des gens*, 4.2.23: ‘de mot à mot’.

\textsuperscript{99} ‘De l’exécution du Traité de Paix’.
ratification. It only became binding upon the subjects of the signatories upon its publication. The ratification of the treaty obliged the treaty signatories to do everything they could immediately to end hostilities. Soldiers, who, however, had not been notified of the peace yet, could not be punished for acts of war committed after the conclusion of the peace. Here, Vattel slightly amended Wolff who simply stated that peace treaties were only binding upon soldiers, as on all subjects, after its publication.\textsuperscript{100} To prevent unnecessary loss of life, it was expedient that the armed forces would be notified as soon as possible. As warfare was now the business of state armies, and not of private persons, this notification did not have to take the form of a solemn publication, but could be communicated through the chain of command. The solemn publication afterwards still had an important purpose. It marked the transfer from the state of war to the state of peace for the former belligerent’s subjects and lifted all measures of war. Unless otherwise stipulated, reason demanded that all clauses had to executed as soon as possible and be faithfully observed. If a treaty partner was prevented from executing a certain obligation through circumstances independent of his will – including actions by the opposite party – he was released from that obligation.

As the conclusion of the treaty made it binding upon the contracting parties themselves and forced them to end hostilities, contributions, which were to be considered an act of hostility, could not be levied any more after the date of the formal conclusion of the peace instrument. The former belligerents remained liable, however, for contributions due at the time of its conclusion. To prevent all misunderstandings, Vattel advised peacemakers to regulate these matters in some detail, which they often did. Fruits and income from realty, which came under a restitution clause, fell to the reinstated owner from the moment the restitution had to be executed. Fruits and incomes already lapsed fell to the wartime possessor. Unless otherwise agreed, property and territories must be restored in the state they were in at the time of seizure. Everything which had happened to them because of the war, was considered to fall under the amnesty clause and thus should not be undone or compensated. However, it was forbidden to change anything to the property or territory once the treaty had been concluded. In relation to fortifications and other improvements to towns by the wartime occupiers, Vattel once again counselled treaty partners to cover all eventualities in detail, as they commonly did.

At this point, Vattel denounced existing practice claiming that treaty partners often preferred the clauses to be ambiguous rather than clear. Therefore, he felt, as a matter of

\textsuperscript{100} Wolff, \textit{Jus gentium}, 8.997, see also 1039-1040.
fairness, that the interpretation of a clause should go against the treaty party who dictated it. Names used to indicate a certain place or territory should be understood as they commonly were by ‘learned and intelligent men’. Finally, one always needed to presume that the treaty clauses only applied to the war the peace treaty ended. Vattel applied this rule by stating that a people, who had freely chosen to go over to the enemy, would not fall under a general clause of ‘restitution’ of all conquered territory.

\[d) \quad \text{The observance and breach of peace treaties}\]

Vattel’s fourth and last chapter on peacemaking was entitled ‘The Observance and the Breach of the Treaty of Peace’. To begin with, Vattel, like Wolff, quickly decided the traditional question about whether signatory princes bound their successors to the peace treaty. As a peace treaty was a public treaty, signed by a sovereign holding public authority, it bound the whole nation, irrespective of the person of the ruler. As all other treaties, peace treaties should be kept faithfully. This was all the more so since a breach of the treaty would revive war and since it was a duty of nations and sovereigns to cultivate peace.

As Wolff had done, Vattel addressed the question whether the exception of *vis metusve* applied to peace treaties. As Wolff had done, Vattel started by claiming that duress did not invalidate peace treaties. But he argued it differently. First, this would jeopardize the binding character of all peace instruments. Second, he stated that in his day it almost never occurred that a war went on until a nation was almost brought on the verge of destruction. By


\[102\] Vattel mentioned this example here because Wolff had treated the subject among the paragraphs dealing with restitution, and he had found no occasion to address the problem at another place. Wolff, *Jus gentium*, 8.1005.

\[103\] ‘De l’observation & de la rupture du Traité de Paix’.


\[105\] On the historical evolution from the Late Middle Ages to the 17th and 18th centuries in this respect, Lesaffer, ‘Peace Treaties from Lodi to Westphalia’, pp. 17-22.


