International Law and The Enlightenment: Vattel and The 18th Century

In 1758 Emerich de Vattel published *Le Droit des Gens* and became one of the most important and controversial theorists in the history of international legal thought. It is the purpose of this paper to examine the influence of contemporary legal theory and political realities on Vattel; specifically to examine the effect on Vattel of the "enlightened" natural-law theory of international law, and the erosion of that theory in the 18th century by the political realities of *raison d'état*, and by the systems beyond natural law which were offered in an attempt to regulate the anarchy which the *raison d'état* philosophy produced.

The Phenomenon of the new Philosophy: "Enlightened" Natural Law Thought

Lord Bryce remarked that the theory of natural law "which had been for nearly two thousand years a harmless maxim, almost a commonplace of morality, became in the end of the eighteenth century a mass of dynamite, which shattered an ancient monarchy and shook the European continent." Yet the natural-law philosophy of the 18th century, which formed the basis of the American and French Revolutions, differed sharply from the traditional natural-law

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1 The full title was *Le Droit des Gens, ou Principes de la Loi Naturelle Appliqué à la Conduite et aux affaires des Nations et des Souverains*. It was printed in Neuchatel despite the appearance of "London" with the date.

2 See, for example, Clive Parry, *The Sources and Evidences of International Law* 39 (1965) in which he suggests that the beginnings of the present age of international law may be found in Vattel; See also C. van Vollenhoven, *The Three Stages of the Evolution of the Law of Nations* 28 (1932), who accuses Vattel of treason to Grotius, but admits the universal influence of Vattel (p.32).

thought of medieval scholasticism, and the growth of the new "enlightened" natural-law thought may be dated from Grotius.

What Grotius had begun was carried on by Samuel Pufendorf, who was the first man to hold a chair as Professor of Natural Law and the Law of Nations. Pufendorf's appointment to this chair at the University of Heidelberg in 1660 was imitated by the other German universities, so that by the first half of the 18th century almost every German university had a chair of natural law.

The enlightened natural-law thought spread rapidly through Europe, especially through the Protestant countries of Sweden, Switzerland and Holland, where it was promulgated by the efforts of Barbeyrac, Burlamaqui and Pufendorf himself. The official reaction of Catholic régimes was somewhat less ardent, and redolent of the "Bon Juriconsulte, Mauvais Catholique" attitude of the Reformation period. Yet, if the new philosophy did not receive official endorsement in a Catholic country like France, it did receive great unofficial or popular support, as the many editions of the work of the new philosophers in that country indicate.

So great was the reception of the enlightened natural-law philosophy in Europe in the 18th century, that Rousseau could declare that France stood alone among European nations in her hesitance to receive it: "C'est le seul peuple de l'Europe qui ait regardé cette étude comme n'étant bonne à rien."

The Beginnings of Enlightened Natural Law Thought: Grotius

Grotius' natural law was extremely close to scholastic natural law in its principles, the essential difference being procedural. The Scholastics had seen natural law as a command of God (Voluntas) which was promulgated by reason. The binding force of the law was divine authority. For Grotius, the link between God as the law giver,

4 See D. M. MacKinnon's Natural Law in DIPLOMATIC INVESTIGATION 74 et seq. H. Butterfield and M. Wright eds. 1966).
5 See A. P. D'ENTREVES, NATURAL LAW, chap. 3 (1967)
7 Id.
8 Id. at 29.
9 Id. at 29-31.
10 Id. at 30
11 D'ENTREVES, supra note 5 at 51.
and man as the receiver of that law, was severed, and the reasoning process itself (Ratio) became the cogent principle of natural law.

This methodology is the thread that unravelled the fabric of Scholastic natural-law thought. In emphasizing his rationalistic method, which Mr. Oakeshott would call a "technique," Grotius had meant to complement rather than make redundant the theological basis of natural law. Yet, by this method, "the self-evidence of natural law . . . made the existence of God perfectly superfluous."13

In *De Jure Belli ac Pacis*, Grotius set out, in 1625, a system of law among states, based ultimately on natural law, but more directly on custom, consent and contract.14 It was based ultimately on natural law, in that man was social and sought society, municipal or global;15 secondly, it was demonstrable from natural law that mutual consent imposed obligations, and those practices agreed on by states for their mutual welfare were binding for that reason. It was based directly on custom, consent and contract, in that the actual substance of the law of nations was as much the subject of agreement, express or implied, as the law of civil society. As the social contract bound within the state, similar contracts among the states themselves were equally binding.16 At this stage, except for the difference of approach, Grotius' natural law was almost indistinguishable from that of his Scholastic contemporaries.

In 1641 Thomas Hobbes published *De Cive*, in which natural law was defined as self-preservation.17 Hobbes challenged the view that there was "a real moral difference between right and wrong which all men had a duty to obey, and by which all human institutions, the state included, must be guided."18 To Hobbes there was no law among nations, but rather a return to the savage existence men endured before the creation of the state. States existed like so many individuals, jealous, tense, and "in the state and posture of gladiators."19 The state was free to do what it needed to do to preserve itself, and what there was of a natural law for Hobbes was deducible from this principle.

