

# Vattel's Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America\*

Stéphane Beaulac\*\*

## I. INTRODUCTION

There is a continuing debate among international commentators as to the doctrinal “paternity” of international law,<sup>1</sup> which must be distinguished from the expression’s etymological origin, credited to the British author Jeremy Bentham.<sup>2</sup> But be it the Spanish Francisco de Vitoria, the Dutch Hugo Grotius, or the Swiss Emer de Vattel who is deemed the “father” of the discipline, there can be little doubt that the latter’s contribution was seminal,<sup>3</sup> with his masterpiece *Le*

---

Copyright 2004, by LOUISIANA LAW REVIEW.

\* This is a translation of *Le transfert de territoire en droit international selon Vattel et la cession de la Louisiane aux États-Unis d’Amérique*. The authenticity of this article was ascertained only by the author.

\*\* Ph.D. (Cantab). Faculty of Law, University of Montreal, Canada.

1. See among many authors on this controversial issue, F. de Martens, *Traité de droit international*, vol. 1 202, 212 (Chevalier-Marescq 1883); J. Basdevant, *Hugo Grotius, in Les fondateurs du droit international* 125, at 127 (A. Pillet ed., Giard & Brière 1904); L.F.L. Oppenheim, *International Law—A Treatise*, vol. 1, Peace 58 (Green Longmans ed, London 1905); W. Van der Vlucht, *L’Œuvre de Grotius et son influence sur le développement du droit international*, 7 R.C.A.D.I. 395, at 444–45 (1925); J.B. Scott, *The Spanish Origin of International Law—Francisco de Vitoria and his Law of Nations* 281 ff. (Clarendon Press 1934); M. Bourquin, *Grotius est-il le père du droit des gens?*, in *Grandes Figures et grandes Œuvres juridiques* 77 (Librairie de L’Université 1948); J.L. Brierly, *The Law of Nations—An Introduction to the International Law of Peace* 28 (Clarendon Press 6th ed. 1963); P. Haggemacher, *La place de Francisco de Vitoria parmi les fondateurs du droit international, in Actualité de la pensée juridique de Francisco de Vitoria* 27 (A. Truylol Serra et al. eds., Bryulant 1988); Y. Onuma, *When was the Law of International Society Born?—An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. History Int’l L. 1, at 5 (2000).

2. Bentham introduced the expression in his influential book, *An Introduction to the Principles of Morals and Legislation* (Pickering 1823). See also M.W. Janis, *Jeremy Bentham and the Fashioning of “International Law,”* 78 *American J. Int’l L.* 405 (1984); M.S. Janis, *Sovereignty and International Law: Hobbes and Grotius, in Essays in Honour of Wang Tieya* 391, at 395 n.9 (R.St.J. Macdonald ed., Martinus Nijhoff 1994) (stating that Bentham invented the expression *international law* “in a fit of new legal definitions”). It is interesting to point out that Bentham was no fan of Vattel, about whom he is deemed to have said: “Vattel’s propositions are most old-womanish and tautological;” see the citation reproduced in E. Nys, *Notes inédites de Bentham sur le droit international*, 1 L.Q. Rev. 225, at 230 (1885).

3. See P. Guggenheim, *Emer de Vattel et l’étude des relations internationales en Suisse* 23 (Librairie de l’Université 1956), who noted the following about Vattel:

*Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains.*<sup>4</sup>

At the outset of this two-volume manuscript, Vattel identified the mission ahead in the following terms: “The Law of Nations, though so noble and important a subject, has not, hitherto, been treated with all the care it deserves.”<sup>5</sup> *Droit des Gens* was meant to remedy this shortcoming.<sup>6</sup> The targeted audience was also explicitly set out in the preface<sup>7</sup>—“The law of nations is the law of sovereigns. It is principally for them and for their ministers, that it ought to be written.”<sup>8</sup> Even though every citizen may be interested in it, it is the

---

“Pourtant, sa contribution au développement du droit international ne saurait être sous-estimée.” See also E. Jouannet, *Emer de Vattel et l’émergence doctrinale du droit international classique* 421 (Pedone 1998) (“Aussi bien, ceux que l’on a longtemps considéré comme les pères du droit international, que ce soient Grotius ou Pufendorf, Barbeyrac ou Burlamaqui, Rachel ou Textor, ne le sont que de manière indirecte et secondaire alors même que cette paternité longtemps controversée revient sans hésitation, selon nous, à Wolff puis Vattel.”).

4. On the publishing history of *Droit des Gens*, see A. de Lapradelle, *Emer de Vattel*, in *The Classics of International Law—Vattel*, vol. 1, i, at lvi–lix (J.B. Scott ed., Carnegie Institution of Washington 1916) and A. Mallarmé, *Emer de Vattel*, in *Les fondateurs du droit international* 481, at 488–90 (A. Pillet ed., Giard & Brière 1904). The version used here is the original London one, E. de Vattel, *Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains*, 2 vols. (London 1758) [hereinafter *Droit des Gens*]. The English translation utilized is that by J. Chitty, *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns* (Johnson Law Booksellers 1863) [hereinafter *Law of Nations*].

5. See *Law of Nations*, *supra* note 4, at vii.

6. Vattel added:

The greater part of mankind have, therefore, only a vague, a very incomplete, and often even a false notion of it. The generality of writers, and even celebrated authors, almost exclusively confine the name of ‘Law of Nations’ to certain maxims and treatises recognised among nations, and which the mutual consent of the parties has rendered obligatory on them. This is confining within very narrow bounds a law so extensive in its own nature, and in which the whole human race are so intimately concerned; it is, at the same time, a degradation of that law, in consequence of a misconception of its real origin . . . .”

See *Law of Nations*, *supra* note 4, at vii.

7. See P. Guggenheim, *supra* note 3, at 12, who wrote:

L’ouvrage de Vattel était destiné aux hommes d’Etats et aux diplomates, en un mot aux professionnels des affaires étrangères. Il ne devait pas seulement leur ‘dire’ le droit; l’ambition de Vattel allait plus loin: il se flattait d’exercer une influence sur les hommes d’Etat et de les amener à respecter ce droit international dont trop souvent ils font fi.

8. See *Law of Nations*, *supra* note 4, at xvi. At the beginning of the second *Livre*, Vattel reiterated that he writes for the conductors of states:

[a]nd why should we not hope still to find, among those who are at the head of affairs, some wise individuals who are convinced of this great

persons entrusted with public affairs who should “apply seriously to the study of a science which ought to be their law, and, as it were, the compass by which to steer their course;”<sup>9</sup> and if they did, Vattel added, “what happy effects might we not expect from a good treatise on the law of nations[?]”<sup>10</sup>

History shows that *Droit des Gens* did obtain such effects on international law and on the people conducting international affairs, not only in Europe but also in the newly formed United States of America.<sup>11</sup> Hersch Lauterpacht wrote that in the 19th century, there was “no author whose name had been more frequently mentioned before international law courts than Vattel’s.”<sup>12</sup> Gerhard von Glahn, for his part, opined thus: “It can seriously be maintained that despite the vital contribution of Grotius, no single writer has exercised as much direct and lasting influence on the men engaged in the conduct of international affairs in the legal sphere, at least until very modern times, as did Vattel.”<sup>13</sup>

---

truth, that virtue is, even for sovereigns and political bodies, the most certain road to prosperity and happiness? There is at least one benefit to be expected from the open assertion and publication of sound maxims, which is, that even those who relish them the least are thereby laid under a necessity of keeping within some bounds, lest they should forfeit their characters altogether. To flatter ourselves with the vain expectation that men, and especially men in power, will be inclined strictly to conform to the laws of nature, would be a gross mistake; and to renounce all hope of making impression on some of them, would be to give up mankind for lost . . .

See Law of Nations, *supra* note 4, at 134. Finally, see Law of Nations, *supra* note 4, at 500.

9. See Law of Nations, *supra* note 4, at xvi.

10. *Id.* In Chitty’s translation, the question mark is mistaken for an exclamation mark. See *Droit des Gens*, vol. 1, *supra* note 4, at xxiii: “quels fruits ne pourrait-on attendre d’un bon Traité du Droit des Gens?” (spelling modernized) See A. Mallarmé, *supra* note 4, at 582, who wrote about *Droit des Gens* that, “il est un *manuel de politique*, une encyclopédie pratique et positive à l’usage des hommes publics.” (emphasis added).

11. The number of editions and translations of *Droit des Gens* provides a good indication of the great success and influence of Vattel. Between 1758 and 1863, there were twenty editions of the work in its original language, French. In Great Britain, there were ten English translations between 1759 and 1834; in the United States of America, there were eighteen translations or reprints of translations between 1796 and 1872. His manuscript was also translated into Spanish (six between 1820 and 1836), German (1760) and Italian (1805). See J.B. Scott, *The Classics of International Law—Vattel*, vol. 1 at lviii–lix (Carnegie Institution of Washington 1916).

