Boundaries of the International

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* To the Critical Analysis of Law workshop: I've appended to the paper a working chapter-by-chapter summary of my book in progress. Because the paper is newer than the chapter structure, it does not quite fit within that structure; I'm not yet sure how to revise accordingly and welcome feedback on that point as on anything else. Many thanks.

1. Introduction
2. Oriental despotism and the Ottoman Empire
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4. Critical legal universalism in the eighteenth century
5. Empire and the international in Bentham and Hamdan Khodja
6. Boundaries of Victorian international law
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Summary of the argument of each chapter

1. Introduction

The introduction presents the book as a study of the ideological and political work that discourses of the law of nations and international law were mobilized to perform during the eighteenth and nineteenth centuries with respect to relations between the imperial powers of Western Europe and states and societies outside Europe. These discourses emerged alongside the expansion and consolidation of Western Europe's global empires, and I argue that they proved powerful in at least three key respects: supplying justifications for imperial expansion; supplying resources for criticism of abuses of power by imperial states; and effacing the imperial dimension of European states by conceptualizing them as territorially bounded moral communities and equal and independent "moral persons," rather than as empires. The introduction explores how treatments of the scope of the law of nations — did the law of nations apply to states beyond Europe? Were legal and diplomatic relations between European and non-European states part of the body of law and practice that made up the law of nations, or were they part of a separate legal universe, or a space free of law? — contributed to this ideological work.

2. Oriental despotism and the Ottoman Empire

This chapter argues that during the course of the eighteenth century, as the law of nations increasingly came to be equated with European public law, the Ottoman Empire played a role of unparalleled importance as the defining marginal case of the European international order. Debates in eighteenth-century Europe about the scope of the law of nations and the nature of legal and diplomatic relations were not highly specialized, as they would become in the nineteenth-century, but were conducted through diplomatic and travel writings, and in works of political thought, with a wide circulation. The chapter examines a diplomatic discourse that, although often disparaging of Ottoman practices,

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was also relatively flexible and pragmatic, and the starker and more uncompromising concept of Oriental despotism deployed in political debates. It argues that interactions between these diplomatic and theoretical texts produced arguments for the legal exclusion of the Ottoman regime that seem to have exceeded the intentions of both diplomats, such as the influential English envoy Paul Rycaut, and theorists of the concept such as Montesquieu. The chapter also introduces the strand of critical legal universalism at the center of chapter 4, in the figure of the French orientalist Anquetil Duperron, whose *Législation orientale* was a thoroughgoing critique of Montesquieu's account of Oriental despotism in the name of the possibility of legal relations between European states and the major Asian empires.

3. Vattel, universalization, and the law of nations

Vattel's *Droit des Gens* (1758) is striking in its apparent ambiguity about the scope of the international community — whether the law of nations applies within Europe or across the globe — and also its relative silence on European imperial and commercial expansion. Although the existing literature has little to say on the question of scope in Vattel (with scholars sometimes writing as though Europe and "the globe" are coterminous, and as though that was Vattel's view), among those few who have addressed the issue there is a polarization between those who claim that Vattel was an exemplary eighteenth-century natural law thinker who believed the law of nations was universal and applied equally and uncontroversially to non-European states, and those who think he was really only addressing the European state system. I try to claim a kind of middle ground, arguing that the universalism of Vattel's law of nations should be taken more seriously than it is in much current scholarship but also that his treatment of non-European examples calls their legal standing into question. I suggest that Vattel's influential account of the state or nation as a moral person, and of the international arena as an egalitarian society of such persons, produced a distinctive, we might say deceptive, picture of the international realm that was to serve an important ideological function in the context of European imperial expansion, by rendering theoretically opaque the imperial nature and activities of the major European states.

4. Critical legal universalism in the eighteenth century

This chapter follows the previous two in exploring a facet of eighteenth-century thought regarding the scope of the law of nations, this time a strand of thinking that asserted the possibility of shared legal frameworks and mutual obligations between Christians and non-Christians, Europeans and non-Europeans. None of these thinkers was an opponent of imperial rule as such, but they envisaged a global legal order, or network of orders, as constraints on the exercise and abuse of European states' power.

The legal and political thinkers on whom this chapter focuses as exemplary of these critical approaches — Edmund Burke and the great admiralty court judge William Scott, Lord Stowell — articulated a more inclusive and pluralistic understanding of the global legal order than the view that came to prevail. They wrote during the decades framed by the Seven Years War and the Napoleonic wars: a period when European states were constructing imperial constitutions of global reach, and when states as well as other actors such as trading companies and pirates competed to defend their power and interests in the terms of newly extensive legal regimes. These thinkers were Europeans

speaking to European audiences, often with limited knowledge of the extra-European societies, languages, and legal traditions they discussed. They drew, likewise, on the ambiguous status of the law of nations as putatively universal despite its heavily European history. But they did so with the aim of chastening European power through legal constraints and obligations, including asymmetrical constraints that Europeans should recognize as binding themselves even when they could not presume to use them to bind others.

5. Empire and the international in Bentham and Hamdan Khodja

Alongside Vattel, Jeremy Bentham was, arguably, the political thinker who exerted the greatest global influence in the first decades of the nineteenth century, as well as a figure of significance for the development of international law at that time. Bentham's writings show the extent to which Bentham (in contrast to Vattel) conceived of the international realm as a space of empires. But his project of codifying international law shifted from one that, in the 1780s, required the emancipation of all colonies as the key precondition for global peace, to one that asked European states instead not to interfere in one another's colonies. Among the many potential collaborators whom Bentham cultivated around the globe was the Algerian Hamdan ben Othman Khodja (ca. 1773-1842), who argued in the early 1830s, from a self-consciously liberal cosmopolitan, and modernizing, perspective, for an independent Algeria that might take its place in a nineteenth-century Europe of emerging nationalities, and that might engage with European states as a diplomatic equal. His work illustrates the constraints on those who sought to preserve some independence, discursive as well as political, in the face of European expansion; as well as the critical possibilities of liberal discourse at a moment when it was being marshaled in France and Britain in the service of empire.

6. Boundaries of Victorian international law

The question of the geographic scope of international law was central for theorists of international law throughout the second half of the nineteenth century in a way that it had not been to the thinkers they recognized as the founders of their field (including, as I argued in chapter 2, Vattel). In this chapter, I explore the preoccupation among Victorian thinkers, both international lawyers and participants in a broader public debate, with the question of the scope of international law. I argue that nineteenth-century international lawyers placed questions of membership in international society at the heart of their theories of international law. The many late-nineteenth-century efforts toward codification of international legal standards intensified the era's exclusionary tendencies by encouraging jurists to specify what might otherwise have remained vague and more implicit prejudices. The British debate over the boundaries of international law ranged beyond professional lawyers and involved political thinkers such as J.S. Mill, legislators, colonial administrators, and journalists. Dissident voices in this broader public debate insisted European states had extensive legal obligations abroad. Such authors (including the moral philosopher Francis Newman, and the diplomat and Muslim convert Henry E.J. Stanley) claimed that while the increasing legal exclusions of non-Europeans neatly served an exploitative imperialist agenda, they also provoked hostility and resistance and so proved not only unjust but also foolish and impolitic.

7. Conclusion

The equality and uniformity to which international law and much international political theory aspire remain seemingly chimerical in the face of a global political and economic order marked by gross, and increasing, inequalities. Such tensions between global inequality and aspirations toward universality are ones we inherit from several centuries of European expansion and from the political and legal thought that emerged alongside that expansion. It is my hope that an investigation of the shifting boundaries of the international, and their justifications, may help to illuminate liberal political thinkers' continuing temptation to restrict the international legal community. Moreover, recovering the perspective of ecumenical strands of eighteenth-century thought, and dissident nineteenth-century ideas, may provide resources for the critical scrutiny of such temptations. The history of international law has until recently been a relatively minor enterprise within international law and has been largely the province of international lawyers only. It has come to be among the most vibrant areas of scholarship in legal history and has only recently have begun to be mined by political theorists and historians. This book project seeks to be a contribution both to the history of political thought and to our thinking about the lines of political, economic, and legal exclusion that have long marked, and that continue to cross, the globe.

The turn to positivism in international law? Vattel and his nineteenth-century reception

The turn of the nineteenth century is widely seen in histories of international law as a watershed moment, when naturalism gave way to positivism: when universalist theories of the law of nations as based on the law of nature were rejected in favor of the view that the only relevant source for international law was state practice, and that European states were the only relevant actors. Many nineteenth-century writers on the law of nations took such a view of the moment, as have subsequent historians from divergent perspectives, from C.H. Alexandrowicz in the 1950s-60s to Stephen Neff in *Justice Among Nations* (2014). The early nineteenth century is clearly a key turning point in a number of respects, including the gradual adoption of the very term *international*, coined by Jeremy Bentham in the early 1780s.[2] Histories of the subject were being written for the first time. The modern fixation on the Peace of Westphalia as the origin of the international system likewise began in this counter-revolutionary ideological moment, as Edward Keene has shown. Indeed, Martti Koskenniemi has gone as far as to argue that there is no continuity between eighteenth-century law of nations discourse and the discipline of international law that emerged in the nineteenth century.[3] And yet too stark an emphasis on the transformation of international law in this period has obscured both important continuities across the revolutionary divide and also considerable diversity in the forms

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[2] Bentham introduced the term international law to the public in 1789 in his *Introduction to the Principles of Morals and Legislation*, noting its novelty, but first used it in earlier notes; "Projet Matière: Entregens," Bentham Papers, University College London XXV.1. And see M.W. Janis, "Jeremy Bentham and the Fashioning of 'International Law,'" *American Journal of International Law* 78.2 (1984), 405-18; and David Armitage, "Globalising Jeremy Bentham," *Foundations of Modern International Thought* (FMIT) (Cambridge, 2013), 172-87.

[3] E.g., Koskenniemi, "International law and *raison d'état*: Rethinking the Prehistory of International Law," in Kingsbury and Straumann, eds, *The Roman Foundations of the Law of Nations*, 297-339 at 298.

of expression that the positivist and historicist turn took in the years following the French Revolution.

