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Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel

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Abstract

This intellectual history of hospitality from Vitoria to Vattel provides an alternative story to the prevailing narrative of migration control. Although migration control is frequently heralded as falling within the domestic jurisdiction of states, the movement of persons across borders is a permanent feature of history that has been framed by international law for ages. The early doctrine of the law of nations reminds us that migration was at the heart of the first reflections about international law through the enduring dialectic between sovereignty and hospitality. This long-standing debate was framed by early scholars following three main trends, which constitute the focus of this article. The free movement of persons was first acknowledged by Vitoria and Grotius as a rule of international law through the right of communication between peoples. By contrast, Pufendorf and Wolff insisted on the state's discretion to refuse admission of aliens as a consequence of its territorial sovereignty. Yet, in-between these two different poles – sovereignty versus hospitality – Vattel counterbalanced the sovereign power of the state by a right of entry based on necessity. As exemplified by the founding fathers of international law, the dialectic between sovereignty and hospitality offers innovative ways for rethinking migration.

1 Introduction

Migration is a permanent feature of history that has been framed by international law for ages. Though not free from controversies, the legal status of aliens has a long lineage in the history of international law. One can even argue that, from its inception, international law has had a symbiotic relationship with migration. The very term *jus gentium* designated the set of customary rules governing the legal status of aliens

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under the law of Ancient Rome.[1] As far back as the 16th century, this Latin expression was specifically used to refer to the law of nations, before Jeremy Bentham coined the term 'international law' in 1789.[2]

From the 16th to the 18th century, the early doctrine of the law of nations played a critical role in thinking the fabric of international law, its foundations and basic concepts. During this particularly fertile and precursory period, the movement of persons across borders was a typical subject of discussions among the founding fathers of international law through the enduring dialectic between sovereignty and hospitality. This long-standing debate was framed by early scholars following three main trends, which constitute the three parts of this article. The free movement of persons was first acknowledged by Francisco de Vitoria and Hugo Grotius as a rule of international law through the right of communication between peoples. Following this stance, sovereignty was not held incompatible with hospitality. By contrast, subsequent scholars (such as Samuel von Pufendorf and Christian von Wolff) insisted on the state's discretion to refuse the admission of aliens as a consequence of its territorial sovereignty. Hospitality accordingly became charity. Yet, in between these two different poles – sovereignty versus hospitality – Emer de Vattel represented a medium position according to which the sovereign power of the state to decide upon the admission of foreigners was counterbalanced by a qualified freedom of entry based on the right of necessity.

This intellectual history of hospitality from Vitoria to Vattel provides an alternative story to the prevailing narrative of migration control. Today, immigration control is frequently viewed as falling within the domestic jurisdiction of each state.[3] Among the domestic courts of common law countries, this assertion has even become a maxim without any further inquiry into its rationale and justification.[4] The notion of domestic jurisdiction is probably the starting point but cannot be the last word, since its very content depends upon the development of international law.[5] The early doctrine of the law of nations reminds us that migration and international law are not mutually exclusive. On the contrary, the movement of persons across borders was at the heart of the first reflections about the law of nations. The founding fathers of international law further underlined that the very notion of state sovereignty was not concomitant with the one of migration control. On the contrary, both sovereignty and hospitality did coexist during several centuries as two central features of the law of nations.

1 D.J. Bederman, *International Law in Antiquity* (2004), at 85.

2 J. Bentham, *Introduction to the Principles of Morals and Legislation* (1789), ch. XVII, para. 1, s. 25, n. 143.

3 See, e.g., J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), at 608; M.N. Shaw, *International Law* (6th edn, 2008), at 826; R. Jennings and A. Watts (eds), *Oppenheim's International Law* (9th edn, 1992), at 897–898.

4 In addition to the other cases referred to later in this article, see notably in the USA: *Kleindiest v. Mandel*, 408 US 753 (1972); in New Zealand: *Ye v. Minister of Immigration* [2009] 2 NZLR 596, para. 116; in the United Kingdom: *R. v. Secretary of State for the Home Department Ex Parte Saadi and Others* [2002] UKHL 41 (Lord Slynn); and in Australia: *Ruddock v. Vadarlis* (2001) 110 FCR 491 at 543, para. 193 (French J); *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, para. 27.

5 *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 PCIJ Series B, No. 4, at 24.

2 Free Movement of Peoples by Vitoria and Grotius

The free movement of persons across borders has a long pedigree in the history of international law. It was acknowledged and conceptualized by Vitoria through the right of communication, before Grotius reaffirmed it as a key principle of international law deriving from the law of hospitality.

A *Vitoria and the Right of Communication*

Francisco de Vitoria (1480–1546), who is frequently portrayed as 'the founder of the modern *Law of Nations*',[6] has played an influential role in establishing the free movement of persons as a cardinal principle of international law. His notion of *ius communicationis* was developed in his well-known lecture 'On the American Indians', which he delivered at the University of Salamanca in 1539 when he discussed the most controversial issue of his time – the legitimacy of the Spanish conquest in the New World. Vitoria first asserted that Indians were the true masters of their land and thus had a right of ownership (*dominium*).[7] Therefore, 'they could not be robbed of their property, either as private citizens or as princes' by the Spaniards.[8] Then, Vitoria meticulously refuted the various grounds generally invoked for justifying the colonization of the New World, such as the universal authority of the emperor and the pope,[9] the right of discovery[10] and the refusal of the Christian faith.[11] He accordingly concluded that 'the Spaniards, when they first sailed to the land of the barbarians, carried with them no right at all to occupy their countries', before inquiring into the legitimate grounds that could justify the Spanish conquest.[12]

The 'first just title' identified by the professor of Salamanca relies on 'the right of natural partnership and communication' (*naturalis societas et communicationis*).[13] The

[6] J.B. Scott, *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations* (1934), at 68. See also Barthélemy, 'François de Vitoria', in J. Barthélemy *et al.* (eds), *Les fondateurs du droit international* (2014 [1904]) 39; Zapatero, 'Legal Imagination in Vitoria: The Power of Ideas', 11 *Journal of the History of International Law* (2009) 221; Valenzuela-Vermehren, 'Empire, Sovereignty, and Justice in Francisco de Vitoria's International Thought: A Re-interpretation of *De Indis*', 40(1) *Revista Chilena de Derecho* (2013) 259. For a more critical and convincing account of his stance as a founding father, see, however, Haggenmacher, 'La place de Francisco de Vitoria parmi les fondateurs du droit international', in A. Truyol Serra *et al.* (eds), *Actualité de la pensée juridique de Francisco de Vitoria* (1988) 27.

[7] 'The conclusion of all that has been said is that the barbarians undoubtedly possessed as true dominion, both public and private, as any Christians.' De Vitoria, 'On the American Indians', in A. Pagden and J. Lawrance (eds), *Francisco de Vitoria: Political Writings* (1992) 250. For Vitoria, 'this is self-evident, because they have some order (*ordo*) in their affairs: they have properly organized cities, proper marriages, magistrates and overlords (*domini*), laws, industries, and commerce, all of which require the use of reason. They likewise have a form (*species*) of religion and they correctly apprehend things which are evident to other men, which indicates the use of reason' (at 250).

[8] *Ibid.*, at 250–251.

[9] *Ibid.*, at 252–264.

[10] *Ibid.*, at 264–265.

[11] *Ibid.*, at 265–275.

[12] *Ibid.*, at 264.