12. H. Lauterpacht, *Les travaux préparatoires et l’interprétation des traités*, 18 R.C.A.D.I. 709, at 713 (1927); author’s translation of “pas d’auteur dont le nom ait été plus fréquemment mentionné devant les tribunaux internationaux que Vattel.”

13. G. Von Glahn, *Law among Nations—An Introduction to Public*

## II. Vattel and the Cession of Louisiana

This unprecedented success of *Droit des Gens*, especially in Great Britain and the United States of America,<sup>14</sup> bears witness to the undeniable impact Vattel's writing has had on the shared consciousness of society,<sup>15</sup> including those of the international society and the American political, legal and diplomatic societies.<sup>16</sup> Part II, Section C of this paper will explore Vattel's theory on the question of territory transfers in international law, and Part II, Section D will discuss whether or not the cession of Louisiana to the United States followed the conditions prescribed in *Droit des Gens*. The conclusion will examine why, unlike in many other instances, Vattel's *doctrine* was absent in the debate over the purchase of Louisiana.

---

International Law 44 (3d ed. Macmillan 1976). It is also interesting to point out that even Vattel's critics agreed that *Droit des Gens* received a phenomenal success. See, for instance, C. Van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* 32 (Martinus Nijhoff 1919). See also C. Van Vollenhoven, *Du droit de paix—De iure pacis* 98–99 (Martinus Nijhoff 1932). Other negative assessments of Vattel's work were made by A.G. Heffter, *Le droit international de l'Europe* 34 (4th ed. Cotillon 1883); F. von Martens, *supra* note 1, at 211–12; W. Van der Vlugt, *supra* note 1, at 467; J.L. Brierly, *supra* note 1, at 40.

14. See A. de Lapradelle, *supra* note 4, at xxvii–xlii, who provided a good summary of the information pertaining to the reception and authority of *Droit des Gens* in Great Britain and in the United States of America during the 18th and 19th centuries. See also T. Ruysen, *Les sources doctrinales de l'internationalisme*, vol. 2, *De la Paix de Westphalie à la Révolution française* 514–15 (Presses universitaires de France 1957); P. Guggenheim, *supra* note 3, at 15–16; E. Jouannet, *supra* note 3, at 14–15.

15. This idea of 'shared consciousness of humanity' is borrowed from the moral philosophy of Georg Wilhelm Friedrich Hegel, in particular from G.W.F. Hegel, *Phänomenologie des Geistes* §§ 632–71 (Meiner 1952) (1807); see also G.W.F. Hegel, *Phenomenology of Spirit* 383–409 (A.V. Miller trans., Clarendon 1977).

16. The idea of 'consciousness' associated with an ensemble of human beings was suggested by G. Butler, *Sovereignty and the League of Nations*, 1 *British Y.B. Int'l L.* 35, at 42 (1920–21), who discussed the word *sovereignty*, and more particularly the expression 'external sovereignty,' by resorting, *inter alia*, to insights from the new field of psychology. See also P. Allott, *Reconstituting Humanity—New International Law*, 3 *European J. Int'l L.* 219, at 223 (1992), who expressed the following view:

Society exists nowhere else than in the human mind. *And the constitution of a given society exists in and of human consciousness, the consciousness of those conceived as its members and its non-members, past and present.* Wherever and whenever a structure-system of human socializing is so conceived in consciousness, there and then a society is conceived—family, tribe, organized religion, legal corporation, nation, state . . .

(emphasis added).

A. *Vattel on territory transfers*

In order to appreciate Vattel's views on the transfers of territory, one must have a sense of his work as a whole. Therefore, the principal themes in *Droit des Gens* will first be presented in Part II, Section B, before examining in detail in Part II, Section C the part of the manuscript dealing with the question of territory transfers.

B. *Droit des Gens in general*

In its original format, *Droit des Gens* had: (i) a *preface*, in which Vattel explained why he wrote the book and the guiding principles he intended to follow; (ii) *preliminaries*, which brushed a general picture of the main ideas of the law of nations; and, (iii) *four books*, which constituted the body of the manuscript—the first book on the nation in itself, the second one on the nation and its relation with others, the third one on war, and the last book on peace and embassies.<sup>17</sup> The most important achievement of Vattel is the *externalisation* of the idea of 'sovereignty,' which was transposed from the internal plane to the international plane.

The intention to externalise 'sovereignty'—which internal ramifications were developed by Jean Bodin in *Les six Livres de la Republique*<sup>18</sup>—is manifested in the very first book of *Droit des Gens*, entitled "Of Nations Considered in Themselves."<sup>19</sup> It provides the following definition of the state:

NATIONS or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.

Such a society has her affairs and her interests; she deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of *obligations* and *rights*.<sup>20</sup>

Such a definition of 'state' or 'nation'—terms which Vattel used interchangeably and viewed as synonymous<sup>21</sup>—is based on the ideas

17. See A. Mallarmé, *supra* note 4, at 591.

18. J. Bodin, *Les six Livres de la Republique* (Jacques du Puys 1583) (1576). See also J. Bodin, *The Six Bookes of a Commonweale* (R. Knolles trans, Impensis G. Bishop 1606).

19. See *Law of Nations*, *supra* note 4, at 1.

20. See *Law of Nations*, *supra* note 4, at lv.

21. But see P.P. Remec, *The Position of the Individual in International Law According to Grotius and Vattel* 172 (Martinus Nijhoff 1960), who pointed out that the terms 'state' and 'nation' are not always used in *Droit des Gens* to convey the same idea: "Yet it appears from other places that he [Vattel] understands under the

of “social contract”<sup>22</sup> and “moral person.”<sup>23</sup> And, most importantly, it would require the recognition of some kind of competence to govern, that is, of some kind of ‘sovereignty.’<sup>24</sup>

Indeed, the public body at the head of such a society of persons coming together to protect shared interests and pursue common goals must have the power to provide order and to rule.<sup>25</sup> “This political authority is the *Sovereignty*,” wrote Vattel, “and he or they who are invested with it are the *Sovereign*.”<sup>26</sup> He further explained thus:

It is evident, that, by the very act of the civil or political association, each citizen subjects himself to the authority of the entire body, in every thing that relates to the common welfare. The authority of all over each member, therefore, essentially belongs to the body politic, or state; but the exercise of that authority may be placed in different hands, according as the society may have ordained.<sup>27</sup>

---

term ‘Nation’ the body of the people united through the civil compact, while ‘State’ would refer more to the political organization of that body as the system in which the Nation chose to function in order to achieve its end.” (footnotes omitted).

22. Also referred to as “social compact.” See Law of Nations, *supra* note 4, at lv–lvi:

Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, lived together in the state of nature,—*Nations*, or sovereign states, are to be considered as so many free persons living together in the state of nature. It is a settled point with writers on the *natural* law, that all men inherit from *nature* a perfect *liberty* and *independence*, of which they cannot be deprived without their own consent. In a State, the individual citizens do not enjoy them *fully* and absolutely, because they have made a *partial* surrender of them to the sovereign. But the body of the nation, the State, remains absolutely free and independent with respect to all other men, and all *other* Nations, as long as it has not voluntarily submitted to them.

23. On this, Vattel further wrote:

[t]hat society, considered as a moral person, since possessed of an understanding, volition, and strength peculiar to itself, *is therefore obliged to live on the same terms with other societies or states, as individual man was obliged, before those establishments, to live with other men*, that is to say, according to the laws of the natural society established among the human race, with the difference only of such exceptions as may arise from the different nature of the subjects . . .

See Law of Nations, *supra* note 4, at lx (emphasis added).

24. See generally, O. Beaud, *La notion d’État*, 35 Archives Philo. D. 119, 125 ff (1990).

25. See A. Mallarmé, *supra* note 4, at 509; see also C. Phillipson, *Emerich de Vattel*, in *Great Jurists of the World*, vol. 2, 477 at 496 (J. Macdonell & E. Manson eds., Littre, Brown 1914).

26. See Law of Nations, *supra* note 4, at 1.

27. *Id.*

Depending on the *locus* of power, the moral person in whose hands the authority is placed constitutes a democracy, an aristocracy or a monarchy and,<sup>28</sup> Vattel opined,<sup>29</sup> these “three kinds of government may be variously combined and modified.”<sup>30</sup>

Then, the association between ‘sovereignty’ and internal governance was transposed onto the international plane.<sup>31</sup> This *externalisation* of the competence to govern was carried out by establishing what constitutes ‘sovereignty,’ this time viewed from without:

Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *Sovereign State*. Its rights are naturally the same as those of any other state. Such are the moral persons who live together in a natural society, subject to the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern [sic] itself by its own authority and laws.<sup>32</sup>

It is clear that Vattel has here changed the idea of ‘sovereignty’—the authority to govern is now seen as vested into a political body acting as the sole representative of the people both internally and externally.