How, and how significantly, did theories of the law of nations change around the turn of the nineteenth century and in the wake of the French revolution? Vattel's *Droit des gens* of 1758 and its reception in Europe and beyond in subsequent decades provides a useful lens onto this question, for it was, as David Armitage has suggested, arguably the most globally significant work of European political thought into the 1830s.[4] Vattel has an important but equivocal role in accounts of international law's development, for he has been read variously as the last universalist and as the key transitional figure in the rise of positivism (as well as a figure in a longer "dualist" continuity running back to Grotius). Vattel's work had an extensive but mixed reception. He was the "current oracle of writers and politicians,"[5] as one author put it in 1798, even as his name became a byword for useless and even dangerous pieties about law. Kant's famous description of Grotius, Pufendorf and Vattel as "sorry comforters," whose precepts are often trotted out in justification of offensive wars but have never been known to restrain state violence, was preceded by similar dismissals by Voltaire and others.[6] A satirical verse along similar lines, first published in an ultra-Tory British volume called the *Anti-Jacobin* in 1802, proved irresistible to later British commentators and can be found echoing across the nineteenth century, quoted by figures from Palmerston to Thomas De Quincey and many

[4] Armitage, FMIT 222.
[5] Anquetil Duperron, *L'Inde en rapport avec l'Europe* (Paris, 1798), p 248.
[6] Kant, "Toward Perpetual Peace," in Practical *Philosophy* 326 (8:354); on Voltaire's verdict after the start of the Seven Years' War that the "law of nations has become chimerical" and for his disparagement of Vattel in a letter of to La Chalotais of 28 February 1763, see Dan Edelstein, "Enlightenment rights talk," 536.

others.[7] The original verse ridiculed the French revolutionary government's consul to Algiers, who, it said, was threatened with execution by the Dey after he tried to foment revolution among the "Moors." In response,

> The Consul quoted Wicquefort,
> And Puffendorf and Grotius;
> And proved from Vattel,
> Exceedingly well,
> Such a deed would be quite atrocious.[8]

Some uses of this verse, which became a ubiquitous shorthand, a kind of Victorian meme, indicate the self-understanding of later nineteenth-century legal writers as positivists who restricted themselves to reporting European state practice, in contrast to an earlier, overly ambitious prescriptive natural law tradition.[9] As *Chambers's Encyclopaedia* summarized the conventional wisdom in 1870, "Like all his predecessors in the same field, V[attel] based his whole system on an imaginary law of nature, and it would be easy to enumerate a large number of false conclusions to which he came in the absence of light thrown on the law of nations by practice, and by the principle of utility in our time, so generally adopted as the test of international morality."[10]

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[7] Palmerston quoted the passage in response to Gladstone during a heated debate leading up to the first Opium War (27 July 1840; Hansard *House of Commons Debates*, vol. 55 cc 1029-54); De Quincey, "Goethe (review of *Wilhelm Meister's Apprenticeship*)," *London Magazine*, September 1824, 292.

[8] "Elegy on the Death of Jean Bon Saint André," *Poetry of the Anti-Jacobin*, 4th edn (London, 1801), 155-160. The verse initially placed the action in Tunis, then self-mockingly called attention to such ignorance about, and indifference to, extra-European societies; it also mocked its own equation of the French Revolutionary regime and North Africans as "Pagans" and "Unchristian Powers."

[9] Thanks to David Armitage for "meme." The *Saturday Review*'s 1883 (4 August) review of John Hosack's *On the rise and growth of the law of nations as established by general usage and by treaties* noted that that the author "warns us indeed in his preface that it is not his object to compete with those eminent writers who have sought 'to lay down certain rules for the guidance of independent States as well in peace as in war.' He does not, it would seem, aspire to be cited by future consuls on future historic occasions, as when 'The Consul quoted Wicquefort […]'. His aim is simply to describe what have been the actual practice and usages of nations in their transactions with each other."

[10] "Vattel," Chambers's *Encyclopaedia: a dictionary of universal knowledge for the people* (Philadelphia: J.B. Lippincott, 1870), vol 9, p 720; this passage was cited critically by the Scottish jurist James Lorimer, an unusual late-Victorian defender of natural law, who wrote that "As Vattel (1714-67) was the last of the philosophical, Moser (1701-86) appears to have been the first of the empirical jurists." He lamented that Vattel failed to save "the science from the rising tide of empiricism," concluding, "It is only when the

In what follows I explore the question of the nature and meaning of the apparent shift to positivism in international law in the wake of the French revolution by way of studying the sources and scope of the law of nations in Vattel and in several significant successor texts and later moments: Robert Ward's 1795 *History of the Law of Nations*, the first history of the law of nations in English; James Mackintosh's 1799 *Discourse on the Law of Nations*, written in the course of his own turn against the French Revolution; and two episodes in which statesmen from Algeria and China in the 1830s and 1840s sought out translations of relevant passages from Vattel to justify their positions in conflicts with expanding European empires.

Why Vattel?

Vattel himself aspired to a wide audience for the *Droit des gens*, intending it as a contribution to a broad public discourse — that of "les gens du monde" — rather than a narrowly doctrinal one.[11] His book exercised tremendous, immediate influence, especially in the Anglophone world, with ten translations published in England between 1759 and 1834 and a further eighteen translations or reprints published in America from 1796 to 1872.[12] As early as 1765, Vattel could boast that "Mon *Droit des gens* a fait grande

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necessary law is lost sight of in its concrete manifestations, that empiricism, utilitarianism, and the like, degenerate into mere objectless groping amongst lifeless facts and life-destroying fictions." Lorimer, *Institutes of the Law of Nations* (Edinburgh and London: William Blackwood, 1883), 80-83.

[11] "C'est un traité systématique du Dr[oit] des gens, mais écrit dans un goût à le faire lire par des gens du monde," he wrote to his lifelong correspondent Samuel Formey, an author, journalist, and professor at the Collège français of Berlin, 17 February 1757, in *Emer de Vattel à Jean Henri Samuel Formey*, letter 65. In an earlier letter to Formey, Vattel had written of his aspiration to write a book "drawn from the works of Wolf [sic], but infinitely shorter, and stripped of that dryness which will eternally repel all the French," letter 23, Dresden, 27 March 1747.

[12] Ruddy 1975, 283; and see La Pradelle, introduction to Vattel, *The Law of Nations* (Washington: Carnegie Institution, 1916).

fortune en Angleterre."[13] It was cited as a major source on international law during the American Revolution, British debates on the French Revolution, the Napoleonic Wars, and the Congress of Vienna.[14] Non-European officials drew on Vattel in encounters with European powers, while the often-reprinted 1834 English translation of Vattel by Joseph Chitty was widely used by British colonial officials in Australia and New Zealand.[15] Vattel's success and influence have been attributed to a variety of features of his argument, above all its deft and pliable dualism, or recognition of two sets of norms, natural and positive, governing states' conduct, which made it at once a source of principles and a compendium of state practice "very much in line with the state of European society at the time of the Enlightenment."[16] Vattel's "casuistical" method, as Ian Hunter has called it, in which a general principle was considered in light of examples, and both principle and cases were judged and adjusted in light of each other, meant that Vattel was invoked on both sides of many questions (though the text often had to be massaged more by one side than another). Vattel was cited by both sides in British parliamentary debate over war with France in 1794, most famously by Burke.[17] Again in

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[13] *Vattel à Formey*, letter 84 to Formey, Dresden, 21 September 1765; he also noted that, having been translated into German in 1760, the book was already being cited in Vienna as a "livre classique."

[14] See C.G. Fenwick, "The Authority of Vattel," Part I, *American Political Science Review* 7 (1913), 395; Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris: Pedone, 1998), 14-15; F.S. Ruddy, "The Acceptance of Vattel, in C.H. Alexandrowicz, ed. *Grotian Society Papers 1972* (The Hague: Martinus Nijhoff, 1972). As Ruddy 1975 and others have noted, Vattel's was the text Jefferson chose for the education of students at William and Mary College in the Law of Nature and of Nations and remained so from 1779-1841, as it was at Dartmouth College from 1796-1828. Also see Hunter, "'A *Jus gentium* for America'. The Rules of War and the Rule of Law in the Revolutionary United States," *Journal of the History of International Law* 14 (2012), 173-206.

[15] As Mark Hickford has argued, Vattel's text, with Chitty's notes updating it to suit the nineteenth-century British empire, was an important resource for colonial officials formulating colonial policy. Hickford, "Decidedly the most interesting savages: an approach to the intellectual history of Maori property rights, 1837-53," *History of Political Thought* 27 (2006), 122-67, at 123-33.

[16] Jouannet, "Emer de Vattel," in *Oxford Handbook*, 1119.

[17] Charles Fox and others opposed to the war relied on Vattel as an authority establishing that no nation had a right to intervene in the internal affairs of another. Fox, *Parliamentary History* XXX, cols. 1254-55 (1794). Burke, while acknowledging this principle, had argued that when a state was driven by principles so destructive to its neighbors they had an obligation to stop it: "Speech on Fox's Motion for the Re-

the pamphlet war on neutral trading rights that erupted in Britain and America in the first years of the nineteenth century, Vattel was cited both by defenders of the right of American ships to trade with France free of British harassment, and by champions of Britain's contrary right to search such ships in search of contraband.[18]

Vattel's dualism — his use of both natural and positive law as sources of the law of nations — may account not only for his great influence in public discourse, but also for many nineteenth-century European legal writers' self-conscious marking of their distance from him. He was on the one hand a late exponent of the tradition of universal jusnaturalism, for he insisted that natural law is binding "internally," on nations' consciences, and he treated it as binding on all nations everywhere, rather than as a specifically European product or practice. But because he held that nations were externally bound — could be held to account by others — only by positive laws, laws to which they could be said or presumed to have consented, he also laid the ground for the positivist turn. His relation to the historicism that was to emerge as a significant feature of nineteenth-century international law was likewise twofold. He rarely employed civilizational or progressive arguments of the sort that would become common several

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establishment of Peace with France," 17 June 1793, col 1012. "He insisted that it was a travelling delusion, that nations were not to interfere with each other: for if any nation endeavoured to confuse, to trample upon, violate or despise the rights of others, the interests of human society required that all should join against them. If, by the subversion of all law and religion, a nation adopts a malignant spirit to produce anarchy and mischief in other countries, it is the right of nations to go to war with them. In support of this doctrine, he quoted the authority of Vattel." Still others dismissed Vattel as an authority precisely because he could supply arguments for contrary positions. As Fox noted, "My hon. friend [William Windham] said, that no dependence could be placed upon the authority of Vattel, with respect to the question of an interference in the internal affairs of other nations, and that arguments might be drawn from his work favorable to either side."

