The history of international law has become far more open as a discipline than it used to be. Over the last thirty years or so, it has been the subject of many reinterpretations but also of many uses by other disciplines and by certain groups which have gone well beyond the official history continuously passed down until then. There began to occur a fresh, ‘grass roots’, public use of the history of international law, that is, it came to be used by groups which had long been deprived of the capacity to voice their opinions on the subject, such as decolonised peoples, but also native peoples, minorities and women. In this respect, the history of international law currently fuels demand for intelligibility, which is also experienced as a requirement that there should be some acknowledgement of the traumas incurred in the past through international law for the profit of those states which used to be its sole subjects. Yet it is often the case that Westerners and non-Westerners, dominant and dominated groups, constantly toss their international pasts back and forth in what is very often a genuine mutual misunderstanding of the other’s interpretations. The Durban Conference was a painful illustration of this.

It is in this context that I would like to propose an interpretation of the modern law of nations that leads to a discussion of the colonial origins of international law and to a nuancing of the idea of a law of nations built entirely for world domination and entirely on the distinction between Europeans and non-Europeans. In re-reading the eighteenth-century archives and treatises, one rediscovers a modern law of nations and a conception of that law in which the objective of colonising or dominating the world was entirely marginal, even if all the way-markers for such domination were in place. On the contrary, one sees emerging a system of law whose dual potential for both emancipating and disciplining the conduct of states was quite apparent.

It is proposed to develop this point of view here through three observations. The first looks to confirm that the colonial question was indeed present in eighteenth-century Europe (section 1). The second observations forks into two and reveals that, for the law of nations,
the colonial question was marginal and that the purpose of the law of nations lay somewhere else entirely (sections 2 and 3). The third observation looks to draw the lessons from this re-reading of the usages of international law and its history (section 4).¹

1. A MODERN LAW OF NATIONS FAVOURABLE TO COLONISATION

The ‘modern’ in the modern law of nations means that there was a law of nations of the Moderns as opposed to a law of nations of the Ancients, in the same way as modern thought superseded ancient thought, because the two phenomena were interconnected. It means that the modern law of nations was that law which emerged at the same time as modern Europe, that is, between the seventeenth and eighteenth centuries. This does not mean that this new system of law was a complete break with the old one. Peter Haggenmacher has brilliantly demonstrated throughout his work that one model does not simply replace another but that sense and meanings shift and slide with the result that, at some point in time, the new model prevails while the old one persists in a reshaped form.² This is what happened with the law of nations of the Moderns which was a reconfiguration of the *ius gentium* of the Ancients.

That said, it is incontrovertible that this modern law of nations was to be used to justify and to make lawful European domination over the parts of the world Europeans were little by little to discover. In that, it corresponded to an intellectual climate that was amenable to this colonisation and this was attested to by state practice and the doctrine of the law of nations.

1.1. The Intellectual and Economic Environment

First of all, the intellectual climate was wholly in favour of colonisation and settlement of non-European lands. This point shall merely be recalled here. Michèle Duchet’s *Anthropologie et histoire au siècle des Lumières* is particularly enlightening in this respect.

---


and teeming with examples and historical traces of this. Economic practice was also favourable to colonisation as it reflected a mix of mercantile, physiocratic and liberal principles which at one and the same time promoted the state’s national development and encouraged the development of foreign trade, the search for precious metals and the establishment of foreign companies. Foreign trade became a crucial institution in the eighteenth century, in keeping with the new bourgeois and merchant values of the time, the new techniques, the output of the manufactories, the exploitation of the colonies by French, English and Dutch companies, the demand from English colonies created in North America and the constant expansion of domestic and world markets and trade. This movement was accompanied by latent racism that reinforced, to the advantage of the ‘natural superiority’ of white European males, the establishment of what was then to become a system of colonial exploitation. While there were seventeenth- and eighteenth-century writers who lambasted the early European colonisation, it was not usually to reject the principle of colonisation but to draw the lessons from the practice of it … so as to become all the better at it. Some English-language authors like Smith and Burke were genuine anti-colonialists, especially with respect to English policy in Asia, but continental intellectuals, who were highly critical of the horrors of the early colonisations, were far more ambivalent about it. This can be seen from reading, say, the famous multi-authored *Histoire philosophique et politique des établissements et du commerce des Européens dans les deux Indes*, first published by the Abbé de Raynal in 1772 (edition dated 1770), which was tremendously successful in Europe. The atrocious character of the massacres and injustices committed by Europeans in the Americas was denounced, as was their savageness, their insatiable greed, the horror of the negro slave trade and the triggering of wars to appropriate new lands. But this very firm condemnation did not produce any appeal to cease colonisation. On the contrary, the aim was to replace these events within a history of a human race moving towards progress and to teach Europeans to better settle outside of Europe, with more humanity and justice. There was, therefore, no ‘anti-colonialism’ by intellectuals at the time because, despite appearances, they ultimately

---

6 *Ibid.*, L. V, Chap. XXXIII.
contributed to maintaining the established order and to preparing nineteenth-century colonial ideology.  

