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# Historical Exempla in Legal Doctrine: Vattel and R al de Curban on the War of the Spanish Succession

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**History in Legal Doctrine.  
Vattel and Réal de Curban on the Spanish Succession**

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# History in Legal Doctrine.

## Vattel and Réal de Curban on the War of the Spanish Succession.

According to the classical theory of international law, international obligations are the consequence of state consent.<sup>1</sup> In the hierarchy of binding norms, international treaties concluded between two primary subjects of law<sup>2</sup> occupy the most prominent position. Next, international custom, or common normative understandings<sup>3</sup> based on a continuous state practice and ‘general principles of law recognized by civilized nations’. Finally, only as a subsidiary means for the determination of rules of law, ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations’ (art. 38(1) ICJ Statute).<sup>4</sup>

When legal scholars systematise the normative environment into a theoretical framework, they tend to give coherence to what traditionally is rather chaotic, as the list of sources above already indicates. The purpose of their writing is *de lege ferenda*. Concepts and classifications can be taken over by states in creating new law, or by international and national courts and tribunals, interpreting international law.<sup>5</sup> Doctrine can thus generate future international law. This explains why most courses on international law still contain a part on ‘Big Names’, such as Vittoria, Grotius, Isidorus of Sevilla or Lauterpacht.<sup>6</sup>

Legal historians should look behind the surface of the ‘Big Names’ canon. Our current selection of prominent doctrinal figures is arbitrary.<sup>7</sup> Second-rank authors might have been unjustly left out or forgotten. The selection made in the ‘Classics of International Law’<sup>8</sup> series, published by the Carnegie Endowment in the early twentieth century, was a translation of academics’ preferences and thus the actual ‘usefulness’ of doctrine for legal interpretation. The present contribution leaves this question aside and focuses on context, establishing an ‘inventory of differences’, rather than a continuous taxonomy of concepts over time.<sup>9</sup> First, I will set the stage for this contribution, introducing the War of the Spanish Succession, a conflict symbolising the culmination of dynastic conflict at the end of Louis XIV’s *Grand Siècle*.<sup>10</sup> Next, select cases from the war will be approached as they appear in the works of two emblematic eighteenth-century scholars, Réal de Curban and Vattel.

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<sup>1</sup> James Crawford and Ian Brownlie, *Brownlie's principles of public international law* (Oxford 2012), 5.

<sup>2</sup> Randall Lesaffer (ed.), *Peace treaties and international law in European history : from the late Middle Ages to World War One* (Oxford/New York 2004).

<sup>3</sup> Jutta Brunnée and Stephen J. Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’, *Columbia Journal of Transnational Law* XXXIX (2000), 19-17; Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’, *European Journal of International Law* XXVI (2015) (forthcoming). <http://ssrn.com/abstract=2470994> (16 November 2014).

<sup>4</sup> Art 38 (1). Statute of the International Court of Justice, 29 June 1945, 33 UNTS 933.

<sup>5</sup> Robert Kolb, *Interprétation et création du droit international : esquisses d’une herméneutique juridique moderne pour le droit international public* (Bruxelles 2006).

<sup>6</sup> A. de la Pradelle, *Maîtres et doctrines du droit des gens* (Paris 1950<sup>2</sup>).

<sup>7</sup> Cornelis van Bynkershoek, *Les deux livres des questions de droit public, dont le premier est sur la matière des guerres, et le second sur des matières de thèmes divers* (ed. Dominique Gaurier) (Limoges 2010) ; Alfred Dufour, ‘Droit international et chrétienté: des origines espagnoles aux origines polonaises du droit international. Autour du sermon *De bellis justis* du canoniste polonais Stanislas de Skarbimierz’, in: Pierre-Marie Dupuy and Vincent Chetail (ed.), *The Roots of International Law-Les fondements du droit international* (Leiden/Boston 2014), 95-120 ; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Reichspublizistik und Polizeiwissenschaften 1600-1800* (München 1988) ; Guido Braun, *La connaissance du Saint-Empire en France 1643-1756* (Paris 2010).

<sup>8</sup> James Brown Scott, *The Classics of international law* (Washington/New York/Oxford 1911).

<sup>9</sup> Bruno Arcidiacono, *Cinq types de paix : une histoire des plans de pacification perpétuelle, XVII<sup>e</sup>-XX<sup>e</sup> siècles* (Paris 2011), 69-70.

<sup>10</sup> François Bluche (ed.), *Dictionnaire du Grand Siècle* (Paris 2005).

## I. Setting the Stage

### A. Fighting For Supremacy in Europe: Habsburg v. Bourbon

The War of the Spanish Succession, fought from about 1701-1702 to 1713-1714, fundamentally reconfigured the European chessboard.<sup>11</sup> Archduke Charles of Austria (1685-1740) faced Philip of Anjou (1683-1740), grandson of Louis XIV (1638-1715)<sup>12</sup> in a struggle with continent-wide and even global implications<sup>13</sup>. Philip conquered the crown of Spain, but had to cede considerable parts of the Spanish composite monarchy<sup>14</sup> to his Habsburg competitor, who had been elected Emperor in 1711.<sup>15</sup> Present-day Belgium (minus Liège), the Southern Netherlands, came under Austrian rule,<sup>16</sup> just as Naples<sup>17</sup> or Milan. Spain welcomed a Bourbon monarch,<sup>18</sup> Gibraltar became British,<sup>19</sup> Catalonia and Scotland were absorbed. Hundreds of thousands of soldiers and civilians died. In the middle run, the war ended a century of bloodshed and brought a point of rest in the secular confrontation between Bourbon and Habsburg monarchs.<sup>20</sup>

I previously argued that the discussion on the succession in Spain was an example of a broader shift from mainly private law-dependent argumentation to an autonomous system of horizontal and bottom-up constructed public international law.<sup>21</sup> This element has been often ignored by historians. The War of the Spanish succession was at the same time inevitable and avoidable. The eventual partition of European monarchies agreed to in 1713-1714 followed the logic of earlier partition treaties in 1697-1700,<sup>22</sup>

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<sup>11</sup> François-Eugène Vault and Jean-Jacques-Germain Pelet, *Mémoires militaires relatifs à la succession d'Espagne sous Louis XIV extraits de la correspondance de la Cour et des généraux rev., publ. et précédés d'une introd. par le lieutenant-général Pelet* (Paris 1835); François-Auguste Mignet, *Négociations relatives à la Succession d'Espagne sous Louis XIV* (Paris 1835); Arsène Legrelle, *La Diplomatie française et la Succession d'Espagne: 1659-1725, Vol. IV* (Paris 1892); Alfred Baudrillart, *Philippe V et la cour de France : d'après des documents inédits tirés des archives espagnoles de Simancas et d'Alcala de Hénarès et des Archives du Ministère des affaires étrangères à Paris* (Paris 1890); Émile Bourgeois, *La Diplomatie secrète au XVIII<sup>e</sup> siècle* (Paris 1909-1910); Johanna Geertruida Stork-Penning, *"Het Grote werk" vredesonderhandelingen gedurende de spaanse successie-oorlog 1705-1710* (Groningen 1958); Lucien Bély, *Espions et ambassadeurs au temps de Louis XIV* (Paris 1990); Linda Frey and Marsha Frey (ed.), *The treaties of the War of the Spanish Succession : an historical and critical dictionary* (Westport (Conn.) 1995); David Chandler, *The art of warfare in the Age of Marlborough* (London 1976); John B. Hattendorf, 'Alliance, encirclement and attrition: British grand strategy in the War of the Spanish Succession, 1702-1713', in: Paul Kennedy (ed.), *Grand strategies in war and peace* (New Haven 1991), 11-30; William Roosen, 'The Origins of the War of the Spanish Succession', in: Jeremy Black (ed.), *The Origins of War in Early Modern Europe* (Edinburgh 1987), 151-175; Reginald De Schryver, *Max II. Emanuel von Bayern und das spanische Erbe : die europäischen Ambitionen des Hauses Wittelsbach 1665-1715* (Mainz am Rhein 1996); Jens Metzdorf, *Politik - Propaganda - Patronage. Francis Hare und die englische Publizistik im spanischen Erbfolgekrieg* (Mainz 2000); Joaquim Albareda i Salvadó, *La guerra de sucesión de España, 1700-1714* (Barcelona 2010); Stefan Smid, *Der Spanische Erbfolgekrieg: Geschichte eines vergessenen Weltkriegs (1701-1714)* (Köln 2011); Frederik Dhondt, *Op Zoek naar Glorie in Vlaanderen. De Zonnekoning en de Spaanse Successie (1707-1708)* (Kortrijk-Heule 2012).

<sup>12</sup> Lucien Bély, *Louis XIV le plus grand roi du monde* ([Paris] 2005), Olivier Chaline, *Le règne de Louis XIV* (Paris 2005),

<sup>13</sup> Thierry Sarmant, *1715 : la France et le monde* (Paris 2014).

<sup>14</sup> Antonio Álvarez-Ossorio, Bernardo J. García García and Virginia León Sanz (ed.), *La pérdida de Europa. La guerra de Sucesión por la Monarquía de España* (Madrid 2007).

<sup>15</sup> Karl Otmar von Aretin, *Kaisertradition und österreichische Grossmachtpolitik (1684-1745)* (Stuttgart 1997).

<sup>16</sup> Klaas Van Gelder, *Tien jaar trial-and-error ? De opbouw van het Oostenrijks bewind in de Zuidelijke Nederlanden (1716-1725) (diss. doc.)* (Gent 2012).

<sup>17</sup> Angelantonio Spagnoletti, 'Il dibattito politico a Napoli sulla Successione di Spagna', *Cheiron* 39-40 (2004), 267-310.

<sup>18</sup> Lucien Bély (ed.), *La présence des Bourbons en Europe, XVI<sup>e</sup>-XXI<sup>e</sup> siècle* (Paris 2003).

<sup>19</sup> Stetson Conn, *Gibraltar in British Diplomacy in the Eighteenth Century* (New Haven 1942).

<sup>20</sup> André Corvisier, 'Présence de la guerre au XVII<sup>e</sup> siècle', in: Lucien Bély, et al. (ed.), *Guerre et paix dans l'Europe du XVII<sup>e</sup> siècle* (Paris 1991), 13-27.