\[107\] Wolff also argued that the duress imposed by the enemy was, as all acts of war, covered by the amnesty in the treaty and could therefore not me invoked. Wolff, *Jus gentium*, 8.1035.
consequence, States made peace because they had chosen to do so. And even if a State found itself in extreme circumstances and annihilation threatened, even then it chose the sacrifices of peace above the danger of destruction. But having said this, Vattel went on to blur the issue.\textsuperscript{108} He claimed that in case of an extremely oppressive peace imposed by the victor, the exception of duress did apply. Natural law, according to the Swiss diplomat, did never favour oppressors. Not unaware of the abuses this rule might lead to, he went on to say that it was better to suffer this than to allow an oppressor of having his way. All this led Vattel to the conclusion that peace treaties should only stipulate ‘equitable adjustments’ to the \textit{status quo ante bellum}.\textsuperscript{109} It is possible that the dire straits Vattel’s employer, the Elector of Saxony Augustus III (1733-1763) was in at the time of Vattel’s writing, inspired this caution.\textsuperscript{110}

Vattel subsequently addressed the problem of the breach of a peace treaty. If a treaty clause was broken, the injured party had the choice either to annul the whole treaty or not. He then had a right to ask for compensation. If compensation was refused – which Vattel acknowledged to be standard practice – the injured party had a just cause to resort to war. Vattel distinguished three different ways to act in contravention of a peace treaty:

\begin{itemize}
\item \textit{(...) by conduct contrary to the nature and essence of treaties of peace in general; by acts inconsistent with the nature of the particular peace in question; and finally by a violation of one of the express provisions of the treaty.}\textsuperscript{111}
\end{itemize}

Vattel took this threefold division directly from Grotius; Wolff had not used it.\textsuperscript{112} The first eventuality occurred when one of the peace partners took up arms and started war again. This did not of necessity imply a breach of the peace treaty. This was not the case if the treaty partner resorted to war for a new cause, which had not been covered by the treaty. That new war might be just or unjust, but it did not constitute a violation of the treaty, or at least, no

\begin{itemize}
\item \textsuperscript{108} The following was an original point, not taken from Wolff.
\item \textsuperscript{109} Vattel, \textit{Le droit des gens}, 4.4.38: ‘acomodemens équitables’.
\item \textsuperscript{110} On the Seven Years War: Franz A. Szabo, \textit{The Seven Years War in Europe 1756-1763}, London 2008.
\item \textsuperscript{111} Vattel, \textit{Le droit des gens}, 4.4.38: ‘ou par une conduite contraire à la nature & à l’essence de tout Traité de Paix en général; ou par des procédés incompatibles avec la nature particulière du Traité; ou enfin en violant quelqu’un des ses Articles exprès’.
\item \textsuperscript{112} Grotius, \textit{De jure belli ac pacis}, 3.20,28, 34 and 39; Wolff, \textit{Jus gentium}, 8.1020.
\end{itemize}
judgment could be rendered on it. Once again, the laws of peace were dictated by the logic of legal war. Likewise, peace treaties did not prevent States from taking up the cause of their allies against their treaty partner, again assuming the allies fought for a cause not covered by the treaty.

The question whether a belligerent acted in violation of an existing peace treaty or not held significant implications. If he was not, then the stipulations of the treaty remained in force. Under the new state of war, the exercise of rights recognised in the treaty might be suspended, but their legal basis was not annulled. So, in case a property or territory which a State had been granted in a peace treaty was seized or occupied in a new war, the occupying power held a claim to it under the laws of war – of the new war that is – and it might revert after the war under a clause of restitution, without there being any need for a new cession and transfer of title. If, however, the war erupted in violation of the peace treaty, this became void, and with it, all former concessions and titles contained in it. Whether the treaty or not was made void, was also of importance to the guarantors of the treaty. To top it all, the violator of a treaty acted perfidiously. Thereby, according to Vattel, he struck ‘at the foundations of public security; and [was] thereby injuring all Nations, he [justified] them in uniting together to suppress them’. Therefore, with Grotius, Vattel concluded it was better to stick to the presumption that a State held a new cause for the war and did not act in contravention to the existing peace treaty.

Resort to force in self-defence did not constitute a violation of the treaty either. Each State had a right to repel an armed attack. To obtain redress for the injury inflicted, peaceful means always had to be preferred to armed force. If private persons had inflicted the injury, a sovereign first had to ask for justice from their sovereign. A sovereign also held a right of hot pursuit if there was fear the perpetrators would otherwise escape.

113 Vattel, Le droit des gens, 4.4.42: ‘le fondement de la tranquillité publique; & blessant par-là toutes les Nations, il leur donne sujet de se réunir contre lui, pour le réprimer’.