1.2. Legal Practice

Next, legal practice of the time also attested to this interest in the colonies. Reading state archives of the seventeenth and eighteenth centuries clearly reveals how European nations progressively consolidated their commercial, military and political sway over other parts of the globe either through a legal arsenal of internal laws or through the law of nations. The diplomatic records of each country contain the edicts, letters patent, privileges, deeds of devolution or revocation of the monarchs of Europe with respect to the Indies, the Colonies and Africa by which they authorised the establishment of national trading companies pretty much everywhere and by which they legally enshrined the ‘freedom of trade’. Such practice was duly recorded, for example, in the Cours diplomatique of George-Frédéric de Martens or in Le droit public de l’Europe fondé sur les traités jusqu’en l’année 1740 by Gabriel Bonnot de Mably.

1.3. The Doctrine of the Law of Nature and of Nations

Lastly, for legal doctrine, the treatises of the law of nature and of nations served as the doctrinal basis and as legal justification for this colonisation and some of the authors of the treatises were especially interested in these issues. One cannot forget, in this respect, the matter of the taking of a Portuguese vessel, defended by Grotius at the behest of the Dutch East India Company, which gave rise to the publication of the celebrated De Iure Praedae. Beyond the sporadic positions taken up by various commentators, it is certain that the seventeenth and eighteenth-century treatises on the law of nature and of nations contained all the legal principles that were to provide a basis for the great conquests of the nineteenth

---

century and to consolidate the business of the great seventeenth- and eighteenth-century trading companies. This has been admirably demonstrated by contemporary historiography with the works of Richard Keene and Anthony Anghie, for example, whereas classical historiography remained largely silent on this matter. Among the most significant principles of the law of nations, one might cite the freedom of commerce, the freedom to enter into treaties, and especially unequal treaties, the right of ownership, the right to occupy *terra nullius*, the rights to cultivate wasteland, the divisibility of the rights of sovereignty, which was to lead to entities with different statuses, not forgetting the principle of the freedom of the seas, which was fully enshrined in the eighteenth century despite England’s ambitions to extend its sovereignty over the oceans and to rule them unchallenged. All of these legal principles, which drew on liberal ideals of the Enlightenment, were to be used to make lawful the domination of colonised peoples and the plundering of their resources.

Let us take the example of the state’s freedom to trade which was fully enshrined in the eighteenth century and is particularly emblematic of this ambivalent use. Considered as a fundamental right of the sovereign state, the freedom to trade was conceived of as what should make it possible to root economically, concretely and materially the sovereignty and freedom of European states and therefore, *a priori*, to make them truly independent. It was quite simply a fundamental freedom of the modern state: to trade was for the state to exercise its freedom. But while it was an instrument of their emancipation, it was soon also to become a component of their power and their outreach. The freedom of trade was in addition the counterpart – and the auxiliary – of the right of ownership enshrined in municipal law as a guarantee of individual freedom, and of the right to enter into treaties which was also acknowledged to be a right states enjoyed. It remained profoundly ambivalent in its effects. The right of the sovereign state to trade freely made it possible to develop relations among states and ensure their mutual prosperity; but it also promoted the power politics of the stronger states, which could advance their interests unperturbed behind the masks of ‘the perfect right to trade’ and ‘sweet commerce’. It must be understood that in consecrating the fundamental freedom to trade, the law of nations of the Moderns did not just reflect the desire to maintain peaceful and prosperous relations among states but it reflected just as much, if not more, a new conception of state power. Now, in the eighteenth century, state power depended less on the size of the territory, or its constant enlargement, than on the state’s prosperity, its

---

fortune and its wealth. This is what Gabriel-François Coyet, for example, pointed out in *La Noblesse commerçante* in 1756: ‘The system of Europe has changed: trade enters, or nearly so, into all treaties as reason of state’.10

From this, foreign trade of European states was to prove as much the locus of struggle and confrontations as of harmony and good understanding among European states, and the right to trade already faltered with the discovery of the Other when different, not making prejudices vanish as Montesquieu wished, but on the contrary making them considerably worse. This is attested to by the fact that it was to be one of the Scottish and English sources of the distinction between the civilised nations, which were ‘polished or refined’ by ‘gentle commerce’, and the ‘barbarian’ nations that did not know how to engage in trade.11 In the eighteenth century, ‘gentle commerce’ coexisted alongside the most brutal slave trade and was already transforming swathes of Africa and Asia into a venture of colonial pillage but also into a venture of internal colonisations, that is, the exploitation of unworked land in Europe and North America and the forced cultivation of non-farm land. So much so that the liberal game of ‘benevolent interest’ was then transformed into a pure predatory economic rationale to serve the interests of a few dominant social groups and states.

Yet the understanding of the modern law of nations cannot be reduced to the staking out of a future system of domination or of a legal and discursive structure based solely on otherness and the European/non-European dichotomy. From reading the documents of the time and especially the major treatises of the law of nature and of nations, it can be better discerned what the first major legal principles of the modern law of nations reflected. In the context of this short study, we cannot be exhaustive but at least it can be recalled that this law of nations, which emerged in a completed form in the eighteenth century, was above all a law devised to discipline the conduct of European states (section 2) and to enshrine their sovereign freedom with respect to the attempted hegemony of the major European powers of the time (section 3).