[13] According to the historian Anthony Pagden, the right of communication as defined by the Spanish Jesuit 'seems to have been Vitoria's own creation', although St. Augustine suggested before him that denying a right of passage might justify a just war. Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', 31(2) *Political Theory* (2003) 197, n. 30.

free movement of persons derived from his *ius communicationis* as a basic axiom of international law. Vitoria conceptualized the principle of free movement as a truly universal norm binding every state (whether European or not), grounded on the natural sociability of human beings and acknowledged by the time-honoured tradition of hospitality. According to this principle, 'the Spaniards have the right to travel and dwell in those countries, so long as they do no harm to the barbarians'.[14] Such a right to travel is founded on international law: it 'comes from the law of nations (*ius gentium*), which either is or derives from natural law'.[15] For Vitoria, all nations recognized the right to travel as a rule of international law for '[a]mongst all nations it is considered … humane and dutiful to behave hospitably to strangers'.[16] He further argued that this rule existed since the beginning of the world, and it was not called in question by the division of the world into different nations:

> [I]n the beginning of the world, when all things were held in common, everyone was allowed to visit and travel through any land he wished. This right was clearly not taken away by the division of property (*diuisio rerum*); it was never the intention of nations to prevent men's free mutual intercourse with one another by this division.[17]

Following this stance, the right of communication is grounded on the natural sociability of mankind and the correlative duty of friendship between human beings: '[I]t is a law of nature to welcome strangers' because 'amity (*amicitia*) between men is part of natural law'.[18] Indeed, 'nature has decreed a certain kinship between all men', and 'man is not a "wolf to his fellow man" as Ovid says, but a fellow'.[19] While quoting St. Augustine, Vitoria reasserted that 'every man is your neighbour'[20] before concluding that 'hospitality is commended in Scripture: "use hospitality one to another without grudging" (1 Pet. 4:9). … It follows that to refuse to welcome strangers and foreigners is inherently evil'.[21] In sum, for Vitoria, free movement derived from the duty of hospitality as a principle of international law grounded on the natural sociability of human beings.

While outlining the legal and moral foundations of free movement, Vitoria further refined its scope in a rather balanced way. Indeed, the right to travel and the duty of hospitality are not absolute. Vitoria underlined on several occasions that they were no longer binding 'if travellers were doing something evil by visiting foreign nations'.[22]

[14] Vitoria, *supra* note 7, at 278.

[15] *Ibid.* The conception of Vitoria is more subtle than this assimilation between *ius naturale* and *ius gentium*. According to him, in most cases, the binding force of the law of nations derives from natural law, and, when this is not the case, its authority comes from the universal consent of the nations: 'And there are certainly many things which are clearly to be settled on the basis on the law of nations (*ius gentium*), whose derivation from natural law is manifestly sufficient to enable it to enforce binding rights. But even on the occasions when it is not derived from natural law, the consent of the greater part of the world is enough to make it binding, especially when it is for the common good of all men' (*ibid.*, at 280–281).

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*, at 279.

[19] *Ibid.*, at 280.

[20] *Ibid.*, at 279.

[21] *Ibid.*, at 281.

[22] *Ibid.*, at 278.

His *ius communicationis* accordingly equates with a qualified right of entry: the admission of foreigners into the territory of another state is mandatory as long as it does not cause harm to the host society. In his own words, he explained that it is 'lawful' only if it is 'neither harmful nor detrimental to the barbarians'.[23] Though he did not detail further the exact content of this significant exception, Vitoria made clear that foreigners who did not commit any crime are free to enter another country: '[I]t is not lawful to banish visitors who are innocent of any crime.'[24] Otherwise, refusing such admission can even be considered as an act of war.[25]

Although the right of communication can be derogated from when it is harmful or detrimental to the host society, it remains a truly universal rule binding all nations. It is accordingly applicable to both Christians and Indians on equal footing: '[I]t would not be lawful for the French to prohibit Spaniards from travelling or even living in France, or vice versa, so long as it caused no sort of harm to themselves; therefore it is not lawful for the barbarians either'.[26] As exemplified by this last quotation, the right of communication reflects a broader conception of international law grounded on reciprocity and equality between foreign nations. This twofold notion of reciprocity and equality represents the key contribution of Vitoria that prefigured classical international law.

Interestingly, his *ius communicationis* was not limited to the right to travel and the duty of hospitality. It was a much broader principle that also included free trade,[27] freedom of navigation[28] and *ius soli*.[29] The right to communication between peoples is accordingly at the heart of his whole conception about the law of nations. Such a right is not only grounded on international law, but it is also the essence of it. Following this stance, the right of communication is the necessary precondition for establishing international relations between equal nations, and it constitutes by the same token the *raison d'être* of international law as a whole. While conceptually sound and attractive, Vitoria's construction suffered from a major paradox: His *ius communicationis* was both the founding principle of a universal society composed by equal nations and the main legal ground for justifying the colonial conquest of the New World.

[23] *Ibid.*

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.* He added that 'the barbarians themselves admit all sorts of other barbarians from elsewhere, and would therefore do wrong if they did not admit the Spaniards' (*ibid.*, at 279).

[27] 'In the first place, the law of nations (*ius gentium*) is clearly that travellers may carry on trade so long as they do no harm to the citizens; and second, in the same way it can be proved that this is lawful in divine law. Therefore any human enactment (*lex*) which prohibited such trade would indubitably be unreasonable' (*ibid.*, at 279–280).

[28] '[T]he jurist's determination that by natural law running water and the open sea, rivers, and ports are the common property of all, and by the law of nations (*ius gentium*) ships from any country may lawfully put in anywhere (Institutions II.1.1–4)' (*ibid.*, at 279).

[29] '[I]f children born in the Indies of a Spanish father wish to become citizens (*cives*) of that community, they cannot be barred from citizenship or from the advantages enjoyed by the native citizens born of parents domiciled in that community' (*ibid.*, at 281).

This ambiguity explains why Vitoria has been condemned by several authors for 'outlining, in clear and stark terms, the colonial origins of international law'[30] and praised by others for his 'moral cosmopolitism'[31] and his modern notion of international community.[32] There is some exaggeration in both positions. At the time of his lecture 'On the American Indians', colonization of the New World was already a *fait accompli* and his great ambition was not to legitimate it but, instead, to constrain and regulate this reality within a general system based on moral and legal precepts.

Within such a construction, the right of communication established the missing link between sovereign entities that are bound to interact and develop relationships. It represented in turn a common good of a world composed by equal nations. While providing the entry point of Europeans into the New World, the general principle of free communication was unable to justify colonization on its own. Even at his time, one cannot contend that colonization did not harm the host society in accordance with his own exception to the right to travel and stay in a foreign nation.[33] In fact, Vitoria had to resort to several other 'just titles' that were related to the spreading of the Christian religion, the defence of the innocents against tyranny as well as true and voluntary election.[34]

Although this colonial bias undermined his very notion of equality between nations, Vitoria wrote the prologue of international law by drawing the contours of an international society governed by universal norms:[35]

> [T]he law of nations (*ius gentium*) does not have the force merely of pacts and agreements between men, but has the validity of a positive enactment (*lex*). The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men;

[30] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), at 9. See also C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005), at 173–178; Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', 5(3) *Social and Legal Studies* (1996) 321; R.A. Williams, Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990), at 96–107; H. Méchoulan, *Le sang de l'autre ou l'honneur de Dieu: Indiens, juifs et morisques au Siècle d'Or* (1979), at 62–67, 85–90.

[31] Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' 10 *Journal of the History of International Law* (2008), at 191. See also Niemelä, 'A Cosmopolitan World Order? Perspectives on Francisco de Vitoria and the United Nations', 12 *Max Planck United Nations Yearbook* (2008) 301.

[32] Zapatero, *supra* note 6, at 227; Lewkowicz, 'The Spanish School as a Forerunner to the English School of International Relations', 6 *Estudios Humanisticos: Historia* (2007) 85; Gòmez Robledo, 'Le *ius cogens* international: sa genèse, sa nature, ses fonctions', 172(3) *Recueil des cours (Hague Academy of International Law)* (1981) 23 and 189; de Los Rio, 'Francisco de Vitoria and the International Community', 14(4) *Social Research* (1947) 488; Barthélemy, *supra* note 6, at 42–43.

[33] The destruction by Cortés and his troops of the Aztec empire on the Yucatán peninsula in 1519–1521 was a well-known example of the violence perpetrated by the *conquistadores*.

[34] Vitoria, *supra* note 7, at 284–291. He also referred to the mental incapacity of the natives, although he expressed his scepticism about this last title.

[35] As Joe Verhoeven rightly observes, *'[i]l ne faut certes pas demander à Vitoria plus qu'il ne peut donner. Le droit des gens est encore à ses balbutiements. L'essentiel est néanmoins en place. Tel est sans doute l'intérêt de [son] œuvre … Vitoria a planté les éléments du décor, et il les a plantés de telle façon que la pièce qui allait s'y dérouler fût largement 'prédestinée'. Mais il n'en a écrit que le prologue.*' Verhoeven, 'Vitoria ou la matrice du droit international', in Truyol Serra *et al.*, *supra* note 6, 127.