114 Grotius, De jure belli ac pacis, 3.20.28.

115 This was the common rule from treaty practice in relation to the prohibition of armed reprisals. Lesaffer, ‘Peace Treaties from Lodi to Westphalia’, p. 42.
The attack on an ally who had been included in the peace treaty by the enemy treaty partner constituted a breach of the treaty. An attack on a new ally not included did not, but furnished a new cause for war.\textsuperscript{116}

In relation to the third category of treaty violations, that of a particular clause, Vattel took his stance in the old debate on whether the breach of a single article voided the whole treaty. Vattel sided with Grotius against Wolff. Like Grotius, Vattel held that all articles in a single peace instrument were interconnected so that the breach of one annulled the whole treaty. Wolff from his side distinguished between interconnected and separate articles. Of course, treaty partners might divert from the general rule by an express provision.\textsuperscript{117} Vattel also found it wise to stipulate penalties for the violation of a treaty clause, instead of having it annulled by each minor act in contravention. Vattel equated deliberate delays to execute treaty clauses with their violation.

Violations of the treaty by subjects of the treaty partners or by his allies should not be imputed on their sovereign or principal – unless he approved or ratified the action.\textsuperscript{118} If the injured sovereign captured the perpetrators, he could enact his justice upon them and should consider this as redress. This rule applied to pirates, but also on those holding a commission from their sovereign – Vattel referred to privateers. In case of injury by an ally, the injured party could seek redress, but the ally’s principal could also intervene to force the warring parties to grant and accept compensation.

4. Conclusion

Between the end of the Middle Ages and the late 17\textsuperscript{th} century, peace treaties became far more elaborate and detailed. To the extent that peace treaties remained a fairly marginal subject, doctrine did not follow suit. Among the great writers of the law of nations of the Early Modern Age, Pierino Belli, Alberico Gentili and particularly Hugo Grotius were the first to treat the subject of peacemaking and peace treaties in a somewhat systematic way, drawing both from historical and contemporary practice as well as various medieval and humanist doctrinal traditions. The authors that came after did not dramatically add to their work. By and

\textsuperscript{116} Similar in Grotius, \textit{De jure belli ac pacis}, 3.20.33.


\textsuperscript{118} Vattel, \textit{Le droit des gens}, 2.6.74.
large, they continued to address and discuss the same issues and made relatively few, if increasingly so, references to or allowances for existing practices. Nevertheless, early modern literature rarely diverted far from that practice either and, brief though it was, succeeded in covering the main aspects of peace treaty practice.

This paradox can easily be explained. Whereas peace treaties dramatically changed between the late 15th and the late 17th century in terms of elaboration and many new practices were introduced, the most fundamental change has already taken place by the late 16th century. Grotius – and Gudelinus for that matter – had already, albeit briefly, identified most of the underlying concepts and rules in their work. As they did not aspire at exposing the particularities of distinct treaties, but only to cover the commonalities in terms of a ‘general law of nations’, the writers of the 17th and 18th century could thus well base themselves on the work of predecessors and had only to make minor concessions to recent developments.

In relation to peacemaking and peace treaties, Emer de Vattel did not stray far from the path laid out by Christian Wolff. He covered almost all the same subjects and questions, and in most cases, adhered to the views of his ‘master’. In general, he made somewhat more references and concessions to contemporary peace treaty practice and was often more concise, to the point, and systematic. The latter he did, among others, by dividing the material Wolff had covered in one chapter over four chapters, slightly rearranging the subjects covered within and without these four chapters. In relation to the law of peacemaking, Vattel had indeed lived up to his promise to make the ideas of Wolff more accessible.

Wolff and Vattel built on the works of their predecessors. The subjects they treated remained largely traditional and their opinions were by and large in accordance with established doctrine. If one compares them with their predecessors from around 1600, and particularly with Grotius on whom they heavily leaned, one can discern four major differences, apart from their being more extensive and comprehensive. The first three are more differences of form than of substance. Nevertheless, these were not without relevance. Wolff and Vattel set the logical next step in the shift from what David Kennedy called primitive to traditional legal scholarship.119 But to some extent it was also the final step in the

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articulation of an autonomous, practical, comprehensible and close to comprehensive, classical law of nations on peacemaking and peace treaties.\textsuperscript{120}

First, Gentili, Gudelinus and Grotius all stood in the humanist tradition. To them and other writers from around 1600 falls the merit to have forged the law of war and peace into an autonomous discipline, distinct from theology, Roman and canon law. But in articulating their ideas, they heavily leaned on the doctrines of the late medieval and 16\textsuperscript{th}-century theologians as well as civilian and canonist commentators. In the humanist style, they also constantly illustrated their points with classical and more recent historical exempla. After Zouche, the authors of the law of nations gradually did away with these references to authoritative doctrine and historical exempla. Few did so more than Wolff and Vattel. With very few exceptions, both authors confined themselves to stating their opinions and giving their arguments. At only a few instances, did Vattel refer to older writers – particularly, apart from Wolff, to Grotius. Each time, he did so because he chose sides in an existing debate and because he adopted the opinion of the writers he referred to.