2. A CODE OF GOOD CONDUCT FOR DISCIPLINING EUROPEAN STATES

The fact of the matter is that, if we are interested in the modern law of nations and only the
law of nations, it must be realised that these questions occupied only a very minor and
secondary place in it. This is what is revealed by the great treaties on the law of nature and of
nations we have mentioned. Even if they do contain the legal principles that were to make
colonisation lawful and to vindicate it, this was not at all their primary objective. For instance,
Vatell’s *Droit des gens*, published in 1758, which was by far the leading reference work for
ministries throughout the period, had in all just five pages on this question out of a total of
more than 900 pages. The same was equally true of all seventeenth and eighteenth century
treatises. Anyone consulting the books by Grotius, Pufendorf, Thomasius, Wolff, Barbeyrac,
Burlamaqui, Rachel and Bynkershoek can immediately see the little interest these
jurisconsults accorded to the colonial question or to the European/non-European distinction.
This is all the more noteworthy because comparison with earlier fifteenth and sixteenth
century studies and later nineteenth century ones shows that the latter developed these
questions and the vindications thereof much more. Besides, it was only at the end of the
nineteenth century that the major legal questions about protectorates, special regimes,
capitulations, unequal treaties and the status of colonies came to be dealt with in any depth in
international and colonial law.

2.1. The Reasons for the Indifference to Colonial Questions

Why this crucial difference? There were many reasons for it that cannot all be set out here.
However, among the most decisive was the simple fact that the age was not marked by any
great colonising wave and so international law was not directly shaped to facilitate expansion
and domination by colonisation. Then again, it cannot be forgotten that it was also a time
when Europe was particularly inward looking, with the result that the law of nations that

12 E. De Vattel, *Droit des gens ou Principes de la loi naturelle appliquée à la conduite et aux
affaires des Nations et des Souverains* (Neuchâtel/Londres, Editeurs du Journal Helvétiques,
l’établissement d’une nation dans un pays’, pp. 191-196.
13 See, for example, H. Grotius, *On the Law of War and Peace* (1623/4); S. Pufendorf, *Of the
Law of Nature and Nations* (1672); C. Thomasius, *Fundamenta Juris Naturae et Gentium*
(Halle and Leipzig, La Veuve de Christophe Salfelden, 1718); C. Wolff, *Institutions du droit
de la nature et des gens* (Leyden, Elie Luzac, 1772); J.-J. Burlamaqui, Principes du droit
naturel (Paris, Janet & Cotelle, 1821); C. van Bynkershoek, *Quaestionum Juris Publicii Libri
duo* (Leyden, J. von Kerckhem, 1737); and S. Rachel, *De Jure Naturae et Gentium
dissertationes* (Kiel, J. Reumann, 1676).
emerged in the eighteenth century was a law centred essentially on Europeans and on the continual questions thrown up by relations among European states. Eighteenth-century Europe was still prey to constant violence and division. It was still familiar with aggression, conquest and destruction. Without speaking of the fratricidal religious struggles that bled the sixteenth and seventeenth centuries and remained in everyone’s memories, territorial redistribution and the redrawing of borders were constant during the Enlightenment, as was the pure and simple elimination of actors from the system as with Poland (1795) or the Republic of Venice (1797). All of this had immediate consequences on the content of the law of nations as it was practised but also as it was developed doctrinally in the major treaties of the time. The attention of jurisconsults was also focused on Europe and it was without any indulgence. They were struck by and far more concerned about European rather than non-European barbarity. This has been confirmed by the investigations of Tom Young and Lucien Bély.\textsuperscript{14} It is anecdotal but suggestive that the term ‘barbaric’ only took on a really negative connotation a century earlier with the Thirty Years War (1618–1648), to designate not those who were referred to as the savages of the Americas but the European neighbour.\textsuperscript{15} The height of irony was reached when, in 1745, the Sublime Porte offered its mediation to settle the troubles among Christians because the wars among Europeans were harming Turkish trade. The Sultan Mahomet seized the opportunity to preach a moral lesson to Christians:

\begin{quote}
Is it not shameful that you Christians, who want to be seen as true believers, have banished from your midst all spirit of peace; and that we Muslims, whom you name \textit{infidels}, are compelled to inspire in you those feelings you ought to have?\textsuperscript{16}
\end{quote}

From this observation made by many jurisconsults about European barbarity in the modern period, it followed that the law of nations that emerged at the time was a code designed to regulate, improve and refine the conduct of \textit{European} individuals, rulers and monarchs. The Roman Catholic Church had itself undertaken from the Middle Ages to civilise the Christian West, especially through canon law and papal bulls, but apart from the

\begin{footnotes}
\end{footnotes}
fact that this wish was profoundly ambivalent in its words and its effects, it was totally called into question by the wars of religion and the Christian fanaticism they triggered. The immense trauma of those wars of religion highlighted the need to discipline the conduct of Europeans and this need was met by the modern law of nations of the mid-eighteenth century. Compounded with this was the fact that the modern law of nations was to be developed conceptually by the school of natural law, whose main representatives had as their primary objective to make morality a science of the universal rules of conduct among humankind. In light of the observations made, this new ethical-legal discourse was not based on European mores, which were far from being considered more refined than those of non-Europeans, but on human nature that was common to all. Ever since Grotius, but above all Pufendorf, writers on the law of nature and of nations had been looking to restore the moral edifice of individual conduct by underpinning it with the science of a rational natural law and not arbitrary European laws. A true critical tradition along these lines was discovered among jurisconsults who were ferociously critical of any feeling of superiority of Europeans compared with non-European civilisations. There is a whole body of writings along these lines, which are too easily overlooked by today’s historiography and that should be rehabilitated as they are astonishingly lucid. Just three of them shall be cited here.