> and these make up the law of nations. From this it follows that those who break the law of nations, whether in peace or in war, are committing moral crimes … No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.[36]

B *Grotius and the Law of Hospitality*

The *ius communicationis* of Vitoria was upheld and developed by Hugo Grotius (1583–1645). Grotius not only endorsed the view of Vitoria, but he also refined and enriched the principle of free movement by delineating its key components: the right to leave one's own country and the right to remain in a foreign country, as the two sides of the same coin. Hence, while Vitoria set the scene for the free movement of persons under international law, Grotius consolidated and detailed its very content.

The Dutch jurist first discussed the general notion of *ius communicationis* in *The Free Sea* (1609), which is considered to be 'an icon in international law'.[37] He reaffirmed free communication in particularly straightforward terms as a fundamental principle inherent to international law: '[E]very nation is free to travel to every other nation' as an 'unimpeachable rule of the law of nations … which is self-evident and immutable'.[38] While referring to Vitoria, he recalled that this basic rule of international law was truly universal[39] and relied on 'the sacrosanct law of hospitality.'[40] Grotius underlined that such a rule was not limited to common properties (such as the sea); it also applied to the territories possessed by states: '[E]ven in the case of the land that has been assigned as private property, whether to nations or to single individuals, it is nevertheless unjust to deny the right of passage (that is to say, of course, unarmed and innocent passage) to men of any nations.'[41]

The right of innocent passage was further refined in his masterwork *The Rights of War and Peace* (1625), which has been praised as 'the first systematic treatment of

[36] Vitoria, 'On Civil Power', in Pagden and Lawrance, *supra* note 7, 40, para. 21. For further discussion about his conception of international law, see, most notably, Wagner, 'Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth', 31(3) *Oxford Journal of Legal Studies* (2011) 565; Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', 73(1) *British Yearbook of International Law* (*BYIL*) (2002) 103, especially at 121–128; Kennedy, 'Primitive Legal Scholarship', 27(1) *Harvard International Law Journal* (1986) 1, especially at 13–40.

[37] Gordon, 'Grotius and the Freedom of the Seas in the Seventeenth Century', 16 *Willamette Journal of International Law and Dispute Resolution* (2008), at 252. For further discussion about his *Mare Liberum*, see van Nifterik and Nijman, 'Introduction: Mare Liberum Revisited (1609–2009)', 30 *Grotiana* (2009) 3; van Ittersum, 'Preparing *Mare Liberum* for the Press: Hugo Grotius' Rewriting of Chapter 12 of *De iure praedae* in November-December 1608', 26–28 *Grotiana* (2005–2007) 246; Borschberg, 'Hugo Grotius's Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)', International Law and Justice Working Papers (New York: New York University School of Law, 2006); Shearer, 'Grotius and the Law of the Sea', 26 *Bulletin of the Australian Society of Legal Philosophy* (1983) 46; Reppy, 'The Grotian Doctrine of the Freedom of the Seas Reappraised', 19(3) *Fordham Law Review* (1950) 243.

[38] H. Grotius, *Mare Liberum 1609–2009*, edited and annotated by R. Feenstra (2009), at 25.

[39] It 'pertains equally to all peoples' because 'nature has granted every nation access to every other nation' *Ibid.*, at 27.

[40] *Ibid.*, at 29.

[41] *Ibid.*, at 93.

international law'.[42] When discussing 'things which belong in common to all Men',[43] Grotius reaffirmed that 'a free passage ought to be granted to persons where just occasion shall require, over any lands and rivers, or such parts of the sea as belong to any Nation'.[44] He concluded in line with Vitoria that, if the right of passage is refused, it can be claimed by force.[45] However, in contrast to the professor of Salamanca, Grotius conceived the right of communication outside any colonial context. With such a decolonized version, the principle of free movement became stronger and more universal than it was assumed by his predecessor.

In addition, Grotius went one step further by delineating two key notions: the right to leave one's own country and the right to remain in a foreign country. His main contribution is to have expressed and detailed them in clear and somehow modern terms. Concerning the first notion, Grotius devoted particular attention 'to the case … when a single person leaves his country'.[46] While endorsing Cicero's view of freedom to leave as 'the Foundation of Liberty', Grotius recognized that the right to leave one's own country was not absolute. It could be submitted to restrictions in the interest of society, primarily with respect to debtors and in times of war.[47] Except in such cases, the principle however remained that 'Nations leave to every one the Liberty of quitting the State'.[48]

This right to leave one's own country is supplemented and reinforced by a right to remain in a foreign country. This represents another key added value of Grotius compared to Vitoria who did not delve into the stay of non-nationals in a foreign country as a consequence of free movement. The Dutch lawyer indeed underlined that:

[42] Bederman, 'Grotius and His Followers on Treaty Construction', 3 *Journal of the History of International Law* (2001) 18. For Lauterpacht, his treatise 'became identified with the idea of progress in international law'. Lauterpacht, 'The Grotian Tradition in International Law', 23 *BYIL* (1946) 52. See also Lesaffer, *supra* note 36, at 103–139; R. Higgins, 'Grotius and the United Nations', 37(1) *International Social Science Journal* (1985) 119; Murphy, 'The Grotian Vision of World Order', 76(3) *American Journal of International Law* (*AJIL*) (1982) 477; Bull, 'The Grotian Conception of International Society', in H. Butterfield and M. Wight (eds), *Diplomatic Investigations: Essays in the Theory of International Politics* (1966) 51. For a more nuanced and thorough account of Grotius as a transitional figure and his debt towards Vitoria and the scholastic, see, however, P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (1983), at 615–629; Kennedy, *supra* note 36, at 76–81.

[43] H. Grotius, *The Rights of War and Peace*, edited and with an introduction by R. Tuck (2005), Book II, ch. II, at 420.

[44] *Ibid.*, at 439, para. xiii.1.

[45] '[T]he liberty of passing ought first to be demanded, and if that be denied, it may be claimed by force': *ibid.*, at 441, para. xiii.3.

[46] Emigration of individuals is distinguished from the case when a large portion of the population leaves the state and may thus imperil the very *raison d'être* of the civil society: 'That we ought not to go out in troops or large companies, is sufficiently evident from the end and design of civil society, which could not subsist if such a permission were granted; and in things of a moral nature, what is necessary to obtain the end has the force of a law.' *Ibid.*, Book II, ch. V, at 553–554, para. xxiv.2.

[47] '[I]t is no ways for the benefit of a civil society, if there be any great public debt contracted, for an inhabitant to leave it, unless he be ready to pay down his proportion towards it: or if a war be undertaken upon a confidence in the number of subjects to support it, and especially if a siege be apprehended, no body ought to quit the service of his country, unless he substitutes another in his room, equally qualified to defend the state.' *Ibid.*, at 554–555, para. xxiv.2.

[48] *Ibid.*, at 555, para. xxiv.3.

> [p]ersons also that pass either by land or water, may, on account of their health, or for any other just cause, make some stay in the country; this being likewise an innocent utility. … So likewise, a fixed abode ought not to be refused to strangers, who being expelled their own country, seek a retreat elsewhere: provided they submit to the laws of the State, and refrain from every thing that might give occasion to sedition.[49]

Similarly to the right to leave, the right to remain in a foreign country is not absolute: it presupposes a 'just cause' to stay therein and foreigners' respect for the laws of the host state.[50] For Grotius, a refugee himself, a typical instance of such a just cause could be found in '[t]he so much revered rights of suppliants or refugees, and the many precedents of *asylums* … for they are intended only for the benefit of them who suffer undeservedly, and not for such whose malicious practices have been injurious to any particular Men, or to human society in general'.[51] Quoting Cicero, the Dutch lawyer recalled that 'It is our duty to have compassion on such whose misery is owing not to their crimes but misfortune'.[52] In Grotius' own words, '[r]efugees are … entitled to protection'[53] because they are 'innocent of [any] crimes'.[54] By contrast, for the one who committed a crime, the host state 'must either punish him or deliver him up' to the injured state according to his well-known maxim *aut dedere aut judicare.*[55]

In drawing the line between those who deserve protection and the others, his distinction between victims and criminals clearly prefigured the modern definition of refugees.[56] Yet his contribution is not confined to asylum. Grotius considerably enriched the debate initiated by Vitoria. He not only reasserted the right of communication between peoples as a universal rule of international law binding all

[49] *Ibid.*, Book II, ch. II, at 446, para. xv.1; at 447, para. xvi. While repeating that 'those people who refuse to admit foreigners amongst them, are very much to blame', he further added: 'And if there be any waste or barren land within our dominions, that also is to be given to strangers, at their request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a property, only so far as concerns jurisdiction, which always continues the right of the ancient people.' *Ibid.*, at 447, para. xvi; at 448, para. xvii.