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13 D'Entrèves, supra note 5, at 53.
15 Id. at 11.
16 Id. at 14-15.
Hobbes' impact was so great that, to borrow a phrase from Whitehead, the enlightened natural-law thought after 1640 was a footnote to Hobbes. Much of the reaction to Hobbes took the form of attempts to introduce benevolence and social consciousness into his stark individualism. Two of the most prominent reactors against Hobbes were Pufendorf and Leibnitz, both of whom attempted to create a middle ground between Grotius and Hobbes. Pufendorf emerged more influenced by Hobbes, Leibnitz more influenced by Grotius.

Samuel Pufendorf (1632-1694) was the foremost exponent of the "naturalist" concept of international law; that is, he did not recognize an international law apart from natural law, but rather as a denomination of it, as he wrote:

... Hobbes' De Civa, chap. xiv, 4, 5, divides natural law "into the natural law of men and the natural law of states, which is commonly called the law of nations. The injunctions of both," he adds, "are the same; but because states upon being constituted, take on the natural properties of men, the law which we call natural when speaking of the duty of individual men, on being applied to whole nations and peoples, or states, is called the law of nations." To this statement we also fully ascribe. Nor do we feel there is any other voluntary or positive law of nations, which has the force of law, properly so called, such as binds nations as if it proceeded from a superior.

Pufendorf claimed that the trouble with Hobbes was that he was misunderstood. In explaining how Hobbes should be interpreted, Pufendorf in fact modified the Hobbesian philosophy. He blunted Hobbes' selfish individualism by reintroducing and re-emphasizing the social nature of man. He defined man's social tendencies as being as basic to man as self-preservation, and the complement of the individual's drive to survive:

... It is easy to find the basis of natural law. It is quite clear that man is an animal extremely desirous of his own preservation, in himself exposed to want, unable to exist without the help of his fellow creatures, fitted in a remarkable way to contribute to the common good, and yet at all times malicious, petulant, and easily irritated, as well as quick and powerful to do injury. For such an animal to live and enjoy the good things that attend his condition, it is necessary that he be sociable, that is, be willing to join himself in such a way that far from

20 Gough, supra note 18 at 119.
23 Id. at 210-211.
having cause to do him harm, they may feel there is reason to preserve and increase his good fortune. . . . And so it will be a fundamental law of nature, that every man so far as in him lies, should cultivate and preserve towards others a sociable attitude which is peaceful and agreeable at all times to the nature and end of the human race. . . . But by a sociable attitude we mean an attitude of each man towards every other man, by which each is understood to be bound to the other by kindness, peace, and love, and therefore mutual obligation.\(^{24}\)

The importance of Pufendorf in the history of international legal theory was that he was fully aware of the gulf yawning between the Scholastic and the new natural-law thought; and he attempted to create a *Summa Theologica* of the enlightened natural law. In it, while retaining the rationalistic method, he tried to rescue natural-law thought from the *reductio ad absurdum* of Hobbes and to create social duties where Hobbes had only selfish rights. The Scholastic natural law had had those duties as part of divine law. The enlightened natural law needed a new rationalistic framework in which to balance individual rights and social duties, and Pufendorf tendered to that need.

His direct treatment of international law as a "denomination" of natural law was a failure in that he could not accommodate the law of treaties or customary law to such a system, and any system which pretended to ignore them was doomed.\(^{25}\) Yet, in applying his system of individual rights and social duties on an international plane, he made a significant contribution. "Since sovereigns are related to one another as individuals in the state of nature, the rules of natural law are basically the same for the conduct of individuals and sovereigns,"\(^{26}\) and by this method Pufendorf translated Hobbes' notion of equality based on strength or cunning into a legal equality, that is, " . . . whatever law a man appeals to against another, he must under every circumstance admit against himself,"\(^{27}\) and applied it to nations among themselves.

Besides Pufendorf, another great reactor to Hobbes was Gottfried Leibnitz (1646-1716), who, like Pufendorf, strove to reconcile the selfish tendencies of mankind and the need for order, within a rationalistic system. If Pufendorf sought the answer by proceeding outwardly from individual requirements to social requirements, Leib-

\(^{24}\) *Id.* at 207-208.

\(^{25}\) See *Nussbaum*, *supra* note 21 at 147.


\(^{27}\) *Pufendorf*, *supra* note 22 at 332.
nitz reversed the process, and thought first in terms of the society, then of its members. His “practical” solutions to international problems were hopelessly out of date. He saw the political salvation of Europe in federation, in a kind of revitalized Holy Roman Empire, under the sway of a single ruler. While this kind of solution might have been appropriate within Leibnitz’ Germany, which was the most politically disorganized country in Europe at that time, it completely ignored the realities of the contemporary European state system. Like St. Pierre’s *Perpetual Peace* of a few years later, Leibnitz’ plan lacked only “the consent of Europe and a few similar trifles.”