Thomasius, in 1705, openly countered the idea that the law of nations might be the law of civilised European peoples by relativising any idea that the mores of one nation might be superior to another’s.

Who will determine whether any Nation is civilised or barbarous since peoples are equal and this name arose out of the pride of the Greeks, of the Romans and out of that of other peoples who imitated them and foolishly despised other Nations? …
The Mores of what are called civilised Nations may be much crueler than those of Barbarian Nations as can be seen in the treatment of protestants by a catholic Prince.\footnote{Thomasius, \textit{Fundamenta Juris Naturae et Gentium}, LXXII, p. 161.}

Vattel, in 1758, commented:

But while a Nation is bound to further, as far as it can, the advancement of others, it has no right to force them to accept its offer of help. The attempt to do so would
be in violation of their natural liberty… Those ambitious European States which attacked the American Nations and subjected them to their avaricious rule, in order, as they said, to civilize them, and have them instructed in the true religion – those usurpers, I say, justified themselves by a pretext equally unjust and ridiculous. It is surprising to hear the learned and judicious Grotius tell us that a sovereign can justly take up arms to punish Nations which are guilty of grievous crimes against the natural law, which ‘treat their parents in an inhuman manner, like the Sogdians…’.18

Pufendorf, back in 1688, had dwelt on these questions at length connecting them with the law of nations. One could not, he claimed, base the law of nations on any ‘consent of nations’:

for who can claim to be familiar with, I shall not say the mores and customs of all the peoples of the Earth, but even their names? Vain would it be to reply that the consent of civilised Nations suffices and that one should have no regard for barbarian Nations. For is there any people so little enlightened and conscious of its own preservation that wishes to recognise itself as barbarian? Or which nation would be vain enough to claim that all others regulate themselves by it and to believe itself entitled to declare barbarians those whose mores are not consistent with its own?19

He went on to say that this idea of superiority was the idea of the Greeks and then the Romans but also of ‘some peoples of Europe’ of his age who ‘believe themselves superior for the politeness of their mores’.20 But, he pointed out:

there are nations that consider themselves infinitely more polished than us. Long have the Chinese claimed to be the only wise and ingenious people, proudly saying that Europeans have but one eye and that all other peoples are quite blind. There are even peoples who greatly scorn the sciences we cultivate with such care

and who regard them as foreign succour by which we endeavour to make up for our lack of genius. 21

2.2. The Law of Nations as a Code of Good Conduct

Examination shows therefore that no mistake should be made about the intentions of those who contributed the most to building the modern law of nations: whereas some great Catholic thinkers of the second Spanish scholasticism had thought out the law of nations in relation to the conquest and the first major colonisation, the reformed thinkers of the natural school of law which succeeded them from the seventeenth century onwards thought about the law of nations in conjunction with their own intra-European difficulties and their concern to build a new ethics which was to serve as a new foundation for law and to reform conduct. They concentrated on problems which had become questions of priority and that were of a strictly intra-European order. The establishment of modern states, the Reform, the endless wars, the escape from religion, the preoccupation with responding to violence no longer outside but within Europe, their own economic rivalries and lastly their renewed and powerful aspiration towards happiness and well-being were to be the central concerns of the time. Their faith in reason, method and science meant they were incorrigible optimists and they believed in the benevolence of law to compel the peoples and the sovereigns of Europe to change, to ensure peace and the civil, material and moral well-being of all. They were widely listened to because they answered the aspirations of an era and one of the most fundamental of Western beliefs characteristic of the Enlightenment. The ancient connections between the ideas of law and civilisation were patent and acknowledged. Through this idealised vision, the law of nations was then considered to be what made it possible to tame the arbitrary rule of European rulers, to channel their violence and to impose law and order, justice and happiness. The law of nations was not at all perceived, yet, as itself being an instrument in the service of violence and domination. Like civil law (ius civile comes from civility), it was the thing that civilised, the thing that made the mores of European states more civil and gentler. Discipline, refinement, advancement were very common words in the eighteenth century in all manner of discourse and they were also used in treatises on the law of nature and of nations. With the result that the law of nations that emerged was indeed an instrument for disciplining and

21 Ibid.
refining the major European powers and their populations. Its objective was to guide rulers towards the achievement of the ends of human existence as they were envisioned by jurisconsults but also politicians of the time.