<sup>21</sup> Frederik Dhondt, 'Law on the Diplomatic Stage: the 1725 Ripperda Treaty', in: Viktoria Draganova, et al. (ed.), *Die Inszenierung des Rechts - Law on Stage* (München 2011), 303-324.

<sup>22</sup> John C. Rule, 'The Partition Treaties, 1698-1700: A European View', in: Esther Mijers and David Onnekirk (ed.), *Redefining William III: The Impact of the King- Stadholder in International Context* (Ashgate 2007), 91-108;

and even of an almost fifty-year old secret partition between Louis XIV and Leopold I in 1668.<sup>23</sup> No monarch could dominate Europe. The composite Spanish monarchy was to be split up in order to preserve the European State System as a whole. In that sense, the Peace of Utrecht was far more important than the Peace of Westphalia, concluded at a time where conflict was still raging on between Spain and France.<sup>24</sup> Consequently, all conflicting rules of a municipal nature, even the most fundamental ones, could be cast aside.<sup>25</sup> However, this style of reasoning seemed to have been limited to diplomatic practice alone. Legal theory lived in a different world. Christian Wolff<sup>26</sup> or Emer de Vattel are seen as authors of natural law.<sup>27</sup>

## B. Réal and Vattel: Erudition v. Philosophy ?

The impact of the War of the Spanish Succession was so considerable across Europe, that it could hardly have escaped legal authors a generation later<sup>28</sup>. My attention was immediately drawn by the narrative techniques used in doctrine since humanism.<sup>29</sup> The use of historical examples can be seen as a

Lucien Bély, 'La diplomatie européenne et les partages de l'empire espagnol', in: Antonio Álvarez-Ossorio, et al. (ed.), *La pérdida de Europa. La guerra de Sucesión por la Monarquía de España* (Madrid 2007), 631-652.

<sup>23</sup> Jean Béranger, 'Une tentative de rapprochement entre la France et l'Empereur', in: Daniel Tollet (ed.), *Guerres et paix en Europe Centrale aux époques moderne et contemporaine : mélanges d'histoire des relations internationales offerts à Jean Béranger* (Paris 2003), 221-236.

<sup>24</sup> Heinhard Steiger, 'Rechtliche Strukturen der europäischen Staatenordnung 1648-1792', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* LIX (1999), 609-649 ; Daniel Seré, 'La paix des Pyrénées ou la paix du roi: le rôle méconnu de Philippe IV dans la restauration de la paix entre l'Espagne et la France (1659)', *Revue d'histoire diplomatique* CXIX (2005), 243-262.

<sup>25</sup> Frederik Dhondt, 'Équilibre et hiérarchie : l'argument juridique dans la diplomatie française et anglaise après la Paix d'Utrecht', in : Nicolas Drocourt and Eric Schnakenbourg (ed.), *Thémis en diplomatie : l'argument juridique dans les relations internationales de l'antiquité tardive à la fin du XVIII<sup>e</sup> siècle* (Rennes 2015) (forthcoming).

<sup>26</sup> Christian L.B. von Wolff, *Institutiones Iuris Naturae et Gentium in quibus ex ipsa Homini Natura continuo nexu omnes obligationes et jura omnia deducuntur* (Venetiis 1761).

<sup>27</sup> Emer de Vattel, *Le droit des gens, ou, Principes de la loi naturelle, appliqués à la conduite & aux affaires des nations & des souverains* (À Londres (Neuchâtel) 1758) [further : Vattel]; Emer de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (Washington 1916 [1758]); Francis Stephen Ruddy, *International law in the enlightenment. The background of Emmerich de Vattel's Le droit des gens* (New York 1975); Peter Haggemacher and Vincent Chetail (ed.), *Vattel's International Law from a XXI<sup>st</sup> Century Perspective - Le Droit International de Vattel vu du XXI<sup>e</sup> Siècle* (Boston 2011); Walter Rech, *Enemies of mankind : Vattel's theory of collective security* (Boston 2013); Stéphane Beaulac, 'Emer de Vattel and the externalization of sovereignty', *Journal of The History of International Law - Revue d'histoire du droit international* V (2003), 237-292 ; Stéphane Beaulac, *The power of language in the making of international law: the word sovereignty in Bodin and Vattel and the myth of Westphalia* (Leiden/Boston 2004); Georg Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?', *Journal of The History of International Law - Revue d'histoire du droit international* X (2008), 181-209 ; Peter Haggemacher, 'L'Etat souverain comme sujet du droit international, de Vitoria à Vattel', *Droits: revue française de théorie juridique* (1992), 11-20 ; Carlo Santulli, 'Emmerich de Vattel (1714-1767)', in: Olivier Cayla and Jean-Louis Halpérin (ed.), *Dictionnaire des grandes oeuvres juridiques* (Paris 2010), 591-593; Peter Pavel Remec, *The position of the individual in international law according to Grotius and Vattel* (Leiden/Boston 1960); Alexander Orakhelashvili, 'The origins of consensual positivism - Pufendorf, Wolff and Vattel', in: Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Cheltenham 2011), 93-110; Christoph Good, *Emer de Vattel (1714-1767) - Naturrechtliche Ansätze einer Menschenrechtsidee und des humanitären Völkerrechts im Zeitalter der Aufklärung* (Baden 2011); Bruno Arcidiacono, 'De la balance politique et de ses rapports avec le droit des gens: Vattel, la 'guerre pour l'équilibre' et le système européen', in: Haggemacher and Chetail (ed.), *Vattel's International Law*, 77-100; Stephen C. Neff, 'Vattel and the Laws of War: A Tale of Three Circles', in: Haggemacher and Chetail (ed.), *Vattel's International Law*, 317-334; Frederik Dhondt, 'VATTEL's Le droit des gens', in: Serge Dauchy, et al. (ed.), *The Books that made Law in the Western World (13<sup>th</sup> Century-1940)* (Heidelberg 2015), forthcoming.

<sup>28</sup> Emmanuelle Tourme-Jouannet's impressive study on *Le droit des gens* by Vattel begins by eliminating political history or contextual factors that could have influenced her main subject. Yet, the author stated that establishing a study of positive law had been her subject's undertaking. See Emmanuelle Tourme-Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris 1998), 9.

<sup>29</sup> Xavier Prevost, 'Mos Gallicus jura docendi. La réforme humaniste de la formation des juristes', *Revue historique de droit français et étranger* (2011), 499-513 ; Alain Wijffels, 'Early-modern scholarship on international law', in:

technique to invalidate improbable argumentation drawn from authority-reasoning, such as as the famous *Donatio Constantini*.<sup>30</sup> Yet, the use of history can also be instrumental, in order to support a thesis brought forward by an author from his own, subjective point of view.<sup>31</sup> The relationship between history and legal writing is complex. Traditionally, the critical study of authentic documents enabling a reliable account of legal precedent is associated with humanism. However, by the eighteenth century, historiography had been split up according to two different approaches. On the one hand, erudites assembled verifiable piles of knowledge. On the other hand, philosophers as Voltaire (1694-1778)<sup>32</sup>, or, later in the eighteenth century, Turgot or Condorcet used history as a theoretical reflection on the past.<sup>33</sup> In his *Discours préliminaire* to the *Encyclopédie*, d'Alembert derided erudition, as a quality of the reproductive mind, lacking originality or utility for society.<sup>34</sup> In the words of La Bruyère :

‘des esprits, si je l'ose dire, inférieurs et subalternes, qui ne semblent faits que pour être le recueil, le registre ou le magasin de toutes les productions des autres génies.’<sup>35</sup>

The two authors selected in this contribution, Gaspard Réal de Curban (1682-1752) and Emer de Vattel (1714-1767), had the ‘bad luck’ to be overshadowed by two main Enlightenment thinkers. Voltaire thought that Réal was outright boring, Rousseau had far a far bigger audience than his contemporary Vattel. Réal de Curban has received scant attention in historiography<sup>36</sup> and is often loathed as a compiler, similar to bureaucrats as Nicolas-Louis Le Dran (1687-1774).<sup>37</sup> His contemporary Mably (1709-1785)<sup>38</sup> was more favourably received. Dietrich Heinrich Ludwig von Ompteda (1746-1803), however, had

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Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Cheltenham 2011), 23-60.

<sup>30</sup> Jean Rousset de Missy, *Les intérêts présents des puissances de l'Europe, Fondés sur les Traitez conclus depuis la Paix d'Utrecht inclusivement, & sur les Preuves de leurs Prétentions particulières* (La Haye 1733), I, 59.

<sup>31</sup> Johannes Burkhardt, ‘Geschichte als Argument in der Habsburgisch-Französischen Diplomatie’, in: Sven Externbrink (ed.), *Formen internationaler Beziehungen in der Frühen Neuzeit; Frankreich und das Alte Reich im europäischen Staatensystem: Festschrift für Klaus Maletke zum 65. Geburtstag*, (Berlin 2001), 191-217.

<sup>32</sup> Voltaire, *Histoire du siècle de Louis XIV* (La Haye 1752); Voltaire, *Essay sur l'Histoire générale, et sur les moeurs et l'esprit des nations, depuis Charlemagne jusqu'a nos jours*. Nouvelle édition, revue, corrigée & considérablement augmentée. (Genève 1761).

<sup>33</sup> Chantal Grell, *L'histoire entre érudition et philosophie : étude sur la connaissance historique à l'âge des Lumières* (Paris 1993), 28.

<sup>34</sup> ‘une science hérissée, souvent ridicule, et quelquefois barbare’ (Jean le Rond d'Alembert, *Discours préliminaire de l'Encyclopédie*, Paris 1751 [1763], 76).

<sup>35</sup> Jean de La Bruyère, *Les Caractères de Théophraste, traduits du grec, ou les Caractères avec les moeurs de ce siècle*. (Paris 1691), XII, §62.: ‘ils sont plagiaires, traducteurs, compilateurs; ils ne pensent point, ils disent ce que les autres ont pensé; et, comme le choix des pensées est invention, ils l'ont mauvais, peu juste et qui les détermine plutôt à rapporter beaucoup de choses que d'excellentes choses; ils n'ont rien d'original et qui soit à eux.’