[50] As for Vitoria, this duty of hospitality did not apply in times of war: 'And without doubt strangers, that come into an enemy's country after a war is proclaimed, and begun, are liable to be treated as enemies' because 'when war is proclaimed against a Nation, it is at the same time proclaimed against all of that Nation.' *Ibid.*, Book III, ch. IV, at 1281, para. vi; at 1282 para. xviii.1.

[51] *Ibid.*, Book II, ch. XXI, at 1067–1068, para. v.1.

[52] *Ibid.*, at 1068–1069, para. v.1.

[53] *Ibid.*, at 1075, para. vi.1.

[54] *Ibid.*, at 1070, para. vi.1.

[55] *Ibid.*, at 1063, para. iv.3. He explained that 'since for one state to admit within its territories another foreign power upon the score of exacting punishment is never practised, nor indeed convenient, it seems reasonable, that that state where the convicted offender lives or has taken shelter, should, upon application being made to it, either punish the demanded person according to his demerits, or else deliver him up to be treated at the discretion of the injured party'. *Ibid.*, at 1062, para. iv.1.

[56] The contemporary definition of the term 'refugee' enshrined in Art. 1 of the United Nations Convention Relating to the Status of Refugees 1951, 189 UNTS 150, meticulously distinguishes between inclusion clauses (a well-funded fear of being persecuted) and exclusion clauses (mainly grounded on serious crimes). For further discussion about the early doctrine of the law of nations and its impact on asylum and refugee law, see Chetail, 'Théorie et pratique de l'asile en droit international classique: étude sur les origines conceptuelles et normatives du droit international des réfugiés', 115(3) *Revue générale de droit international public* (2011) 625.

nations, but he also strengthened and refined it by two related rights: departure (from one's own country) and admission (into another country) as the key tenets of free movement.

3 State Sovereignty and the Admission of Aliens by Pufendorf and Wolff

In stark contrast to Vitoria and Grotius, subsequent scholars of the law of nations insisted on the state's discretion for refusing the admission of foreigners. This change of paradigm obviously coincided with the rise of state's sovereignty as endorsed in the Treaty of Westphalia (1648).[57] Within the doctrine of the law of nations, the main rationale of the sovereign power to refuse admission of aliens was based on two main and mutually reinforcing notions: the reason of state as presumed by Pufendorf and the patrimonial conception of the state as elaborated by Wolff.

A *Pufendorf and the Reason of State*

Samuel von Pufendorf (1632–1694) is one of the first scholars who departed from the right of communication between peoples inherited from Vitoria and developed by Grotius. The German professor distinguished departure from admission as two opposite notions governed by different sets of norms. As far as emigration was concerned, Pufendorf reasserted in *The Law of Nature and Nations* (1672) that 'every man reserved to himself the liberty to remove at discretion'.[58] Like Grotius, freedom of emigration can be subjected to legitimate restrictions mainly for debtors or in case of war.[59] With Pufendorf, however, the right to leave is divorced from the general principle of free movement. Departure from one's own country becomes a distinctive right on its own, whereas admission in another country falls into the realm of the sovereign:

> [I]t is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted, who are driven on the coasts by necessity, or by any cause that deserves pity and compassion. Not but that it is barbarous to treat, in the same cruel manner, those who visit us as friends, and those who assault us as enemies.[60]

As a result of the state's power to decide upon the admission of foreigners, freedom to leave one's own country did not coincide with a correlative right to enter into another country. The former is a right of individuals, while the latter is a right of states. Although this distinction will become a conventional wisdom, Pufendorf did not explain the exact rationale and motives for such a departure from free movement.

[57] Treaty of Westphalia, 1648, 1 Parry 271.

[58] S. von Pufendorf, *The Law of Nature and Nations or a General System of the Most Important Principles of Morality, Jurisprudence and Politics* (5th edn, 1749 [1672]), Book VIII, ch. XI, at 873, para. ii.

[59] *Ibid.*, at 874, para. iii.

[60] *Ibid.*, Book III, ch. III, at 252–253, para. ix.

His insistence on the reason of state and the influence of Thomas Hobbes are probably the main reasons.[61]

The thought of Pufendorf was nevertheless more nuanced than it may appear at first sight. His main concern focused on the excess of an indiscriminate access for all kinds of foreigners. While criticizing the *ius communicationis* of Vitoria, he argued that:

> it seems very gross and absurd, to allow others an indefinite or unlimited right of travelling and living amongst us, without reflecting either on their number, or on the design of their coming; whether, supposing them to pass harmlessly, they intend only to take a short view of our country, or whether they claim a right of fixing themselves with us for ever. And that he who will stretch the duty of hospitality to this extravagant extent, ought to be rejected as a most unreasonable, and most improper judge of the case.[62]

He expressed the same concern on several occasions. Although the Ancients conceived 'the right of hospitality … [as] the most sacred friendship', 'to give a natural right to these favours, it is requisite that the stranger be absent from his own house on an honest, or on a necessary account; as, also, that we have no objection against his integrity, or character, which might render our admission of him, either dangerous or disgraceful'.[63] His criticism of Vitoria and Grotius was, however, hardly justified since, for both of them, the free movement of persons was not absolute and could be restricted in the interest of the host society. Furthermore, Pufendorf had to concede in line with his predecessors that 'inhospitality [is] commonly, and for the most part, justly censured, as the true mark of a savage and inhuman temper'.[64] The resulting tension between sovereignty and hospitality accordingly framed and constrained the admission of aliens.

While rejecting free movement as a rule of international law, Pufendorf inversed the terms of the debate: sovereignty became the principle and hospitality an exception. He thus prioritized the former over the latter, although the two notions were not necessarily incompatible. For Pufendorf, the admission of foreigners had to be encouraged not only as an office of humanity but also in the interest of the state following an early conception of utilitarianism:

> Humanity, it is true, engages us to receive a small number of Men expelled [sic] their home, not for their own demerit and crime; especially if they are eminent for wealth or industry, and not likely to disturb our religion, or our constitution. And thus we see many states to have risen

[61] For further discussion about the influence of Hobbes on Pufendorf, see T. 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* (2011), at 30–39; Palladini, 'Pufendorf Disciple of Hobbes: The Nature of Man and the State of Nature: The Doctrine of *Socialitas*', 34 *History of European Ideas* (2008) 26; E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (1998), at 283–286, 361–363; Nutkiewicz, 'Samuel Pufendorf: Obligation as the Basis of the State', 21(1) *Journal of the History of Philosophy* (1983) 15. On the very notion of the 'reason of state', see more generally T. Poole, *Reason of State. Law, Prerogative and Empire* (2015); Nitschke, 'The Anatomy of Power in International Relations: The Doctrine of Reason of State as a "Realistic" Impact', in O. Asbach and P. Schröder (eds), *War, the State and International Law in Seventeenth-Century Europe* (2010) 155.

[62] Pufendorf, *supra* note 58, Book III, ch. III, at 252, para. ix.

[63] *Ibid.*, at 251–252; see also at 245, para. v; 251, para. viii, when he discussed the right of passage by Grotius.

[64] *Ibid.*, Book III, ch. III, at 252, para. ix.

> to a great and flourishing height, chiefly by granting licence to foreigners to come and settle amongst them; whereas others have been reduced to a low condition, by refusing this method of improvement.[65]

However, it remains that, with Pufendorf, the admission of foreigners became a favour granted by the host state because the primary consideration for deciding their admission was based on its own interest:

> [E]very State may be more free or more cautious in granting these indulgences, as it shall judge proper for its interest and safety. In order to which judgment, it will be prudent to consider, whether a great increase in the number of inhabitants will turn to advantage; whether the country be fertile enough to feed so many mouths; whether upon admission of this new body, we shall be strained for room; whether the men are industrious, or idle; whether they may be so conveniently placed and disposed, as to rend them incapable of giving any jealousy to the government. If on the whole, it appears that the persons deserve our favour and pity, and that no restraint lies on us from good Reasons of State, it will be an act of humanity to confer such a benefit on them.[66]

Hospitality must therefore be granted when humanitarian considerations coincide with states' interests. If not, Pufendorf considered the reason of state to be self-evident enough for discarding any sense of duty.