[18] See, e.g, James Madison, *An examination of the British doctrine, which subjects to capture a neutral trade not open in time of peace*. (America [sic], 1806), pp 25-28, 34; and Robert Plumer Ward, *An essay on contraband: being a continuation of the Treatise of the relative rights and duties of belligerent and neutral nations, in maritime affairs* (London, 1801), p 186, 216-219; in the latter section, Ward has to torture Vattel's text somewhat to support his fairly extreme argument that seizing even necessary provisions, at the risk of civilian death, can be a legitimate act of war.

decades later, in which legal practices are understood as tracking the development of societies through stages. At the same time, however, his reliance on historical examples to develop an account of legal principles may be said to entail an incipient historicism that was to be developed in full-fledged histories of the sort that D. H. L. von Ompteda and Robert Ward would soon develop.

Vattel's book emerged from and was then taken up in multiple and diverse contexts, complicating efforts to interpret the text.[19] He was deeply influenced by Christian Wolff and through him the German academic tradition of *ius naturae et gentium*.[20] He was active in the world of war and rivalry between Prussia and smaller states of the decomposing Holy Roman Empire such as Saxony, for which he worked as a diplomat.[21] Although his political context was thus primarily "German" rather than French, as a Protestant citizen of the francophone Swiss principality of Neuchâtel, Vattel was a participant in a French public sphere who read and commented on Voltaire and Rousseau and wrote literary essays and dialogues in addition to his legal writings.[22] So the book's contexts included German academic debate, German-Imperial diplomatic maneuvering, and the French republic of letters.

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[19] For background see E. Béguelin, "En souvenir de Vattel," in *Recueil de travaux* (Neuchâtel, Switzerland: Attinger, 1929); A. de Lapradelle, "Emer de Vattel," in J.B. Scott, ed., *The Classics of International Law — Vattel*, vol 1 (Washington: Carnegie Institution of Washington, 1916); and Béla Kapossy and Richard Whatmore, "Introduction," in Vattel, *The Law of Nations*, ed. Kapossy and Whatmore (Indianapolis: Liberty Fund, 2008), ix-xx. Unless otherwise noted, I cite chapter and section from this edition, which uses an anonymous eighteenth-century translation (London, 1797) (with pages numbers added as KW).
[20] Vattel, *Law of Nations*, "Preface," KW13.
[21] See André Bandelier, "De Berlin à Neuchâtel: La Genèse du *Droit des Gens* d'Emer de Vattel," *Schweizer im Berlin des 18. Jahrhunderts*. Eds. Martin Fontius and Helmut Holzhey. (Berlin: Akademie Verlag, 1996) 45–56.
[22] His more narrowly legal context has been called "l'École romande [i.e., francophone Swiss], protestante, du droit naturel," pioneered earlier in the century by Jean Barbeyrac, the translator and popularizer of Grotius and Pufendorf, and Jean Jacques Burlamaqui, professor of civil and natural law in Geneva; André Bandelier, "Introduction," *Emer de Vattel à Jean Henri Samuel Formey: Correspondances autour du* Droit des gens (Paris: Honoré Champion, 2012), vii.

It is worth stressing that the book that was to exercise such profound influence in the intellectual and political circles of Europe's major imperial and commercial powers, Britain and France, at the height of their global rivalry, was written by a diplomat most concerned with continental politics in the German states. As a Swiss subject of the Prussian king, preoccupied by the fate of his vulnerable homeland ("a country of which liberty is the soul, the treasure, and the fundamental law"),[23] Vattel's attention was arguably less drawn to the global features of European states and their wars than was true of his French and British contemporaries, or had been true of Vitoria and Grotius as subjects of major imperial powers.[24] What would come to be called the Seven Years War began on the continent in August 1756, when Frederick II of Prussia, Neuchâtel's king and a British ally, invaded Saxony (Vattel's employer), which was allied with Austria. Although by that time France and Britain had already declared war on each other, after two years of fighting in North America and preparations for war in India, it was the battles of the European theater of the Seven Years' War that were those of most urgent interest to Vattel.[25] The imperial concerns of France and Britain that were such a dominant part of those states' experience of the Seven Years' War and subsequent decades through the fall of Napoleon were muted for Vattel in a way that shaped his influential framing of the "universal" law of nations, as much in his occlusions and

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[23] "un pays, dont la liberté est l'ame, le trésor & la loi fondamentale," Vattel, *Law of Nations*, "Preface," KW20.

[24] He did observe, in arguing for the importance of precision and specificity in peace treaties, that if the negotiators of the Treaty of Utrecht had been more precise, "we should not see France and England in arms, in order to decide by a bloody war what are to be the boundaries of their possessions in America. But the makers of treaties often designedly leave them in some obscurity, some uncertainty, in order to reserve for their nation a pretext for a rupture:—an unworthy artifice in a transaction wherein good-faith alone ought to preside!" (II.vii.92, KW 308).

[25] Note the inconclusive evidence of the series of volumes attributed to Vattel as a co-editor, called the *Mémoires pour server à l'histoire de notre tems*, par l'Observateur hollandois, rédigez et augmentez part M.D.V. (Frankfort and Leipzig: Aux Dépens de la Compagnie, 1757-1758); these address both the American and the Asian theaters of the war in a way that might suggest greater attention to the war's extra-European facets than the *Droit des gens* implies.

omissions as in his overt arguments.[26] The unselfconscious universality of Vattel's text may be due in part, that is, to his distance from the truly global politics of the major imperial states, France and Britain.

Whereas on crucial questions Vitoria and Grotius developed accounts of the law of nations from the dilemmas thrown up by imperial expansion, Vattel largely ignored the very significant imperial facet of the states he described as territorially based moral persons.[27] While he addressed one aspect of colonial expansion, namely the justification of European settlement on lands occupied by "nomads," he had less to say about European commercial expansion into Asia, particularly in contrast to Grotius, for whom such contexts were important sources of reflection on the principles of the law of nations and the laws of war and peace.[28] Scholarship on Vattel's thought about empire and the non-European world has, consequently, focused on his views about the legitimacy of settlement of "vacant" lands and his contributions to agriculturalist justifications for the expropriation of native peoples in the Americas and Australia.[29] I would argue that we

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[26] As David Armitage has written of Jeremy Bentham and his contemporaries for whom the Seven Years War was a formative experience, this was the first generation "to grow up with a comprehensively global vision of its place in the world"; *Foundations of Modern International Thought*, 174. While this global consciousness is strikingly apparent in the work so many of Vattel's contemporaries — Bentham, Burke, Smith, and Hume; Voltaire, Diderot, and the abbé Raynal — it is less apparent in Vattel.

[27] On Vitoria, see, e.g., Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge 2004), 13-31; on Grotius, Martine van Ittersum, *Profit and Principle* (2006), Peter Borschberg "Hugo Grotius, East India Trade and the King of Johor," *Journal of Southeast Asian Studies* 30 (1999), 225-248. Richard Tuck, *The Rights of War and Peace* (Oxford, 2000); and Benjamin Straumann, *Roman Law in the State of Nature* (Cambridge 2015), who argues that although *De iure belli ac pacis* was written at a "great distance" from the questions of colonial expansion that had shaped *De iure praedae*, "in terms of doctrinal substance [it] was essentially an expanded version of" the earlier work (33).

[28] As Koskenniemi writes, "Grotius did not intend to write a textbook on 'the law of nations'. Instead, he was concerned to say a number of things about the legitimacy of war, in particular war waged by the United Provinces for access to the colonies"; Koskenniemi, "The Advantage of Treaties," *Edinburgh Law Review* 13 (2009), 27-67 at 51.

[29] See Antony Anghie, "Vattel and Colonialism," in *Vattel's International Law in a XXIst Century Perspective*, ed. Peter Haggenmacher and Vincent Chetail (Boston: Martinus Nijhoff, 2011), pp. 237-53. Vattel was routinely cited in support of Britain's right to settle New Zealand in mid-nineteenth-century debates; see, e.g., the House of Commons debates of 17 June, 7 July, and 23 July 1845, in the last of which Lord John Russell argued that "You must say that New Zealand shall be treated as inhabited by a civilized

should, however, and despite Vattel's own relative inattention to questions of global commerce when compared with French and British contemporaries, attend to the implications of Vattel's argument for other questions of relations between European states and the rest of the world, both within the text and in its reception.

A striking feature of Vattel's treatise is its ambiguity about the scope of the international community — whether the law of nations applies within Europe or across the globe — and also its relative silence on European imperial and commercial expansion. Vattel has been read as both a characteristic exponent of an eighteenth-century natural-law universalism committed to the view, in the words of Charles Henry Alexandrowicz, that "non-European State entities…enjoyed a full legal status," and, in contrast, as a thinker narrowly concerned to theorize relations among European states and to justify one political form, that of the Protestant agricultural-military republic. For Alexandrowicz, Vattel exemplified, and concluded, a tradition running from the Spanish Scholastics and Grotius through the late eighteenth century, which saw natural law as the basis of the law of nations, with two crucial and related implications: a commitment to a universal scope for the law of nations and a declaratory rather than constitutive view of the recognition of sovereignty, such that a state's sovereignty exists prior to and independent of its recognition by others.[30] Recent scholarship has mounted a significant challenge to Alexandrowicz's reading by asserting the highly particular nature of Vattel's apparently universal claims. For Ian Hunter, who has developed this line of argument most comprehensively and forcefully, Vattel's substantive account of the nation and the law of

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people… [or] you must apply the principle of Vattel, who alleged that savages could only hold the land they occupied, and beyond that they should have no favour whatever." (Hansard, 3rd Ser. vol 82, cols 970-1025; http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp-us&rft_dat=xri:hcpp:hansard:CDS3V0082P0-0014).