Besides, we find here the influence of the Protestantism of the jurisconsults of the law of nature and of nations which makes it possible to decipher some underlying reasons for this ethical project. By virtue of their belonging to the reformed movement, they were men with a vision of the relationship with God, with faith and knowledge that had markedly changed from that of their Roman Catholic predecessors and a vision that was asserted against the stifling claims of the scholastic Christian world. They were to deploy a genuine war machine against Catholicism and the Roman Catholic Church which had maintained such a hold over the law of nations and foreign relations for so long. In this, the reformed jurisconsults introduced a notion of the universality of the law of nature and of nations which, contrary to what historiography sometimes gives us to believe, Catholic thinkers had barely recognised. Faithfully following in that the teachings of the Church, most Catholic thinkers who had dealt with the law of nations based its application discriminatorily on the fundamental distinction between Christian and non-Christian, civilised and uncivilised peoples. Affirming the universality of the law of nature and of nations was for modern jurisconsults a very good way to combat Church doctrine, to show the inanity of its principles of exclusion based on the superiority of Christian civilisation and to recognise the multiplicity of mores and religions. The law of nations or natural law they theorised was applicable to all peoples because of the common nature of individuals and states, making it possible to encompass pluralism in a new universalism. Such universalism might again be used for imperialist ends when it justified imposing a model of law, but that was not yet the primary aim of jurisconsults whose concerns were more directly dependent on the political, intellectual and religious context of eighteenth-century Europe.

3. A LIBERAL PLURALIST LAW AS AN INSTRUMENT OF EMANCIPATION OF EUROPEAN STATES

23 See E. Jouannet and H. Ruiz-Fabri (eds), Droit international et impérialisme en Europe et aux Eats-Unis (Paris, Société de législation comparée, 2007).
The law of nations of the Moderns was a law that was characterised as being liberal pluralist law to take up the distinctions suggested by Gerry Simpson.\textsuperscript{24} It was liberal pluralist law in the classical sense, that is, it corresponded to a set of rules by which European sovereign states might co-exist while being independent and divided by their moral, philosophical, political and religious conceptions of the good. It required states to respect the sovereign freedom of each, that is, to let them conduct their own affairs and to live as they saw fit without interference from other states.\textsuperscript{25} More specifically, this liberal end-purpose of the modern law of nations was limited to the two primary functions of law in any liberal system: law had to ensure both the freedom and the safety of European states.

Without expanding on all of these aspects, I would like to give the reader a sense of the conception of sovereignty that was at the heart of this new law of nations and the pluralist and anti-hegemonic dimension of that system of law.

\textbf{3.1. State Sovereignty as Freedom}

3.1.1. The notion of sovereign freedom of the state was the cardinal principle on which the whole of the law of nations of the Moderns stood. The jurisconsults of the law of nations were to think of sovereignty of the state or the ruler as they thought of the liberty of individuals in the state of nature and this transposition provides a much better understanding of the concept of sovereignty as it was formulated by them and not as it was theorised by the publicists of internal law such as Jean Bodin in France or Robert Filmer in England.\textsuperscript{26} The outcome was a shift from the seventeenth-century model of the state as a power broker towards the eighteenth-century model of the state as free and independent. The state was considered to be


\textsuperscript{26} J. Bodin, \textit{Les six livres de la République} (1576) (Paris, Fayard, 1986) and R. Filmer, \textit{Patriarcha or the Natural Power of Kings} (1680) http://www.constitution.org/eng/patriarcha.htm.
the sovereign of itself, free and independent, answerable for itself and determining its own ends. One cannot disregard, in this respect, the converging influence of many English-speaking writers with continental jurists, because the Anglo-Saxons were faced with the major fact of the Declaration of Independence of the thirteen American colonies. This was a decisive point for the law of nations of the Moderns, just like the French Revolution. In the eighteenth century, the issue of the subordination of the American colonies stirred far more passion and controversy than the conquest and colonisation of the peoples of Africa and South America.

3.1.2 Richard Price published his celebrated Two Tracts on Civil Liberty in 1778 in which he very clearly defined what a subservient state was: ‘A country that is subject to the legislature of another country, in which it has no voice, and over which it has no control, cannot be said to be governed by its own will. Such a country therefore is in a state of slavery’.27

In France, the marquis de la Maillardière said as much in his Précis du droit des gens, de la guerre, de la paix et des ambassades published in 1775 in which he formulated independence positively: ‘Any nation that governs itself, in whatever form it may be, without depending on any foreigner, by its own authority and its own laws, is a sovereign state’.28

Ideas converged, then, to envision the sovereign state in this way. Sovereignty was not theorised, as it had been by Jean Bodin and many scholars of municipal law two centuries earlier, in the form of state power, ‘royal power’ or the ‘majesty of state’, the sovereign power that quite naturally found its place in the absolutist theories of a Richelieu or Cardin Le Bret. Sovereignty was presented above all as the capacity of the state as a legal entity to make its own determinations independently. In short, state sovereignty was not theorised as ‘power’ but as ‘freedom’, to take up Jean Combacau’s terms.29 Where even seventeenth-century jurisconsults of the law of nations spoke of ‘sovereign authority’, eighteenth-century authors spoke far more readily of ‘sovereign nation’ or ‘free and independent state’. The entire second generation of jurisconsults of the modern law of nations (Vattel, Wolff, Béat Philippe de Vicat, Formay, De Félice, Burlamaqui, Rayneval, De Martens) were to consolidate this

28 De La Maillardière, Précis du droit des gens, de la guerre, de la paix et des ambassades (Paris, Quillau, 1775) pp. 1-2 and 10.
orientation. This sovereign freedom became the distinguishing feature of the state, the necessary condition for it to exist as a state.