B *Wolff and the Patrimonial State*

The shift from the duty of hospitality to the discretionary power of the state was endorsed and consolidated by Christian von Wolff (1679–1754). The German philosopher proved to be more radical than Pufendorf in vindicating the authority of the state in the field of admission. He reaffirmed in particularly strong and categorical terms that a state can forbid the entry of foreigners into its own territory. He explained in his *Jus Gentium Methodo Scientifica Pertractatum* (1749) that '[n]o nation nor any private person who is a foreigner can claim any right for himself in the territory of another'.[67] As a result, 'no foreigner is in any way permitted, contrary to the prohibition of the ruler, to enter the latter's territory, even for some definite purpose, as the prohibition may have set forth'.[68] In such a case, the state can even 'impose a penalty upon the one entering or forbid it under a definite penalty'.[69] Wolff accordingly confirmed and exacerbated the departure from Vitoria and Grotius initiated by Pufendorf. The admission of foreigners became a discretionary competence of the state that could be enforced by criminal sanctions.

Such a discretionary power was grounded on a patrimonial conception of the state whereby ownership of its territory equated with sovereignty. Wolff developed this analogy in considerable detail. For him, 'there is a natural connexion of the ownership of a nation with the sovereignty so that if ownership is established, sovereignty is likewise

65 *Ibid.*, at 253, para. x.

66 *Ibid.*

67 C. von Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, translation by J.H. Drake (1934), vol. 2, ch. III, at 149, para. 293.

68 *Ibid.*, at 149–150, para. 295.

69 *Ibid.*, at 150, para. 296.

established, but if sovereignty is taken away, ownership also is taken away'.[70] Thus, 'the ruler of the state may be called the lord (or owner) of the territory … because, of course, he has ownership over the nation'.[71] This assimilation between property right and territorial sovereignty triggered in a self-referential logic the discretionary power of excluding foreigners from the state's territory: 'A nation has the same power of ownership as a private person. Therefore, just as the owner of a private estate can prohibit any other person from entering upon the same, a thing which no one denies, so also the ruler of a territory can prohibit any foreigner from entering upon it.'[72]

According to this patrimonial conception of territorial sovereignty, it is up to each state to decide if and under which conditions foreigners may be permitted to enter their territory. Indeed, 'since an owner can dispose of the use of his property according to his liking, the conditions under which the ruler of a territory desires to permit approach to foreigners, depend altogether upon his will'.[73] Hence, the grounds for refusing admission must be left to the discretion of the sovereign state. They can be related to various considerations, such as the number of foreigners, their difference of religion and morality, their criminal convictions and any other reasons that are justified by public welfare.[74] Emigration does not make an exception to this system entirely based on the discretionary power of the state. Contrary to Pufendorf, Wolff argued that 'in a state of nature there is no right to emigrate'.[75] As a result, emigration is nothing more than the 'permission to go into voluntary exile',[76] which 'depends upon the law of the state'.[77]

In order to mitigate the drastic consequences of his own construction, Wolff counterbalanced the discretion of the state by a reminiscence of the right to free passage. He reasserted in line with the scholastic tradition of natural law that ownership of the territory – and, by extension, sovereignty – did not prejudice the 'right of harmless use'.[78] Such a right includes the right 'of passage for proper causes over lands and rivers … the right of remaining in lands which are subject to the ownership of a

[70] *Ibid.*, at 154, para. 305.

[71] *Ibid.*, at 155, para. 307.

[72] *Ibid.*, at 150, para. 295.

[73] *Ibid.*, at 150–151, para. 298.

[74] '[T]here may be several reasons on account of which admittance may be denied and … they must be determined by the state. … Here properly belongs the fact that the number of subjects is greater than can be provided for adequately from the things which are demanded for the needs, comforts, and pleasure of life, both as regards the people in general and also as regards the class of people who follow the same pursuit of life. Here also belongs the reason that there is fear lest the morals of the subjects may be corrupted, or lest prejudice may be aroused against religion, or even lest criminals be admitted, because of whom injury threatens the state, and other things which are detrimental to public welfare.' *Ibid.*, ch. I, at 81, para. 148.

[75] *Ibid.*, at 83, para. 154.

[76] *Ibid.*, at 83, para. 153.

[77] *Ibid.*, at 83, para. 154.

[78] '[O]wnership of things could not have been introduced unless the right of harmless use had been reserved.' *Ibid.*, ch. III, at 175, para. 343. In other words, 'the right of harmless use, … as a residue from the primitive joint holding remains common to nations after the introduction of ownership'. *Ibid.*, at 179, para. 349.

nation, [and the right] of the admittance of those who have been expelled from their own homes'.[79] Wolff deduced from the right of harmless use that 'foreigners must be allowed to stay with us for the purpose of recovering health',[80] 'of study'[81] or 'for the sake of commerce'.[82]

This duty of admission, however, is an imperfect right and, as such, cannot be enforced.[83] The limit of such an imperfect right is graphically illustrated by the admission of refugees. To Wolff, '[w]e ought to be compassionate toward exiles'[84] and, as a result, '[a] permanent residence in its territory cannot be denied to exiles by a nation, unless special reasons stand in the way'.[85] However, 'since nations are free, the decision concerning these matters must be left to the nations themselves, and that decision must be respected. … And if this right should be claimed as regards these lands, it is imperfect, consequently no nation can be compelled to receive exiles'.[86]

Against such a frame, foreigners have a right to claim admission but not a right to be granted it. Because of its imperfect nature, the right of admission is accordingly confined to a moral duty. In other words, admission becomes charity, and the discretionary competence of the state is thus preserved. To Wolff, the difference between perfect and imperfect rights relied on the distinction between justice and charity: '[I]t is against charity and not justice, if one nation fails in its duty toward another. Therefore although it does no wrong, nevertheless it sins.'[87] In sum, the state is morally bound to admit foreigners but legally free to refuse them.

4 The Synthesis of Vattel: Sovereignty versus Necessity

No other treatise on international law has been more widely read and cited than *The Law of Nations* by Emer de Vattel (1714–1767).[88] Published in 1758, his treatise acquired

79 *Ibid.*, at 175, para. 343.

80 *Ibid.*, at 177, para. 345.

81 *Ibid.*, at 176, para. 344.

82 *Ibid.*, at 177, para. 346.

83 For further discussion on the distinction between perfect and imperfect rights by Wolff, see Jouannet, *supra* note 61, at 211–213.

84 Wolff, *supra* note 67, ch. I, at 81, para. 150.

85 *Ibid.*, at 81, para. 149.

86 *Ibid.*, at 81, para. 149. '[S]ince it depends altogether on the will of the people, or on the will of the one who has the right of the people, whether or not he desires to receive an outsider into his state, an exile is allowed to ask admittance, but he cannot assuredly according to his liking determine domicile for himself, wherever he shall please, and if admittance is refused, that must be endured' (at 80, para. 148).

87 *Ibid.*, at 86, para. 159.

88 E. de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, edited by B. Kapossy and R. Whatmore (2008). Among the numerous books devoted to Vattel, see notably V. Chetail and P. Haggenmacher (eds), *Vattel's International Law in a 21st Century Perspective / Le droit international de Vattel vu du XXIeme siècle* (2011); S. Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (2004); Jouannet, *supra* note 61; F.S. Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's 'Le Droit des Gens'* (1975); P.P. Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (1960); P. Guggenheim, *Emer de Vattel et l'étude des relations internationales en Suisse* (1956).

an unrivalled and durable influence during the following centuries.[89] Although his thought has been frequently distorted by courts and commentators, Vattel falls in a medium position between the partisans of free movement and the proponents of state's sovereignty. On the one hand, the Swiss author endorsed and framed emigration and immigration in rather traditional terms when compared to the current understanding of these issues. On the other hand, he counterbalanced and qualified state sovereignty in the field of admission by two substantial caveats: innocent passage and necessity.