[30] Alexandrowicz, *Introduction to the history of the law of nations in the East Indies*, 10.

nations was not only distinctively European. It was also, more particularly, "a concrete historical order — that of a Protestant agricultural-military republic sourced from his Swiss homeland," which it raised "to the abstract level of a model of the virtuous national republic."[31]

There is textual support for both these strongly contrasting interpretations. Vattel's language is resolutely universal in a way that contrasts strongly with certain contemporaries and nearly all writings from the turn of the nineteenth century onward: he routinely writes of the law of nations as applying to the world, to mankind, to the "universal society of nations,"[32] and he opens the book by justifying a new work on the subject with the complaint that most writers "confine the name of the Law of Nations to certain maxims and customs which have been adopted by different nations," which is to confine "within very narrow bounds a law so extensive in its own nature, and in which the whole human race are so intimately concerned" (Preface, KW 5). At the same time, his illustrative examples are generally, though not exclusively, drawn from modern European interstate relations, and his text has often been read, in the decades after it was published as well as in later scholarship, as an account of the modern European state system. As the Admiralty Court judge Sir William Scott wrote in 1799, "For this proof I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public international law…. Vattel is here to be considered not as a

[31] Ian Hunter, "'A *Jus gentium* for America': The Rules of War and the Rule of Law in the Revolutionary United States," *Journal of the History of International Law* 14 (2012), 173-206 at 181; Tetsuda Toyoda, *Theory and Politics of the Law of Nations. Political Bias in International Law Discourse of Seven German Court Councilors in the Seventeenth and Eighteenth Centuries* (Leiden: Martinus Nijhoff, 2011), pp. 174ff. Also see Bela Kapossy, "Rival Histories of Emer de Vattel's *Law of Nations,*" *Grotiana* 31 (2010), 5-21, offering a less polemical version of the argument that the Swiss Protestant republican tradition is a key context for Vattel's account of the state.

[32] Vattel, *Law of Nations*, Preliminaries, §28.

lawyer merely delivering an opinion, but as a witness asserting the fact,—the fact that such is the existing practice of modern Europe."[33]

Some of Vattel's contemporaries explicitly narrowed attention to European public law or the "European law of nations." The Abbé de Mably, in his *Droit public de l'Europe*, for instance, described Europe as a political system of treaties and alliances. This was effectively a closed system; alliances or legal norms governing relations with non-European states do not enter Mably's account. Mably portrayed the discovery of the New World and the Portuguese rounding of the Cape of Good Hope (initiating maritime commerce with Asia) as revolutionary events that radically and profoundly affected the European system by making commerce a new source of power, so that "money became the sinew of war and policy," and England, the country that made the best use of the new opportunities for wealth, developed unprecedented power.[34] But although Mably understood modern Europe to have been in key respects built on global commercial and imperial enterprises ("ships…factories…and colonies"), the political and diplomatic "system" that interested him was entirely restricted to Europe. Likewise, several decades later, the German legal theorist G.F. von Martens restricted his accounts of the law of nations to the "society of European nations."[35] While he celebrated Vattel as one of a

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[33] Sir William Scott in the *Maria*, in Christopher Robinson, *Reports of Cases argued and determined in the High Court of Admiralty*, vol 1 (London, 1806) [1 C. Rob.], 340-78 at 363. He adds, "And to be sure the only marvel in the case is, that [Vattel] should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, (on which great part of the law of nations is founded,) but of the private jurisprudence of most countries in *Europe*."

[34] Mably, *The Principles of negotiations: or, an introduction to the public law of Europe Founded on treaties, etc.*, (London: James Rivington and James Fletcher, 1758), 26; Mably, *Des principes des negotiations, pour server d'introduction au "Droit public de l'Europe"* (La Haye, 1757). Also see Mably, *Le droit public de l'Europe fondé sur les traitez conclus jusqu'en l'année 1740* (La Haye: J. Van Duren, 1746).

[35] Martens, *A compendium of the law of nations, founded on the treaties and customs of the modern nations of Europe*. trans. William Cobbett (London: Cobbett and Morgan, 1802 [1788]), 11. Neff sees Martens as working "strongly in the spirit of Vattel," though he characterizes him as holding that there "was not, and could not be, any such thing as a universal law of nations" (199); there could be a universal society of states

handful of modern authors who had paid attention to the positive law of nations, as opposed to the universal, he argued the law of nations as a "science" and "system" could only be properly developed by "separating it entirely from the universal law of nations."[36] The authors Martens cited as contributing to this positive science, unlike Vattel, address a specifically European law of nations.[37] These laws applied to the European state system that such authors understood to have developed since the Treaty of Westphalia (though Martens noted that the roots of the European system lay in the Romans' efforts to "make themselves masters of the world"[38]). The European society was like a people before they form themselves into a republic, but while they would "never" take that final step, he predicted, still the connections among Christian European states were close and robust in a way that their connections with others, including the Ottoman Empire, were not. For Martens, the law of nature was inadequate as a source of laws for the "frequent commerce" that characterized European interactions: it was too rigorous, and too abstract; its insistence on the equality of rights was unrealistic. Although Vattel too described Europe as so closely united that it formed "a kind of republic" (III.iii.§47), he analyzed it as a political system based on the balance of power rather than as a distinct legal universe or the sole domain of the law of nations.

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but a natural one, governed by natural law and not a positive one. Kapossy (2010) likewise sees Vattel and Martens as sharing "a strong common ground"; Kapossy 2010, 15; it seems this is because he assumes that Vattel is talking about a European political system.

[36] He cited Grotius, Hobbes, Locke, Pufendorf, Wolff, and Burlamaqui among those who studied the universal law of nations and Zouche, Textor, Glafey, Real, and Vattel as those whose works were "more useful" because they drew on modern history in addition to natural law (8-10).

[37] Martens singled out for praise Johan Jacob Moser, whose first such work, *Anfangsgründe der Wissenschaft von der heutigen Staatsverfassung von Europa*, was published in 1732, followed by various works on "Europäischen Völkerrechts" published into the 1770s. Martens also cited G. Achenwall, *juris gentium Europ. practici primae lineae*; P.J. Neyron, *Principes du droit des gens Européens, conventionnel et coutumier* (Brunswick, 1783); and C.G. Gunther, *Grundris eines Europ. Völkerrechts* (Rogensburg, 1777) and *Europäisches Völkerrecht in Friedenszeiten* (1787).

[38] Martens, *Compendium*, 27n and 25-6. Note that Martens's insistence on a European society distinct from the rest of the world, and that of the other thinkers he cites, preceded the counter-revolutionary strand identified by Keene and Armitage.

A number of features of Vattel's account of the law of nations and the family of nations suggest that he regarded it not as restricted to Europe but as having broader or even universal application, though I will also highlight the ambiguity of this universality. First and most obvious is the universalist language already noted: Vattel's frequent references to the "universal society of mankind," "*l'amour universel du genre-humain*," his claims that that if the "benevolent precepts of nature" were followed, the "world would take on the appearance of a great Republic, all men would live together as brothers, and each would be a citizen of the universe."[39] Second is the related claim that nations' mutual obligations owe nothing to religion but are due to others simply as fellow human beings, as when Vattel writes that the obligation of performing the offices of humanity is founded solely on the "nature of man. Wherefore no nation can refuse them to another, under pretence of its professing a different religion: to be entitled to them, it is sufficient that the claimant is our fellow-creature" (II.1.§15). Third is Vattel's source material from non-European state practice and precepts, though this is fairly sparse. And fourth are those instances (also relatively rare) concerning relations between Europeans and non-Europeans, including those in which Vattel draws attention to European failures to respect principles of justice or the law of nations in their relations with non-European societies.

After setting out the general principle that we are bound by the law of nature to respect and work for the benefit of all other members of human society (quoting Cicero, "*pro omnibus gentibus*") he explicitly includes the "American nations" among those

[39] II.1.§§15-16. Daniel Edelstein points out Vattel's use of the phrase "*l'ennemi du Genre-humain*" (*hostis humani generis*), noting its usage more generally in eighteenth-century French thought, attributing its currency to the theological resonance of the phrase given its use in Roman Catholic liturgies as a term for the devil; *The Terror of Natural Right* (Chicago, 2009)

nations who are "absolutely free and independent" and protected by the law of nations from the unwarranted intrusions of others.[40] His cursory treatment of China and Japan likewise indicates that he assumes them to be participants in the law of nations, in the sense that their actions with respect to foreigners have been perfectly in accordance with that law.[41] The ambiguity of Vattel's universalism arises especially in relation to Muslim states, for although he includes them among the family of nations and suggests that Europeans are bound by the law of nations in dealing with them, his examples cumulatively suggest that Muslim states are distinctly untrustworthy and pose a particular threat to international society. The only societies whom Vattel excludes in principle from law of nations protections were those that "by [their] manners and by the maxims of [their] government" encouraged mistreatment of foreigners or piracy (II.vii.§8). But his examples tend to vilify Muslim states in particular, while his account largely obscures the violence of European imperial expansion. In these senses — his proscription of the sort of "savage" violence associated especially with Islam; and the effacing of the violence of European expansion — Vattel serves as a blueprint figure for later treatments that shift from religion to violence as the ground of otherness.[42] At the same time, for those who were concerned about the European infliction of violence on others, Vattel could be a useful resource precisely because of the universal terms in which he couched his argument, as he was for Edmund Burke during the Hastings impeachment trial.

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[40] "Those ambitious Europeans who attacked the American nations, and subjected them to their greedy dominion, in order as they pretended, to civilize them, and cause them to be instructed in the true religion,—those usurpers, I say, grounded themselves on a pretext equally unjust and ridiculous" (II.1.§7); he criticizes Grotius for licensing punishment of "transgressions of the law of nature" when these do not affect the rights or safety of the punisher. He repeats the point at II.iv.§55, criticizing the Spanish violations of the law of nations with respect to the Inca Atahualpa (as both Vitoria and Montesquieu among others had done, although Vattel cites Garcilaso de la Vega as his source).
[41] And see II.vii.§94 (on the justice of China's former prohibition to foreigners to enter the country); I.xii.§148 (on the prudence of China's expulsion of European missionaries).
[42] See, e.g., II.1.§7, II.1.¶15, II.1.§17; II.xvii.§273; IV.vii.§103.