The importance of Leibnitz’ influence would be in the translation of his philosophic thought into general laws which would have relevance to relations of states. Leibnitz’ ideas, as expressed in his *Monadology*, which R. W. Meyer interpreted as a political allegory of self-interest and universal harmony, would very much color the thinking of future theorists such as Wolff and Vattel. The problem of individual freedom and universal harmony in a world in which everything is linked with everything else, was as much a fact of European political life as of Leibnitz’ organisms. Leibnitz’ success in solving this problem is not so important to international legal thought as is the effect his conclusions had on the juriconsults. If one changes the meaning of “free beings” in Carr’s commentary on Leibnitz from monads to states, one can get some idea of the potential impact of Leibnitz on international legal thought:

Granted the creation of such free beings (monads), what will be the nature of their freedom? Their freedom will depend on the range of their activity, and it will differ in degree and consequently in character proportionate to the range of such activity. In itself each such nature will consist in a living force ready to find expression when the occasion arises. A universe of such beings will be a universe of free forces mutually limiting one another, and also mutually providing one another the scope for action.

Christian Wolff (1676-1756) was Professor of the Law of Nature and of Nations at the University of Halle, and the man who

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29 *Id.* at 45.
systemize Leibnitz.\textsuperscript{34} If Pufendorf's work represented the edifice of international legal theory as it stood in 1740, Wolff was the artisan who, under the influence of Leibnitz' philosophy, would remodel and extend it.

Wolff could agree that Pufendorf was correct in asserting that inasmuch as states were moral persons, they were bound by natural law, yet he was unwilling to agree that the principles of the law of nature applied to individuals were the same as the law of nature affecting states (the law of nations).

Since indeed nations are moral persons and . . . subject only to certain rights and duties, which by virtue of the law of nature arise from the social contract . . . the law of nations does not remain the same in all respects as the law of nature in so far as it controls the acts of individuals.\textsuperscript{35}

Furthermore, in opposition to Pufendorf, Wolff asserted that there was an international positive law which he, like Grotius, called the Voluntary Law of Nations. He argued that there existed in international society a "supreme state"\textsuperscript{36} which corresponded to the formation of society on the individual level. The supreme state was formed by nature herself, and from the purpose for which that supreme state was formed can be deduced the laws governing that state. The laws so deduced form the Voluntary Law of Nations.

Thus, for Wolff, each nation was bound by the principles of natural law, just as each individual person, but with this difference: A person was bound by virtue of his existence as an individual, a state by virtue of social contract. Thus, both would have, for example the right to self-defense; but what constitutes a lawful exercise of that right would differ between an individual and a state, and in this way, the natural law for individuals would differ from the natural law of states (the law of nations).

In addition, each nation was bound by the Voluntary Law of Nations just as an individual in society was bound by civil law. The Voluntary Law of Nations did not remove the original obligation of the natural law, but rather dealt with what may be enforced. In civil law, a statute of limitation may bar a claim, but it cannot destroy the moral obligation to pay just debts. So too did the Voluntary Law of

\textsuperscript{34} See CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM XXX, note 2 (Carnegie Edition Reprint, 1964).
\textsuperscript{35} Id. at 5.
\textsuperscript{36} Id. at 13.
Nations operate, affecting only externals, and leaving the original natural law obligations unimpaired.

In this way, Wolff sought to solve the problem with which Pufendorf struggled. Pufendorf's idea that only natural law bound nations, could not satisfactorily explain a system of regulation beyond natural law, and Pufendorf was put in the uncomfortable position of recognizing the existence of such a system but denying it legal status. Through the use of the Voluntary Law of Nations as defined by himself, Wolff was able to incorporate into a system of law both the natural law, and that regulation of states which existed outside natural law.\textsuperscript{37}

Wolff brought international legal theory forward, in that he reintroduced international law as a discipline existing separately from natural law. Yet his single flaw was that of Leibnitz, in a bit more sophisticated form. Wolff was unable to free himself from thinking in terms of an imperial solution to the problem of European disorder. If this kind of thinking was out of date at the beginning of the 18th century, it was ridiculous in the "political maelstrom" of the mid-18th century.

This development from Grotius to Wolff reflected the thinking of those who saw natural law as the central point of international legal theory. Toward the middle of the 18th century two factors greatly hindered the acceptance of these points of view. The first was the political anarchy of Europe, in which, under the name of \textit{raison d'\text{\textecolon;}, force rather than law was the method of settling controversies. The second factor, which was a reaction of the first, was the growing outcry for a form of regulation beyond natural law, whether utopian federation or universal education, to deal with the excesses of a European state system which behaved so barbarously.

\textbf{The Political Maelstrom of the 18th Century}

The climate of international relations in the 18th century is stated bluntly by Baron Bielfeld: "In matters of politics one must not be deceived by speculative ideas which the common people form of justice, equity, moderation, candor, and the other virtues of nations and their leaders. In the end everything is reduced to force."\textsuperscript{38}

\textsuperscript{37} \textit{Id.} at 9-19.