<sup>36</sup> Fanny Siam, “Une soumission éclairée n'en est que plus prompte et plus sincère” : souveraineté et bonheur public chez le juriste Gaspard de Réal de Curban (1682-1752) (diss. lic.) (Genève 2000), 11-15. In spite of Réal's condemnation by the philosophes, he received a Spanish translation of his work by Don Mariano Joseph Sala, *La Ciencia del Gobierno, Obra de Moral, de Derecho, y de Política, que comprende los principios del Mando, y de la Obediencia, en qué se reducen todas las materias de Gobierno* (Madrid 1775), as well as a German, *Die Staatskunst oder vollständige und gründliche Anleitung zu Bildung kluger Regenten, geschickter Staatsmänner und rechtschaffener Bürger* (transl. Johann Philipp Schulin) (Leipzig 1766), 1076 p. The Jesuit journal *Journal de Trévoux* extensively reported on each volume published, lauding his ‘érudition immense, génie ferme, critique sûre, logique saine, précision également méthodique et lumineuse’ (Siam, *Soumission*, 44.). See also Jean-Mattieu Mattéi's elaborate treatment of Réal and his doctrinal comparison with his eighteenth century contemporaries : *Histoire du droit de la guerre, 1700-1819 : introduction à l'histoire du droit international ; avec une biographie des principaux auteurs de la doctrine internationaliste de l'Antiquité à nos jours* (Aix-en-Provence : PUAM, 2006). Mattéi attributes the exclusion of natural law from international law to Réal's introductory distinctions (*Ibid.*, 230).

<sup>37</sup> Frederik Dhondt, 'Looking Beyond the Tip of the Iceberg: Diplomatic Praxis and Legal Culture in the History of Public International Law', *RechtSkultur - Zeitschrift für Europäische Rechtsgeschichte/European Journal of Legal History/Journal européen d'histoire du droit - Methode der Rechtsgeschichte und ihrer Nachbarwissenschaften beim Umgang mit rechtshistorischen Quellen* 2 (2013), 31-42; Christian Fournier, *Nicolas-Louis Le Dran, 1687-1774, "homme de Mémoires"* (*Mémoire de Master 2, Paris IV-Sorbonne*) (Paris 2009).

<sup>38</sup> Gabriel Bonot de Mably, *Le droit public de l'Europe fondé sur les traités* (Genève 1748).

nothing but laudatory remarks on Réal's treatment of the law of nations.<sup>39</sup> Réal omitted important areas, such as maritime law, but this did not make up for his fine and –foremost- practically useful treatment of embassies, war or treaty law.<sup>40</sup> Albeit... with a zest of French chauvinism.<sup>41</sup> Precisely this remark by Ompteda shows how sensitive the Spanish Succession still was. Vattel's work is the next in von Ompteda<sup>42</sup>'s standard review of literature. The latter perfectly demonstrates how all chapters in Vattel conform to those of Wolff's analysis of the law of nations.<sup>43</sup>

However, although the Neuchatelian diplomat and writer seems to limit himself to a mere transposal of Wolff's Latin writings into the more accessible French, it is clear that Vattel dropped essential elements, such as Wolff's *Civitas Maxima*, or the collective organ of the society of States.<sup>44</sup> Moreover, Ompteda expressed his frustration with Vattel's *superficiality*.<sup>45</sup> The author proclaimed to be writing for statesmen and diplomats. Well, then, why not illustrate the general theory of Wolff by:

'Beispiele und Beweise aus der Geschichte, besonders der neueren, zu erläutern und zu unterstützen suchet, als worunter sich Real sehr gegen ihn auszeichnet.'<sup>46</sup>

Present-day judgements on Vattel are more nuanced. The author, 'un diplomate qui [...] avance [...] ses opinions personnelles'<sup>47</sup>, foresaw the necessary pragmatic handles in his manuscript. He did not conceive of natural law as a top-down ordained command on subjects. Consequently, the virtue of the sovereigns (who did feel concerned), would automatically restrain even the most ferocious beasts among the crowned heads of Europe, and bring them to measure and reason, in order not to forfeit their reputation.<sup>48</sup> What cannot be denied, however, is his clearly subjective oriented discourse towards France and the Pope. Writing as the legal counsel of an independent multi-confessional republic,<sup>49</sup> Vattel, son of a Calvinist minister<sup>50</sup>, consistently argued in favour of self-determination and filled his work with anti-Popish,<sup>51</sup> anti-Imperial<sup>52</sup> or anti-French innuendo.<sup>53</sup> The supplementary value of the oath accompanying a

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<sup>39</sup> Ludwig von Ompteda, *Literatur des gesammten sowohl natürlichen als positiven Völkerrechts* (Regensburg 1785), I, 334, §98: 'seines wahren Werths ohngeachtet in Teutschland wenig bekannt und noch weniger geschätzt ist.'

<sup>40</sup> *Ibid.*, I, 338.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, I, §99, 338-339.

<sup>43</sup> *Ibid.*, I, §99, 345. Frederik Dhondt, 'VATTEL's Le droit des gens'.

<sup>44</sup> von Ompteda, *Literatur*, I, §99, 345. Vattel did however suggest these omissions: 'Je me suis borné à prendre dans l'Ouvrage de M. WOLF ce que j'y ai trouvé de meilleur [...] mais j'ai puisé avec choix [...] je diffère entièrement de M. WOLF dans la manière d'établir les fondemens de cette espèce de Droit des Gens, que nous appelons Volontaire. M. WOLF déduit de l'idée d'une espèce de grande République (*Civitas Maxima*) [...] Cette idée ne me satisfait point, & je trouve la fiction d'une pareille République, ni bien juste, ni assez solide pour en déduire les règles d'un Droit des Gens universel & nécessairement admis entre les Etats souverains ? (Vattel, B. I, Preface).

<sup>45</sup> *Ibid.*, I, §99, 346.

<sup>46</sup> *Ibid.*, : 'Hätte Vattel diesen Vorzug seinem Werke gegeben, und es dadurch practischer gemacht, so würde es gewiss noch weit grösseren Nutzen nach sich ziehen, und sich noch weit mehr in den Händen der Grossen und überhaupt dererjenigen befinden, von denen die praktische Ausübung des Völkerrechts abhänget.'

<sup>47</sup> Dominique Gaurier, *Histoire du droit international* (Rennes 2014) 171. 'un certain réalisme pratique, qui le met un peu à l'abri des thèses purement jusnaturalistes' (*Ibid.*, 173). Elisabetta Fiocchi Malaspina, 'La boussole des Souverains: l'application du droit des gens de Vattel dans la diplomatie internationale' in: Drocourt and Schnakenbourg (ed.), *Thémis en diplomatie*, forthcoming. Vattel's extremely pragmatic approach gave rise to numerous internal contradictions which –paradoxically- partly explains its extraordinary success with US lawyers and tribunals (Vincent Chetail, 'Vattel and the American Dream: An Inquiry into the Reception of the *law of Nations* in the United States', in: Pierre-Marie Dupuy and Vincent Chetail (ed.), *The Foundations of International Law-Les fondements du droit international* (Leiden/Boston 2014), 251-300).

<sup>48</sup> Vattel, B. II, Ch. I, §1.

<sup>49</sup> Vattel, B. I, Ch. XII, § 130: 'La liberté de conscience est de droit naturel'.

<sup>50</sup> Yves Sandoz (ed.), *Réflexions sur l'impact, le rayonnement et l'actualité du "Droit des gens" d'Emer de Vattel* (Bruxelles 2010) 202.

<sup>51</sup> Vattel, B. I, Ch. IV, § 51: tyranny of Philip II of Spain exerted on his Protestant subjects; *Ibid.*, Ch. XVIII, §208: praise for English Puritans, who at least pay a price for occupied land previously detained by 'les Sauvages';

treaty is the object of Vattel's irony. Only in remote ages of obscurity and ignorance did men believe they were bound by oath, subject to Papal intervention and annulation:<sup>54</sup>

‘Les enfans mêmes savent aujourd’hui, que le serment ne constituë point l’obligation de garder une Promesse ou un Traité : il prête seulement une nouvelle force à cette obligation, en y faisant intervenir le nom de Dieu. Un homme sensé, un honnête-homme, ne se croit pas moins lié par sa parole seule, par sa foi donnée, que s’il y avoit ajouté la religion du serment.’<sup>55</sup>

At some instances, Vattel committed lapidary factually inaccurate assertions. E.g. when he described the French invasion of the Southern Netherlands in 1667, at the occasion of the War of Devolution. According to the Neuchatelian author, ‘LOUIS XIV. étoit au milieu des Pais-bas, avant que l’on sçut en Espagne qu’il prétendoit à la Souveraineté d’une partie de ces riches Provinces, du chef de la Reine son Epouse’.<sup>56</sup> This assessment was not entirely correct: French claims were already very well known for years by the time of Louis’ invasion.<sup>57</sup> France insisted on the payment of Queen Marie Thérèse (1638-1683)’s dowry and linked this to the validity of her renunciation sworn as Spanish Infanta, based on cause theory in contract law and natural law. A consistent pamphlet accompanying the invasion listed all claims based on customary inheritance rules in the Southern Netherlands.<sup>58</sup>

Vattel was extremely subjective on conference diplomacy as well. From 1712 to 1730, Europe knew no less than five successive multilateral conferences: Utrecht, Baden, Brunswick, Cambrai and Soissons.<sup>59</sup> They were dismissed as :

‘ennuyeuses comedies, jouées sur le théâtre politique ; & dans lesquelles les principaux Acteurs se proposoient moins de faire un accommodement, que de paroître le désirer.’<sup>60</sup>

International guarantees, the backbone of the European State System after the Peace of Utrecht (1713), were brought into question by Vattel, since ‘they are always conceived as subsidiary to the rights of

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*Ibid.*, Ch. XIV, §179: affirmation according to which Protestant members of the Holy Roman Empire have a twice as populous as their Catholic counterparts; *Ibid.*, Ch. XIV, §155: Roman Catholic clergy imposing taxes on fresh husbands to obtain the right to sleep with their wives in the first three nights after the ceremony, with reference to a *Réglement du Parlement* of 19 March 1409 and Montesquieu’s *Esprit des Loix*, cynically noting that those clearly were ‘les nuits qu’il falloit choisir; on n’auroit pas tiré grand argent des autres.’; *Ibid.*, Ch XII, §§ 150-151: complaints on the jurisdictional competence and immunities of the clergy, and on the injustice of the celibacy (§ 140, 149).