For all the universality of his language, however, Vattel's treatment of global commerce suggests that he did not consider in detail questions of law of nations obligations outside Europe that this commerce might well have raised for him, as it did for French and British contemporaries such as Raynal, Smith, or Burke. He notes in passing that although monopolies in general constitute violations of the rights of citizens to engage freely in the nation's commerce, certain commercial enterprises can be undertaken only with considerable capital and it was for this reason that many countries chartered monopoly companies for the East Indies trade.[43] Here, like Mably, Vattel briefly registers the remarkable impact that global trade and conquest have had on the European political system, without pursuing questions of whether European conduct in Asia has conformed, or should conform, to principles of the law of nations. He notes the power, wealth, and glory amassed by the English and Dutch in the East Indies — it is thanks to its global commerce that England holds "in her hand the balance of Europe," while "a company of [Dutch] merchants possesses whole kingdoms in the east, and the governor of Batavia exercises command over the monarchs of India" (I.viii.§85) — but neither here nor elsewhere does he address whether those eastern possessions, or the relationship of command over Indian monarchs, are in conformity with the law of nations.

Finally, I want to suggest that Vattel's influential account of the state or nation as a moral person, and of the international arena as an egalitarian society of such persons, produced a distinctive, we might say deceptive, picture of the international realm that was to serve an important ideological function in the context of European imperial

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[43] I.viii.§97. Britain's pamphlet wars over the East India Company's trade monopoly were to erupt only in the 1760s.

expansion.[44] It rendered theoretically opaque the fact that some of Europe's most important powers were global empires rather than simply territorially bounded communities of citizens engaged in a shared (implicitly republican) political project, and it largely disregarded the violence of European commercial and imperial expansion. It thus effaced the features of hierarchy and imperial extension that characterized the world system in Vattel's day, and from his day through to the present. Such problems would be exacerbated when Vattel's implicitly republican doctrine was taken up by an avowedly imperial state. Joseph Chitty, for instance, gave an imperial elaboration of Vattel's principle that because a nation is charged with its own self-perfection, other states may not interfere in its affairs.[45] Chitty took this principle to indicate that states may not recognize, or engage in independent commerce with, another state's revolting colonies: since "the direct recognition of such revolted colony must necessarily be offensive to the principal state to which it belonged."[46] If the principle that a nation is a community of individuals in pursuit of a collective moral life together, already idealized in Vattel's formulation, is strained to the breaking point in the case of rebelling colonies, Chitty

[44] On the centrality to Vattel's project of the conception of the state as moral person, see Ben Holland, "The moral person of the state: Emer de Vattel and the foundations of international legal order," *History of European Ideas* 37 (2011), 438-45. Vattel used the terms *état* and *nation* interchangeably: see, e.g., the opening line of his "Preliminaries," "Les Nations, ou Etats sont des corps politiques de societies d'homme unis ensemble pour procurer leur salut & leur avantage, à forces réunies"; *Droit des Gens*, 1758, vol 1 p 1. For discussion of the emergence of such an elision between nation and state in late-eighteenth-century French thought (though without reference to Vattel), see Istvan Hont, "The Permanent Crisis of a Divided Mankind," in *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Harvard, 2005), 447-

[45] Vattel, *Law of Nations*, II.i.§18: "since the perfection of a nation consists in her aptitude to attain the end of civil society…no one nation ought to hinder another from attaining the end of civil society…. This general principle forbids nations to practice any evil manoeuvres tending to create disturbance in another state, to foment discord, to corrupt its citizens, to alienate its allies, to raise enemies against it, to tarnish its glory, and to deprive it of its natural advantages."

[46] Chitty comments: "An instance of this rule is, the illegality of any commercial intercourse with a revolted colony before its separate independence has been acknowledged. A contract made between a revolted colony in that character with the subject of another state that has not as yet recognized such revolted colony as an independent state, is illegal and void"; Vattel, *Law of Nations*, ed. Chitty, 141-142.

showed no sign of concern about his extension of the principle to relations of imperial control or domination.[47]

Arguably one of the earliest public figures to draw on Vattel's text in debates over Britain's external affairs was Edmund Burke, who, in contrast to nineteenth-century European readers of Vattel, embraced and even deepened the universality of Vattel's law of nations. Burke referred sporadically to Vattel throughout his career (most famously during debates over war with revolutionary France, when he drew on the *Law of Nations* to argue for war). He perhaps first invoked Vattel in 1781 when arguing for relief of the merchants, particularly Jewish merchants, who had had their property seized during the British conquest of the Dutch Caribbean trading entrepôt of St. Eustatius, which the British accused of supplying the rebelling Americans with provisions for war.[48] Burke returned to Vattel and the law of nations in 1794 during his closing speech for the impeachment trial of Warren Hastings. In both these instances Burke recognized the particularity of the system of law of nations that had developed in eighteenth-century Europe, while also explicitly confronting the question of how the law of nations might be drawn upon to address global and imperial contexts where the relations in question were not between two European states.

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[47] Indeed, elsewhere he gushed that "[o]ur colonies, then, present such a field for the promotion of human happiness, such a scope for the noblest purposes of philanthropy, that we cannot be led to think their interests will be overlooked by a wise legislature or government." Vattel, *Law of Nations*, ed. Chitty, 42. Vattel himself does argue that whenever "the political laws, or treaties, make no distinction between them, every thing said of the territory of a nation, must also extend to its colonies" (I.xviii.§210), so it may be that Chitty's gloss is faithful to Vattel's intention.

[48] As Richard Bourke has noted, the variability of spellings of Vattel's names that we find in the newspaper records of Burke's speech suggests his relative unfamiliarity to a British audience (The *Morning Herald*, 15 May 1781, quoted Burke as citing "Votelle, the last and best writer upon the subject"; the *London Chronicle* of 15 May 1781 had, "Vallette, a Swiss, the last writer on the law of nations, who was an author of acknowledged reputation, had availed himself of every former authority, and from his country was likely to be impartial"); *Empire and Revolution* (Princeton: Princeton University Press, 2015), 436-39.

In the case of St. Eustatius, Burke described "certain limited and defined rights of war recognized by civilized states, and practiced in enlightened Europe," but derived ultimately from universal principles.[49] The confiscation of all the merchants' property was "against the law of nations as interpreted by its innate propriety [and] deduced from precedent," including the recent conquest of Grenada by France. In particular, the "Jews, as members of no community," with "no state on which they could call as dependent members of it to avenge their wrongs," had a distinct claim on the respect and protection of "every society."[50] Jewish merchants' particular situation and vulnerability illustrated how respect for the law of nations by a powerful state like Britain was indispensable for the protection of global commerce. "There was not a class of men more valuable in any society than those; for they were of a commercial spirit; and dispersed as they were in every state, from the remotest corner of Asia to the western extremity of Europe, they became links of communication in the mercantile chain; or, to borrow a phrase from electricity, the conductors by which credit was transmitted through the world."[51] In the Hastings trial, Burke argued that "the Law of Nations is the Law of India as well as Europe, because it is the Law of reason and the Law of nature" and "the birth right of us

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[49] "First, he could prove that they were established by reason, in which they had their origin and rise; next, by the convention of parties; thirdly, by the authorities of writers, who took the laws and maxims not from their own invention and ideas, but from the consent and sense of ages; and lastly from the evidence of precedent." Burke, "Motion for an inquiry into the seizure, etc., of private property in St. Eustatius," 14 May 1781, in *The Speeches of the Rt. Hon. Edmund Burke* (London: Longman, Hurst, Rees, Orme, and Brown, 1816), vol. 2, 256-7.
[50] As quoted in *London Chronicle*, 15 May 1781.
[51] Burke repeated this theme of the mutual reliance of commerce and the law of nations in his "Report on the Lords Journal" of 1794: "as Commerce, with its Advantages and its Necessities, opened a Communication more largely with other Countries; as the Law of Nature and Nations (always a Part of the Law of *England*) came to be cultivated; as an increasing Empire; as new Views and new Combinations of Things were opened, this antique Rigour and over-done Severity gave Way to the Accommodation of Human Concerns, for which Rules were made, and not Human Concerns to bend to them" (*Writings and Speeches of Edmund Burke [WSEB]*, 7:163).

all."[52] He used Vattel's text as a detailed account of a general principle in order to defend the actions of Raja of Benares, Chait Singh, whom Hastings had deposed in 1781 on grounds of rebellion. Citing Vattel on the principles governing the relations between "a Sovereign dependant upon another" and his "Protector," Burke argued that Chait Singh's actions were entirely in conformity with universal law-of-nations principles. Burke used Vattel to establish that "in the opinions of the best Writers on the Law of Nations," Chait Singh had done "that which his safety and his duty bound him to do."[53]

Burke drew out the universal implications of Vattel's text in ways that Vattel himself had largely not done, applying it to inter-polity relations that arose in the context of European commercial and imperial expansion and insisting that it bound the British in their dealings with Jews unprotected by any European state and with Indian sovereigns with whom they had signed treaties of protection and dependency. Indeed, Alexandrowicz's argument that Vattel's text clearly asserts the universal application of the law of nations relies on Burke's use of Vattel in the Indian case rather than on any applications to Asian cases by Vattel himself.[54] Burke's applications of Vattel's principles to extra-European contexts seem both to respect the abstractly universal language of the treatise and in a sense to exceed the imagination, if perhaps not the intentions, of Vattel.

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[52] "Speech in Reply," 30 May 1794, *WSEB* 7:290-2.

[53] "Speech in Reply," 30 May 1794, *WSEB* 7:292. "What I refer to this author to prove is this: that Cheit Sing, so far from being blameable in raising these objections, was absolutely bound to do so for fear of hazarding the whole benefit of the Agreement upon which his subjection was founded. The Law is the same with respect to the two contracting Parties" (291) since, despite their relationship of subordination, both were equally subjects of the law of nations and Chait Singh was "cloathed with every one of the attributes of Sovereignty" (290).

[54] Alexandrowicz, "G.F. de Martens on Asian Treaty Practice," *Indian Year Book of International Affairs*, 13, pt. II (Madras, 1964), 59-77 at 72. Vattel does, in the relevant passage, assert, in Alexandrowicz's words, that the "relationship between a dependent ruler and his suzerain remained the concern of the law of nations," but Vattel's own examples were all European.

