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Vattel's *law of nations* and just war theory

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ABSTRACT

It has often been said that Vattel's treatise on the law of nations breaks with the tradition of modern natural law and just war theory. Based on a closer examination of Vattel's justification of preventive war and of his assessment of the balance of power in Europe, the paper argues that this criticism is greatly exaggerated, if not entirely misleading.

Introduction

In his seminal book, *Just and Unjust Wars*, Michael Walzer portrayed Vattel as a proponent of what he calls 'the classic argument for prevention', based on the idea of a balance of power. According to Walzer, the classic argument assumed a utilitarian form. It was premised on the belief that the balance of power actually did preserve the liberty or independence of European states, and that a war fought to maintain the balance was therefore justified by virtue of the fact that fighting sooner rather than later greatly reduced the cost of defence. Citing a critical remark made by Edmund Burke concerning the balance of power, Walzer suggests that the idea of an equilibrium of power was but a 'utopian dream', leading to 'innumerable and fruitless wars' rather than to the preservation of peace.[1] Richard Tuck comes to a remarkably similar conclusion in his study *The Rights of War and Peace*, where he describes Vattel as heir to the humanist arguments put forward by Grotius and Locke in defence of European colonization and of preventive war against a prospectively hegemonic power. Comparing Vattel's theory of international relations with the 'pacific model of human and state interaction' of Pufendorf and Wolff, Tuck concludes that the liberal politics of the kind Vattel subscribed to in his *Law of Nations* was linked to 'a willingness to envisage international adventurism and exploitation', since his liberalism was based on the belligerent post-Renaissance state.[2]

These assessments of Vattel's theory of war and peace stand in stark contrast to the author's own declared intentions. While he accepts that war remains an inevitable fact of politics, he also points to the 'happy effects' which might be expected from his treatise on the law of nations, if only the number of 'wise conductors of nations' who take its teachings to heart would be multiplied.[3] In the same vein he insists, throughout his treatise, on the devastating effects of war, and reminds the sovereign who wages war of his moral responsibility, as for example in the following terms: 'The slaughter of men, the pillage of cities, the devastation of provinces, – such is the black catalogue of his enormities.

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[1] M. Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, 3rd edn (New York, 2000), 76–8. Later, Burke endorsed the doctrine of the balance in a manner fully compatible with that of Vattel. D. Armitage, 'Edmund Burke and Reason of State,' *Journal of the History of Ideas* 61/4 (2000), 617–34.

[2] R. Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (Oxford, 1999), 191–6.

[3] E. de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed. with an Introduction by B. Kapossy, R. Whatmore (Indianapolis, 2008), 18f.

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He is responsible to God, and accountable to human nature, for every individual that is killed, for every hut that is burned down. The violences, the crimes, the disorders of every kind, attendant on the tumult and licentiousness of war, pollute his conscience, and are set down to his account, as he is the original author of them all' (482f.). In light of the terrible consequences of war, Vattel insists that 'a just and wise nation, or a good prince' has recourse to this 'wretched and melancholy expedient' for obtaining justice 'only in extremities' (483). Sovereigns who wage war without necessity are denounced as 'scourges of the human race, barbarians, enemies to society, and rebellious violators of the laws of nature' (467). In conformity with this moral repudiation of war in Book III of the *Law of Nations* – which is devoted to war – Vattel pursues a twofold aim: first, to *mark the just bounds* of the right of sovereign nations to employ force for their defence and for the preservation of their rights; and second, to *moderate* the exercise of that right (470). These two issues are dealt with in the chapters concerning the right of making war on one hand, the right of nations in war on the other. In the terms commonly used today, we could also say that *jus ad bellum* and *jus in bello* – the two essential parts of 'classical' just war theory – provide the core of Vattel's doctrine of war.[4]

The aim of this paper is to re-assess Vattel's just war theory and to examine the extent to which it modified the basic tenets of 'classical' just war theory.[5] Two aspects will be important here: the role Vattel ascribed to the idea of a balance of power; and his claim that traditional just war theory requires substantial modification when applied to a system of free and independent nations. As we shall see in the next section, this latter claim leads to the distinction between the necessary (or natural) law of nations, and the voluntary law of nations.