True, this conception did not necessarily lead to liberal institutions internally and to the full self-determination of the people, because the concept of sovereignty was conceived of in dissociation by most jurisconsults or politicians as being sovereign freedom externally and sovereign authority of absolute power internally. It is true, too, that many eighteenth-century writers continued to theorise state power as a pivotal concept in international relations, as did, for example, the Abbé Gabriel de Mably, but almost exclusively from the vantage point of political relations among states; therefore without having as their objective to think through the legal discourse of the law of nations itself, as did the jurisconsults specialised in this domain, and therefore with far less impact on the discipline. An author like Mably contributed to a long reflection on the logic of state power – in its relations with morality – whereas the jurists of the law of nature and of nations were primarily concerned with law and therefore with subjecting sovereign authority to law while maintaining its autonomy and its freedom. To stem power so as to preserve the autonomy of each sovereign with respect to others; it was this dual challenge that faced the modern law of nations in reconfiguring the idea of sovereignty and its relationship with law.

Two factors shed light on this liberal formulation of the first modern law of nations based on the idea of state as enjoying sovereign freedom. First, the identification of the state with a legal entity, an idea derived directly from the legal humanism of the age. This idea of a legal entity made it possible to impose an individualist conception on this form of political association that is the modern state. It made the state into an individual and made it a subject of law that accepted to consider other states as its equals and their rights and duties as symmetrical to its own. The result was that the state, as an individual subject, was to be legally answerable for its deeds as a moral and legal entity and to make good any wrongs it might commit against others.

3.1.3. Next, the second factor was the new understanding of the relationship of sovereignty with law, because of the parallel between state sovereignty and individual freedom as theorised in those times. The notion of freedom that emerged in the seventeenth and

---

eighteenth centuries was intimately bound up with law and right. Law was what limited the freedom of men but also the prerequisite for that freedom because, without law, freedom was not freedom in the true sense of the word, it became ‘licence’ to do anything. Licence, which was so common a term in the eighteenth century, reflected the condition of a man delivered up to his passions and therefore a prisoner of his irrational leanings. Such a connection between freedom and law was thought out in exactly the same way for sovereign states: the sovereignty of each state was thought of as a freedom but existed as such only with regard to the law of nations. The treatises on the law of nature and of nations recalled this point to the extent that it became a common place, even in the ministries of state, so dictating one of the fundamental principles of a law-based society, whether internal or international. Besides, it was precisely in the idea that freedom is founded in law that the liberal principle of the primacy of rights lies, which was so often evoked to characterise political liberalism and the end of the relationship constituting ‘the political’, which was supposedly the connection between command and obedience.32

So contrary to what nineteenth-century historiography purported,33 the sovereignty-freedom of the state was in no event defined at the time, especially for Vattel or the Moderns, in any absolute way or as an arbitrary power to do whatever they liked; it did not in any way reflect the non-submission of the state to a higher legal order but the legal situation of the independent political entity in the face of other equally independent entities which were legally recognised as such.

The same movement that led to the recognition of the sovereignty-freedom of states included the recognition of their formal equality. If the law of nations was to protect states’ sovereignty-freedom, it was conditional upon generalised reciprocity and therefore of observance of the equal freedom of all. The law of nations of the time was understood as the law that procured equal consideration of all sovereign nations and equal respect for their rights and duties. This formal equality was decisive at the time: it was asserted in reaction to the old hierarchies among European sovereigns, the existence of unequal rights and seventeenth-century policies of power and domination. In recognising this formal legal equality, the authors of the modern law of nations were by no means unaware of the real inequalities among states at the time. On the contrary, they built this notion on the concrete

fact of these actual inequalities and admitted the existence of feudatory or tributary states, for example, or the survival of old questions of precedence among European monarchs based on ancient vassal, dynastic or imperial rights. But the rule of equality among states, proclaimed notably by Wolff, Vattel and De Martens in the eighteenth century, was designed to allow each state, whatever its size and power, whatever the official rank of its monarch, to play on a level field with others and to have the same rights and duties. In other words, this way of conceiving of equality among states was a new progressionist and modern way of thinking about equality and inequality whereas all ancient, scholastic and medieval thought was based on the recognition of inequalities among different political forms (not yet states) which were considered natural forms. It was accepted in practice because all the sovereigns of the time were to see their mutual interest in such recognition.

3.2. An Anti-Hegemonic and Pluralist Law of Nations

Accordingly, the law of nations of the Moderns was conceived of as a liberal legal system of rights and duties of states with for its first principles the freedom and equality of states. It was thought of as a law of limits devised to encompass and ensure the interplay of freedom-sovereignties. The guidelines were very simple and perfectly sum up a system of individual freedoms: the exercise of rights and duties pertaining to the sovereignty of each state had as its principal limits those that ensured other states enjoyment of those same sovereign rights and duties.