But this universalizing gesture was soon to be eclipsed in the European reception of Vattel's text.

Ward, Mackintosh, and the advent of historicism

The idea that international law could be understood only as a historical phenomenon was perhaps first ventured in Robert Ward's 1795 *Enquiry into the Foundation and History of the Law of Nations in Europe from the time of the Greeks and Romans to the Age of Grotius*. The book is significant as the first history of the subject written in English, and one of the first in any European language.[55] Ward's historicizing of the law of nations was of a piece with a broader tendency at the end of the eighteenth century to turn to state practice as the source of legal principles, and to specify the European law of nations or the *droit des gens de l'Europe* as the appropriate subject of study.[56] But Ward's pluralism and his consciousness of the provincialism of European law sharply distinguish his historical narrative from the developmental historicism based on an account of progressive civilization that, as we will see, characterized James Mackintosh's account, and that would come to dominate nineteenth-century international law.[57]

A young and untested lawyer when he wrote the *Enquiry*, Ward had had a cosmopolitan youth. Born in 1765 in London to an English merchant based in Gibraltar and his wife, a native of Spain from a Genoese Jewish family, he lived in Spain for his

[55] Ward himself was conscious of the novelty of his project, writing that while the historical facts he adduced were familiar, for the "same collection of facts" had been used to tell a variety of histories ("of man…of the progress of society…the effects of climate…laws in general…but never yet a History of the Law of Nations"; Ward, *Enquiry*, 1:xix.

[56] See G.F. von Martens, *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage* (Gottingen, 1801), and Martti Koskenniemi, "Into Positivism: Georg Friedrich von Martens (1756-1821) and Modern International Law," *Constelleations* 15 (2008), 189-207.

[57] Ward's pluralism was undercut by his belief in the unique truth of Christianity, which he saw as the basis of the European law of nations; but he nonetheless insisted on the valid legal nature of a plurality of legal systems around the globe.

first eight years.[58] After studying at Oxford and then enrolling at Lincoln's Inn, he left for France for his health around 1788 and remained there until he was arrested at the hands of the revolutionary regime, apparently mistaken for another Ward. "Ordered without trial to Paris, to be guillotined," he told his nineteenth-century biographer, he was released when the "real traitor" was found but "banished from the republic merely for my name's sake," returning to London by the last packet boat allowed to sail for England in 1790. Thanks to a 1794 episode that drew attention to his counter-revolutionary opinions, he was taken up by a powerful Tory circle that included Prime Minister William Pitt, the attorney general Lord Eldon, and the Admiralty Court judge William Scott (later Lord Stowell), who apparently suggested that he write a history of the law of nations.[59] The only extensive critical study of Ward's thought sees Ward as a representative of modern conservative ideology at its inception and a spokesman for an "Ultra-Tory orientation."[60] But while Ward was indeed critical of the French revolution when he wrote the *Enquiry*, and while he rejected what he saw as the misguided universalism of natural-law accounts of the law of nations, the arguments he developed in the *Enquiry* cannot be reduced to or even explained by either the idea of an incipient conservative ideology or an opposition to the French revolution.

Ward's central argument in the *Enquiry* was that the law of nations had to be understood historically, because normative diversity was so profound both within and

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[58] Edmund Phipps, *Memoirs of the political and literary life of Robert Plumer Ward, Esq*. (London, 1850), 1:1, 1:8ff.

[59] As the story had it, in 1794, passing by a London watchmaker's shop with a "placard in the window, of a very revolutionary character," Ward entered the shop and engaged the watchmaker in argument against the "horrors" of revolution; the watchmaker, ultimately convinced, revealed to Ward a revolutionary plot and persuaded Ward to accompany him to the authorities, who took him directly to Pitt. Pitt took an interest in the young lawyer and ultimately recommended him for a pocket-borough seat in the House of Commons, which he took up in 1802. See Phipps, *Memoirs*, 1:12-16.

[60] Diego Panizza, *Genesi di una ideologia. Il conservatorismo moderno in Robert Ward* (Padova: CEDAM, 1997), 2 and, 57ff; also see Armitage, FMIT, 182-5.

among communities, and normative commitments so greatly shaped by custom and education, that no principles could be said to oblige human beings universally. He wrote that "we expected too much when we contended for the *universality* of the duties laid down in the Codes of the Law of Nations." Rather, he proposed, laws that oblige nations in their interactions with one another must arise among "different divisions or *sets* of nations" connected by "particular religions, moral systems, and local institutions," but this was a theory that had to be "proved from history, if proved at all." He wrote that he had decided test his theory from the history of Europe, "as that in which we are most interested," not, at least here, because it was normatively superior to others. Ward did argue for the unique truth of Christian principles as well as for the superiority of many principles of European law of nations over those of various predictable others such as "Turks" and "Tartars."[61] At the same time, he was clearly committed to the legitimacy of plural moral judgments.[62] Although such a commitment to moral pluralism is certainly compatible with strands of conservatism and defenses of traditional social orders, and even if Ward's thought developed in a conservative direction in later years, his pluralism as expressed in the *Enquiry* is neither distinctly conservative nor particularly counter-revolutionary.[63] It also marks a significant departure from Burke's emphatically

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[61] See, e.g., 1:145-6 (here Ward is remarkably uncritical of his European sources). Ward sees the balance of power as a distinctively European institution of mixed value, for it leads European states to "join cheerfully in the most dreadful conflicts to which the lot of Humanity is liable" but precisely because of this tendency to generate war has also necessitated its relative "polish and mildness."

[62] Ward's pluralism may bear comparison to Herder's, also grounded in Christian belief and a faith in providence.

[63] The book's few asides critical of the revolution are moderate, and Ward does not portray revolutionary France as a mortal threat to civilization or the European order; he blamed French aggression as much on geopolitical as ideological motivations, namely the desire extend their territory to the Rhine (see, e.g., 1:78). One of his most emphatic criticisms reads, "The miserable departure of the French from that humanity which has constituted the distinguishing honour of modern warfare, however execrated by all good men, is considered by themselves an elevation of their character" (1:153); in the preface written just before publication, he adds, "the conduct of this nation is now *somewhat* mended, and…the points most

universalist account of the law of nations and cannot, I would argue, be marshaled into a "Burkean" counter-revolutionary tradition.

Ward wrote of being struck by the conflict between the universal language of the law of nature and the historical fact that what was called "the system of the Law of Nations was neither more nor less than a particular, detailed, and ramified system of morals," in other words that "what is commonly called the Law of Nations, falls very far short of *universality*." He argued that general terms such as "'the *Law of Nations*,' or '*the whole World,*'" should not be taken "in the extensive sense which is implied by those terms" but rather should be understood to mean "nothing more, than the law of the European Nations, or the European World" (158). Importantly, the particularism of the European law of nations meant, for Ward, that even as Europeans should understand themselves to be morally bound by its precepts, they had no "right to act toward all other people as if they had broken a law, to which they had never submitted, which they had never understood, or of which they had probably never heard" (x). If others followed precepts that threatened European "happiness and just rights," they might be treated as enemies, but never as if they were "punishable for *breaches* of those laws" (xi). Europeans were not justified in appealing to their own legal principles as if they were universally obligatory.

Ward affiliated himself with Vattel and can be seen as a dualist in the tradition of Vattel, in the sense that he accepted reason and natural law as the distant bases for the law of nations, but found them inadequate for the purposes of establishing external legal

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complained of were the effects of the influence of a merciless tyrant, or of dark minded ruffians who have already, most of them, met their reward" (lvii).

duties.[64] At the same time, his pluralism constitutes a substantial departure from the presumed universality of Vattel's law of nations. Ward's far greater stress on cultural and normative diversity evidently owes a great deal to the example of Montesquieu, who had likewise argued that different peoples have different laws of nations. He quoted Montesquieu as holding that the law of nations depends on the principle that different nations ought to do as much good in peace and as little harm in war as possible; while such a principle might be fine as a starting point, he wrote, when we require a more "detailed scheme of duties, it is obvious that much more is necessary to render it definite," and the fundamental question then becomes "*who is to judge*?"[65] It is here, in his insistence on the question of judgment, and on the inappropriateness of any peoples' presumption to judge on behalf of others, that we may see the distinctiveness of his argument in relation to both Vattel on the one hand and later civilizational legal theories on the other. Vattel, for his part, seems to have been indifferent to the question of diversity of judgment. The universality of his law of nations is taken for granted; he begins, mostly, with European principles and practices, looks for confirmation in the practices of others, and maintains that all are obligated by the same principles in their interactions. This universality could provide a useful basis for criticism of European violence and abuse of power outside Europe, as we have seen with Burke. But it could also serve as a means by which to foist parochial normative judgments on others; it is this latter facet of Vattel's thought, and the tradition for which he stood, in Ward's account, that Ward's stress on normative diversity and judgment positioned him to criticize. For

[64] Ward, *Enquiry*, 1:35ff. Ward generally praises Vattel though questioning a few of his particular judgments and notes that "if we differ [from Vattel] at all, it will only be in endavouring to give something more definite and binding even than this assumable of the laws of Nature and the laws of Man, as the *real* foundation of the Law of Nations"; Ward, *Enquiry*, 1:27.
[65] Ward, *Enquiry*, 1:36 [emphasis in original]

instance, he questioned the presumption of Vattel's claim that nations have a duty to cultivate commerce, objecting that if commerce's utility is the source of the obligation, "its universality must entirely depend upon this, that all mankind consider commerce in the same light with Vattel, which is known not to be the case."[66]

Ward recognized a history of interaction among disparate societies as well as of normative difference, and he saw treaties as a means of drawing together societies that otherwise fell into different communities or "classes" of the law of nations. The "horrid enmity" between Christian and Muslim nations was generated on both sides by prejudice due to unfamiliarity, as well as by more active ideological manipulation within Europe, where the popes sought to gain power over certain monarchs by castigating their alliances with the Ottoman Empire.[67] Ward critically canvassed the history of the European prohibition on alliances with "infidels," showing it to be ill founded from the outset and always contravened by a more flexible practice of treaty and alliance across religious divisions, as well as obviously obsolete by Ward's own time.[68] "Treaties once begun," the two sides developed regular principles of interaction and came to consider each other "*legitimate States*," an example of "the manner in which Convention came to change and to amend the errors of the Law of Nations."[69] While Ward's pluralism led him, that is, to reject the imposition by philosophical fiat of a particular European law of nations onto nations that had not consented to it, he was interested in the historical processes by which nations of different international legal communities could come to share principles and respect one another's legal standing.