A *Emigration and Immigration by Vattel*

Contrary to Wolff, who was his master, Vattel devoted long passages to 'the liberty of emigration'.[90] He acknowledged as a principle that '[e]very man has a right to quit his country, in order to settle in any other, when by that step he does not endanger the welfare of his country'.[91] Such qualified right to leave a country applies to both citizens and foreigners alike.[92] Nonetheless, freedom of emigration is only applicable in times of peace, while public interest may require return.[93] As a witness of his time, Vattel provided a nuanced account of the prevailing practice. While observing that 'the political laws of nations vary greatly in this respect', he distinguished three types of state practice:

> In some nations, it is at all times, except in case of actual war, allowed to every citizen to absent himself, and even to quit the country altogether, whenever he thinks proper, without alleging any reason for it. … In some other states, every citizen is left at liberty to travel abroad on business, but not to quit his country altogether, without the express permission of the sovereign. Finally, there are states where the rigour of the government will not permit any one whatsoever to go out of the country, without passports in form, which are even not granted without great difficulty. In all these cases it is necessary to conform to the laws, when they are made by a lawful authority. But in the last-mentioned case, the sovereign abuses his power, and reduces his subjects to an insupportable slavery, if he refuses them permission to travel for their own advantage, when he might grant it to them without inconvenience, and without danger to the state.[94]

In support of his contention against undue restrictions to the freedom of emigration, the Swiss author strongly reaffirmed that 'there are cases in which a citizen has an absolute right to renounce his country, and abandon it entirely – a right founded on

[89] For further discussion about the influence of Vattel, see Chetail, 'Vattel and the American Dream: An Inquiry into the Reception of the *Law of Nations* in the United States', in V. Chetail and P.-M. Dupuy (eds), *The Roots of International Law: Liber Amicorum Peter Haggenmacher* (2013) 251; Ruddy, 'The Acceptance of Vattel', *Grotian Society Papers* (1972) 177; Thévenaz, 'Vattel ou la destinée d'un livre', 14 *Annuaire suisse de droit international* (1957) 9; Fenwick, 'The Authority of Vattel', 7 *American Political Science Review* (1913) 395.

[90] Vattel, *supra* note 88, Book I, ch. XIX, at 224, para. 225.

[91] *Ibid.*, at 221, para. 220.2.

[92] To Vattel, a foreigner 'is free at all time to leave it; nor have we a right to detain him, except for a time, and for very particular reasons, as, for instance, an apprehension, in war time, lest such foreigner, acquainted with the state of the country and of the fortified places, should communicate his knowledge to the enemy.' *Ibid.*, Book II, ch. VIII, at 315, para. 108.

[93] 'In a time of peace and tranquillity, when the country has no actual need of all her children, the very welfare of the state, and that of the citizens, requires that every individual be at liberty to travel on business, provided that he be always ready to return, whenever the public interest recalls him.' *Ibid.*, Book I, ch. XIX, at 222, para. 221.

[94] *Ibid.*, at 222, para. 222.

reasons derived from the very nature of the social compact'.[95] Such a fundamental right is triggered in three cases when the state: is unable to provide subsistence to his own citizens; fails to discharge its obligations towards its citizens; or enacts intolerant laws (such as those interfering with freedom of conscience).[96] Although his construction primarily relied on natural law, Vattel further observed that freedom of emigration may derive from several sources of positive law, such as the constitution of the state, the explicit permission granted by the sovereign and international treaties.[97]

In contrast to the freedom of emigration, the admission of foreigners falls within the competence of the host state as a consequence of its territorial sovereignty. In line with Wolff, Vattel reaffirmed that:

> [t]he sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this, that does not flow from the rights of domain and sovereignty.[98]

Following the same premise, the sovereign state may subject the entry of foreigners into its own territory to any specific conditions: '[S]ince the lord of the territory may, whenever he thinks proper, forbid its being entered … he has no doubt a power to annex what conditions he pleases to the permission to enter'.[99] The two passages quoted above have been frequently heralded by Anglo-American courts to substantiate an unqualified discretion of states for refusing admission of foreigners. The best illustration is provided by the oft-quoted case *Nishimura Ekiu v. United States*, where the US Supreme Court held in 1892:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§ 94, 100.[100]

[95] *Ibid.*, at 223, para. 223.

[96] '1. If the citizen cannot procure subsistence in his own country, it is undoubtedly lawful for him to seek it elsewhere. For political or civil society being entered into only with a view of facilitating to each of its members the means of supporting himself, and of living in happiness and safety, it would be absurd to pretend that a member, whom it cannot furnish with such things as are most necessary, has not a right to leave it. 2. If the body of the society, or he who represents it, absolutely fail to discharge their obligations towards a citizen, the latter may withdraw himself. For if one of the contracting parties does not observe his engagements, the other is no longer bound to fulfil his; for the contract is reciprocal between the society and its members. It is on the same principle also that the society may expel a member who violates its laws. 3. If the major part of the nation, or the sovereign who represents it, attempt to enact laws relative to matters in which the social compact cannot oblige every citizen to submission, those who are averse to these laws have a right to quit the society, and go settle elsewhere. For instance, if the sovereign, or the greater part of the nation, will allow but one religion in the state, those who believe and profess another religion have a right to withdraw, and to take with them their families and effects. For they cannot be supposed to have subjected themselves to the authority of men, in affairs of conscience; and if the society suffers and is weakened by their departure, the blame must be imputed to the intolerant party: for it is they who fail in their observance of the social compact, – it is they who violate it, and force the others to a separation.' *Ibid.*, at 223–224, para. 223.

[97] *Ibid.*, at 224–225, para. 225.

[98] *Ibid.*, Book II, ch. VII, at 309, para. 94.

[99] *Ibid.*, Book II, ch. VIII, at 312, para. 100.

[100] *Nishimura Ekiu v. United States*, 142 US 651, at 659 (1892), Opinion of Justice Gray. See also *Attorney-General for Canada v. Cain*, [1906] AC 542, at 546: 'One of the rights possessed by the supreme power in

At the time of this judgment, the authority of Vattel proved to be instrumental in justifying a radical breakdown from the time-honoured tradition of free movement. However, as James Nafziger convincingly demonstrates, the famous dictum of the US Supreme Court was based on a biased and selective reading of Vattel.[101] In fact, the two earlier-quoted passages from the Swiss author were taken out of their context, with the overall result of providing a partial account of his views on the admission of foreigners. This misreading of Vattel has prevailed until now among US judges.[102]

It is true that the ambiguity of his law of nations is prone to this sort of manipulation; the nuanced and sometimes contradictory statements of Vattel contributed a lot to his enduring success by providing a powerful rhetorical tool for justifying various kinds of actions. As observed by many scholars, 'it is easy to find in his book detached passages in favour of either side of any question'.[103] There is nothing surprising in this. On the one hand, the very notion of national sovereignty constitutes the driving force of his law of nations, which explains in turn both his ambiguity and durable influence during the following centuries.[104] On the other hand, Vattel provides a synthesis between the tradition of natural law and an early form of positivism.

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every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace order, and good government, or to its social or material interest. Vattel, *Law of Nations*, I, para. 231; II, para. 125.

101 Nafziger, 'The General Admission of Aliens under International Law', 77(4) *AJIL* (1983) 811.

102 *Arizona v. United States*, 567 US (2012), Dissenting Opinion of Justice Antonin Scalia: 'As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty. Emer de Vattel's seminal 1758 treatise on the Law of Nations stated: "The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state."'

103 R. Wildman, *Institutes of International Law* (1849), vol. 1, at 32. For a similar account, see also M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), at 112; Wight, 'Western Values in International Relations', in H. Butterfield and M. Wight (eds), *Diplomatic Investigations: Essays in the Theory of International Politics* (1966) 119; Parry, 'The Function of Law in the International Community', in M. Sørensen (ed.), *Manual of Public International Law* (1968) 25; Thévenaz, *supra* note 89, at 13. For further discussions about the ambiguity of Vattel as a key factor for his enduring success, see Chetail, 'Vattel et la sémantique du droit des gens: une tentative de reconstruction critique', in Chetail and Haggenmacher, *supra* note 88, 387.