Second, this emancipation from old authorities and exempla allowed Wolff and Vattel to expose their ideas concisely and clearly. They cut summarily through some outdated discussions. Wolff, and even more so Vattel, dealt briefly with traditional issues such as patrimonial kingdoms, the binding of peace treaties on successors or the question whether the breach of one article annulled the whole treaty or not, only to state the facts as they were in the practices of his own time. Vattel’s material views rarely diverted from established doctrine, but by referring to contemporary practice and briefly dismissing the whole debate, he gave them the authority of being self-evident.

Third, Vattel, as Wolff before him, made more explicit or implicit references to contemporary or recent practice than his predecessors. From time to time generalising statements on contemporary practice slipped in. Vattel did only extremely rarely go into any details from specific treaties. These did not pertain to the voluntary, but the conventional law of nations, and were a subject for historians, not for a theorist of the law of nations.\textsuperscript{121} Vattel’s aim was to expose the general, voluntary law of peace, which treaties either applied or deviated from. In all, freedom from traditional authorities, concision and keeping an eye on


\textsuperscript{121} Vattel, Le droit de gens, Préliminaires, par. 24.
common practices helped Vattel to articulate the general rules and principles of peace treaty practice in a concise, clear and straightforward way. In only 54 paragraphs, Vattel covered most of the aspects of peacemaking and peace treaties, both with regards to form as to substance, dealing with the three categories of clauses typical for early modern peace treaties. His treatment of the questions of inclusion, the perpetuity of peace, the bond between amnesty and restitution and the general rules of restitutions stand out for their clarity and insightfulness.

The fourth difference is one of both form and substance. Vattel – as Wolff had done – laid out a more systematic and consistent doctrine of peacemaking and peace treaties by expressly relating it to the doctrines of just and legal war. The underlying ideas were not new. The Spanish neo-scholastics and Grotius, as well as from another theoretical perspective Gentili, had already covered a large part of the distance. Wolff and Vattel drew heavily on the Grotian conceptions of war and peace.

From the 16th century onwards, all writers on the law of nations had been forced to address the challenge to the just war doctrine coming from the rise of the sovereign State. But Vattel was far more explicit in his acknowledgment of this new reality and its implications than any of his predecessors, including Wolff. Vattel expressly and unapologetically made sovereign equality into the basic tenet that underlay the dichotomies between justice and law in the whole fabric of his system. He made the sovereignty and equality of the European States into the guiding principles of his doctrine of war and peace. Vattel consummated the conception of legal war in his doctrine of peace. His straightforward claims on the rights of sovereign and equal States gave more autonomy and a more central place to the concepts of legal war and of formal peace than it had with most of his predecessors. They allowed him convincingly to argue the inescapability of peace as political compromise, to disentangle just peace and peace as political compromise and to set them up as two distinct categories, formally autonomous, but in part materially interacting.

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122 One should of course also take into account Vattel’s chapters on the law of treaties in general for the formal aspects (2.15-2.17). For the clauses regarding the organisation of the state of peace for the future, reference must also be made to his chapter on trade (2.2)

123 The first and third point, together with his treatment of postliminium, were points on which Vattel’s work was quoted by one of his main 19th-century students, Henry Wheaton: Elements of International Law (end 1866, The Classics of International Law), Oxford/London, Clarendon/Humphrey Milford, 1936, pp. 599-601.
Vattel has often been credited, or discredited, for developing a positive law of war and peace that cut all the remaining bonds with morals and justice.\(^{124}\) In his well-known essay, *The Three Stages in the Evolution of the Law of Nations*, Cornelius van Vollenhoven, reproached Emer de Vattel to have earned ‘the success of a mother who suffers herself to be bullied by her children; of a schoolmaster who abolishes home-tasks, tells stories and gives a holiday; of a cabinet minister who grants and puts down in the Estimates, whatever the members of parliament come to ask of him’.\(^{125}\)

It is easy to see why Vattel received such treatment from later international writers, who read and, in doing so edited, Vattel through the spectacles of positivism. But one should be careful not to dust Vattel’s claims on justice in war and peace too readily under carpet as the debris from ancient theories. One should read Vattel in the context of his time, and not of that of the heyday of sovereignty, the 19th century.