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[66] Ward, *Enquiry*, 1:36

[67] Ward, *Enquiry*, 2:322.

[68] Edward Coke's version of the prohibition, for instance, was based on Biblical passages that should have been irrelevant to the modern European law of nations; Ward, *Enquiry*, 1:326.

[69] Ward, *Enquiry*, 1:331-2.

Although Ward's book was well received, and he had a modest political career and some popularity in later years as a novelist,[70] the *Enquiry*, with its distinctively pluralist historicism, was not influential.[71] A nearly contemporary work, James Mackintosh's brief *Discourse on the study of the law of nature and nations*, published in 1799 in the course of his own counter-revolutionary turn, was more representative of the developments that were to take place in British thought on the law of nations in the early nineteenth century.[72] Its significance for our story lies in its turn to historicism in the service of an argument for the European law of nations as of uniquely universal significance. While Mackintosh's *Discourse* bears some resemblance to Ward's argument in its turn to history and its interest in the "positive" facet of the law of nations, alongside a basic commitment to the law of nature as the ultimate foundation of the law of nations, its preoccupations differ in crucial ways. Mackintosh's historicism is progressive, and his preference for Christianity is based not simply on religious principle but on an elision of "Christendom" with civilization. For Ward, the history of any collection of polities would provide evidence for its positive law of nations; he presents his choice of Europe as one of local partiality rather than as due to its universal significance. Mackintosh, in contrast, presents the positivist refinement of the law of nations as a distinctively European achievement: what "we now call the law of nations has, in many of its parts, acquired

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[70] Note, however, George Canning's quip that Ward's "law books were as interesting as novels and his novels as dull as law books"; quoted by Clive Towse, "Ward, Robert Plumer (1765–1846)," *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008.

[71] Joseph Chitty, in his list of works of jurisprudence that should be counted (alongside state practice) among the sources of "the positive Law of Nations generally and permanently binding upon all independent states," cites Ward's book a few times, calling it a work "of great ability, but not yet acknowledged to be such high general authority" as the earlier classics including Vattel (Vattel, *Law of Nations*, Chitty, ed., lv[note]).

[72] (London, n.d. [1799]). The text was the first of a projected lecture series that he would deliver on the subject at Lincoln's Inn in 1799.

among our European nations much of the precision and certainty of positive law."[73] Mackintosh presented the law of nations in a "gradation" running from the most basic, "necessary, to any tolerable intercourse between nations," "some traces" of which can be "discovered even among the most barbarous tribes"; to a second class of principles more advantageous and more advanced, which might be found among "the Asiatic empires" and "the ancient republics"; to the most advanced "law of nations, as it is now acknowledged in Christendom."[74] Mackintosh's essay, although it was reprinted as a preface in a number of later French and Spanish editions of Vattel's *Droit des gens*, was remarkably dismissive of him as a legal authority, and his criticisms of Vattel's legal thought seem to be tied in a way that is not true for Ward to a rejection of Vattel's politics.[75] Meanwhile, as noted earlier, Vattel was given a new life as an important authority for an increasingly hegemonic Britain in Joseph Chitty's English edition of 1834, which Chitty greatly expanded with commentary referring to British colonial law and citations from Admiralty, Prize, and other courts, adapting Vattel for an imperial state.[76]

<u>European imperial expansion and Vattel's global reception</u>

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[73] Mackintosh, *A Discourse on The Study of the Law of Nature and Nations* (London, 1800), 5.
[74] Mackintosh, *Law of Nations*, 60-61.
[75] Mackintosh added a footnote to his description of Vattel as "ingenious, clear, elegant, and useful," which reads: "I was unwilling to have expressed more strongly or confidently my disapprobation of some parts of Vattel….His politics are fundamentally erroneous; his declamations are often insipid and impertinent; and he has fallen into great mistakes in important practical discussions of public law"; has "adopted some doubtful and dangerous principles"; *Discourse*, 32. Editions of Vattel that began with Makintosh's Discourse as a preface include French editions of 1830 and 1863, a Belgian edition of 1839, and a Spanish edition of 1836.
[76] Vattel, *The Law of Nations; or, principles of the law of nature, applied to the conduct and affairs of nations and sovereigns*, ed. Joseph Chitty (London: S. Sweet, 1834). In a significant departure from Vattel, Chitty, citing Ward's *Enquiry*, asserted that when there was doubt about a legal principle, "Christianity….should be equally appealed to and observed by all as an unfailing rule of construction" (liv-lv).

Chitty's edition was well-timed to contribute to British debates leading up to the first Opium War, in which Vattel's text was a ubiquitous point of reference, "constantly quoted by advocates of war," as one of their critics noted, and invoked likewise on the anti-war side. The key questions around which Vattel was invoked were whether China was justified in prohibiting the opium trade; whether China had violated the law of nations in confiscating and destroying millions of pounds of opium in 1839, and in detaining the British merchants of Canton in order to force British traders to hand over the opium on their ships off the Canton coast; and whether Britain was justified in demanding compensation for the destroyed opium and ultimately in going to war to exact repayment and to force China to permit the opium trade. For those who supported the use of military force to compel China to allow the opium trade, Vattel's arguments about commerce were inconvenient because Vattel so categorically supported every state's right to regulate commerce in whatever way it deemed in the best interests of its people.[77] Some pro-war authors quoted Vattel, straining his meaning to claim that nations are obliged to engage in commerce and to suggest that China's conduct had implied a tacit agreement to "carry on trade with us on equitable principles."[78] But others, recognizing that Vattel contravened their position, bit the bullet and argued for excluding China from the community protected by the law of nations.

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[77] See *Law of Nations*, I.§§92-95 and II.ii.§25.

[78] See, e.g., James Matheson, *The present position and prospects of the British trade with China: together with an outline of some leading occurrences in its past history*. (London, 1836), 33-35; and see Lydia Liu, "Legislating the universal," in *Tokens of Exchange: The Problem of Translation in Global Circulation.* Also see Samuel Warren, *The Opium Question*, January 1840, citing Vattel on the duty of nations to fulfill their engagements and arguing, notwithstanding Vattel's explicit principle that nations may choose not to participate in commerce and may change their commercial policy at any time without injuring their trading partners, that "The Chinese may possibly have been entitled originally to refuse any intercourse with us, either social or commercial; but they have long resigned such rights. They have *invited* our commercial intercourse…. They have led us to invest in it our capital to an enormous extent, and to erect a machinery for carrying on such commerce, which they cannot now shatter to pieces at their will" (101-103).

> It is laid down by all writers on public law, that it depends wholly on the will of a nation to carry on commerce with another, or not to carry it on, and to regulate the manner in which it shall be carried on (Vattel, book i.§ [i.e., chapter] 8). But we incline to think that this rule must be interpreted as applying only to such commercial states as recognize the general principles of public or international law. If a state possessed of a rich and extensive territory, and abounding with products suited for the use and accommodation of the people of other countries, insulates itself by its institutions, and adopts a system of policy that is plainly inconsistent with the interests of every other nation, it appears to us that such nation may be justly compelled to adopt a course of policy more consistent with the general well-being of mankind.[79]

Indeed, the pressure brought to bear on the pro-war position by a universalist application of Vattel's principles might be seen as a contributing factor in the movement toward the exclusion of China from the "family of nations" and in the displacement of a universalist Vattel as an authority. Such a movement can be seen not only in the British but also the American response to the war. John Quincy Adams, in the course of his forceful defense of the war (which was unusual at that moment in relation to American public sentiment generally in favor of the Chinese position),[80] felt the need to reckon with Vattel's categorical defense of a nation's right to order its commercial policy as it sees fit.[81] He argued first that an unrestricted such right contradicted Vattel's own principle that nations

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[79] "Opium," *Supplement to Mr. McCulloch's Commercial Dictionary* (London: Longman, Brown, Green, and Longmans, 1842), p. 72.

[80] Teemu Ruskola discusses American public opinion in favor of the Chinese position and identifies the Treaty of Wanghia of 1844 as a turning point in American conceptions of Chinese legal standing; *Legal Orientalism* (Harvard University Press, 2013), 123-30.

[81] Adams's speech, delivered before the Massachusetts Historical Society in December 1841, was reprinted in part in the *Chinese Repository* (May 1842), vol 11, 274-289, and then in full in "J.Q. Adams on the Opium War," *Proceedings of the Massachusetts Historical Society*, 3rd ser., 43 (February 1910), pp 295-325. I quote from the 1910 version. Giving a thumbnail sketch of the history of the law of nations, Adams argued that there is "a Law of Nations between *Christian* communities, which prevails between the Europeans and their descendants throughout the globe. This is the Law recognized by the Constitution and Laws of the United States, as obligatory upon them in their intercourse with the European States and Colonies. But we have a separate and different Law of Nations for the regulation of our intercourse with the Indian tribes of our own Continent; another Law of Nations between us, and the woolly headed natives of Africa; another with the Barbary Powers and the Sultan of the Ottoman Empire; a Law of Nations with the Inhabitants of the Isles of the Sea wherever human industry and enterprize have explored the Geography of the Globe; and lastly a Law of Nations with the flowery Land, the celestial Empire, the Mantchoo Tartar Dynasty of Despotism, where the Patriarchal system of Sir Robert Filmer, flourishes in all its glory" (307).

have a general moral duty to engage in commerce; and second that in any case the Chinese followed a “churlish and unsocial system” that contravened the principle of equality among nations that was the cornerstone of the European law of nations.[82] The *Chinese Repository*, an American missionary publication in Canton, reprinted the lecture because it showed “in a lucid manner one of the strongest reasons why the Chinese government has not the right to shut themselves out from the rest of mankind, founded on deductions drawn from the rights of men as members of one great social system” (289). Such a claim, issued alongside Adams’s extravagant proliferation of “separate and different” laws of nations governing relations among Europeans and their descendants, versus between Europeans and other societies, illustrates the typical dual movement by which westerners simultaneously declared that they adhered to universal laws, so that the Chinese were violating general principles in supposedly contravening them, and also that the European law of nations was historically particular and did not pertain to relations extra-European states.[83]

For their part, anti-war texts appealed to Vattel in their rejection of attempts to exclude China from the law of nations. One such pamphlet asked, “Now what says Vattel a high law authority, constantly quoted by the advocates of war?” and responded with Vattel’s principle that foreigners are obligated to obey local laws.[84] “And yet in direct contravention of this equitable rule, which regulates our own government in regard to

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[82] Adams rejected as a “fallacy” what is arguably the structuring principle of Vattel’s dualist system, that while nations have a duty in conscience to contribute to the happiness and perfection of others, a nation’s first duty is to itself and it is the exclusive judge of that interest (Adams, 311).