104 On the extensive literature devoted to Vattel's conception of the sovereign state, see Chetail, *supra* note 103, at 402–413; Holland, 'The Moral Person of the State: Emer de Vattel and the Foundations of International Legal Order', 37(4) *History of European Ideas* (2011) 438; T. Tetsuya, 'La doctrine vattelienne de l'égalite souveraine dans le contexte neuchâtelois', 11 *Journal of the History of International Law* (2009) 103; Christov, 'Liberal Internationalism Revisited: Grotius, Vattel, and the International Order of States', 10(7) *European Legacy* (2005) 561; Beaulac, *supra* note 88, at 138–179; Jouannet, *supra* note 61, at 319–340; N.G. Onuf, *The Republican Legacy in International Thought* (1998), at 118, 123, 139–140; Haggenmacher, 'L'Etat souverain comme sujet du droit international de Vitoria à Vattel', 16 *Droits: Revue Française de Théorie Juridique* (1992), at 11; Whelan, 'Vattel's Doctrine of the State', 9 *History of Political Thought* (1988) 59; Muir-Watt, 'Droit naturel et souveraineté de l'Etat dans la doctrine de Vattel', 32 *Archives de Philosophie du Droit* (1987) 71; Butler, 'Legitimacy in a State-System: Vattel's Law of Nations', in M. Donelan (ed.), *The Reason of States: A Study in International Political Theory* (1978) 45.

B *Innocent Passage and the Dual Law of Nations*

The great ambition of Vattel was to reconcile state sovereignty with natural law.[105] This dialectic between power and justice is illustrated by his 'double law … [which] will constitute the principal subject of this work'[106] – that is, the fundamental distinction between the internal law of nations (also called necessary law) and the external law of nations (labelled voluntary law). The former 'is just and good in itself',[107] and, as such, it 'is always obligatory on the conscience',[108] whereas 'voluntary law tolerates what cannot be avoided without introducing greater evils'.[109] Vattel explained in his preface that:

> [t]he necessary and the voluntary law of nations are therefore both established by nature, but each in a different manner; the former as a sacred law which nations and sovereigns are bound to respect and follow in all their actions; the latter, as a rule which the general welfare and safety oblige them to admit in their transactions with each other. … This double law, founded on certain and invariable principles, is susceptible of demonstration, and will constitute the principal subject of this work.[110]

When transposed to the admission of foreigners, his dual law of nations provides a fairly nuanced account that is far from endorsing an unqualified discretion of the state. On the contrary, the external/voluntary right of refusing admission is qualified by the internal/necessary duty of innocent passage:

> In explaining the effects of domain we have said above … that the owner of the territory may forbid the entrance into it, or permit it on such conditions as he thinks proper. We were then treating of his external right, – that right which foreigners are bound to respect. But now that we are considering the matter in another view, and as it relates to his duties and to his internal right, we may venture to assert that he cannot, without particular and important reasons, refuse permission, either to pass through or reside in the country, to foreigners who desire it for lawful purposes. For, their passage or their residence being in this case an innocent advantage, the law of nature does not give him a right to refuse it: and though other nations and other men in general are obliged to submit to his judgment … he does not the less offend against his duty, if he refuses without sufficient reason: he then acts without any true right; he only abuses his external right.[111]

Thus, while the external law of nations acknowledges the state's competence to decide upon the admission of foreigners, the internal law of nations requires a right of innocent passage that cannot be refused without solid reasons. Otherwise, the state

[105] For further discussion about Vattel as a transitional figure, see, most notably, Jouannet, 'Les dualismes du *Droit des gens*', in Chetail and Haggenmacher, *supra* note 88, 133; Nakhimovsky, 'Vattel's Theory of the International Order: Commerce and the Balance of Power in the Law of Nations', 33 *History of European Ideas* (2007) 157; Jouannet, *supra* note 61, at 249–250, 419–425; D.J. Bederman, *The Spirit of International Law* (2010), at 55–56; Onuf, '"Tainted by Contingency": Retelling the Story of International Law', in R. Falk, L.E.J. Ruiz and R.B.J. Walker (eds), *Reframing the International: Law, Culture, Politics* (2002) 28.

[106] Vattel, *supra* note 88, at 17, Preface.

[107] *Ibid.*, at 16, Preface.

[108] *Ibid.*, at 79, Preliminaries, para. 28.

[109] *Ibid.*, Book III, ch. XIII, at 593, para. 192.

[110] *Ibid.*, at 17, Preface.

[111] *Ibid.*, Book II, ch. X, at 328, para. 135.

is committing an abuse of its external right to control entry onto its own territory. Indeed, 'his duty towards all mankind obliges [the owner of the territory] … to allow a free passage through, and a residence in, his state'.[112] In echo to the scholastic tradition of natural law, Vattel recalled that:

> [t]he introduction of property cannot be supposed to have deprived nations of the general right of traversing the earth for the purposes of mutual intercourse, of carrying on commerce with each other, and for other just reasons. It is only on particular occasions when the owner of a country thinks it would be prejudicial or dangerous to allow a passage through it, that he ought to refuse permission to pass. He is therefore bound to grant a passage for lawful purposes, whenever he can do it without inconvenience to himself. And he cannot lawfully annex burthensome conditions to a permission which he is obliged to grant, and which he cannot refuse if he wishes to discharge his duty, and not abuse his right of property.[113]

Although this key feature of the Vattelian thought has been frequently ignored, each nation is bound by both internal and external laws. These two laws are not incompatible nor exclusive but, instead, mutually reinforcing. As a result of this dual law, the state competence must be carried out in accordance with the right of innocent passage. However, if such admission is prejudicial or dangerous to the host state, its external right to refuse it must prevail on the internal duty of innocent passage. In such a case, even refugees must comply with a refusal of admission, when the safety of the territorial state requires it to do so.[114] One should concede that the practical result of his subtle construction is not so remote from that of Wolff. Vattel, however, distinguishes himself from his master with a major feature: his right of necessity as transposed in the field of admission.

C *Necessity: A Right to Illegal Entry?*

The key contribution and modernity of Vattel lie in the right of necessity as a way to reconcile the external right of refusing admission with the internal duty of innocent passage. This crucial aspect has been neglected by courts and commentators because of their enduring misperception that Vattel was endorsing 'an early triumph of state sovereignty'.[115] Even the very few authors having noticed his right of necessity have

[112] *Ibid.*, Book II, ch. VIII, at 312, para. 100.

[113] *Ibid.*, Book II, ch. X, at 327, para. 132.

[114] 'For, on the other hand, every nation has a right to refuse admitting a foreigner into her territory, when he cannot enter it without exposing the nation to evident danger, or doing her a manifest injury. What she owes to herself, the care of her own safety, gives her this right; and in virtue of her natural liberty, it belongs to the nation to judge, whether her circumstances will or will not justify the admission of that foreigner' (Preliminaries, para. 16). 'He cannot then settle by a full right, and as he pleases, in the place he has chosen, but must ask permission of the chief of the place; and if it is refused, it is his duty to submit. However, as property could not be introduced to the prejudice of the right acquired by every human creature, of not being absolutely deprived of such things as are necessary, – no nation can, without good reasons, refuse even a perpetual residence to a man driven from his country. But if particular and substantial reasons prevent her from affording him an asylum, this man has no longer any right to demand it, – because, in such a case, the country inhabited by the nation cannot, at the same time, serve for her own use, and that of this foreigner.' *Ibid.*, Book I, ch. XIX, at 226–227, paras 230–231.

[115] Cavallar, 'Immigration and Sovereignty: Normative Approaches in the History of International Legal Theory (Pufendorf – Vattel – Bluntschli – Verdross)', 11 *Austrian Review of International and European Law* (2006) 9.

concluded that 'Vattel ultimately cannot decide between right of communication and right of property.'[116] This assertion is arguably incorrect given the importance Vattel attributes to the right of necessity in order to resolve the tension between sovereignty and hospitality. Indeed, necessity constitutes a major restriction to state sovereignty and paves the way for a right to illegal entry.