The proposition that a society is not merely the sum of persons forming it, but ought to be viewed in terms of an aggregate of individuals—that is, of a corporate body, having its own will and its

28. See Law of Nations, *supra* note 4, at 1, 52:

That moral person resides in those who are invested with the public authority, and represent the entire nation. Whether this be the common council of the nations, an aristocratic body, or a monarch, this conductor and representative of the nation, this sovereign, of whatever kind, is therefore indispensably obliged to procure all the knowledge and information necessary to govern well, and to acquire the practice and habit of all the virtues suitable to a sovereign.

29. So Vattel followed the same classification of forms of government used by Bodin; he did not refer to Montesquieu’s new classification of governments as republics, monarchies, and despotisms, introduced in C.-L. de S. Montesquieu, *De l’esprit des loix* (London 1757) (1748).

30. See Law of Nations, *supra* note 4, at 1.

31. See E. Jouannet, *supra* note 3, at 404, who wrote:

Que Vattel, ensuite, ait ainsi théorisé la notion de souveraineté externe n’empêche pas qu’il ait perçu tout aussi nettement la notion de souveraineté interne, il commence d’ailleurs son grand ouvrage, au livre I, par une théorisation très poussée à l’égard de la souveraineté interne avant de l’envisager, aux livres suivants, comme *pilier de sa construction internationale*. On ne veut pas dire non plus que l’on a affaire à deux notions réellement différentes puisqu’il ne s’agit en définitive que des deux faces opposées d’un même concept.

(emphasis added).

32. See Law of Nations, *supra* note 4, at 2.

own finality—predates Vattel.<sup>33</sup> According to Roscoe Pound, the personification of the state can be traced back to Ancient Greece and would be as old as Plato's Republic.<sup>34</sup> Although picked up by the Roman private civil law, it was only in the Middle Ages that the concept of fictitious juridical person resurfaced, initially in domestic public law and then in international law.<sup>35</sup>

The first reappearance of the doctrine was with the work of Johannes Althusius, who published *Politica*<sup>36</sup> in 1603. But it is Thomas Hobbes<sup>37</sup> who is credited with the medieval rebirth of the theory of moral personality,<sup>38</sup> hinted at in *De Cive*,<sup>39</sup> and firmly

33. See P.P. Remec, *supra* note 21, at 166.

34. See R. Pound, *Philosophical Theory and International Law*, 1 Bibliotheca Visseriana 71, at 79 (1923):

To Plato the city-state was an individual and the characteristics of the individual human soul projected themselves enlarged in the physiognomy of the state. He was not thinking of a moral order among states but of a moral order within the city-state. But the transition in thought was easy and led to ready acceptance of the juristic dogmatic fiction that treated the mass of a population collectively as the equivalent in moral responsibility of an individual man.

See also A.P. d'Entrèves, *Natural Law—An Introduction to Legal Philosophy* 10 (Hutchinson 1951).

35. On the influence of Roman law in the development of international law concepts, see H. Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* 23–25 (Longmans, Green 1927).

36. J. Althusius, *Politica methodice digesta et exemplis sacris et profanis illustrata* (Corvin 1603). The importance of Althusius theory was brought up by O. Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien* (Koebner 1880). See also E. Jouannet, *supra* note 3, at 265.

37. Hobbes's *Leviathan* is said to be "the greatest, perhaps the sole, masterpiece of political philosophy written in the English language . . ." See M. Oakeshott, *Introduction*, in T. Hobbes, *Leviathan* viii (Basil Blackwell 1946). See also F.H. Hinsley, *Sovereignty* 141 (2d ed. Cambridge University Press 1986).

38. See, among many authors on this aspect of Hobbes's work, C.B. Macpherson, *The Political Theory of Possessive Individualism—Hobbes to Locke* 17–29 (Clarendon Press 1964); A. Clair, *Aliénation de droits et institution de l'Etat selon Hobbes*, 25 *Archives Phil. D.* 305 (1980); D. Copp, *Hobbes on Artificial Persons and Collective Actions*, 89 *Philosophical Rev.* 579 (1980); S. Goyard-Fabre, *Le concept de 'persona civilis' dans la philosophie politique de Hobbes*, 3 *Cahiers Phil. Pol. & Jur.* 51 (1983); L. Jaume, *La théorie de la 'personne fictive' dans le Léviathan de Hobbes*, 33 *Rev. française sc. pol.* 1009 (1983); D. Gauthier, *Hobbes's Social Contrat*, 22 *Noûs* 71 (1988); F. Tinland, *Droit naturel, loi civile et souveraineté à l'époque classique* 123–57 (Presses universitaires de France 1988); S. Goyard-Fabre, *Loi civile et obéissance dans l'Etat-Léviathan*, in Thomas Hobbes—Philosophie première, théorie de la science et politique 289 (Y.C. Zarka & J. Bernhardt eds., Presses universitaires de France 1990); L. Stephen, *Hobbes* 182–95 (Thoemmes Antiquarian 1991); A. Ryan, *Hobbes's Political Philosophy*, in *The Cambridge Companion to Hobbes* 208 (T. Sorell ed., Cambridge University Press 1996); E. Jouannet, *supra* note 3, at 265 ff.

39. T. Hobbes of Malmesbury, *Elementa philosophica de cive* (Amsterdam

established in *Leviathan*<sup>40</sup> with the notion of “artificial person.”<sup>41</sup> Samuel von Pufendorf<sup>42</sup> further developed the theory of juristic person—what he called *persona moralis composita*—in his *De Iure Naturae et Gentium*,<sup>43</sup> first published in 1672, which discussed the dissociation of the moral person of the state from the physical person of the ruler.<sup>44</sup> In fact, he suggested a doctrine of double contracts—one among the individuals of the society and one between this social body and the political body, which is the corporate body of the nation.<sup>45</sup>

Although it had already resurfaced in the 18th century, it is accurate to say that, “[a]t the time of Vattel no clearcut theory of moral personality was widely accepted.”<sup>46</sup> In fact, Albert de Lapradelle argued that it is really only with Vattel—some say<sup>47</sup> along with Christian Wolff<sup>48</sup>—that the personality and authority of the ruler

1647) (1642).

40. T. Hobbes of Malmesbury, *Leviathan, or The Matter, Forme, & Power of a Common-Wealth—Ecclesiasticall and Civil* (Green Dragon 1651).

41. *Id.* at 80–83 (spelling modernized).

42. See generally, Michel Villey, *Les fondateurs de l'école du droit naturel moderne au XVIIe siècle*, 6 *Archives Phil. D.* 73, 84–90 (1961); A. Renaut, *Pufendorf Samuel, 1632–1693—Le Droit de la nature et des gens, 1672*, in *Dictionnaire des Œuvres Politiques* 659 (F. Chatelet, O. Duhamel & E. Pisier eds., Presses universitaires de France, 1986).

43. Samuel Pufendorf, *De iure naturae et gentium libri octo* (Hoogenhuysen 1688). See also the French translation from the notes of J. Barbeyrac, S. von Pufendorf, *Le Droit de la Nature et des Gens, ou Système Générale des Principes les plus importants de la Morale, de la Jurisprudence et de la Politique*, 2 vols. (Kuyper 1706) and the English translation by C.H. Oldfather & W.A. Oldfather, S. von Pufendorf, *On the Law of Nature and Nations* (2nd ed.) (Clarendon Press 1934).

44. See Otto von Gierke, *The Development of Political Theory* 175 ff. (Fertig 1966); Paul Guggenheim, *La souveraineté dans l'histoire du droit des gens — De Vitoria à Vattel*, in *Mélanges offerts à Juraj Andrassy* 111, at 119 (Nijhorff 1968); P.P. Remec, *supra* note 21, at 163, 170.

45. See Alfred Dufour, *Tradition et modernité de la conception pufendorffienne de l'État*, 21 *Archives Philo. D.* 55, at 66–67 (1976); Jouannet, *supra* note 3, at 286–95.

46. Remec, *supra* note 21, at 169.

47. See, among others, Guggenheim, *supra* note 3, at 120–21; Jouannet, *supra* note 3, at 255, 311–16. See also P. Haggemacher, *L'État souverain comme sujet de droit international, de Vitoria à Vattel*, 16 *Droits* 11, at 20 (1992):

Mais c'est seulement au siècle suivant [18th century] que la qualité de sujet du droit international finit par être théorisée à l'aide de la personne étatique souveraine, entraînant un effacement relatif du problème de la compétence de guerre et du belligérant souverain. Les artisans de cette reformulation sont Wolff et Vattel qui, tout en rendant hommage au prince souverain devenu entre-temps despote éclairé, font de l'Etat souverain le principe structurel décisif de leurs traités sur le droit des gens.