[83] Citing Vattel on the “necessary” law of nations as the law of nature applied to inter-state relations, Adams made a distinctly unVattelian move with the qualification that the necessary law “can be enforced only between Nations who recognize that the State of Nature is a State of Peace” and that “Mahometan Nations” rejected that claim in principle (306).

[84] Captain T.H. Bullock, *The Chinese vindicated, or another view of the Opium Question, being in Reply to a Pamphlet by Samuel Warren, Esq. Barrister at Law in the Middle Temple*. (London: Allen and Co., 1840), 65; quoting Vattel, Book 2, chapter 8, §101.

foreigners, and is submitted to by the subjects of England in every other part of the world; and to support the monstrous proposition,—that the Chinese are without the common rights of other nations,—is a criminal withheld from justice, momentous interests involved in inextricable embarrassment, and hundreds of lives have already been sacrificed." The Chinese authorities likewise had recourse to Vattel to defend their actions. When Commissioner Lin Zexu arrived in Canton in March 1839 to enact the emperor's anti-opium policy, he employed a number of agents and translators to gather and translate information about the foreign traders there; one of his early requests was for the translation of several passages from Vattel in relation to commercial prohibitions, the right of a state to confiscate contraband, and the right to wage war.[85] Lin obtained translations from the American medical missionary Peter Parker (apparently nearly incomprehensible), who recorded the request in his medical report, as well as from his senior interpreter, who had been educated in English and who may have been the one to alert Lin to Vattel's text.[86] The opium contraband that Lin proclaimed later that year was entirely in keeping with Vattel's principle that states have perfect liberty to set and

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[85] See Chang Hsi-T'ung, "The earliest phase of the introduction of Western political science into China," *Yenching Journal of Social Studies* 5.1, 1-30 at 10-15; Immanuel C.Y. Hsü, *China's Entrance into the Family of Nations* (Harvard University Press, 1960), 123-5; and Lydia Liu, *The clash of empires: the invention of China in modern world making* (Cambridge: Harvard University Press, 2004), 118. Hsi-T'ung [CHECK TK] describes Parker's translation of Vattel as "very likely the earliest piece of literature on Western political science ever written in the Chinese language"; 13.

[86] Parker wrote, "Professionally, there is nothing in this case to make it interesting, indeed the patient was not ever seen, but it is thought that it may not be uninteresting to give some account of intercourse with so distinguished a personage, one whose acts have been the proximate occasion of rupture between two such powers as England and China: the one the most widely combined, the other the most anciently united, and second but to one in extent, on the face of the globe. His first applications, during the month of July, were not for medical relief, but for translation of some quotations from Vattel's Law of Nations…sent through the senior hong-merchant; they related to war, and its accompanying hostile measures, as blockades, embargoes, &c." Peter Parker, "Tenth Report of the Ophthalmic Hospital, Canton, Being for the Year 1839." *Chinese Repository* 8 (1839-1840), 634-635.

change at will their commercial policy.[87] Lin then gave the two sets of translated passages to a fellow official in Beijing, who included them in a compilation of texts about the conditions and views of foreigners, a compilation that was printed and circulated to officials across China in 1844 and expanded to two further editions over the next decade.[88] But, in a development indicating Vattel's waning authority in the West in subsequent decades, when the American missionary W.A.P. Martin set out to translate a text of international law into Chinese in the early 1860s, he decided against Vattel and in favor of the American Henry Wheaton's *Elements of International Law*, first published in 1836.[89] The Opium War thus arguably marks an important turning point, when the implications of Vattelian universalism sat so uncomfortably with a dominant political position in a European imperial state that Vattel had to be argued away or dismissed.

Like Lin Zexu, the Algerian Hamdan Khodja found it useful in the early 1830s to obtain translations of some key passages in Vattel for the purpose of making his argument in critique of the French conquest of Algiers and in particular of the French.[90] Hamdan Khodja concluded a memorandum that he submitted to the French commission of inquiry into the conquest of Algiers in 1833, with a protest against the French violation

[87] Hsü re-translates Parker's rendition of the commercial prohibition passage asserting that foreign nations have no right to protest or violate a state's prohibition's against foreign merchandise. Liu argues that "Lin's use of international law in these transactions was strategic," on the grounds that he had selectively translated passages "strictly confined to the issues of how nations go to war and impose embargoes, blockades, and other hostile measures" rather than taking the text as a whole; Liu, "Legislating the universal: the circulation of international law in the nineteenth century," in *Tokens of Exchange: the problem of translation in global circulations*, ed. Lydia Liu (Durham: Duke University Press, 1999), 127-64 at 141. But this is to mark too stark a boundary between opportunism and simple willingness to engage sources the British themselves considered authoritative, on a subject on which he considered himself in the right, and on which Vattel unambiguously supported his position.

[88] Hsi-T'ung, "The earliest phase," 14, 17.

[89] Martin explained in the book's English preface, "My mind at first inclined to Vattel; but on reflection, it appeared to me, that the work of that excellent and lucid writer might as a practical guide be somewhat out of date"; quoted by Hsü, *China's Entrance*, 127.

[90] Hamdan Khodja, "Mémoire de Si Hamdan," Archives Nationales, F. 80 9, reprinted by Georges Yver, *Revue Africaine*, 57 (Algiers, 1913), 122-138 at 138.

of fundamental principles of the "laws of war and peace" in the course of the conquest. He cited two passages from Vattel, the first arguing that "justice" is "indispensably binding on nations" even more stringently than on individuals, and the second that not only are agreements made during the course of war inviolably binding, but it is particularly "unjust and scandalous" as well as imprudent, for conquerors to violate capitulation agreements with those that surrender to them.[91] Hamdan Khodja wrote,

> Finding myself one day with a general [Clauzel], this illustrious personage declared to me that the French were not at all obliged to the observe the rules of the capitulation, which was nothing but a ruse of war. This is the source of all our troubles, since the French soldiers, those who hold power, think themselves free to do anything and have acted thus as long as they have been in my country.
>
> Even so I am astonished that the heads of the French army are oblivious to [*ignorent*] the existence of the laws of war and peace that govern the civilized world.… As for me, I do not read French, but I certainly know the faithful translation into Arabic that the Sherif Hassuna Deghiz has made of the treatise on the law of nations by Vattel, and I think I may cite here the provisions contained in Book 2 chapter 5, para 63 and book 3 chapter 16 para 263, which I will not report here.
>
> Can these principles be denied? Are Africans excluded from the society of humanity [*la société humaine*]? Would liberty properly understood approve the morals of this illustrious general? No. In any other common [*vulgaire*] man, one could excuse this manner of reasoning, but in a leader representing the French nation, such language is unpardonable.

Both Lin Zexu and Hamdan Khodja drew on Vattel to argue that European states had the same stringent legal duties to their states that they had within Europe, even as the principle of the universal application of the law of nations was coming to be seen as obsolete in Europe, and Vattel as an outdated authority in relation to newer sources that recognized the uniquely European character of the law of nations.

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[91] He mentions Book 2, chap. 5, para. 63 on states' obligation to justice (glossed in the next paragraph as a duty to "respect [others nations'] rights, and to leave them in the peaceable enjoyment of them"); and book 3, chap. 16, para. 263: "the consequences of such an act of perfidy often prove detrimental to the party who has been guilty of it," by strengthening the resolve of insurgents.

As international law came in the latter half of the nineteenth century to be increasingly a self-conscious discipline, its major practitioners came to argue that international law had to be understood as a historically particular system that had arisen under the distinctive circumstances of early-modern Europe and was constantly adjusting to the "growing wants of a progressive civilization."[92] They were, consequently, preoccupied in a way that earlier theorists of the law of nations such as Vattel had not been with delineating the scope of the international community, expounding the criteria for admission into that community, managing its gradual expansion to encompass some excluded states, and specifying the legal status of various societies they deemed inadmissable. Anxious to establish the scientific credentials of their discipline, most shared with figures in other emerging social or human sciences of the period a conviction that the intellectual advances made over their eighteenth-century predecessors lay precisely in their historical approach to their subject. International law could be scientific, and progressive, only by being historical.[93] The resulting constellation of beliefs — in the historical particularity of the European law of nations, the normative validity of the European legal system for the future of the world as a whole, and the possibility of rendering international law scientific — distinguished nineteenth-century international

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[92] Travers Twiss, *The Law of Nations Considered as Independent Political Communities* (Oxford, 1884), "Preface to the Second Edition," v. This group, plus the Oxford professor Mountague Bernard, were the British members and associates of the Institute of International Law in its early years. See *Annuaire de l'Institut de Droit International* (Gand, 1877) xiii-xv.

[93] See, e.g., T.E. Holland's claim that jurisprudence is "not a science of legal relations *à priori*, as they might have been, or should have been, but is abstracted *à posteriori* from such relations as have been clothed with a legal character in actual systems, that is to say from law which has actually been imposed, or positive law. It follows that Jurisprudence is a progressive science"; Holland, *The Elements of Jurisprudence* (Oxford: Clarendon Press, 1880), 8. John Burrow attributed the influence of evolutionary social theory in Victorian Britain precisely to the "tension between English positivistic attitudes to science on the one hand and, on the other, a more profound reading of history, coming to a large extent from German romanticism, which made the older form of positivist social theory, philosophic radicalism, seem inadequate"; Burrow, *Evolution and society: a study in Victorian social theory* (Cambridge: Cambridge University Press, 1966), xv.

legal thought from its eighteenth-century sources, most notably Vattel, and left a marked legacy for international law in the twentieth century.