According to Vattel, the right of necessity overrules the prevalence of the external right of refusing admission over the internal duty of innocent passage. He defined such a right as 'the right which necessity alone gives to the performance of certain actions that are otherwise unlawful, when, without these actions, it is impossible to fulfil an indispensable obligation'.[117] As a result, the right of necessity allows foreigners to force the passage denied by the state. He explained that:

> The right of passage is also a remnant of the primitive state of communion, in which the entire earth was common to all mankind, and the passage was everywhere free to each individual according to his necessities. Nobody can be entirely deprived of this right (§ 117); but the exercise of it is limited by the introduction of domain and property: since they have been introduced, we cannot exert that right without paying due regard to the private rights of others. The effect of property is to give the proprietor's advantage a preference over that of all others. When, therefore, the owner of a territory thinks proper to refuse you admission into it, you must, in order to enter it in spite of him, have some reason more cogent than all his reasons to the contrary. Such is the right of necessity: this authorises an act on your part, which on other occasions would be unlawful, viz. an infringement of the right of domain.[118]

As a result of this balancing act between territorial sovereignty and the right of necessity, Vattel concluded:

> When a real necessity obliges you to enter into the territory of others, – for instance, if you cannot otherwise escape from imminent danger, or if you have no other passage for procuring the means of subsistence, or those of satisfying some other indispensable obligation, – you may force a passage when it is unjustly refused.[119]

Instead of acknowledging an unbridled discretion of states, Vattel endorsed in a rather modern fashion a right to illegal entry when there is no other means to flee from a danger or to procure one's own means of subsistence. Even more, such a right of necessity is a perfect right, which can be enforced against the will of the state.[120] This represents, in turn, a major difference from innocent passage since, contrary to this last right, necessity leaves no room of appreciation for the state, which is accordingly bound and forced to admit foreigners: '[T]h[e] right of innocent use is not a perfect right like that of necessity; for it belongs to the owner to judge whether the use we wish to make of

[116] Baker, 'Right of Entry or Right of Refusal? Hospitality in the Law of Nature and Nations', 37 *Review of International Studies* (2011) 1430.

[117] Vattel, *supra* note 88, Book II, ch. IX, at 320, para. 119.

[118] *Ibid.*, Book II, ch. IX, at 322, para. 123.

[119] *Ibid.*

[120] *Ibid.*, Book II, ch. IX, at 324, para. 128. To Vattel, '[t]he *perfect right* is that which is accompanied by the right of compelling those who refuse to fulfil the correspondent obligation; the *imperfect* right is unaccompanied by that right of compulsion. The *perfect obligation* is that which gives to the opposite party the right of compulsion; the *imperfect* gives him only a right to ask.' *Ibid.*, at 75, Preliminaries, para. 17.

a thing that belongs to him will not be attended with damage or inconvenience.'[121] Accordingly, Vattel's notion of necessity has two particularly straightforward implications: first, the judgment as to whether there is a state of necessity lies with the person seeking entry and not with the state and, second, necessity truly confers an individual right and is not merely a defence to a claim.[122]

The threshold triggering the right of necessity remains high and requires a casuistic approach that is quite similar to a proportionality test: necessity prevails over sovereignty if, and only if, irregular entry is the only way to safeguard an essential interest of the foreigner. As Vattel cautiously underlined, 'in such a case, the obligation must really be an indispensable one, and the act in question the only means of fulfilling that obligation. If either of these conditions be wanting, the right of necessity does not exist on the occasion'.[123]

Against such a frame, one could be tempted to say that Vattel's right of necessity prefigures a post-modern duty of *non-refoulement* where there is a risk of serious violations of human rights (whether civil, political, economic or social). His right of necessity, however, remains an exception to the principle of the state's competence to decide upon the admission of foreigners. His system accordingly contrasts with the regime of free movement developed by Vitoria and Grotius. His innovative construction based on the right of necessity was thus primarily bound to apply to states – like China and Japan – that forbade entrance of foreigners without express permission.[124] Vattel, however, observed that in the practice of other states, such as in the European continent, free movement of persons remained the rule: '[I]n Europe the access is every where free to every person who is not an enemy of the state, except, in some countries, to vagabonds and outcasts'.[125]

5 Conclusion

As exemplified by Vitoria, Grotius and Vattel, early scholars of international law were far from acknowledging an absolute state discretion in the field of migration. Except for Pufendorf and Wolff, the very notion of state sovereignty was not held incompatible with a qualified right of entry whether grounded on the right of necessity or the

[121] *Ibid.*, Book II, ch. IX, at 324, para. 128.

[122] In this last regard, Vattel's conception of necessity contrasts with the modern principle of necessity, as set out in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 3 August 2001, in which necessity merely precludes wrongfulness and can be invoked by states only.

[123] Vattel, *supra* note 88, Book II, ch. IX, at 320, para. 119. According to this proportionality test, 'if an equal necessity obliges the proprietor to refuse you entrance, he refuses it justly; and his right is paramount to yours. Thus a vessel driven by stress of weather has a right to enter, even by force, into a foreign port. But if that vessel is infected with the plague, the owner of the port may fire upon it and beat it off, without any violation either of justice, or even of charity, which, in such a case, ought doubtless to begin at home.' *Ibid.*, Book II, ch. IX, at 322, para. 123.

[124] *Ibid.*, Book II, ch. VIII, at 312, para. 100; ch. VII, at 309, para. 94.

[125] *Ibid.*, Book II, ch. VIII, at 312, para. 100.

right of communication between peoples. This intellectual legacy has been ignored and sometimes instrumentalized in order to justify immigration restrictions as a natural consequence of territorial sovereignty. This narrative of immigration control has become commonplace until today. For instance, in 2004, the British Supreme Court asserted in its famous case *European Roma Rights Centre and Others v. Immigration Officer at Prague Airport* that '[t]he power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state'.[126]

However, this conventional wisdom is grounded on false premises for both historical and normative reasons. Indeed, assuming the power to exclude aliens as the earliest prerogative of the state is highly disputable.[127] On the contrary, free movement across borders has long been the rule, rather than the exception, in the history of mankind.[128] Furthermore, from the 16th to the end of the 18th centuries, the rise of the nation-state and its implicit corollary – territorial sovereignty – did not coincide with the introduction of border controls. For a long time, the admission of foreigners was traditionally viewed as a means for strengthening the power of host states (primarily for demographic and economic reasons). This remained the prevailing view for most of the 19th century before immigration controls were introduced at the turn of the 20th century.

History teaches us that immigration control is a relatively recent invention of states. With few exceptions (in some regions – such as in China and Japan – or in times of war and domestic turmoil), immigration control only emerged at the end of the 19th century in some countries and for specific categories of aliens.[129] It was then generalized as wartime legislation during World War I and reinforced by the economic crisis of the inter-war period.[130] Still today, the vicious circle of armed conflicts, terrorism, and economic recession constitute influential factors for justifying immigration control.

Meanwhile, on a more conceptual plane, immigration control has become conventionally associated with territorial sovereignty. Though the former is not concomitant with the latter, the very notion of territorial sovereignty has been a powerful tool not only for vindicating a radical break from the past but also for ensuring the perpetuation of immigration control. The early doctrine of the law of nations reminds us that there is nothing irremediable nor insurmountable in this *status quo*. As exemplified by the founding fathers of international law, the dialectic between sovereignty and hospitality still offers innovative ways for rethinking the movement of persons across borders.

[126] *European Roma Rights Centre and Others v. Immigration Officer at Prague Airport*, [2004] *UKHL* 55, para. 11, Lord Bingham.

[127] As R. Plender rightly underlines, 'the right to exclude aliens has not always been regarded as an essential attribute of a state's sovereignty'. R. Plender, *International Migration Law* (1988), at 62. For a similar account, see notably S. Saroléa, *Droits de l'homme et migrations: De la protection du migrant aux droits de la personne migrante* (2006), at 442ff; G. Fourlanos, *Sovereignty and the Ingress of Aliens: With Special Focus on Family Unity and Refugee Law* (1986), at 9ff; Nafziger, *supra* note 101, at 807ff.

[128] For an historical overview of global migrations, see most notably M.H. Fisher, *Migration: A World History* (2014); P. Manning, *Migration in World History* (2005); W. Gungwu (ed.), *Global History and Migrations* (1997).

[129] See most notably the US Chinese Exclusion Act of 1882, 22 Stat. 58.

[130] For an overview of the body of immigration legislation at the time, see International Labour Office, *Emigration and Immigration: Legislation and Treaties* (1922), at 167–226.