\textsuperscript{38} \textit{Albert Sorel, Europe under the Old Regime} 17 (F. H. Herrick, trans. 1947).
Many of the ideas found in the writings of the juriconsults seemed belied by events:

To see on the other hand the perpetual dissensions, the brigandage, the usurpations, the rebellions, the wars, the murders which daily distress this venerable abode of sages, this respectable sanctuary of science and art, and to think of our fine talk and then of our horrible actions, so much humanity in principle, so much cruelty in deed, a religion so gentle and an intolerance so blood-thirsty, a political system so wise on paper, so harsh in practice, rules so benevolent and people so miserable, governments so moderate and wars so cruel, one hardly knows how to make these strange contradictions agree; and this pretended brotherhood of the nations of Europe seems nothing but a term of derision to express ironically their mutual animosity.\(^{39}\)

For Voltaire, "the right of the strongest equates foreign policy to the uninhibited man of force",\(^{40}\) and diplomacy is "the art of lying at the right time."\(^{41}\) Diderot summarized the views of the philosophers on the diplomacy of their times in his "Political Principles of Rulers": "Make alliances only in order to sow hatred.... Incite wars among my neighbors and try to keep them going.... Have no ambassadors in other countries, but spies.... To be neutral means to profit from the difficulties of others in order to improve one's situation."\(^{42}\)

Montesquieu, in Letter 84 of The Persian Letters, uses irony to emphasize his feelings about war:

Je fus hier aux Invalides; j'aimerais autant avoir fait cet établissement, si j'étais prince, que d'avoir gagné trois batailles. On y trouve partout la main d'un grand monarque. Je crois que c'est le lieu le plus respectable de la terra.

Quel spectacle, de voir assemblées dans une même place toutes les victimes de la Patrie, qui ne respirent que la défendre, et qui, se sentant le même coeur, et non pas la même force, ne se plaignent que de l'impuissance où elles sont de se sacrifier encore pour elle!

Quoi de plus admirable, que de voir ces guerriers débiles, dans cette retraite, observer une discipline aussi exacte que s'il y étaient constraint par la présence d'un ennemi, chercher leur dernière satisfaction dans cette image de la guerre, et partager leur coeur et Leur esprit entre les devoirs de la religion et ceux de l'art militaire....

In Letter 94, Montesquieu outlines some of the shortcomings of the relations of states, as typical of the ancien régime:

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\(^{39}\) Quoted in E. M. Nuttall, Saint Pierre: A Project for Perpetual Peace 19 (1927).


\(^{41}\) Id.

\(^{42}\) Felix Gilbert, To the Farewell Address 61 (1961).
Le droit public est plus connu en Europe qu’en Asie; cependant on peut dire que les passions des princes, la patience des peuples, la flatterie des écrivains, en ont corrompu tous les principes. Ce droit, tel qu’il est aujourd’hui, est une science qui apprend aux princes jusqu’à quel point ils peuvent violer la justice, sans choquer leurs intérêts.

Sorel is echoing Rousseau when he states that “the Europe of the ancien régime observed certain practices, to which attention should be paid, rather than to international law which reformers proposed as an ideal for future society.” From 1740, Europe was characterized as “an armed camp”, which led to the arms race Montesquieu called “the new malady which has spread all over Europe.” If raison d’etat was not something peculiar to the 18th century, the brashness with which it was used led Sorel to comment that “never before had the reason of state been opposed more impudently to the most elementary concepts of honor and justice.” The attitude is exemplified in the anecdote about Philosopher King Frederick’s taking of Silesia on the basis of ancient rights over the province. He was informed by Podewils that these rights had been given up by solemn treaty and replied: “Legal distinctions are the business of ministers; that is your affair. The time has come to work on it secretly, for orders to the troops have already been given.”

The sovereignty of the individual state, and the maintenance of that sovereignty, were basic and did not require argument: “The state embodied its own ends. It was sovereign; it recognized no authority above its own”; and when it needed direction and a standard of judgment, “the state could find it nowhere but in itself.” Baron Bielfeld gave an indication of the strength of this belief when he wrote that the great principle of all human action, not only to preserve existence but to render it as good as possible, is at the base of politics:

Chaque société, chaque état, peut et doit même se servir de tous les moyens légitimes qui lui paraissent nécessaires, soit à sa conservation, soit à l’augmentation de sa puissance réelles et relative. Cette règle dictée par loi naturelle aussi bien que par la politique, sert de fondement de toutes les opérations des différents cabinets de l’Europe, au système chaqun d’eux embrasse, aux mesures qu’il prend, aux alliances qu’il contacte, à la guerre qu’il déclare, ou la paix qu’il conclut.

43 Sorel, supra note 38 at 4.
44 Id. at 17.
45 Id. at 28. See also Van Vollenhoven, supra note 2 at 34.
46 Sorel, supra note 38 at 9.
47 Id.
48 II Jacob Bielfeld, Institutions Politiques 138-139 (1768).
In addition, he stated that "in whatever situation a state may find itself, the fundamental principle of the reason of state is ever the same. This principle, adopted by all ancient and modern peoples, is that the safety of the people should ever be the supreme law."