Vattel's concept of the law of nations

Vattel defines the law of nations as 'the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights'.[6] Two aspects of this definition are important. First, it implies that self-governing nations or sovereign states are exclusively the subject of the law of nations. They are treated as moral persons who live together in a state of nature, and are therefore free and independent (67f.). Unlike Hobbes and Pufendorf, who tended to identify the authority of the state with the person of the sovereign, Vattel draws a clear distinction between the nation as 'body politic', to which authority or sovereignty originally belongs, and the person or persons who exercise this authority or sovereignty. In his view, nations or states as 'body politics' are the proper subject of the law of nations. Just as individual men in the state of nature are governed by the law of nature, so entire nations remain subject to this law (68), which he then calls the law of nations. Thanks to the straightforward identification of the subject of the law of nations, Vattel's treatise has been credited with expressing in mature form what we now call 'classic international law'.[7]

The second important aspect of Vattel's definition concerns the relation between the law of nations and natural law. As we have seen, Vattel claims that originally the law of nations is nothing other than the law of nature applied to nations. But he then goes on to explain that the application of a rule must always be adapted to its proper subject. As human individuals and nations are distinct subjects, it follows that the law of nature requires modification when applied to nations. This is why Vattel concludes that the law of nations is not the same as natural law, but needs to be treated as a distinct science.[8] In his view this insight is one of the genuine achievements of Christian Wolff (10f.). It leads to the crucial distinction between the necessary (or natural) law of nations that obligates internally or in conscience, and the voluntary law of nations that is limited to 'external right'. While the former is directly imposed on nations by nature, the latter is based on consent (16f.). Since voluntary law depends on the will of nations, it belongs, together with conventional and customary law, to the positive law of nations (78).

Since Vattel connects voluntary law to the will and consent of nations, it has often been said that he broke with the tradition of modern natural law and inaugurated the era of positivism. This one-sided assessment of Vattel's *Law of Nations* has since been revised. Two powerful arguments have been advanced to demonstrate the extent to which Vattel remains indebted to the tradition of modern natural law. The first argument, put forward by Emmanuelle Jouannet, is a historical one.[9] It rests on a claim that one of the important dividing-lines within the tradition of modern natural law arises from the question: is there a universal positive law of nations? Grotius was ready to acknowledge that, besides natural law, a voluntary law of nations exists, which he described as customary, non-written law based on a tacit convention of the majority of peoples and applicable to the whole society of mankind (64). Hobbes, together with Pufendorf and his disciples, firmly rejected such an idea, because in their view law in the proper sense of the term implied an obligation, which in turn presupposed a relation of dependence between a subject and a superior. As Jouannet puts it, Pufendorf's *Law of Nature and Nations* represents 'a complete devaluation of consensual or voluntary law' and leads to a nearly complete exclusion of contractual and of customary law from international relations (49). Consequently Pufendorf identified the law of nations

[4] On the origin of the terms *jus ad bellum* and *jus in bello* see R. Kolb, 'Origin of the Twin Terms jus ad bellum/jus in bello,' *International Review of the Red Cross* 320 (1997), 553–2.

[5] Following Gregory Reichberg, I use the term 'classical' just war theory to designate the tradition of just war theory from its inception in medieval canon law to the middle of the eighteenth century. G. Reichberg, 'Preventive War in Classical Just War Theory,' *Journal of the History of International Law* 9 (2007), 5–34.

[6] Vattel, *The Law of Nations*, 67.

[7] P. Haggenmacher, 'L'état souverain comme sujet du droit international, de Vitoria à Vattel,' *Droits* 15–16 (1992–1993), 11–20.

[8] Vattel, *The Law of Nations*, 5, 69.

[9] E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris, 1998), 39–104.