<sup>52</sup> Vattel, B. II, Ch. III, § 41: royalty liberated the House of Brandenburg from serfdom under the House of Habsburg.

<sup>53</sup> Vattel, B. I, Ch. XII, 57, § 144: the ambition of popes and clerics is fuelled by the ‘superstition des peuples’; B. I, Ch. IV, § 39: ‘ces impôts accablants, dont les deniers sont dissipés par un luxe ruineux, ou livrés à des Maitresses & à des Favoris.’; *Ibid.*, Ch. XX, §242, ridiculing the Parliament of Paris, humbly remonstrating to the French King on formal aspects of Royal legislation.

<sup>54</sup> Vattel, B. II, Ch. XV, §223.

<sup>55</sup> *Ibid.*, Ch. XV, §225.

<sup>56</sup> *Ibid.*, Ch. XVIII, §335.

<sup>57</sup> Mignet, *Négociations*, 64-89.

<sup>58</sup> François-Paul de Lisola, *Bouclier d’etat et de justice contre le dessein manifestement découvert de la monarchie universelle, sous le vain prétexte des prétentions de la reine de France* ((S. l.) 1667); Markus Baumanns, *Das publizistische Werk des kaiserlichen Diplomaten Franz Paul Freiherr von Lisola (1613-1674) : ein Beitrag zum Verhältnis von Absolutistischem Staat, Öffentlichkeit und Mächtepolitik in der frühen Neuzeit* (Berlin 1994); Delphine Montariol, *Les droits de la reine. La guerre juridique de dévolution (1667-1674) (diss. doc.)* (Toulouse 2005); Antoine Bilain, *Traité des droits de la reine très-chrétienne sur divers États de la monarchie d’Espagne* (Paris 1667) ; Philippe Le Bailly, *Louis XIV et la Flandre, problèmes économiques, prétextes juridiques (diss. doc.)* (Paris 1970) ; Pierre Stockmans, *Tractatus de jure devolutionis* (Bruxellis 1667).

<sup>59</sup> Karl-Heinz Lingens, ‘Kongresse im Spektrum der Friedenswährenden Instrumente des Völkerrechts’, in: Heinz Duchhardt (ed.), *Zwischenstaatliche Friedenswahrung in Mittelalter und früher Neuzeit* (Köln 1991), 205-226; Heinz Duchhardt, *Gleichgewicht der Kräfte, Conenance, europäisches Konzert. Friedenskongresse u. Friedensschlüsse vom Zeitalter Ludwigs XIV. bis zum Wiener Kongress* (Darmstadt 1976).

<sup>60</sup> Vattel, B. II, Ch. XVIII, §330.



third parties'. To be more specific: if France guaranteed Charles VI's Pragmatic Sanction in 1735,<sup>61</sup> this obligation was rendered void by the fact that the document violated the rights the Elector of Bavaria Charles Albert of Wittelsbach (1697-1745), a French ally, claimed on the basis of his marriage with a daughter from the preceding Emperor.<sup>62</sup> As far as treaties were concerned, the *lex posterior*-principle did not count for Vattel.<sup>63</sup> This clearly is no example of impartial and abstract legal reasoning. The relative brevity of Vattel's historical *exempla* prevents the development or comparison of specific argumentation and harms the credibility of his theoretical statements. In the following section, I compare his and Réal's interpretation of events and legal argumentation during and after the War of the Spanish Succession, and confront them with evidence from diplomatic sources where applicable.

## II. The War of the Spanish Succession as an Historical *Fundgrube*

The use of contemporary *exempla* in legal doctrine was made possible by the abundance of eighteenth century publications on military conflicts. It would be an overstatement to see in the War of the Spanish Succession the birth of European public opinion.<sup>64</sup> However, in contrast to the situation in the early seventeenth century, when Grotius composed his *De iure belli ac pacis*, the reliability of published treaty collections had already been established.<sup>65</sup> Jean du Mont de Carels-kroon's *Corps Universel Diplomatique du Droit des Gens*<sup>66</sup> and its complementary volumes by Jean Rousset de Missy<sup>67</sup> were standard works. Whereas Grotius mainly quoted examples from Antiquity, Réal or Vattel had no similar heuristic problems: published documents, legal as well as political, were abundant. Both men lived in a different era

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<sup>61</sup> Treaty of Peace between Charles VI and Louis XV, Vienna, 3 October 1735, Rousset, *Supplément au CUD*, II, nr. CXCIVII, 546-548.

<sup>62</sup> Vattel, B. II, Ch. XVI, §238.

<sup>63</sup> *Ibid.*, Ch. XII, § 165.

<sup>64</sup> Solange Rameix, *Justifier la guerre : Censure et propagande dans l'Europe du XVII<sup>e</sup> siècle (France-Angleterre)* (Rennes 2014).

<sup>65</sup> Martens, preface, reprint in *CTS* I, x, pointing to collections by Jean Tillet (*greffier* at the Parliament of Paris), *Recueil des guerres et traités de paix, de trêve, d'alliance d'entre les rois de France et d'Angleterre depuis Philippe Ier, roi de France, jusqu'à Henri II* (Paris 1588), or the Germans Goldast, *Impp., regum et electorum S.R.I. statuta et rescripta a Carolo M. ad Carolo V, et a Carolo V ad Rudolphum II* (Frankfurt, 1607) and Hortleder, *Ursachen des Schmalkaldischen Krieges* (Jena 1617). Rousset made his own adaptation of the *Theatrum Europeum*-collection, which started in 1617 (Frankfurt) and ran up to 21 versions (1738) (*Theatrum Europaeum Oder Aufgeführliche und Warhafftige Beschreibung aller und jeder denckwürdiger Geschichten* (Frankfurt 1617-1738). Contemporary publications, such as those of Zink (*Rube des jetzt lebenden Europa Oder Die neueste und merkwürdigste Europaeische Friedens-Handlungen, Commerciën - Tractate, Neutralitäts-Acten, Waffen-Stillstände / Confoederationen, Allianzen, Gwarantien, nebst andern publicqven Sanctionen und Urkunden*, Coburg 1727) or Johann Christian Lunig (*Codex Germaniae Diplomaticus*, Leipzig, 1732-1733; *Das Teutsche Reichs-Archiv*, Leipzig 1710-1723) did not cover more than Du Mont and Rousset's collection, nor did the English *A general collection of treaties, declarations of war, manifestos and other public papers relating to peace and war among the potentates of Europe from 1648 to the present time* (London 1732) or Rymer's historically oriented volumes. It should be noted, that his approach of ancient history already consisted a step further than that of his predecessors (Ernest Nys, *Le droit de la guerre et les précurseurs de Grotius* (Bruxelles 1882), 155; Stephen C. Neff, *Justice Among Nations. A History of International Law* (Cambridge (Mass.) 2014) 190).

<sup>66</sup> Jean Du Mont de Carels-kroon, *Nouveau recueil de traités d'alliance, de trêve, de paix, de garantie et de commerce faits et conclus entre les rois, princes et Etats souverains de l'Europe, depuis la paix de Munster juesqu'à l'an 1709* (Amsterdam 1710); *Idem*, *Corps universel diplomatique du droit des gens* (La Haye 1731); F. De Martens, "Recherches sur la vie et les écrits de Jean du Mont Baron de Carelskroon, redacteur du Corps universel diplomatique du droit des gens", in: F. De Martens (ed.), *Supplément au recueil des principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange etc.* (Göttingen 1802), lxiv-xciv; Jean Dumont de Carels-Kroon, *La vérité du fait, du droit, et de l'intérêt de tout ce qui concerne le commerce des Indes, établi aux Pais Bas Autrichiens par octroi de sa Majesté Impér. et Catholique* (s.l. 1726); *Idem* and Jan Van Huchtenburg, *Batailles gagnées par le serenissime prince Fr. Eugene de Savoye sur les ennemis de la foi, et sur ceux de l'Empereur, & de l'Empire, en Hongrie, en Italie, en Allemagne & aux Pais-Bas* (A La Haye 1725).

<sup>67</sup> Jean Rousset de Missy, *Supplément au Corps universel diplomatique du droit des gens, contenant un recueil des Traitez d'alliance de paix, de trêve, de neutralité* (Amsterdam 1739); *Idem*, *Les intérêts présents des puissances de l'Europe, Fondez sur les Traitez conclus depuis la Paix d'Utrecht inclusivement, & sur les Preuves de leurs Prétentions particulières*; *Idem*, *Mémoires sur le rang et la préséance entre les souverains de l'Europe et entre leurs ministres représentant leurs différens Caractères. Pour servir de supplément à l'ambassadeur et ses fonctions de Mr. de Wicquefort* (Amsterdam 1746); *Idem*, *Recueil historique d'actes, négociations, mémoires et traités, depuis la Paix d'Utrecht* (La Haye 1728).

from that of Louis XIV and William of Orange, but still had explicit assumptions on the major war that closed the seventeenth century.

#### A. Réal: Justifying French Behaviour

‘Comment les princes éviteront-ils ces fautes, s’ils ne connoissent pas tous les devoirs attachés à la Royauté ? Comment seront-ils instruits de ces devoirs, si personne ne prend soin de les leur expliquer ?’

Réal de Curban, *La Science du Gouvernement*, B. I, Discours préliminaire

##### (1) *Catalonia*

Réal de Curban treated the -still controversial- example of Catalonia’s status within the Spanish state. The Spanish monarchy was in essence a composite structure of personal unions. At the end of the fifteenth century, the marriage of Queen Isabella I of Castile (1451-1504) and King Ferdinand II of Aragon (1452-1516) brought two already composite entities together. The crown of Aragon, ruled by Ferdinand, comprised the Kingdom of Majorca, Valencia, Sardinia, Sicily, Naples... and the principality of Catalonia, a reference to the conglomerate of territories ruled initially by the counts of Barcelona. The coming to power of Philip V, grandson of Louis XIV, caused a major constitutional revolution in Spain. Whereas the different crowns had stood for separate types of local privileges and customs, the new monarch imposed a uniform model.