Voltaire expressed the same view when he wrote that "survival was the state's ultimate object." And survival for Voltaire meant nothing less than independence: "Sovereignty and dependence . . . are a contradiction in terms."

Again, writing in 1769, Voltaire declared that no republican assembly or monarch can have one other than God as master. In such a maelstrom, to use Frederick the Great's term, there was no international law generally recognized. What there were of principles grew mainly "in the light of the rules adopted by the major powers in their negotiated treaties of peace or through prize courts or other institutions set up to determine international legal relationships." There was no one system of law universally recognized, but there were laws which each power was ready to uphold. "They were a confusion of feudal customs complicated with all the subtleties of Roman jurisprudence." But nothing was sacred, no principle inviolable, as the Pragmatic Sanction and the War of the Austrian Succession illustrate. Not even the most explicit treaty arrangements were honored.

The balance of power, which was the nominal system existing, or alleged to exist, between states, had for its most basic purpose the maintenance of independent states, but it was itself subject to the same caprice it was meant to offset.

The Moralists: The Augmenters of Natural Law

If the methods of the ancien régime were so disastrous what was the alternative? One answer, reflecting the optimism of many philosophers, was that the future relationships of states would be governed by moral laws and reason. "The picture which the philosophers envisaged of the relations among nations after the rule of reason had

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49 Quoted in Sorel, supra note 38 at 11.
50 Perkins, supra note 40 at 1300.
51 Id. at 1301.
52 Id.
53 Jacob Bielfeld, Elements of Universal Erudition 111.
54 Sorel, supra note 38 at 27.
56 Sorel, supra note 38 at 24.
been established, was implied in their criticism of the existing foreign policy; the former would be the reverse of the latter. Foreign policy should follow moral laws. There should be no difference between 'moral principles' which rule the relations among individuals and 'moral principles' which rule the relations among states."\textsuperscript{57}

Another method was to think of a world federation. This was not new. There had been Penn's \textit{Essay Towards the Present and Future Peace of Europe} (1693), and Abbe St. Pierre's \textit{Perpetual Peace} (1710).\textsuperscript{58} Mably, whose disgust with the wanton practices of diplomacy drove him to history, wrote of a "future fédération européenne."\textsuperscript{59} Rousseau himself was very much taken with the idea of a European federation: "Réaliser la république européenne un seul jour, c'est assez pour la faire durer éternellement."\textsuperscript{60}

Rousseau is between Scylla and Charybdis. On the one hand he realized that only the most rigid confederation could achieve the desired end of world order and an end to war, and on the other that no such federation could ever be established.\textsuperscript{61} So long as the particular wills of the individual states were not sublimated in such a way as to eliminate the international system altogether, it was true, but irrelevant, that a state of war was a consequence of man's irrationality and imperfection. Capricious acts were the immediate causes of war, but in the international system it was necessary, not accidental, that such acts should occur.\textsuperscript{62}

He was moralist enough to want a confederation to give law and order to Europe where "the public law has not been established or sanctioned by concerted action and . . . has no general principles, and varies constantly according to times and circumstances . . . abounds in contradictory rules which can be reconciled only by right of the stronger."\textsuperscript{63} On the other side of the coin, he was critical enough to recognize that "the reason of state directed all policy, and state interest was the only guarantee of any engagements."\textsuperscript{64} This kind of pessimism is a bit startling in a germinal thinker such as Rousseau, but on reflection is quite consistent and candid, and

\textsuperscript{57} GILBERT, supra note 42 at 65.
\textsuperscript{58} HINSLEY, supra note 28 at 33.
\textsuperscript{59} JACQUES Hodé, \textit{L'IDÉE DE FÉDÉRATION INTERNATIONAL} 136 \textit{et seq.} (1921).
\textsuperscript{60} Id.
\textsuperscript{61} See HINSLEY, supra note 28 at 46 \textit{et seq.} for discussion of various peace plans.
\textsuperscript{62} Id. at 52.
\textsuperscript{63} Quoted in NUTTALL, supra note 39 at 23.
\textsuperscript{64} SOREL, supra note 38 at 16.
possibly not so radically different from the more practical views of Voltaire.

Rousseau had maintained that the Law of Nations was the product of consent, express or tacit, and at the same time stressed the natural goodness of man. As individual man has progressed on the basis of his freedom and desire for perfection, so, too, may states on the same basis. "La nature humaine ne retrograde pas" was perhaps not so different from Voltaire's belief that the ultimate solution to international problems lay in the education of the nations' populates in "the authentic image of human nature".

Those who held to the need of a federation were regarded as utopians, and did not have a great following in these beliefs. Voltaire attacked St. Pierre and Rousseau almost as savagely as he attacked the makers of war. The physiocrats submitted that international salvation lay in free trade, and in this way sought to point the way to a practical solution to the international crises. Others were less dogmatic about the solutions, but offered general guidelines. These guidelines would usually be expressed in terms outside the law of nations as then understood, because the law of nations was generally viewed as feckless. Were it not feckless, the exercise would be futile. But what was to be suggested would be a theory of relationships which, if accepted, would become the basis of legal relationships, and hence of a new law of nations.