48. Wolff simply assimilated states to individuals, without explaining the

become the personality and authority of the *state*, as a corporate body representing the citizens.<sup>49</sup> On the juridical person of the state, Vattel wrote:

A political society is a moral person (Prelim. § 2) inasmuch as it has an understanding and a will, of which it makes use for the conduct of its affairs, and is capable of obligations and rights. When, therefore, a people confer the sovereignty on any one person, they invest him with their understanding and will, and make over to him their obligations and rights, so far as relates to the administration of the state, and to the exercise of the public authority.<sup>50</sup>

The same idea of artificial moral person, separate from the person of the ruler, whose authority to govern was given by the aggregate of individuals it represents,<sup>51</sup> is found in chapter four of book one, entitled “Of the Sovereign, His Obligations, and His Rights”:<sup>52</sup>

We have said, that the *sovereignty* is that public authority which commands in civil society, and orders and directs what each citizen is to perform, to obtain the end of its institution. This authority originally and essentially belonged to the body of the society, to which each member submitted, and ceded his natural right of conducting himself in every thing as he pleased, according to the dictates of his own understanding, and of doing himself justice. But the body of the society does not always retain in its own hands this sovereign authority: it frequently intrusts it to a senate,

---

juristic personality of the former. See Christian Wolff, *The Law of Nations Treated According to a Scientific Method — In which Natural Law of Nations is carefully distinguished from that which is voluntary, stipulative and customary*, in *Classics of International Law* 9 (James Brown Scoll ed., Clarendon Press 1934): “Nations are regarded as individual free persons living in a state of nature. For they consist of a multitude of men united into a state. Therefore since states are regarded as individual free persons living in a state of nature, nations also must be regarded in relation to each other as individual free persons living in a state of nature.” See also the original Christian Wolff, *Ius gentium methodo scientifica pertractatum. In quo ius gentium naturale ab eo, quod voluntarii pactitii, et consuetudinarii est, accurate distinguitur* 1 (Frankfurt & Leipzig 1764). Wolff first made reference to the state as a “person” in Christian Wolff, *Institutiones juris naturae et gentium, in quibus ex ipsa hominis natura continuo nexu omnes obligationes et jura omnia deducuntur* 533 (Officina Rengeriana 1754).

49. Lapradelle, *supra* note 4, at x: Pour la première fois, la personnalité et la souveraineté de l’Etat (§§ 3–4) se substituent à la personnalité et à la souveraineté du prince.” See also Guggenheim, *supra* note 47, at 119–21; Jouannet, *supra* note 3, at 404.

50. Law of Nations, *supra* note 4, at 13–14.

51. See Phillipson, *supra* note 25, at 497–98.

52. Law of Nations, *supra* note 4, at 12.

or to a single person. That senate, or that person, is then the sovereign.<sup>53</sup>

This public authority transferred from the people to the nation<sup>54</sup> must be exercised according to the “Constitution,”<sup>55</sup> which prescribes the “fundamental laws”<sup>56</sup> that may limit the power to govern.<sup>57</sup> Those laws cannot be changed by the ruler.<sup>58</sup> Further, because the authority to govern is rooted in the aggregate of individuals, the people can both reform the government and change the constitution;<sup>59</sup> it may also rid itself of a tyrannical ruler.<sup>60</sup>

---

53. Law of Nations, *supra* note 4, at 12.

54. Indeed, Vattel argued that the people transferred the competence to govern in favor of the juridical person of the state. This is different than Rousseau’s theory, to the effect that the people continually hold this power, crystallised in a “*volonté générale*,” which must be followed by the ruler, who is merely an agent of the people. See J.-J. Rousseau, *Du Contrat Social; ou Principes du Droit Politique* 20–22 (Marc Michel Rey 1762) and the translation J.-J. Rousseau, *A Treatise on the Social Compact; or the Principles of Political Law* 20–22 (London 1764). See also Guggenheim, *supra* note 3, at 22.

55. See Law of Nations, *supra* note 4, at 8: “The fundamental regulation that determines the manner in which the public authority is to be executed, is what forms the *constitution of the state*. In this is seen the form in which the nation acts in quality of a body politic,—how and by whom the people are to be governed,—and what are the rights and duties of the governors.”

56. *Id.*

The Laws are regulations established by public authority, to be observed in society. All these ought to relate to the welfare of the state and of the citizens. The laws made directly with a view to the *public* welfare are *political laws*; and in this class, those that concern the body itself and the being of the society, the form of government, the manner in which the public authority is to be exerted,—those, in a word, which together form the *constitution* of the state, are the *fundamental laws*.

57. See Law of Nations, *supra* note 4, at 14–15.

58. See Law of Nations, *supra* note 4, at 15.

59. See Law of Nations, *supra* note 4, at 10–11.

60. See Law of Nations, *supra* note 4, at 17: “As soon as a prince attacks the constitution of the state, he breaks the contract which bound the people to him; the people become free by the act of the sovereign, and can no longer view him but as an usurper who would load them with oppression.”

This line of thought put forward by Vattel, who earlier spoke of the governing authority as the “depository of the empire” (see Law of Nations, *supra* note 4, at 14) is analogous to Locke’s theory of government, according to which the supreme governmental authority (i.e. the legislative power) is held in trust by those who rule and return to the people if the trust is broken. See J. Locke, *Two Treatises of Government* 369–70 (Amen-Corner 1690):

Though in a constituted commonwealth, standing upon its own Basis, and acting according to its own nature, that is, acting for the preservation of the Community, there can be but one Supreme Power, which is the Legislative, to which all the rest are and must be subordinate, yet the Legislative power being only a Fiduciary Power to act for certain ends, *there remains still in the People a Supreme Power to remove or alter the Legislative*, when they find the Legislative act

It follows from the incorporation of citizens into this moral person that the primary, in fact the only, agent for securing individual interests is the state, which thus owes its principal duty to itself, and thereby to its people.<sup>61</sup> Accordingly, Vattel explained that “a moral being is charged with obligations to himself,”<sup>62</sup> and these are essentially “to preserve and to perfect his own nature.”<sup>63</sup> The preservation of a nation is its survival and that of its members; the perfection of a nation is the happiness of its people. He noted:

The *end* or *object* of civil society is to procure for the citizens whatever they stand in need of for the necessities, the conveniences, the accommodation of life, and, in general, whatever constitutes happiness,—with the peaceful possession of property, a method of obtaining justice with security, and, finally, a mutual defence against all external violence.<sup>64</sup>

The idea of a moral person representing the people is also found in book three of *Droit des Gens* dealing with war, which Vattel defined as “that state in which we prosecute our right by force.”<sup>65</sup> The natural right of individuals to use force for their personal preservation is deemed to pass to the state, not only to administer justice and peace between citizens within,<sup>66</sup> but also to defend the nation against outside threats.<sup>67</sup> Such a transfer of power to declare and make war appears clearly from this passage:

*Thus the sovereign power alone is possessed of authority to make war.* But, as the different rights which constitute this

---

contrary to the trust reposed in them.  
(emphasis added) (spelling modernized).

61. See Daniel George Lang, *Foreign Policy in the Early Republic—The Law of Nations and the Balance of Power* 17 (Louisiana State University Press 1985); Mallarmé, *supra* note 4, at 513: “Mais ce souverain n’est établi que pour le bien commun de tous les citoyens. Il représente la Nation en ce qu’il devient le sujet où résident les obligations et les droits relatifs à la personne morale de la société politique; par suite, ses devoirs et ses droits sont ceux même de cette nation concernant sa conservation et sa perfection.”

62. *Law of Nations*, *supra* note 4, at 4.

63. *Id.*

64. *Id.* See also Francis Stephen Ruddy, *International Law in the Enlightenment—The Background of Emerich de Vattel’s Le Droit des Gens* 145–65 (Oceana Publications 1975); Mallarmé, *supra* note 4, at 516–33; Phillipson, *supra* note 25, at 498–502.

65. *Law of Nations*, *supra* note 4, at 291.

66. See *Law of Nations*, *supra* note 4, at 292. On the administration of justice internally, see also chapter thirteen in book one. *Id.* at 77 ff.