During the war, Philip had been far more popular in the crown of Castile than in that of Aragon. His main contender, Archduke Charles of Habsburg, had even held a full-fledged court in Barcelona.<sup>68</sup> On 20 June 1705, Britain concluded a treaty of alliance with the Estates of Catalonia.<sup>69</sup> On 2 July 1713, Philip V signed peace with Great Britain at Utrecht.<sup>70</sup> He had won the war and was now recognized by the major powers in Europe. His final reconciliation with his resentful opponent Charles, who had been crowned Holy Roman Emperor in 1711, would not come about until 1725. French military victories at Villaviciosa and Brihuega (9-10 December 1710), had driven the Austrian pretender out of most of Spain, but not out of Catalonia. An intermediate solution was found in the Convention for the Evacuation of Catalonia and the Neutrality of Italy, concluded under British mediation at the Utrecht conference on 14 March 1713,<sup>71</sup> weeks before the final Franco-British peace treaty. From 1711 to 1725,<sup>72</sup> this document remained the basis for legal relations between Charles VI and Philip V.

On 11 September 1714, Franco-Spanish troops under Marshal Berwick captured Barcelona and put an end to an ephemeral claim to sovereignty.<sup>73</sup> Réal de Curban cited the case as an example of bad treaty drafting. When territory was acquired by cession, the former owner had to discharge it of all

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<sup>68</sup> After his coronation as Emperor, Charles VI consequently installed a Spanish Council and a Spanish Secretary of State in Vienna, symbolizing his enduring claims on Charles II’s inheritance. See Erwin Matsch, *Der Auswärtige Dienst von Österreich(-Ungarn) 1720-1920* (Wien 1986), 42-43.

<sup>69</sup> Treaty of Alliance between Queen Anne and the principality of Catalonia against the Duke of Anjou [Philip V], to instate Charles III as King of Spain, Genoa, 20 June 1705.

<sup>70</sup> Treaty of Peace between Philip V and Queen Anne, Utrecht, 2 July 1713, *CUD* VIII/1, nr. CLXIV, 393-400.

<sup>71</sup> Convention between the belligerent parties, mediated by Queen Anne, for the Evacuation of Catalonia and for an armistice in Italy, Utrecht, 14 March 1713, *CUD*, VIII/1, nr. CXLVII, 327-330; Agreements for the Execution of the Treaty for the Evacuation of Catalonia between Charles VI, Queen Anne and Louis XIV, El Hospitalet, 22 June 1713, 28 *CTS* 233.

<sup>72</sup> Treaty of Peace between Charles VI and Philip V, Vienna, 30 April 1725, *CUD* VIII/2, nr. XXXVI, 106-113.

<sup>73</sup> Joaquim Albareda i Salvadó, 'La Catalogne et Philippe V d'Espagne dans la guerre de Succession d'Espagne: des espérances de 1705 à la perte des libertés de 1714', *Revue d'histoire diplomatique* CXXI (2007), 231-248.

possible claims, pretensions, mortgages, or literally stipulate he could only transfer the rights he actually held (*nemo plus transferre potest quam ipse habere*):<sup>74</sup>

‘La cession qu’une Puissance fait d’un pays à l’autre ne doit pas être simplement expliquée en termes généraux, elle doit être détaillée, & l’on doit faire mention expresses des noms de chaque place cédée, du tems, de la manière dont elle sera remise, & de toutes les circonstances qui y ont rapport’<sup>75</sup>.

Réal referred to the political context of the Utrecht conference. France and Britain had concluded separate preliminaries of peace (8 October 1711).<sup>76</sup> Thus, Britain had left the alliance tying the Habsburg pretender to the Dutch Republic and most German princes. As a consequence, the French armies obtained victories against the remaining allied troops in the field, such as the battle of Denain (24 July 1712).<sup>77</sup> The Utrecht Peace Conference was already going on at the time of Austrian defeat. Yet, Charles VI’s plenipotentiaries failed to agree with their French counterparts at the conference. Charles refused to sign a peace dictated by a treacherous ally and persisted in his determination to obtain the Spanish crown. The conference broke up, and fighting resumed, until Eugene of Savoy and Marshal Villars signed a Peace Treaty in Rastatt (6 March 1714).<sup>78</sup> However, before Charles VI’s men left the table at Utrecht, they had signed the convention on Catalonia and Italy. Réal de Curban recalled that the agreement foresaw a peaceful evacuation by the Austrian forces. The treaty was silent on the exact modalities, and counted on the parties’ good faith in the execution of this contractual obligation between sovereigns.

Philip V had not negotiated this convention directly.<sup>79</sup> Charles refused to treat with his opponent and thought he could only rely on the French plenipotentiaries.<sup>80</sup> Réal deplored this, and would have preferred a clause stating that Spanish troops could simultaneously enter the city through the gates at the other end of town when the Austrians left. In reality, the Austrians had cleared Barcelona three weeks before the Spanish could enter the town.<sup>81</sup> Consequently, the Estates of Catalonia decided to seize power themselves. The Austrian commander Starhemberg, instead of sticking to his duties as a subject of Charles VI, who was a party to the Convention, even allowed his soldiers to desert and serve the Catalan cause. Moreover, the commanders on the isles of Mallorca and Iviça (Ibiza) refused to recognize Philip V as King, declaring war on Louis XIV and Philip V (15 July 1713).<sup>82</sup> The ensuing bloody siege of Barcelona by Berwick, concluded on 11 September 1714, would not have been necessary, if this ‘défaut d’attention’ had been avoided from the French side... Réal treated this explicitly as a problem of bad treaty drafting, applied to the specific case of cession clauses, under the part devoted to treaty making (Chapitre III).<sup>83</sup> From the internal point of view, Réal argued that inhabitants of Catalonia were not actually punished by Philip V. Their case was similar to the subjects of the crown of Aragon and Valencia. Seven years earlier, on 25 April 1707, Marshal Berwick had crushed the Austro-British-Dutch-Portuguese-Aragonese army of

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<sup>74</sup> Reinhard Zimmermann, *The law of obligations : roman foundations of the civilian tradition* (Cape Town 1990), 279.

<sup>75</sup> Gaspard Réal de Curban, *La science du gouvernement, t. 5: contenant le droit des gens, Qui traite les Ambassades; de la Guerre; des Traités; des Titres; des Prerogatives; des Prétentions, & des Droits respectifs des Souverains* (Paris 1764), 564. [further: Réal].

<sup>76</sup> Preliminary articles of peace between Louis XIV and Queen Anne, London, 8 October 1711, Archives Diplomatiques, Base des Traités: <http://www.diplomatie.gouv.fr/traites/affiche traite.do?accord=TRA17110002>.

<sup>77</sup> Gérard Lesage, *Denain (1712) Louis XIV sauve sa mise* (Le Mans/Paris 1992).

<sup>78</sup> Peace Treaty between Charles VI and Louis XIV, 6 March 1714, Rastatt, *CUD*, VIII/1, nr. CLXX, 415-423.

<sup>79</sup> Which would not stop him from accusing Charles VI of having retreated his troops not too early, as Réal reproached them, but too late (Torcy to Nancreé, 26 April 1718, copy, Auction Godts (Brussels), 18 March 2014, nr. 291).

<sup>80</sup> Réal, B. V, Ch. III, S. 1, VII, 565.

<sup>81</sup> Marquis de Quincy, *Histoire militaire du règne de Louis le Grand, Roy de France* (Paris : Mariette, 1726), VIII, 329.

<sup>82</sup> *Ibid.*, VIII, 335.

<sup>83</sup> Réal, B. V, Ch. II, S. IX, 517 (Article VII).

Charles 'III' at the battle of Almanza.<sup>84</sup> As a consequence, the specific *fueros* or privileges of those crowns had been abolished.<sup>85</sup> Philip V had extended the Castilian situation to his other subjects. The same operation took place in Catalonia after the fall of Barcelona.

During the Franco-Spanish war of 1718-1719, French armies invaded Catalonia and Aragon, 'pour donner occasion à ces peuples de se remettre en possession de leur libertez et de leurs privileges'.<sup>86</sup> In fact, the King of Spain had ignored his obligation under article XIII of the Treaty of Peace concluded with Britain in Utrecht on 11 April 1713.<sup>87</sup> The British had asked to safeguard the privileges of their old allies. However, once Philip V had been forced to adhere<sup>88</sup> to the Quadruple Alliance -a treaty concluded on 2 August 1718 in order to complement the Peace Treaties of Utrecht, Rastatt and Baden-<sup>89</sup> the subject was not touched upon anymore. The following words of the Regent, reported by the Earl of Stair, George I (1660-1727)'s ambassador in Paris, are sufficiently clear:

'Dans l'art. 8 des mêmes conditions, l'on a ajouté aux personnes qui doivent être restituées dans leurs biens et dans leurs droits, les communautez, universitez et corps; le regent dit, que cela implique la restitution des privileges des catalans, et qu'ainsy il faut absolument le rayer, parce qu'il fait, que jamais le roy d'Espagne ne consentira cette restitution.'<sup>90</sup>

At the ensuing Peace Conference in Cambrai (1722-1725),<sup>91</sup> the British plenipotentiaries Polwarth and Whitworth followed Réal de Curban's interpretation. The inhabitants of Catalonia had

'forfeited a good deal of their Rights [...], by their second Rebellion, and declaring War on their own account, after the Emperor was retired and had withdrawn all his forces [...] and by their surrendering at last on discretion, reserving any thing further than their lives and fortunes'.<sup>92</sup>

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<sup>84</sup> Henry Kamen, *Philip V of Spain: the king who reigned twice* (New Haven 2001), 59.

<sup>85</sup> Royal Decrees of 23 June (Aragon) and 19 July 1707 (Valencia), abolishing the local legal system and declaring the Castilian laws applicable to these crowns. Réal, II, Ch. 7, S. II, XXIII, 104; Jesus Lalinde Abadia, *Iniciación histórica al derecho español* (Barcelona 1970), 217-218. However, in successive steps (1711-1715-1716, the so-called 'Nueva Planta'-system), Philip V allowed for the coexistence of local rules (*leyes municipales*) and the Law of Castile (*Derecho común*). E.g. in Catalonia, penal law and procedure were subject to local rules. For civil law, local law was applicable in all cases not prohibited by central legislation. E.g. the *Consolato del Mar* continued to be applicable in Catalonia and Mallorca.