The thinkers of the Enlightenment agreed that there were laws which would successfully guide the relationships of states. The physiocrats thought that a proper knowledge of economic principles was the answer, because politics and economics were identical on the international level. Somewhat similarly, Voltaire emerges behind the vast mountain of negative comments, to champion a freedom of natural instincts as the basis of an improved, if not perfect, international order.

There are natural drives of *amour propre* in states as in men, and

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65 DERATHÉ, supra note 6 at 396-397.
67 Id. at 105.
68 Id.
69 PERKINS, supra note 40 at 1304.
70 HODÉ, supra note 59 at 136 et seq.
71 GILBERT, supra note 42 at 21.
72 Id. at 62-64.
73 PERKINS, supra note 40 at 1299.
concomitant with them are the restraining forces of bien-veillance, or forebearance. They are concomitant with amour propre because it is only on the basis of forebearance that one's own rights will be respected. In an enlightened state, a knowledge of these natural drives "reverses the state's aims as the meaning of sovereignty shifts from ego, right of the strongest, and raison d'état, to a fourth definition, legitimate defense or preservation of a nation's independence." Thus it is the education of the nation's populations to these truths which will bring about their realization in international relations.

Voltaire believed the lawyers were as useless as those who favored world government. It was not that they lacked a desirable end, but the means were naive. To attempt to have a world federation or to impose laws from without was to build a house of cards. It was bad pathology. It treated the symptom as the cause.

War was a fléau contradictoire avec la nature humaine, but nonetheless as old as man. The solution had to be realistic, but it could be sanguine. It had to cope with undeniable evils, and strive to educate in order to make the best of conditions. This is the meaning of the last line of Candide: "Ce la est bien dit, mais il faut cultiver notre jardin." It is in this sense that he wrote: "La paix ne subsistera pas plus entre les princes qu'entre les éléphants et les rhinoceros, entre les loups et les chiens; les animaux carnassiers se déchirent toujours à la première occasion." (Hode, p. 17 HN) In such a world, the best means of dealing is to use these forces against one another: "Car les chiens d'égale force se montrent les dents et ne se déchirent que lorsqu'ils ont à se disputer une proie." (Hode, p. 17 HN)

Grotius' and Pufendorf's treatises, he said, "never contributed anything to the composition of treaties and to safeguarding the rights of men." Anyone who listened to them (Grotius and Pufendorf) would not keep his kingdom long, because the law of nations is totally unrelated to the practice of states, where the only rule is to be continually on the qui vive, "a truth all kings and statesmen know." Vattel was dismissed as a "poor imitator."
In a more satirical mood he wrote: "Le droit de la paix, je le connais assez. C'est de tenir sa parole et de laisser tous les hommes jouir les droits de nature; mais, pour le droit de la guerre, je ne sais que c'est. Le Code de meurtre me semble une etrange imagination. j'espère que bientot on nous donnera la jurisprudence des voleurs de la grand chemin." But one may observe that despite Voltaire's constant denunciation of abuses, his condemnation of the past in the name of reason and tolerance, recognizes the reality of progress.

Montesquieu wrote that "all countries have a law of nations, not excepting the Iroquois themselves, though they devour their prisoners: for they send and receive ambassadors, and understand the rights of war and peace. The mischief is that their law of nations is not founded on true principles. Montesquieu begins by stating: "Laws, in their most general signification, are the necessary relations arising from the nature of things." And although, as Mr. Shackleton points out, Montesquieu's natural law is not a law in the sense in which that term has been used by the jurists, it is significant that he introduces his "descriptive" natural law in the traditional terminology: "The laws of the first list are in no cases laws in the sense in which that term has been seen to be used by the jurists. Montesquieu does not say that a man has an obligation to feed himself, but that man does in fact feed himself. He does not say that man ought to believe in God, that he ought to be born free, that he ought to be reasonable, but that man does, rightly or wrongly believe in God, that he is born free, that he is in fact reasonable. These laws are not normative. They are descriptive of man's condition. They express no prescriptions, and they are alien to the ordinary conceptions of jurisprudence. They are not natural laws in the sense known to Grotius, Pufendorf, Burlamaqui, or Domat."

In this same way, Montesquieu's law of nations sought to derive order by recognizing that states like persons do have certain characteristics, rightly or wrongly, and the best method of ordering states was by appealing to these basic and universal characteristics.

Montesquieu's law of nations is founded on two principles: "That different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible, without

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82 Hodé, supra note 59.
85 ROBERT SHACKLETON, MONTESQUIEU 251 (1961).
prejudicing their real interests.” Secondly: “The object of war is victory; that of victory conquest, and that of conquest preservation.”

The first principle was a rule of practical experience. It is not in a state’s interest to be uncooperative in peace and bloodthirsty in war because history has shown that kind of state conduct to be unprofitable.