67. See Ruddy, *supra* note 64, at 217, who wrote: “With the formation of society these rights passed from the individual to society, and in society, the right to make war was in the sovereign . . .” See also Lang, *supra* note 61, at 18.

power, *originally resident in the body of the nation*, may be separated or limited according to the will of the nation (Book I. § 31 and 45), it is from the particular constitution of each state, that we are to learn where the power resides, that is *authorized to make war in the name of the society at large*.<sup>68</sup>

Also, given that a state represents its people, a declaration of war means that not only the nations, but “all the subjects of the one are enemies to all the subjects of the other.”<sup>69</sup>

For the present discussion, the most important feature in Vattel’s theory is that the power to govern for the benefit of the people is solely in the hands of this ‘moral person,’ who will exercise it both within and without, that is, both internally on the state territory and externally on the international plane. He explained the exclusive authority of the state government to represent and act on behalf of the people:

The sovereign, or conductor of the state, thus becoming the depositary of the obligations and rights relative to government, in him is found the moral person, who, without absolutely ceasing to exist in the nation, *acts thenceforwards only in him and by him*. Such is the origin of the representative character attributed to the sovereign. *He represents the nation in all the affairs in which he may happen to be engaged as a sovereign*.<sup>70</sup>

Accordingly, the state is the incorporated body that absorbs the individuals that form society and represents them not only for domestic matters, but also for matters involving foreign persons or foreign nations. As far as international affairs are concerned, “[t]he sovereign state and not the individual man are henceforth the criterion by which all relations in the international sphere are judged.”<sup>71</sup>

Moreover, in order to assure that the incorporated body of the nation will be the only representative of the people, both within and without, Vattel put forward the idea of state *independence*, which had already been introduced in the preface, where he wrote that “[e]ach sovereign state claims, and actually possesses an absolute independence on all others.”<sup>72</sup> In the preliminaries, an analogy about

---

68. Law of Nations, *supra* note 4, at 292 (emphasis added).

69. Law of Nations, *supra* note 4, at 321.

70. Law of Nations, at 14. (emphasis added).

71. Remec, *supra* note 21, at 180. *See also* Haggemacher, *supra* note 47, at 11–12: “Or, durant la période en question, l’Etat souverain est, d’une part, pleinement constitué et, d’autre part, le principal, sinon l’unique sujet du droit international.”

72. Law of Nations, *supra* note 4, at xiii.

independence was made between the situations of men in society and of nations in the society of nations:

Nations being free and independent of each other, in the same manner as men are naturally free and independent, the *second* general law of their society is, *that each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature.* The natural society of nations cannot subsist, unless the natural rights of each be duly respected.<sup>73</sup>

When concluding chapter three of book one, dealing with the constitution of a nation, Vattel also made it clear that “no foreign power has a right to interfere”<sup>74</sup> in matters of national concern.

However, it is in the second book of *Droit des Gens*, entitled “Of a Nation Considered in Its Relation to Others,”<sup>75</sup> that this principle of state independence was developed.<sup>76</sup> On the international plane, it would mean that the moral person entrusted by the people ought to be able to govern without the interference of foreign public authorities or individuals. From this idea of state independence, Vattel laid down the general rule prohibiting interference in the internal affairs of a nation:

It is an evident consequence of the liberty and *independence* of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another. Of all the rights that can belong to a nation, *sovereignty* is, doubtless, the most precious, and that which other nations ought the most scrupulously to respect, if they would not do her an injury.<sup>77</sup>

It comes out clearly from this passage that Vattel thus changed ‘sovereignty’ by associating it with ‘*independence*,’ which would refer to a normative prescription according to which, on the international plane, one state ought not to interfere in the domestic government of another.

It is with his law of nations that Vattel completed the *externalisation* of ‘sovereignty’ in *Droit des Gens*. This brings back the stated object of the treatise, which was to lay down the principles of the law of nations “[t]o establish on a solid foundation the *obligations* and *rights* of *nations* . . .”<sup>78</sup> In the preface, Vattel had acknowledged Hobbes as the first, to his knowledge, “who gave a

---

73. Law of Nations, *supra* note 4, at lxi.

74. Law of Nations, *supra* note 4, at 11.

75. Law of Nations, *supra* note 4, at 132.

76. See Brierly, *supra* note 1, at 38, who opined that the system proposed by Vattel put an “exaggerated emphasis on the independence of states.”

77. Law of Nations, *supra* note 4, at 154–55 (emphasis added).

78. Law of Nations, *supra* note 4, at lv.

distinct, though imperfect idea, of the law of nations.”<sup>79</sup> For his part, Vattel wrote the following: “The *Law of Nations* is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.”<sup>80</sup>

For present purposes, suffice it to say that because the fictitious moral person of the state has absorbed the individuals of society and represents them on the international plane, the legal normative scheme governing the relations involving such foreign elements is concerned solely with the members of the society of nations, namely, the nations.<sup>81</sup> Here is how it would work: “The law of nations is the law of sovereigns; free and independent states are moral persons, whose rights and obligations we are to establish in this treatise.”<sup>82</sup> Thus the law of nations is a law which applies to nations, to their mutual external relations, and to them only.<sup>83</sup> This is something that was already coming out clearly from the full title of Vattel’s work—*The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*.<sup>84</sup>

In fact, as one author put it, “Vattel’s main achievement was in outlining the sovereign state as *the* subject of the law of nations,”<sup>85</sup> indeed, “the sole subjects of the law of nations.”<sup>86</sup> It follows that the legal system put forward in *Droit des Gens* to regulate the relations between independent states constitutes the last element in order to accomplish the *externalisation* of the idea of state ‘sovereignty.’

### C. *Droit des Gens* and territory transfers

The question of territory transfers must be appreciated in the general context of Vattel’s work, in which ‘sovereignty’ means that the authority to govern is vested in a political body that acts as the sole representative of individuals in society, not only for domestic affairs, but also for matters involving foreign nations. In fact, the personification of the state as the representative of an aggregate of

79. Law of Nations, *supra* note 4, at vii.

80. Law of Nations, *supra* note 4, at lv.

81. See Remec, *supra* note 21, at 181, who wrote: “In its external relations, by the same reason, the state absorbs the individual men comprising it.”

82. Law of Nations, *supra* note 4, at 3.

83. See Remec, *supra* note 21, at 128: “Vattel’s aim was to establish a definite body of laws which regulate the relations among states, laws which would subsume these relations in their entirety and yet exclude analogous relations among subjects other than states. For this purpose he constructed a very elaborate system of several kinds of the laws of nations” (footnotes omitted).

84. This is Joseph Chitty’s translation. The original title, in French, reads: *Le Droit des Gens; ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains*.

85. Remec, *supra* note 21, at 180.

86. *Id.* at 190.

individuals, which is free of outside interference or legal constraint, constitutes the basis upon which Vattel justified the rejection of *patrimonial kingdoms*, kingdoms founded on monarchical ownership of the national territory. This concept is at the centre of the theory dealing with territory transfers in international law found in *Droit des Gens*.

As Arthur Nussbaum pointed out, territory transfers through treaties between state rulers remained quite common in the 18th century: "Treaties of the medieval type, by which a prince, in one way or another, might dispose of his territory, are still found in this period."<sup>87</sup> Vattel himself noticed that the principle of patrimonial kingdoms, based on a proprietary right of the territory controlled by ruler, was defended by several authors, including the German Christian Wolff<sup>88</sup> and the Dutch Hugo Grotius:

I know that many authors, and particularly Grotius, give long enumerations of the alienations of sovereignties. But the examples often prove only the abuse of power, not the right. And besides, the people consented to the alienation, either willingly or by force.<sup>89</sup>

Vattel rejected this approach in the most explicit terms, as he had already announced in the preface of *Droit des Gens*.<sup>90</sup>

In book one, at chapter five, entitled "Of States Elective, Successive or Hereditary, and of those Called Patrimonial,"<sup>91</sup> Vattel took a firm stand against the idea that a ruler has some kind of proprietary title over the national territory:

This pretended proprietary right attributed to princes is a chimera, produced by an abuse which its supporters would fain make of the laws respecting *private inheritances*. The state neither is nor can be a patrimony, since the end of patrimony is the advantage of the possessor, whereas the prince is established only for the advantage of the state.<sup>92</sup>

---

87. Arthur Nussbaum, *A Concise History of the Law of Nations* 128 (Macmillan 1950). See also C. Laviolle, *De la fonction du territoire et de la domanialité dans la genèse de l'État en France sous l'ancien régime*, 15 *Droit* 19 (1992).

88. Vattel referred to Wolff in his preface. See *Law of Nations*, *supra* note 4, at xiii.

89. *Law of Nations*, *supra* note 4, at 30 (footnotes omitted).

90. See *Law of Nations*, *supra* note 4, at xiii. See also Horatia Muir Watt, *Droit naturel et souveraineté de l'Etat dans la doctrine de Vattel*, 32 *Archives Philosophie Droit* 71, at 73 (1987); Guggenheim, *supra* note 3, at 21; Lapradelle, *supra* note 4, at ix-x; Brierly, *supra* note 1, at 39; Ruddy, *supra* note 64, at 140-41; Jouannet, *supra* note 4, at 320 ff.

91. *Law of Nations*, *supra* note 4, at 23.

92. *Law of Nations*, *supra* note 4, at 25 (footnotes omitted).