<sup>86</sup> James Stanhope to Guillaume Dubois, Hanover, 22 August 1719, NA, SP, 78, 165, f. 51r<sup>o</sup>. James Stanhope (1673-1721), Whig politician, fought as commander in Spain during the War of the Spanish Succession and occupied various ministerial and diplomatic charges. Basil Williams, *Stanhope. A Study in Eighteenth-Century War and Diplomacy* (Oxford 1932). Guillaume Cardinal Dubois (1656-1723), preceptor of Philip of Orléans, French Regent. Secretary of State for Foreign Affairs (1718), Prime Minister (1723). Frederik Dhondt, 'Kardinaal Dubois door Hyacinthe Rigaud (1723). Een insider's view op een bibliotheek van de macht in de Grand Siècle', *Pro Memoria. Bijdragen tot de rechtsgeschiedenis der Nederlanden* XVI (2014), 188-198.

<sup>87</sup> Treaty of Peace between Philip V and Queen Anne, Utrecht, 11 April 1713, *CUD* VIII/1, nr. CLXIV, 396: 'The Catholic King concedes to the Catalans, for the grace of Her Brittanick Majesty their old privileges [...], the full possession of all of their goods and honours, but even all of the privileges enjoyed until this time by the inhabitants of Castile, the most favoured of all of his subjects.'

<sup>88</sup> Accession by Philip V to the Treaty of the Quadruple Alliance, The Hague, 17 February 1720, *CUD* VIII/2, nr. XI, 26-27.

<sup>89</sup> Treaty of Alliance between Charles VI, Louis XV and George I, London, 2 August 1718, *CUD*, VIII/2, nr. CCII, 531-541.

<sup>90</sup> Stair to James Stanhope, Paris, 12 June 1718, SP, 78, 161, f. 311v<sup>o</sup>. However, during the War of the Spanish Succession, both the Regent and Stanhope had fought in the military campaigns. Late in 1708, the latter tried to seduce the former into leaving the Spanish alliance in exchange for the creation of an independent kingdom in the North-East of Spain, comprising Valencia, Aragon and Catalonia (Jean-Christian Petitfils, *Le Régent* (Paris 1986), 152).

<sup>91</sup> Frederik Dhondt, 'La culture juridique pratique au Congrès de Cambrai (1722-1725)', *Revue d'histoire diplomatique* CXXVII (2013), 271-292.

<sup>92</sup> Polwarth and Whitworth to Newcastle, Cambrai, 20 May 1724, NA, SP, 78, 174, f. 20r<sup>o</sup>-v<sup>o</sup>. Alexander Hume Campbell, second earl of Marchmont (1675-1740) studied civil law in Utrecht, envoy, then extraordinary ambassador in Copenhagen (1716-1721). Charles Baron Whitworth (1675-1725), studies at Westminster and Trinity

Even Emperor Charles VI, who had held his personal court in Barcelona during the war, decided to give in at the Cambrai conference.<sup>93</sup>

Moreover, at another instance, Réal de Curban came back to the Franco-Spanish military confrontations earlier in Louis XIV's reign. When invading Catalonia during the Nine Years' War, Marshall Noailles (1650-1708) explicitly rejected proposals by the Catalans to strangle sleeping Spanish soldiers quartered at their houses.<sup>94</sup> Thematically, Réal used this to illustrate his point in the part devoted to *ius in bello* (Chapter 2).<sup>95</sup> The rules of war applied. Thus, proportionality and necessity restricted 'cases wherein one could attempt at the life or liberty of an enemy, or harm him'.<sup>96</sup> The illustration of this principle comes in a sequence classical, humanist examples going back to Antiquity.<sup>97</sup>

## (2) Gibraltar

Another controversial issue of the Spanish Succession, the fate of Gibraltar, is also seen as a technicality. Anything important should be explicitly stated. Réal proposed a hierarchy between general obligations, to be framed in the most generous terms, and specific clauses, 'pour tout ce qui est important'.<sup>98</sup> Since the latter are the logical consequence of the former, or the application of a general reasoning in a specific case, everything from the historical preamble (which should not be too precise, in order not to resuscitate old enmities), to treaty structure (whereby 'l'ordre des articles, doit contribuer à l'intelligence du Traité [...] à bien distinguer les objets') should serve to strengthen consensus between the parties. 'Plus la foi des traités est sainte, plus aussi l'on doit écarter avec soin tout ce qui peut y donner quelque atteinte.'<sup>99</sup> In the case of Gibraltar, general intentions proclaimed by George I in 1721 could give Spain a vague claim to the rock.<sup>100</sup> The King of Great Britain had in effect uttered the following promise:

'Monsieur mon frère [...] je ne ballance plus à assurer V.M. de ma promptitude à la satisfaire par rapport à sa demande touchant la restitution de Gibraltar lui promettant de me servir des premières occasions favorables p[ou]r régler cet article du Consentement de mon Parlem[en]t.'

George I explicitly referred to Parliamentary assent, indicating that the King alone could not alienate possessions held by the Crown. Interestingly, Réal limited his analysis to the mere textual expression in the international treaty. British diplomats argued shortly after George's promise to return Gibraltar, that the sovereign could only have formulated this within the prevailing constitutional framework, implying the necessity of parliamentary consent permitting territorial alienation.<sup>101</sup>

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Hall (Cambridge), envoy extraordinary, then ambassador to Russia (1704-1714), at the Imperial Diet in Regensburg (1714), envoy in Berlin (1716-1717, 1719-1722), The Hague (1717-1719). MP for the Isle of Wight (1722).

<sup>93</sup> The Imperial plenipotentiaries Windischgrätz and Pentherriedter implored Luis I [Philip V's temporary successor, January-August 1724]'s 'magnanimité et Piété', but could not ignore, that Catalonia had obtained the same treatment as the most favoured subjects of Castile (Courtes Reflexions sur la Reponse de Mess<sup>rs</sup> les ambassadeurs Plenipotentiaires d'Espagne, Cambrai, 26 May 1724, NA, SP, 78, 174, f. 138v<sup>o</sup>).

<sup>94</sup> Réal, B. V, Ch. II, S. IX, V, 445

<sup>95</sup> *Ibid.*, Ch. I, S. XVI, V, 321

<sup>96</sup> *Ibid.*, Ch. II, S. IX, V, 442.

<sup>97</sup> *Ibid.*, Ch. II, S. IX, V, 444. First Mucius Scaevola, then Fabricius, Augustus and Tiberius. Réal omitted the Middle Ages, and continued with Charles V, who refused to have the Turk Barbarossa assassinated.

<sup>98</sup> *Ibid.*, Ch. III, S. 1, VII, 562.

<sup>99</sup> *Ibid.*, 561.

<sup>100</sup> *Ibid.*, 563. Letter of George I to Philip V, London, 1 June 1721, AMAE, CP, Angleterre (suppl.), 7, f. 14r<sup>o</sup>.

<sup>101</sup> Linking Gibraltar to the obtention of a compensation in the West Indies (Florida, Hispaniola). Basil Williams, *Stanhope*, 350; Emile Bourgeois, *La Diplomatie secrète au XVIII<sup>e</sup> siècle* (Paris 1910), III, 278. See also Frederik Dhondt, *Balance of Power and Norm Hierarchy. Franco-British Diplomacy After the Peace of Utrecht (1713)* (Leiden/Boston 2015), 184-186, 193-194 and 237-239.

Nevertheless, Réal did not stop at the unilateral conditionality of finding ‘une occasion favorable’.<sup>102</sup> Britain’s attitude is seen as dependent on the execution of countervailing Spanish obligations:

‘la promesse a été faite dans le cours d’une négociation, & son execution paroissoit dépendre de ce que le Roi d’Espagne devoit exécuter de son côté’.<sup>103</sup>

If we confront this with the practice of negotiation, Réal’s assessment accurately reflected diplomatic positions. Britain promised the eventual restitution of Gibraltar in return for Spanish accession to the conditions of the Quadruple Alliance. Philip acceded in February 1720, but delayed the full execution of the treaty clauses. Just as his opponent, Emperor Charles VI. When Charles and Philip concluded peace in 1725, they were facing an alliance of France, Britain, the Dutch Republic and Protestant German princes<sup>104</sup>. Spain laid siege to Gibraltar (22 February 1727). Yet, the Austrian commitment to war was far from serious. Barely three months after the start of the siege, Peace Preliminaries were signed in Paris (31 May 1727). The Spanish monarch judged George I had broken his royal word, and carefully locked the original of the letter away in a wooden box at court.<sup>105</sup> Yet, Philip failed to conquer the Rock before a new international agreement was reached, and chose not to pursue the conquest as a primary objective. The siege was lifted on 6 March 1728.

### (3) *British Betrayal?*

Réal further developed the theory of the *exceptio non adimpleti contractus* when treating the inviolability of treaty promises. He started by nuancing the absolute nature of the *pacta sunt servanda*-principle.<sup>106</sup> The necessities of international life and the changing nature of alliances had crowned self-interest as the infallible yardstick of promises, or of treaty interpretation. Rare were the obligations interpreted according to their original *ratio*.<sup>107</sup> Yet, this did not imply that a sovereign could easily break his word. States were repeat players. Breaking one’s word equalled losing one’s reputation. Moral and political considerations alike excluded treaty-breakers from the Society of Nations:

‘Tout Prince qui ne regarde les Traités que comme de vains fantômes qu’un instant critique a produits, & qu’un autre instant peut détruire arbitrairement au gré de l’intérêt, est non-seulement un ennemi du genre humain, mais encore un très-mauvais politique [...] un Prince ne peut violer sa parole, sans perdre sa réputation.’<sup>108</sup>

In essence, sovereigns had to stick to their word. Treaty interpretation according to subsequent practice or the necessities of international life allowed for subtleness with respect to the initial motives. However, if a treaty was reciprocal in nature, the non-execution of one’s own obligations could count as a valid reaction to similar behaviour by a contracting party, just as between private persons. Sovereigns never concluded contracts alone.<sup>109</sup> When confronted with the non-execution of a treaty by the other party, sovereigns were excused from performing on their side. This could concern essential treaty violations, as well as accessory ones.

Loyalty to treaty promises in general did not pose a particular theoretical problem. However, the War of the Spanish Succession presented a peculiar problem. By signing the preliminaries of Peace with France in October 1711, Britain *de facto* deserted the Treaty of the Grand Alliance concluded with the

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<sup>102</sup> Réal, B. V, Ch. III, S. 1, VII, 563.