The second principle deals with the most observable characteristic of the Realpolitik of 18th century Europe, the desire for aggrandizement. As Catherine II said, “Who gains nothing, loses.” What Montesquieu attempted to do was to show that this system itself had built-in limits, and it was not in the interests of states to exceed them. It was not ethical reasoning, but practical reasoning, like Machiavelli’s advice that a prince should hurt no one, except mortally. Any other approach simply did not pay.

In the second principle, Montesquieu was simply giving expression to the principle which motivated France’s policy over Alsace, Roussillon, Flanders and Franche Comte: “There was then a natural limit of conquest—the power of assimilation. Nothing should be conquered which could not be kept, and nothing should be kept which could not be absorbed.” And so, the proscriptions against conquest were not legal, but common sense, because only by appealing to states’ interests could they be effected.

The Cultural but Non-Political Unity of Europe: The Unity within Diversity

It is an historical irony that during the same period during which nations were rending themselves asunder in Europe, a new spirit was abroad which stressed the unity of Europe: “If the spectacle of practical politics must make one sigh ‘There was no Europe,’ an examination of the intellectual life will on the contrary evoke a clear picture of European homogeneousness.” As the late Professor Van Geyl pointed out, it was in terms of the “practical politics” that the movement was new. It was new against the Balkanization of Europe since the 17th century, “when the movement away from universality

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86 Montesquieu, supra note 84.
87 Sorel, supra note 38 at 11.
88 Id. at 23.
89 Pieter Van Geyl, Encounters in History 374 (1967).
(could) be observed most strikingly,\textsuperscript{90} and whence may be traced the \textit{machtstaat} principle in which a state's actions are justified by the state's needs.

"Some of the most eminent writers of the age, Montesquieu, Voltaire, Hume, and later in the century, Gibbon, set themselves to produce history of a new kind, which would illustrate, in terms of human society, the kind of complex interdependence that biologists were discovering in the animal world. Montesquieu's \textit{tout est extremement lié} summarized the attitude of an age."\textsuperscript{91} And the idea of an interdependence was no less strong on the international level.

Rousseau described the community of Europe as a "real society which has its religion, its manners, its customs, and even its laws from which none of the people who compose it can withdraw without at once causing trouble."\textsuperscript{92} For Montesquieu, Europe is "solidaire": "Les choses sont telles en Europe que tous les états dependent les uns des autres. La France a besoin de l'opulence de la Pologne et de la Moscovie, comme la Guyenne a besoin de la Bretagne et de l'Anjou. \textit{L'Europe est un état composé de plusieurs provinces}."\textsuperscript{93}

The \textit{Encyclopédie}, under "L'Europe" agree substantially with Montesquieu. Voltaire saw Europe as a "kind of great republic, embracing several states, some monarchical, some not, the former aristocratic, the others democratic, but all in relationship to one another, all having one and the same religious basis, the same principles of public law, the same political ideas, all of them unknown in other parts of the world."\textsuperscript{94} Europe was viewed as "\textit{ein bewunderswurtiges Ganze}, a marvellous whole,"\textsuperscript{95} and it was so, not on the basis of a single country or race, but by virtue of all the peoples and all the countries of Europe.\textsuperscript{96}

The vogue of travel thrived and encouraged this spirit of unity, as well as the avalanche of literary exchanges and translations.\textsuperscript{97} Edmund Burke wrote that

\textsuperscript{90} Id. at 371.
\textsuperscript{91} Norman Hampson, \textit{The Enlightenment} 108 (1968).
\textsuperscript{92} Quoted in Nuttall, \textit{supra} note 39 at 19.
\textsuperscript{93} Quoted in Hode, \textit{supra} note 59.
\textsuperscript{94} Paul Hazard, \textit{European Thought in the 18th Century} 463 (J. L. May, trans., 1965).
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 465-472.
\textsuperscript{97} Id. at 465-472.
"nothing is so strong a tie of amity between nation and nation as correspondence in laws, customs, manners, and habits of life. They have more than the force of treaties in themselves. . . . The secret, unseen, but irrefragible bond of habitual intercourse hold them together. . . . At bottom these laws are all the same. . . . It is virtually one great state, having the same basis of general law, with some diversity of provincial customs and local establishments. . . . The whole of the polity and economy of every country of Europe has been derived from the same sources. . . ."98

Burke concluded that there was such a closeness in the very conduct of European life that "no European can be a complete exile in any part of Europe."99

In fine, there was a recognition of a cultural unity in Europe, and the need for political cooperation. "There was a concordance of views and aspirations arising naturally from each nation's particular, as well as universal, European development. The intellectuals of the period were aware of this. Each might feel warmly for his own country and at moments of international tension side with it unhesitatingly, yet each knew that Europe constituted a cultural unity."100

At the same time, there was a very acute recognition of the political realities of Europe, and this kind of thinking must be seen against the background of lawlessness and war on the international level, and the most basic fact of international existence, the independence and sovereignty of the state.