Vattel refrained from excising concerns of justice from the *ius ad pacem* in particular, and from the laws of war and peace in general. He retained them at three different levels. First, Vattel’s purpose in laying out the voluntary law of nations was as much prescriptive as descriptive. The voluntary law of peacemaking, which was covered in the Chapters 2 to 4 of Vattel’s fourth book, at one and the same time offered a good reflection of the contemporary common practice of States and was meant to set a standard for their behaviour. The voluntary law of nations dictated that a peace treaty had to be a ‘fair compromise’ – ‘une transaction équitable’. What Vattel meant with that, has to be surmised each time from the particular context. But in general, one can say that it turned around of equality, reciprocity and good faith. As the voluntary law of nations was a watered-down necessary law of nations, modified to answer a situation where the demands of ‘a strict and rigorous justice’ did not apply, justice had to descend into the context and language of external law and came out as ‘fairness’ or ‘equity’. But one should not take the material impact of this ‘fairness’ too far. The identification of prescription and description worked both ways. In fact, when Vattel

\(^{124}\) See the contribution by Amanda Perreau-Saussine to this volume.

admonished States, most of the time he only counselled what they commonly did, or at least claimed to do.126

Second, the necessary law of nations interacted with the voluntary law of nations, in that it set limits on the States’ right to continue a war and even provided States with the perfect right to enforce them against those who broke through these constraints.

Third, Vattel’s most important significance may indeed have been, as Van Vollenhoven so eloquently explained, to have brought doctrine in line with practice. But this he no less did in saving justice a place in war and peace as in laying out his conceptions of legal war and formal peace. With this, Vattel did in no way depart from the practice of kings and princes when declaring wars. Even Frederik II of Prussia, the most infamous recidivist in breaking peace of the mid 18th century, took trouble— if not by himself, than by his ministers – to justify his resort to force.127 As Vattel and others before him had indicated, third States had a right to decide which side had just cause and to come to its aid; also, an alliance could never oblige a State to support an unjust belligerent.128 Here too, he did not stray far from the path of reality. In 18th-century Europe, alliance treaties formed the foundation stone of the fabric of foreign policy of most European powers. Most of these treaties were defensive in that the casus foederis presupposed an unprovoked armed attack. In practice, this meant that the ally reserved the right to judge on the justice of the attack and make his help dependent thereon. Although it might serve a political purpose and was also increasingly becoming political in itself, the language of the just war doctrine was still current.129 Many obligations imposed by the law of nations – those from the necessary law of nations – might only be

126 E.g. his comments with regards to inclusion and on laying down detailed stipulations about the settlement of the causes and objects of war. The most important exception was where he admonished States to make the clauses of treaties unequivocal and not to build in unclarities which they could later use to their advantage.

127 Even when clearly and consciously dispensing with all law and right with his invasion of Silesia in 1740, Frederik II did not stop his ministers of preparing and publishing a legal argument. In this, the language of the just war tradition was operated. In later wars – particularly in 1745 and 1756 – Frederik II took great trouble in justifying himself: Mémoire sur les raisons qui ont déterminé le Roi à faire entrer ses troupes en Silésie, in: Reinhold Koser (ed.), Preussische Staatsschriften aus der Regierungszeit Königs Friedrichs II (1740-1745), vol. 1, Berlin, ???, 1877, pp. 75-78; Theodor Schieder, Frederick the Great, London, Longman, 2000, p. 86.

128 Vattel, Le droit des gens, 3.3.40 and 3.6.86 and 89. See Stephan Oeter’s chapter in this volume.

morally binding. For Christian monarchs, this counted for a lot, also for the less religiously conscientious among them. As John Austin (1790-1859) would have it, the law of nations might only constitute a moral obligation, but it was not without sanction. It was sanctioned by

(...) fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they should violate maxims generally received and respected.130

To Frederick the Great, that was enough to make it a serious matter, if not for decision-making, than at least for justification and persuasion. For Vattel, it certainly was no less. Whereas Austin’s focus was on the moral dimension of the obligation of natural law, for Vattel, his predecessors, and some of his students, as the American Henry Wheaton (1785-1848), it was above all on the obligation.131

Vattel did, after all, not develop a theory solely of legal war and formal peace. He stuck to the by then traditional distinction between just and legal war and, through this, retained the language of justice. But by laying out the proper and distinct consequences of each of the two conceptions of war and peace so clearly as he did, he made it easier for his readers to loosen the ties between the two conceptions, even if he did not cut them all himself. By relating the dilemma of just and formal peace explicitly to sovereign equality, Vattel only acknowledged a reality that had been present for some time and which all his predecessors had taken into account as well, though more grudgingly. Thus, his work offered a convenient platform for later international lawyers to develop and operate a concept of peace that was devoid of all concerns of justice.