It follows that “the care of their own safety, and the right to govern themselves, still essentially belong to the society, although they have intrusted them, even without any express reserve, to a monarch and his heirs.”<sup>93</sup>

His stand on patrimonial kingdoms is intertwined with his general theory of governance based on a ‘sovereignty’ that is *unalienable*, because such authority is transferred by the people to the ruler in order to represent them both internally and externally. Vattel explained his position as follows:

Every true sovereignty is in its own nature, unalienable. We shall be easily convinced of this, if we pay attention to the origin and end of political society, and of the supreme authority. A nation becomes incorporated into a society, to labor for the common welfare as it shall think proper, and to live according to its own laws. With this view it establishes a public authority.<sup>94</sup>

As a consequence, territory transfers “can never take place without the express and unanimous consent of the citizens, with the right of really alienating or subjecting the state to another body politic.”<sup>95</sup> This is because, “the individuals who have formed this society, entered into it, in order to live in an independent state, and not under a foreign yoke.”<sup>96</sup> “Let us conclude then,” wrote Vattel, “that, as the nation alone has a right to subject itself to a foreign power, the right of really alienating the state can never belong to the sovereign, unless it be expressly given him by the entire body of the people.”<sup>97</sup>

Chapter twenty-one of book one, entitled “Of the Alienation of the Public Property, or the Domain, and that of a Part of the State,”<sup>98</sup> deals specifically with the *dismemberment* of the state, that is, “the cession of a town or a province that constitutes a part of it.”<sup>99</sup> What Vattel wrote about such transfers of some parts of the national territory is particularly relevant for the present analysis of the cession of Louisiana by France to the United States of America:

A nation ought to preserve itself (§ 16)—it ought to preserve all its members—it cannot abandon them; and it is under an engagement to support them in their rank as members of the nation (§ 17). It has not, then, a right to traffic with their rank and liberty, on account of any advantages it may expect to

---

93. *Id.*

94. Law of Nations, *supra* note 4, at 31.

95. *Id.*

96. *Id.*

97. *Id.* at 31–32 (footnotes omitted).

98. *Id.* at 116.

99. Law of Nations, *supra* note 4, at 118.

derive from such a negotiation. They have joined the society for the purpose of being members of it—they submit to the authority of the state, for the purpose of promoting in concert their common welfare and safety, and not of being at its disposal, like a farm or an [sic] herd of cattle.<sup>100</sup>

Vattel opined, however, that in extreme cases of necessity, such a dismemberment of territory could be justified:

But the nation may lawfully abandon them in a case of extreme necessity; and she has a right to cut them off from the body, if the public safety requires it. When, therefore, in such a case, the state gives up a town or a province to a neighbor or to a powerful enemy, the cession ought to remain valid as to the state, since she had a right to make it: nor can she any longer lay claim to the town or province thus alienated, since she has relinquished every right she could have over them.<sup>101</sup>

Accordingly, “[t]he nation ought never to abandon its members but in a case of necessity, or with a view to the public safety, and to preserve itself from total ruin; and the prince ought not to give them up except for the same reasons.”<sup>102</sup>

Another relevant aspect of Vattel’s position on the cessions of parts of the national land is the effect on the populations. Again, his reasoning is fundamentally linked to his theory of ‘sovereignty,’ according to which the ruler is the representative of the people:

But the province or town thus abandoned and dismembered from the state, is not obliged to receive the new master whom the state attempts to set over it. Being separated from the society of which it was a member, it resumes all its original rights; and if it be capable of defending its liberty against the prince who would subject it to his authority, it may lawfully resist him.<sup>103</sup>

Thus although valid between the parties to the peace treaties, the peoples living on the transferred territories may ignore the cession and refuse to accept the new ruler.

It is through peace treaties that transfers of parts of the territory are accomplished in cases of “pressing necessity, such as is produced by the events of an unfortunate war,”<sup>104</sup> wrote Vattel in chapter two

---

100. *Id.*

101. *Id.*

102. *Id.* at 119.

103. *Id.* at 118.

104. *Id.* at 433.

of book four in *Droit des Gens*, entitled “Treaties of Peace.”<sup>105</sup> It is noteworthy, however, that Vattel further made the following interesting point: “[A]lienations made by the prince in order to save the remainder of the state, are considered as *approved and ratified by the mere silence of the nation*.”<sup>106</sup> That could happen when the nation “has not in the form of her government, retained some easy and ordinary method of giving her express consent, and has lodged an absolute power in the prince’s hands.”<sup>107</sup>

*D. The cession of Louisiana to the United States of America*

The stand Vattel took in *Droit des Gens* against patrimonial kingdoms—founded on his theory of ‘sovereignty’—dictated his position on territory transfers. The ruler, who represents the people, is not generally empowered to cede territories. In cases of state dismemberments, Vattel is clear that the *express and unanimous consent* of the individuals living in the part of the territory ceded is required because ‘sovereignty’ belongs to the people and is thus unalienable. The only exception is in situations of pressing necessity or danger to public safety (such as in the context of wars), which validate the cession of territory as between the parties to such treaties. As for individuals living there, they are not bound by even such a necessary transfer unless they consent to it, which may be implied by their mere silence.

It is now appropriate to examine the cession of the territory of Louisiana by France to the United States of America. “By this act,” wrote Floyd Shoemaker, “Napoleon Bonaparte ceded to the United States the port of New Orleans and more than 825,000 square miles of land west of the Mississippi, almost doubling the country’s area.”<sup>108</sup> The objective under this heading is to assess whether or not the conditions for such transfers set out in *Droit des Gens*, which was the dominant international law *doctrine* of the time in both Europe and the United States, were met when the cession occurred.

By way of reminder, one must keep in mind that Louisiana, which had been transferred to Spain in 1762,<sup>109</sup> was retroceded to

---

105. *Id.*

106. *Id.* at 432–33 (emphasis added).

107. *Id.* at 433.

108. Floyd C. Shoemaker, *The Louisiana Purchase, 1803, and the Transfer of Upper Louisiana to the United States, 1804*, 48 *Mo. Hist. Rev.* 1, 1 (1953). On the boundaries of the Louisiana colony that was transferred to the United States, see Richard R. Stenberg, *The Boundaries of the Louisiana Purchase*, 14 *His Amer. Hist. L. Rev.* 32 (1934).

109. On the cession of Louisiana by France to Spain, see William R. Shepherd, *The Cession of Louisiana to Spain*, 19 *Pol. Sci. Q.* 439 (1904); Arthur S. Aiton, *The Diplomacy of the Louisiana Cession*, 36 *Am. Hist. L. Rev.* 701 (1931); A.P.

France in 1800 by the *Treaty of San Ildefonso*<sup>110</sup> after Napoleon put pressure on Charles IV in Madrid.<sup>111</sup> The English informed the Americans of the conclusion of this treaty and they became eager to protect their interests in the area, particularly in New Orleans where they used to have an agreement with the Spaniards for the navigation on the Mississippi and the storage of merchandise in the port.<sup>112</sup> Following the *Peace of Amiens*<sup>113</sup> in 1802, which ended the war with England, France was getting ready to formalise the *Treaty of San Ildefonso*; in fact, a naval expedition of troops was meant to take possession of Louisiana.<sup>114</sup> This proved unnecessary, however, with

---

Whitaker, *The Retrocession of Louisiana in Spanish Policy*, 39 Am. L. Hist. Rev. 454 (1934). It is thus shortly before the *Treaty of Paris*, in 42 Consolidated Treaty Series 281 (French) and 320 (English) (Cliver Parry ed., Oceana Publications 1969), signed on February 10, 1763, which ended the Seven Years' War (where France, Austria, Russia, Saxony, Sweden, and Spain after 1762 opposed Prussia, Great Britain, and Hanover) that Louisiana was transferred to Spain, as a recompense for its assistance to France; the treaty was entitled the *Acte de cession de la Louisiane par le roi de France au roi d'Espagne* and concluded at Fontainebleau on November 3, 1762. *Id.* at 241 (French).

110. *Traité préliminaire et secret, conclu à Saint-Ildephose, pour l'aggrandissement des Etats de Parme, et la cession de la Louisiane à la France*, in 55 Consolidated Treaty Series 377 (French) (Clive Parry ed., Oceana Publications 1969), concluded at San Ildefonso on October 1, 1800, as well as confirmed and signed at the palace of Aranjuez in March 1802. Pursuant to it, the colony of Louisiana and its dependencies (including New Orleans and the Isle of Orleans) were transferred back to France in exchange of which Spain received the kingdom of Etruria in the Italian peninsula. It is worth noting that there was a clause in the agreement to the effect that France could not later cede Louisiana to a third party.