<sup>103</sup> *Ibid.*, 564.

<sup>104</sup> Frederik Dhondt, ‘So Great A Revolution: Charles Townshend and the Partition of the Austrian Netherlands, September 1725’, *Dutch Crossing* XXXVI (2012), 50-68.

<sup>105</sup> Ragnhild Hatton, *George I* (New Haven (Conn.) 2001 [1971]) 225.

<sup>106</sup> Hendrik Willem Verzijl, *International Law in Historical Perspective* (Leiden 1970), II, 244.

<sup>107</sup> Réal, B. V, Ch. III, S. 1, IX, 568.

<sup>108</sup> Réal, B. V., Ch. III, S. 1, IX, 570. For Vattel’s ideas on the subject: Rech, *Enemies of Mankind*, 131.

<sup>109</sup> Réal, B. V., 570.

Habsburg Emperor and the States-General of the United Provinces.<sup>110</sup> At least, this was the opinion of Charles VI. He was left alone in his struggle against Philip V. During the Utrecht peace conference, Eugene of Savoy, Charles' most brilliant general, lost the battle of Denain. British troops did not participate in the battle. It had become clear that the French candidate for the Spanish throne could not be defeated. Britain argued that the Grand Alliance's main aim had been to procure a *reasonable satisfaction* for the Austrian candidate, against the excessive claim on European hegemony from the Bourbon camp. Réal sought a position in the middle, and recognised the violation of the Treaty of the Grand Alliance. He left aside whether the 'reasonable satisfaction' had been attained, and formulated accessory grounds to justify British behaviour.

Allies were under a common obligation to persist until they all agreed to terms of peace with a common enemy. Yet, exceptions to this principle existed, designed to reduce the impact of every sovereign's arbitrary veto power. It would have been unreasonable if one could prevent his alliance partners from signing a treaty, or if reasonable peace conditions were blocked time and again by one of the partners: an ally obstinately refusing to conclude peace at advantageous terms, was judged to break up the alliance. Finally, a state could not be assumed to sacrifice its essential interests to an alliance, concluded to serve the interest held in common with the other partners. Obstinate partners continuing the war effort, violated the base and spirit which grounded the actual treaty, and dispensed their contracting parties of their obligation to continue the struggle.<sup>111</sup> Charles VI's behaviour could well fit into the latter category. Even after the battle of Denain, the Emperor refused to sign a peace treaty in Utrecht, and decided to fight on. A series of defeats brought him to the negotiating table in November 1713, leading to the Treaties of Rastatt (6 March 1714) and Baden (7 September 1714), confirming the Utrecht agreements.

#### B. Vattel: A Pamphlet Against the Sun King ?

'Je suis né dans un pais, dont la Liberté est l'ame, le trésor & la Loi fondamentale'

Vattel, *Le droit des gens ou principes de la loi naturelle*, preface

##### (1) *Salus populi suprema lex ! The Bottom-Up Construction of Sovereignty*

In view of the construction of his work, Vattel first treated succession as a matter of internal public law. In view of the Neuchâtel situation,<sup>112</sup> it was clear to him that the corpus of the nation (the 'corporate people')<sup>113</sup> should be sovereign in deciding on the criteria for succession, as well as in the actual choice when the throne became vacant.<sup>114</sup> *Salus populi suprema lex !*<sup>115</sup> According to this general rule, the testament of Charles II (1661-1700) and Maria Teresa's renunciation before the *Cortes* (Estates) of Castile ought to have been valid:

'Si même les Prétendants ont transigé entr'eux, ou choisi des Arbitres, la Nation n'est point obligée de se soumettre à ce qui aura été ainsi réglé, à-moins qu'elle n'ait consenti à la Transaction,

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<sup>110</sup> Treaty of Alliance between Emperor Leopold I, William III and the States-General, The Hague, 7 September 1701, *CUD*, VIII/1, nr. XIII, 89-91.

<sup>111</sup> Réal, B. V, Ch. III, S. V, VIII, 637

<sup>112</sup> Neuchâtel was an independent principality, aloof from the Swiss Confederation, but attached to it in a system of neutralization conventions (*Vormauern*). Until 1707, the house of Orléans ruled as counts of Neuchâtel. From 1707 to 1857, the house of Hohenzollern (Brandenburg/Prussia) acted as its overlord and protector. Tetsuda Toyoda, *Theory and Politics of the Law of Nations: Political Bias in International Law Discourse of Seven German Court Councillors in the Seventeenth and Eighteenth Centuries* (Leiden/Boston 2011), 165. Vattel, B. I, Ch. XVI, § 192: treaties of protection (such as Neuchâtel and other Swiss cantons had with France; Edgar Bonjour, *La Neutralité suisse* (Neuchâtel/Paris 1979), are immediately positioned as without impact on a state's sovereignty).

<sup>113</sup> Ian Hunter, 'Kant and Vattel in Context: Cosmopolitan Philosophy and Diplomatic Casuistry', *History of European Ideas* XXXIX (2013), 493.

<sup>114</sup> Vattel, B. I, ch. V, §65.

<sup>115</sup> *Ibid.*, §61.

ou au Compromis [...] Elle ne reconnoit aucun Juge sur elle, dans une affaire où il s'agit de ses Devoirs les plus sacrés & de ses Droits les plus précieux.<sup>116</sup>

Attempts to divide the composite Spanish monarchy would not have found favour with Vattel, since:

‘un Prince n'est point en droit de partager son Etat entre ses Enfants. Toute souveraineté proprement dite est, de sa nature, une & indivisible ; puisqu'on ne peut séparer malgré-eux ceux qui se sont unis en Société.’

However, an important exception existed. In case a monarch had several federate entities under his power in a composite state, he was entitled to partition his possessions among his siblings. Albeit with the concurrence of the respective national *demoi* concerned.<sup>117</sup> In the opposite case, the monarch united in his person all majesty essentially belonging to the ‘Corps entier de la Nation.’<sup>118</sup>

## (2) *Renunciations and Partitions*

Vattel's emphasis on popular consent was in striking contrast with contemporary diplomatic practice. The Peace Treaties of Utrecht, Rastatt and Baden, terminating the War of the Spanish Succession, were only possible after a political deal on the partition of the Spanish monarchy had been reached. Moreover, diplomats constructed an analogy with the international approbation of two other successions: the *Act of Settlement* (1701) voted in the English Parliament<sup>119</sup> and the Pragmatic Sanction (1713) issued by Emperor Charles VI.<sup>120</sup> Vattel's reasoning started from the opposite point of view. Renunciations pronounced by a ‘Fille qui épouse un prince étranger’, such as Louis XIV's wife, were in his eyes as valid as a formal law issued by the competent state organs to exclude specific persons from succeeding to the throne,<sup>121</sup> with reference to the English *Act*. For Vattel, not the interest of the ruling dynasty should predominate, but that of the political *corpus* in which sovereignty ultimately resided.<sup>122</sup> He thereby referred to the ‘most learned and well-informed legal authors’ of his time, echoing the conceptions of Henri François d'Aguesseau (1668-1751), future chancellor of Louis XV (1710-1774) and proctor general at the Parliament of Paris,<sup>123</sup> and his contemporary Joly de Fleury (1675-1756), advocate-general.

Both magistrates argued that the renunciations of Philip of Anjou, grandson of France, to the French throne, would have deprived the French people of a sovereign, by declaring a person normally entitled to succeed under the *lois fondamentales*, a foreigner and thus victim to exclusion under the *droit d'aubaine*.<sup>124</sup> The nation was not to be deprived of a ‘petit-fils de France’, who could not dispose of his right to succeed to the throne, or of the national territory.<sup>125</sup> ‘Ny le Prince peut aliéner l'Etat ni l'Etat ne peut perdre son Prince.’<sup>126</sup> This threatened the unicity of the transmission of the French crown.<sup>127</sup> More fundamentally, d'Aguesseau warned that France produced contradictory rhetoric. On the one hand, Louis' claims to the Spanish throne had always rested on the invalidity of his wife's renunciation

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<sup>116</sup> *Ibid.*, §65.

<sup>117</sup> *Ibid.*, §65.

<sup>118</sup> Vattel, B. I, ch. IV, §39.

<sup>119</sup> Eveline Cruickshanks and Jeremy Black (ed.), *The Jacobite challenge* (Edinburgh 1988).

<sup>120</sup> Charles Ingrao, ‘The Pragmatic Sanction and the Theresian succession: A re-evaluation’, *Études danubiennes IX* (1993), 145-161.

<sup>121</sup> Vattel, B. I, ch. V, §62.

<sup>122</sup> *Ibid.*, §62.

<sup>123</sup> Isabelle Storez, *Le chancelier Henri François d'Aguesseau (1668-1751), monarchiste et libéral* (Paris 1999).

<sup>124</sup> d'Aguesseau, Observations on the renunciation of Philip V, February 1713, AMAE, CP, Angleterre, 220, f. 64v°, Sixtus de Bourbon-Parme, *Le traité d'Utrecht et les lois fondamentales du royaume* (Paris 1914), 105.

<sup>125</sup> Francis Garrisson, ‘Lois fondamentales’, in: Lucien Bély (ed.), *Dictionnaire de l'Ancien Régime* (Paris 2010), 737-757.

<sup>126</sup> d'Aguesseau, Observations *o.c.*, f. 63r°; Sixtus de Bourbon-Parme, *Lois fondamentales*, 103.