It must be clearly understood that such a liberal system of law concerning states, as sovereign, independent and equal legal entities was introduced originally in order to counteract any hegemonic practice and not to provide a basis for a new domination over the rest of the world. It aimed for relations among states to be organised not for the benefit of the sovereignty of one of their number (the Pope, Holy Roman Empire, or the most powerful state, etc.) but in the interest of all. So much so that it fulfilled above all the expectations of the small and medium-sized European states of the time (which were the great majority) because state sovereignty was ‘liberating’ from this point of view. Besides, analogy required that state sovereignty should be connected with a whole series of individual state rights and duties which, for the most part, were negative freedoms (right to respect of sovereignty, right

to equality, right to preserve oneself, right to defend oneself by war, etc.). Much any
eighteenth-century treatise took up this series of individual rights and duties which was
consecrated in the nineteenth century with the ‘theory of fundamental rights and duties of
states’. The celebrated Déclaration du droit des gens presented by the Abbé Grégoire in
France on 18 June 1793 at the National Convention furnished a fine example of this
eighteenth-century internationalist liberal trend because it was intended to be the counterpart
to the 1789 Déclaration des droits de l’homme et du citoyen.35 It revealed this liberal spirit
which was at the heart of the modern law of nations. Grégoire made a near complete
transposition of the individual laws of nations, following in that Montesquieu, Boucher
d’Argis, Wolff, Vattel, Burlamaqui and many others besides.

The liberal regime of coexistence of sovereignties-freedoms also made mandatory that
other essential principle of tolerance or neutrality since it ensured pluralism of states and their
sovereign freedom as to the choice of their political regime and their religion. This principle
of tolerance, so well analysed by Edward Keene36 – which I shall call here the principle of
neutrality of law – was not formulated as such in terms of the law of nations but was implicit
in all of its working. It notably took the form of the legal principle of non-interference in
states’ internal affairs.

But, as Montesquieu wrote, freedom was also related to security and the feeling of
safety.37 The same was true of the sovereignty-freedom of eighteenth-century European states.
For all the observers of the time, the society formed among European states was fragile
because, outside of any Civitas maxima or of a court of justice of nations that did not exist,
the rights of each sovereign state were often violated by the continuation in the Enlightenment
of seventeenth-century power politics and wars. Several sovereigns and statesmen of the time
were aware of this. This was the paradox of a European society that wanted peace but
maintained warfare as an essential function, of a law of nations that was erected on a new
model of the state as free and independent but which authorised the use of force, of a
European society that remained anarchic but without being anomic. The liberal end-purpose
of the law of nations was therefore to split into two as in any liberal system: the law of nations
was to have as its object the preservation of the security of all states (peace) so as to ensure
the freedom of each.

35 H. de Grégoire, Mémoires de Grégoire, ancien évêque de Blois (Paris, A. Dupont, 1837) V.
1, pp. 128-130. For the historical circumstances see R. Hermon-Belot, L’Abbé Grégoire. La
36 Keene, Beyond the Anarchical Society, pp. 97 ff.
4. CONCLUSION. THE USES OF INTERNATIONAL LAW AND OF THE HISTORY OF INTERNATIONAL LAW

This study seeks to show that the historical readings of a European law of nations built entirely to dominate the world and founded on the principle of otherness through the division into Europeans and non-Europeans does not correspond to what the majority of seventeenth- and eighteenth-century treatises on the law of nations say. Such readings do not match the deep-seated intentions of the authors who wrote those treatises but, and this is the crucial point, neither do they correspond to the major concerns of the sovereigns of Europe. Admittedly, what is proposed here is merely one interpretation and it is above all not a case of freeing the thinking and practice European international law from blame for the colonial exploitation and domination that the world was to know.\textsuperscript{38} The modern law of nations, it has been said several times, contained all the underpinnings for the basic principles of colonialism.

But at the very least this interpretation teaches, it seems to me, three lessons.

First it seems we can resituate colonial and imperialist practices and principles in their most accurate historical period. They were first developed with the great Spanish scholastics of the fifteenth and sixteenth centuries and were to reappear in the middle of the nineteenth century with the advent of the ‘Gentle Civiliser of Nations’.\textsuperscript{39} In other words, they corresponded to the two major waves of European colonisation of the world.\textsuperscript{40} Let us take the example of the nineteenth century to make a comparison. Contrary to the seventeenth and eighteenth centuries, the nineteenth century was no longer a century when Europeans were self-critical and jurisconsults in doubt about how civilised their own states were. It was no longer therefore a matter of disciplining European states but indeed this time of civilising non-Europeans and, once civilised, of admitting them into the law of nations then known as the law of civilised nations. This very name of ‘law of civilised nations’ would not have failed

\textsuperscript{38} Which I wrote about in E. Jouannet, ‘Colonialisme européen et néo-colonialisme contemporain (Notes de lecture des manuels européens du droit des gens entre 1850 et 1914)’, \textit{Baltic Yearbook of International Law}, Vol. 6, 2006, pp. 49-78.