111. See Frank J. Turner, *The Policy of France toward the Mississippi Valley in the Period of Washington and Adams*, 10 Am. Hist. Rev. 249 (1905); Mildred S. Fletcher, *Louisiana as a Factor in French Diplomacy from 1763 to 1800*, 17 Miss. Valley Hist. Rev. 367 (1905).

112. See Gene A. Smith, "To Conquer without War": *The Philosophy of Jeffersonian Expansion*, in *Filibusters and Expansionists: Jeffersonian Manifest Destiny, 1800–1821* 16 (Frank L. Owsley, Jr. & Gene A. Smith eds., University of Alabama Press 1997), reprinted in *The Louisiana Purchase and Its Aftermath, 1800–1830* (Dolores E. Labbe ed.) in 3 Louisiana Purchase Bicentennial Series in Louisiana History 7, 9 (University of Southwestern Louisiana 1998):

Spain's cession of Louisiana and the Floridas to France, Jefferson believed, 'works most sorely on the United States,' because it threatened the American right of navigation as well as the country's security. [ . . . ] Before France could take possession of Louisiana, a more critical event occurred. On October 16, 1802, Juan Ventura Morales, Spanish Intendant at New Orleans, closed the port to all American commerce descending the river, blatantly violating the 1795 Pinckney Treaty.

(footnotes omitted).

113. *Found* in 56 Consolidated Treaty Series 291 (French) (Clive Parry ed., Oceana Publications 1969) (French) (signed on March 27, 1802).

114. See generally Ronald D. Smith, *Napoleon and Louisiana: Failure of the*

Napoleon's change of policy vis-à-vis Louisiana, which basically meant that France was withdrawing from North America.<sup>115</sup>

It is in this context<sup>116</sup> that Minister to France Robert Livingston and Secretary of State James Monroe were in Paris on behalf of the American government, empowered by President Thomas Jefferson to settle the Mississippi question, and in particular to negotiate an agreement over the status of New Orleans.<sup>117</sup> They were startled when Monsieur de Talleyrand and François Barbé-Marbois, negotiating for Napoleon, offered the whole of Louisiana:

Instead of the cession of a town and its inconsiderable territory, a vast portion of America was in some sort offered to the United States. They only asked for the mere right of navigating the Mississippi, and their sovereignty was about to be extended over the largest rivers of the world. They passed over an interior frontier to carry their limits to the great Pacific Ocean.<sup>118</sup>

Ten days later, on 30 April 1803, the *Treaty between the French Republic and the United States, concerning the Cession of Louisiana*<sup>119</sup> was signed in Paris. Napoleon thus accepted to sell the

*Proposed Expedition to Occupy and Defend Louisiana, 1801–1803*, 12 La. Hist. 21 (1971); Shoemaker, *supra* note 108, at 5.

115. See William M. Sloane, *The World Aspects of the Louisiana Purchase*, 9 Am. Hist. Rev. 507, 511–12:

Bonaparte's foremost thought, therefore, was for concentration of energy. The sea-power of the world was Britain's, and her tyranny of the seas without a real check; even the United States could only spit out defiant and revengeful threats when her merchantmen were treated with contempt on the high seas by the British men-of-war. Therefore with swift and comprehensive grasp he framed and announced a *new policy*. The French envoy in London was informed that France was now forced to the conquest of Europe—this of course for the stimulating of French industries—and to the restoration of her occidental empire. This was most adroit.

(emphasis added).

116. See Alexander DeConde, *This Affair of Louisiana 164ff* (Louisiana State University Press 1976).

117. See also W. Edwin Hemphill, *The Jeffersonian Background of the Louisiana Purchase*, 22 Miss. Valley Hist. Rev. 177 (1935); see generally Dumas Malone, *Jefferson and his Time*, 2 vols. (Little, Brown, & Co. 1948).

118. F. Barbé-Marbois, *The History of Louisiana: Particularly of the Cession of that Colony to the United States of America* 280–81 (Louisiana State University Press 1977).

119. *Found in 57 Consolidated Treaty Series* 29 (French & English) (Clive Parry ed., Oceana Publications 1969) (signed on April 30, 1803). Pursuant to it, France transferred to the United States the territory of Louisiana, albeit undefined in the instrument (see *supra* note 108), which had been retroceded by Spain to France in 1800. Although the agreement was negotiated in French, the articles were in both French and English; it provided for a six-month period for ratification. There were

recently re-acquired colony for the price of 80 million French Francs (15 million American dollars), which today amounts to over 2,5 billion Francs (over 400 million dollars).<sup>120</sup>

In the meantime, on March 26, 1803, Prefect Pierre Clément Laussat arrived in New Orleans to begin the reestablishment of a French administration in Louisiana.<sup>121</sup> On August 19, 1803, he was informed of the French-American treaty, a copy of which he received on October 7, 1803. It was on November 30 that the *Treaty of San Ildefonso* was executed and that France's sovereignty over Louisiana took over Spain's;<sup>122</sup> ironically, therefore, Louisiana reverted back to the French after it had been ceded again to the Americans. When the retrocession actually took place,<sup>123</sup> Prefect Laussat made a proclamation to the Louisianans in his capacity of Commissioner to the French

---

also two conventions dealing with accessory matters, such as the amount to be paid by the United States for Louisiana.

It is worth noting that the Spaniards protested vigorously against the cession and contended that it was in fact invalid because, *inter alia*, the *Treaty of San Ildefonso* prohibited the subsequent transfer of Louisiana to a third party. Not only did Carlos IV feel double-crossed by Napoleon, but also he was most insulted because he only learned of the cession when it became public information. See the letter by *Le Chevalier Azara, Ambassadeur de Sa majesté Catholique pres la Republique Française a Son Excellence le ministre des Relations Exterieures* (which can be found at the Archives du ministère des Affaires étrangères—Correspondance politique, Etats-Unis, supplement volume 8, page 5). See also Thomas D. Clark & John D. W. Guice, *Frontiers in Conflict: The Old Southwest, 1795–1830* 41ff (University of New Mexico Press 1989); J.W. Bradley, *W.C.C. Claiborne and Spain: Foreign Affairs under Jefferson and Madison, 1801–1811*, reprinted in *The Louisiana Purchase and Its Aftermath, 1800–1830* in 3 Louisiana Purchase Bicentennial Series in Louisiana History 7, 110 (University of Southwestern Louisiana, 1998).

120. On the negotiations between Livingston and Monroe, on the one hand, and Talleyrand and Barbé-Marois, on the other, see Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* 745ff (Oxford University Press, 1970); see also Shoemaker, *supra* note 108, at 7–9.

121. See R.D. Bush, *L'Abandon de la Louisiane: The Last Days of Prefect Laussat, 1803–1804*, 8 La. Rev. 120, at 120–21 (1979):

As Bonaparte's envoy for the transfer ceremonies of Louisiana, Laussat was the highest ranking French official in the colony until the American takeover on December 20, 1803, and it was his responsibility to close the book on this chapter in French colonial administration before departing for Martinique in April, 1804. During his final four months in Louisiana, he had an opportunity to make several observations of importance.

(footnotes omitted).

122. See *Procès-verbal de reprise de possession de la Louisiane*, found in the Papers of Pierre Clément Laussat, Historic New Orleans Collection—MSS 125 (New Orleans, Nov. 30 1803). On the approximately 600 documents contained in the Papers of Laussat, see R. D. Bush, *Documents on the Louisiana Purchase: The Laussat Papers*, 18 La. Hist. 104 (1977).

123. See *Procès-verbal de prise de possession de la Louisiane*, found in the Archives du ministère des Affaires étrangères—Traité, Etats-Unis, 18030010–16 (New Orleans, Dec. 20, 1803).

sovereign, which content is highly relevant to the present analysis and is thus worth reproducing in full:

This mission, less agreeable to me than the one which I had come to fulfil, however, offers me the consolation that it will be more advantageous to you than the first could have been. The return of the French sovereignty will be only momentary. *The approach of a war, which threatens the four quarters of the world, has given a new direction to the beneficent views of France towards Louisiana.* She has ceded it to the United States of America.

The Treaty secures to you all the advantages and immunities of citizens of the United States. The particular government, which you will select, will be adapted to your customs, usages, climate, and opinions.

Above all, you will not fail to experience the advantages of an upright, impartial, incorruptible justice, where the publicity and invariable forms of the procedure, as well as the limits carefully interposed to the arbitrary application of the laws, will concur with the moral and national character of the judges and juries in effectually guarantying to the citizens their property and personal security.

The Mississippi, which washes not deserts of burning sand, but the most extensive, the most fertile, and the most favourably situated plains of the new world, will, at the quays of this new Alexandria, be forthwith crowded with thousands of vessels of all nations.