<sup>127</sup> Lucien Bély, *La société des princes XVI<sup>e</sup> XVIII<sup>e</sup> siècle* (Paris 1999), 345.



to her father's throne. At the end of the war, however, the British rendered Philip V's recognition conditional on his own renunciation to the throne of France. Was Philip undermining the very basis of his own accession?<sup>128</sup>

Réal de Curban, on the other hand, completely adhered to the partition logic. In the second volume of his *Science du Gouvernement*, dedicated to a comparative description of the public law of different European countries, he deplored the non-execution of the 1698 and 1700 partition treaties:

'Plus heureuse mille fois la France, si le feu Roi avoit pû faire exécuter le Traité de partage!'<sup>129</sup>

If the War of the Spanish Succession had had a practical utility, it was mainly for the British, who obtained Gibraltar, the Hudson Bay, Newfoundland, parts of Acadia and Saint-Christopher. As for the law of nations, the war proved one single point, namely:

'Si cet exemple, qu'ont donné les Traités d'Utrecht, de Bade, & de Rastadt, prouve quelque chose, c'est que les renonciations à la future succession d'un Etat Souverain sont bonnes.'<sup>130</sup>

(3) *Louis XIV, a Threat to the Whole of Europe*

For Vattel, there was no doubt that Louis XIV had aimed to totally dominate Europe. The more sophisticated argumentations of Louis XIV's military advisers Chamlay (1650-1719) and Vauban (1633-1707), who preferred to fight the inevitable war with the strategic advantage of beginning outside France's border,<sup>131</sup> did not count for the Neuchatelian lawyer. The 'proofs of arrogance and limitless ambition' already shown in the past were a sufficient pretext for Vattel to arm a Europe-wide coalition against France.<sup>132</sup> The whole continent would have been enslaved by the acceptance of Charles II's will.<sup>133</sup> Clearly a contradiction, if we consider Vattel's point of view expressed above, according to which the Spanish nation was sovereign in designating its new monarch. Vattel's treatment of the outbreak of the War of the Spanish Succession bears the title 'how appearances of danger can give the right to wage war'. Preventive warfare against the potential hegemon was clearly justified in his eyes. Vattel's reasoning on the matter was completely political. The intentions of Louis XIV mattered, not the actual actions undertaken by the French.

Vattel's anti-French sentiment becomes even more apparent when he treated the case of Savoy. A notoriously inconstant ally, duke Victor Amadeus II of Savoy (1666-1732) had a black reputation of betrayal and changing alliances, gearing its policy on eternal interests, rather than transitory contractual agreements.<sup>134</sup> During the Nine Years' War (1688-1697), Savoy started on the allied side, but prematurely quit the alliance against Louis XIV, ultimately obtaining the wedding of both Louis XIV's eldest grandsons to Savoyard princesses (1697, 1701). The War of the Spanish Succession started with Savoy in the French camp. Yet, after barely a year of fighting, Victor Amadeus II switched sides once again, attacking the French army in the rear (8 November 1703).<sup>135</sup> Vattel omitted the latter movement, and

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<sup>128</sup> d'Aguesseau, *Ibid.*, f. 63r°.

<sup>129</sup> Réal, B. II, Ch. VII, S. II, XXI, 101.

<sup>130</sup> *Ibid.*, 102.

<sup>131</sup> Jean-Philippe Cénat, *Chamlay, le stratège secret de Louis XIV* (Paris 2011),

<sup>132</sup> Louis XIV's foreign policy can be divided into two parts: an aggressive phase, culminating in the *Réunions* policy, whereby he annexed the Alsace and Luxembourg without formal declaration of war, while the rest of Europe was occupied in relieving the siege of Vienna, and, in the later part of his reign, a more defensive attitude, where the consolidation of the French borders was at stake. Cf. 'la défense aggressive', John A. Lynn, *The wars of Louis XIV, 1667-1714* (Longman 1999), 37.

<sup>133</sup> Vattel, B. III, Ch. II, § 44.

<sup>134</sup> Geoffrey Symcox, *Victor Amadens II: absolutism in the Savoyard State* (London 1983).

<sup>135</sup> Linda and Marsha Frey, *A question of empire : Leopold I and the War of Spanish Succession, 1701-1705* (New York/Boulder 1983) 60-62.

chose to emphasize Victor Amadeus' switching to Louis XIV during the Nine Years' War, 'under French pressure.'<sup>136</sup>

(4) *Vattel's Sympathy for the Anti-French Alliance: Fair and Balanced?*

As cruelties of the war (rules of the *ius in bello*), are concerned, Vattel showed some compassion for the bombardment of Dunkirk in 1694.<sup>137</sup> Damage to the harbor and portuary installations of a notorious corsair basis was the product of military necessity. Nevertheless, the bombardment remained a tragic event, for which he mentioned the compassion of Queen Mary II Stuart (1662-1694), wife of King William III (1650-1702), spin in the web of alliances against Louis XIV.<sup>138</sup> Vattel used William III's capture of Marshal Boufflers after the siege of Namur in 1695 as an example of the *exceptio non adimpleti contractus*. William could violate existing agreements with the French, since they had infringed on the capitulation agreements for Dixmude and Deinze, two cities in the County of Flanders.<sup>139</sup>

Louis' support for the Old Pretender (1688-1766), the son of the chased Catholic King of England and Scotland, James II/James VII (1633-1701), was treated politically as well. Louis' recognition of the rights of James 'III' as his father's son, was dismissed by Vattel as a mere 'insult' to the British nation.<sup>140</sup> Réal, however, took up the defence of the French point of view. Louis had granted asylum to James II. At the Treaty of Rijswijk (20 September 1697),<sup>141</sup> Louis had undertaken the obligation not to disturb William III in his possession of the Kingdom of England. James' son was recognised in order not to let him drop out of the Society of Princes. Acknowledging a mere title to James 'III' could not be an issue in the mutual Anglo-French relationship. James 'III' could and would not receive any more assistance in recovering his domains across the Channel than his father. Moreover, how could Louis act as a judge between William III and James 'III', 'en lui refusant un titre que sa naissance lui donnoit' ?<sup>142</sup>

## Conclusion

Finally, there is a point where Vattel and Réal join: the legality of alienations contracted by the French sovereign. Réal argued it was a mistake to reason from the civil-law analogy of a usufruct exercised by the monarch on his territories and his ensuing incapability to alienate. This would make the whole network of peace treaties crumble. The theory of the *lois fondamentales* pushed to its extremities, caused absurd consequences, slavishly copied in French doctrine. If a King could not create obligations for his successor, Europe would be in a state of perpetual war:<sup>143</sup>

'c'est une erreur qui vient de ce que ce Jurisconsulte [Jean Bodin] raisonneit, dans une matière du Droit des Gens, sur les principes du Droit Civil qui n'y ont aucune application [...] De ce qu'un Souverain a le droit de faire la guerre, & celui de conclurre [sic] la paix, il suit que toutes les ces-[621]sions qu'il fait, lient & ses sujets & ses successeurs. Dès que la guerre est déclarée, tout appartient au vainqueur, & le successeur du vaincu, à qui elle pouvoit à jamais enlever ses Etats, est obligé de se conformer à un Traité de paix qui lui en a conservé une partie.'

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<sup>136</sup> Vattel, B. III, Ch. VII, § 107.

<sup>137</sup> Frederik Dhondt, "'The cursed sluices of Dunkirk': Dunkerque, thermomètre des relations franco-britanniques après Utrecht", in: Olivier Ryckebusch and Rik Opsommer (ed.), *Guerre, frontière, barrière et paix en Flandre* (Ieper 2014), 124-140.

<sup>138</sup> Vattel, B. III, Ch. IX, § 169.

<sup>139</sup> *Ibid.*, Ch. X, § 176.

<sup>140</sup> Vattel, B. IV, Ch. V, § 68.

<sup>141</sup> Treaty of Peace between Louis XIV and William III, Rijswijk, 20 September 1697, *CUD* VII/2, nr. CXCVII, 399-408.

<sup>142</sup> Réal, B. V., Ch. I, S. VI, V, 93-94.

<sup>143</sup> *Ibid.*, Ch. III, S. V, IV, 620-621.

Vattel came to a similar point of view, but from a bottom-up perspective: 'les Nations, ou Etats, sont des Corps Politiques, des sociétés d'hommes'.<sup>144</sup> Alienations consented to by the *corpus* of the nation could be deemed void.<sup>145</sup> However, this opened Pandora's box ! In the light of d'Aguesseau's and Joly de Fleury's remarks at the registration of Louis XIV's *lettres patentes* in 1713, it could be argued that the Parliament of Paris had only registered the treaty, but had opposed itself to Philip V's renunciation. However, the Parliament was a court of justice, and not an assembly representing the Nation or its Estates, as the *Riksdag* in Sweden, an example cited by Vattel.<sup>146</sup>

The absolute limit on obligations undertaken by a sovereign was in both cases the primary obligation of man under the law of nature: self-preservation. Vattel<sup>147</sup> as well as Réal rejected a supranational integration of international law and described the law of nations of a society, not of a community. *Bien étonnés de se retrouver ensemble ?* Rather not. Although the common premise was sovereignty, their treatment of the Spanish Succession (albeit more implicit with Vattel than with the more erudite Réal de Curban) shows that the choice for the '*Société des Princes*' or a patriotic Republic as touchstone for the validity of international intercourse<sup>148</sup> had more links with political history than with abstract reasoning.

In conclusion, the present selective analysis of two classics of eighteenth century international law doctrine has shown that the War of the Spanish Succession was far from over for either Vattel or Réal. Depending on the mission of international scholarship, their methods can be judged differently. Either legal scholars serve to codify the practice, with the most impartial care for accuracy and transparency. In that case, Réal can be said to have been conscious of multiple opinions and, thus, of the need to produce arguments to justify his affirmations. Or, conversely, if scholars feel entrusted with a prescriptive or normative mission, their subjectivity is less problematic. Vattel was not unaware of the pressing needs of politics as a shrewd defender of Neuchâtel. He drew a caricature of French policy during the 'Grand Siècle', although he could have consulted a considerable amount of readily available edited primary sources. If this omission had strengthened the systematic coherence of his work, implicit partiality not have drawn our attention. Yet, Vattel's extraordinary success was more due to his *ad hoc* and contradictory compilation of arguments in all possible directions.<sup>149</sup>

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<sup>144</sup> Vattel, B. I, Preliminaries, §1.

<sup>145</sup> Vattel, B. IV, Ch. II, §11.

<sup>146</sup> *Ibid.*, §10.

<sup>147</sup> 'Les devoirs envers soi-même l'emportant incontestablement sur les devoirs envers autrui, une Nation se doit premièrement & préféablement à elle-même tout ce qu'elle peut faire pour son bonheur & pour sa perfection.' (Vattel, B. I, Preliminaries, §14) ; 'l'intérêt seul agit puissamment sur le cœur des hommes. Inséparable de l'amour propre, il est le principe & l'origine de toutes nos actions' (Réal, B. V, Preface, II, 4).

<sup>148</sup> 'providing republican thought with a territorial architecture' (Hunter, 'Kant and Vattel', 493).

<sup>149</sup> Chetail, 'Vattel and the American Dream'.

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