Indeed, Montesquieu went even a little too far when he described Europe as one state composed of several provinces. Montesquieu himself realized the true state of affairs, and wrote of it in less hyperbolic terms elsewhere. For example, he wrote that although the peoples of the world were "les habitants d'une grande planète, cependant il est impossible de les soumettre aux lois qui régissent les individus à l'intérieur de l'état,"101 he said elsewhere that "what all the countries of Europe have in common is a spirit of liberty, which has always made it difficult for them to submit to alien power."102 These two elements of political freedom and interdependence are best demonstrated for Montesquieu in the balance of power: "Rechercher la ruine de l'état voisin est un mauvais calcul, c'est rechercher sa propre ruine, car l'Europe est solidaire."103

100 Van Geyl, supra note 89 at 375.
101 Hodé, supra note 59.
102 Van Geyl, supra note 89 at 377.
103 Hodé, supra note 59.
Rousseau despaired that such a compelling reason for harmony in Europe should be accompanied by such bloodshed and strife: “One hardly knows how to make these strange contradictions agree; and this brotherhood of the nations of Europe seems nothing but a term of derision to express ironically their mutual animosity.”

Voltaire saw survival as the ultimate objects of the states composing his great republic, by which he meant nothing less than independence: “No republican assembly or monarch can have anyone but God for Master,” and the states of Europe were “above all . . . at one in the wise policy of maintenance among themselves as far as possible, an equal balance of power.” In 1760, Burke, like Voltaire, was convinced that the balance of power had long operated “to preserve the liberty of Europe’s states, if not to keep peace between them.” By 1769, Baron Bielfeld could write: “Les intérêts divers qui partagent les puissances de l’Europe en vertu de ce système, ont donné place à un sixième, qui est le maintien de la balance de la purvoir en Europe.”

Shortly thereafter Gibbon wrote: “The division of Europe into a number of independent states, connected however, with each other by the general resemblance of religion, language and manners, is productive of the most beneficial consequences to the liberty of mankind. The cities of ancient Greece were cast in the happy mixture of union and independence, which is repeated on a larger scale, but in a looser form, by the nations of modern Europe: the union of religion, language and manners, which renders them spectators and judges of each others’ merit; the independence of government and interest, which asserts their separate freedom, and excites them to strive for pre-eminence in the career of glory.”

Thus, the Europe of the mid-eighteenth century was, to borrow from Von Ranke, “a unity in diversity.” It was distinctly not the Europe Wolff described.

104 Quoted in Nuttall, supra note 39 at 19.
105 Perkins, supra note 40 at 1301.
106 Id.
107 Hinsley, supra note 28 at 163.
108 Id.
109 Bielfeld, supra note 48 at 151.
110 Hinsley, supra note 28 at 163-164.
Conclusion:

To summarize, in the words of Gierke:

The problem of the extent, and the nature, of international society still continued to be met by a variety of solutions. If the state of nature were conceived as an absolutely non-social state; and again, if international law were regarded simply as the law of nature, still prevailing between states because they were *persones morales* who still continued to remain in a state of liberty and of equality—then the logical result was a total rejection of any idea of a general 'society of states.' For a time it appeared as if, owing to the prestige of Pufendorf, a view of this sort would actually hold the field. In the long run however, the opposite theory triumphed. Assuming [not an original social condition but] an original community of all mankind, thinkers argued that the state of nature which continued to prevail among states must necessarily be a state of natural society. Even when they made the solitary individual their starting point, they still could obtain the same result. They could proceed to add, to their postulate of the solitary individual, the idea that the creation of a social condition was nonetheless to be regarded as a state in the development of natural law, and they could then argue that natural law in the course of its development, dictated, or at any rate postulated, a society of nations. With this conclusion there generally went hand in hand the recognition of a body of positive international law, which was held to be due to a further development of the 'natural' international law among the society of nations through the process of express or tacit consent. The conception of a universal society of states was successfully vindicated by Mevius, by Leibnitz, and by other opponents of the theory of Pufendorf; it was also maintained by Thomasius, and it was finally restored in its integrity by Wolff and his successors.\(^1\)

To one aware of this development, as Vattel certainly was, there was a very great need to synthesize the predominant elements of previous systems, i.e. the natural liberty of states and the natural society of nations. Moreover, the lawlessness of the times emphasized the need of some system which would evoke order from the chaos of power politics, and at the same time recognize the liberty of states. Vattel responded to this need by publishing his *Droit des Gens* in 1758.\(^2\) In it, he stressed the natural law basis of international law more than anyone except Pufendorf, and the liberty of nations as part of that system more than anyone except Wolff. This formula resulted in the most important international legal text for the next hundred years, and the basis of much of the public international law of the 20th century.\(^3\)

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\(^3\) Van Vollenhoven, *supra* note 2 at 32 declares that Vattel's was the primary influence in international legal thought from 1770-1914. See also Wheaton, *note 21 supra* for the influence of Vattel on practising lawyers and the municipal courts. Finally, see F. H. Hinsley, *supra* note 28, for the use of Vattel by Foreign Offices.