\textsuperscript{40} For these great periods see, R. Robertson, \textit{The Three Waves of Globalization. A History of a Developing Global Consciousness} (London, Zed Books, 2004).
to draw bitterly ironic criticism from the jurisconsults of the previous two centuries. But
mindsets had changed: whereas seventeenth and eighteenth century jurisconsults could be
scathing of certain political regimes of Europe and very critical of violence, of European
mores, as has been seen in the writings of Pufendorf, Thomasius and Vattel, nineteenth-
century European international lawyers reflected in their textbooks a feeling of complete
superiority of European civilisation celebrated as being the civilisation of progress, prosperity
and of liberal humanist values. This development can be explained by the change in the
political and economic context of Europe. The nineteenth century was a particularly stable
century for the European continent which experienced comparatively few wars among states,
unlike in the previous centuries. It was also a century which, from the 1870s onwards, saw the
disappearance of _anciens régimes_ and saw many of them swing progressively towards liberal
regimes. Lastly, it was the century of the industrial revolution and of an incredible economic
and technological leap forward by European states. Accordingly, nineteenth-century
international law scholars had the feeling that European states were liberal, humanistic and far
more peaceful than in the past. They had learnt to contain their territorial ambitions and had
become pacified. In point of fact, as is well known, they shifted their territorial ambitions and
their rivalries, their thirst for enlargement to the rest of the world and the international law
that was to be produced at the time was to accompany and vindicate their domination of three-
quarters of the planet. It was to wheel around and, from a liberal law within Europe, it was to
become an anti-liberal law outside of Europe. All of its most fundamental principles were
used in the sense of domination: freedom to trade became freedom to exploit, treaties between
equals became an instrument of inequality, sovereignty-freedom became protected
sovereignty, legal personality became an instrument of exclusion, the ideal of emancipation a
policy of subordination, decentralised international society a hierarchical society and the right
to security an instrument of police repression.

Second, at a time when many historical versions of international law are multiplying,
it is worth making out a case for this point of view and this interpretation so as to fuel the
debate which sometimes tends to confine international law deliberately to this imperialistic
and colonialist end-purpose alone. It must be clearly seen that contemporary historiography

---

41 See the fuller discussion in Jouannet, _The Liberal-Welfarist Law of Nations_.
42 See, as the most complete and incisive example Anghie, _Imperialism, Sovereignty_. See also
the open debate by Anghie with the commentaries of U. Baxi, ‘New approaches to the history
Barsalou, ‘Commentaire sur Antony Anghie’s Imperialism, Sovereignty and the Making of
has been largely renewed over the last thirty years or so and that several brilliant contemporary studies have shifted our vantage point in a healthy way by deconstructing the false certainties of classical historiography. They offer a critical re-reading of the great Western account of international law as an instrument of progress and highlight the way it has served the domination and exploitation of the periphery by the centre. They reveal the dark side of international law, the way in which international legal discourse has sustained a double language and falsified the humanist principles it brandished before the world. However, the fact is that some of them have tended to swing exclusively towards the counter-narrative. This effect is deliberate for some who wish to produce a discourse of resistance but is unconvincing. As in any domain, the counter-narrative of international law is condemned to reproducing what it denounces. It is nothing more than the mirror image of classical conservative history and reproduces the same conservative effects. Moreover, like the classical narrative, it generally leads to a hardening of points of view and a reinforcement of antagonisms among peoples at a time when the war of memories is particularly keen in the international arena. Now, confronted with this type of narrative, it is of course possible to contemplate other paths and in particular to critically review the European and Western legacy related to international law without turning radically away from it, in other words, to accept it having taken stock of it and to maintain its double emancipating and stabilising potential.


43 See, for example, M. Craven, M. Fitzmaurice and M. Vogiatzi (eds), *Time, History and International Law*, (Leyden, M. Nijhoff, 2006).


Third, the upshot is, and this is the most crucial point, that there is, to my mind, no law of necessity in this area. European international law, as it has been devised, does not lead inexorably to imperialism or anti-imperialism, to colonialism or anti-colonialism. The return to modern European law shows that international law can be an instrument for peace and emancipation from hegemonic policies (as a liberal law governing relations of multiple equal entities) and that it can also be an instrument of domination (in its use to legitimise colonisation and impose domination).\textsuperscript{47} Everything depends in point of fact on the international, cultural, economic and political context in which international law is deployed and its actual usages which are, because it is an instrument that can be used for contradictory ends, liberating, peaceful or oppressive. The context of an age can mean its effects are felt more in the sense of emancipation or in the sense of domination. It might even be thought that ultimately international law is no more and no less than the reflection of our deepest ambivalences.\textsuperscript{48} There is no ‘good’ international law nor any ‘evil’ international law, but a law that is run through by tensions and contradictions, that may be as much the instrument of the most brutal domination as a pathway towards a solution for a world made up of many plural and heterogeneous societies.

\textsuperscript{47} But see, although I agree with many of her analyses, M. Chemillier-Gendreau, \textit{Humanité et souverainetés : Essai sur la fonction du droit international} (Paris, La Découverte, 1995).
\textsuperscript{48} Berman, \textit{Passions et ambivalences}.