I have great pleasure, Louisianians, in opposing this picture to the touching reproaches of having abandoned you, and to the tender regrets, to which this indelible attachment of very many of you to the country of your ancestors makes you give utterance on the present occasion. France and her government will hear the account of these regrets with affection and gratitude; but you will soon be convinced that they have marked their conduct towards you by the most eminent and most memorable of favours.

By this proceeding the French republic gives the first example in modern times of the voluntary emancipation of a colony;—an example of one of those colonies of which we are delighted to find the prototype in the glorious ages of antiquity: may a Louisianian and a Frenchman never meet now or hereafter in any part of the world without feeling sentiments of affection, and without being mutually disposed to call one another brothers.<sup>124</sup>

---

124. *Quoted in Barbé-Marbois, supra* note 118, at 329 (emphasis added).

Consequently, it becomes clear that the population of Louisiana learned of the cession of their land to the United States from the French authority and that Louisianians were not consulted neither before or after the transfer of territory.

In assessing whether the cession of Louisiana met the conditions set out in *Droit des Gens*, this is the first point to make, namely, that the individuals living on the transferred territory did not consent to, let alone expressly approve or ratify, the *Treaty between the French Republic and the United States, concerning the Cession of Louisiana*. One must thus reach the *a priori* conclusion that both France and the United States considered Louisiana as a ‘patrimony,’ a piece of estate, that one ruler could dispose of in favour of another without consulting the affected population. Of course, such a view is irreconcilable with that defended by Vattel, to the effect that ‘sovereignty’ resides in the people and is merely transferred to the holder of power, with the consequence that territory transfers must be authorised by the people to be valid.<sup>125</sup>

The fact that the general principle put forward in *Droit des Gens* was not followed by the French and American authorities in 1803 does not end the inquiry because Vattel also provided for an exception in cases of extreme necessity and danger to public security.<sup>126</sup> The question then becomes whether or not the situation prevailing at the time of the cession of Louisiana, especially with respect to France (as the ceding party in the treaty), justifies the application of the *necessity exception*. Such a conclusion would relax the requirement concerning the consent of the affected population to one of tacit approval or ratification of the territory transfer, which could be implied from the silence of the individuals living in the relevant area.<sup>127</sup>

In that regard, a passage in Prefect Laussat’s address to the Louisianians on November 30, 1803, proves most pertinent because it refers to the strong possibility of armed conflict as the main reason for the territory transfer. He declared that “[t]he approach of a war, which threatens the four quarters of the world, has given a new direction to the beneficent views of France towards Louisiana.”<sup>128</sup> Indeed, it was to avert a likely confrontation with England, which was France’s continuing foe as well as the dominant naval power at the time, that Napoleon was forced to renounce his North American

---

125. See *supra* notes 91–100 and accompanying text.

126. See *supra* notes 101–105 and accompanying text.

127. See *supra* notes 106–107 and accompanying text.

128. Quoted in F. Barbé-Marbois, *supra* note 118, at 328. See also the account found in R. Hubert-Robert, *L’Histoire merveilleuse de la Louisiane française—Chronique des XVIIe et XVIIIe siècles et de la cession aux Etats-Unis 357–58* (Maison française 1941).

colony. François Barbé-Marbois, France's Minister of Public Treasury and special negotiator for Louisiana,<sup>129</sup> explained the situation as follows:

Bonaparte had only a very reduced navy to oppose to the most formidable power, that has ever had the dominion of the ocean. Louisiana was at the mercy of the English, who had a naval armament in the neighbouring seas, and good garrisons in Jamaica and the Windward Islands. It might be supposed that they would open the campaign by this easy conquest, which would have silenced those voices in parliament that were favourable to the continuance of peace. He concluded from this state of things that it was requisite to change without delay his policy in relation to St. Domingo, Louisiana, and the United States. He could not tolerate indecision; and before the rupture was decided on, he adopted the same course of measures, as if it had been certain. He had no other plan to pursue when he abandoned his views respecting Louisiana than to prevent the loss, which France was about sustaining, being turned to the advantage of England.<sup>130</sup>

Barbé-Marbois related an episode that took place on 10 April 1803 where he and Admiral Denis Decrès had a meeting with Napoleon at Saint-Cloud during which, after referring to his discussion with Foreign Minister Talleyrand, the Premier Council expressed his intentions to abandon Louisiana.<sup>131</sup> He was convinced by then of England's naval threat in the region and of its imminent attack on his North American colony:

The English have successively taken from France, Canada, Cape Breton, Newfoundland, Nova Scotia, and the richest portions of Asia. They are engaged in exciting troubles in St. Domingo. They shall not have the Mississippi which they covet. Louisiana is nothing in comparison with their conquests in all parts of the globe, and yet the jealousy they feel at the restoration of this colony to the sovereignty of France, acquaints me with their wish to take possession of it, and it is thus that they will begin the war. They have twenty ships of war in the gulf of Mexico, they sail over those seas

---

129. See generally E. Wilson Lyon, *The Man Who Sold Louisiana: The Career of François Barbé-Marbois* (University of Oklahoma Press 1974).

130. Barbé-Marbois, *supra* note 118, at 261–62.

131. One author has argued that Louis-André Pichon, French *chargé d'affaire* in the United States from 1801 to 1805, significantly influenced Napoleon in giving up his aspirations of American empire. See A.H. Bowman, *Pichon, The United States and Louisiana*, 1 *Diplomatic Hist.* 257 (1977).

as sovereigns, whilst our affairs in St. Domingo have been growing worse every day since the death of Leclerc.

The conquest of Louisiana would be easy, if they only took the trouble to make a descent there. I have not a moment to lose in putting it out of their reach. I know not whether they are not already there. It is their usual course, and if I had been in their place, I would not have waited. I wish, if there is still time, to take from them any idea that they may have of ever possessing that colony. I think of ceding it to the United States.<sup>132</sup>

Decrès did not share Napoleon's opinion, but Barbé-Marbois did:<sup>133</sup> "We should not hesitate to make a sacrifice of that which is about slipping from us. War with England is inevitable."<sup>134</sup> The French Minister of Public Treasury also thought that Louisiana was, in fact, vulnerable from all directions; he stated, "[It is vulnerable] from the north by the great lakes, and if, to the south, they [English troops] show themselves at the mouth of the Mississippi, New Orleans will immediately fall into their hands."<sup>135</sup> In any event, concluded Barbé-Marbois, such a conquest of Louisiana "would be still easier to the Americans; they can reach the Mississippi by several navigable rivers."<sup>136</sup>

It is fair to argue, therefore, that the main motivation behind Napoleon attitude towards his North American colony was very much linked to power politics—To avoid a war he would lose with the English over Louisiana, the territory had to be transferred to the United States of America.<sup>137</sup> This is the plan of action the Premier Council announced to Barbé-Marbois on April 11, 1803, the day after their meeting: "Irresolution and deliberation are no longer in season.

132. Barbé-Marbois, *supra* note 118, at 263–64. The very same words attributed to Napoleon are recorded in Hubert-Robert, *supra* note 128, at 335–36 and in Shoemaker, *supra* note 108, at 7.

133. See B. Lugan, *Histoire de la Louisiane française, 1682–1804* 207 (Perrin 1994):

Barbé-Marbois était du même avis que Bonaparte. Il lui expliqua que les Anglais, maître du Canada, pouvaient s'emparer de la Louisiane par le nord, à partir des Grands Lacs, alors que la France n'était pas en mesure d'y faire passer un corps expéditionnaire susceptible de défendre cette colonie puisque l'Angleterre était déjà quasiment maîtresse de l'Atlantique.

134. Barbé-Marbois, *supra* note 118, at 264.

135. *Id.* at 265.

136. *Id.*

137. See Sloane, *supra* note 115, at 512: "The very last of his [Napoleon's] great constructions was the sale of Louisiana. He needed the purchase-money, he selected his purchaser and forced it on him, with a view to upbuilding a giant rival to the gigantic power of Great Britain." See also DeConde, *supra* note 116, at 164.

I renounce Louisiana.”<sup>138</sup> It was thus not only New Orleans but the whole of Louisiana that was to be transferred, a course of action Napoleon adopted “with the greatest regrets.”<sup>139</sup> But he went on to say that “[t]o attempt obstinately to retain it would be folly,”<sup>140</sup> given the overwhelming power of the English in the region.<sup>141</sup>

Assuming that the *necessity exception* set out in *Droit des Gens* was met because of the perceived threat to the colony of Louisiana from the English forces, there remains the condition that the affected population approve of the territory transfer. In such cases of extreme necessity or danger to public safety, Vattel watered down the consent requirement, although there still must be at least some kind of acquiescence, albeit silent, on the part of the people.<sup>142</sup> Transfers of parts of the national territory, such as colonial possessions, “in order to save the remainder of the state,” wrote the Swiss author unambiguously, “are considered as approved and ratified by the *mere silence* of the nation.”<sup>143</sup>

To help determine whether there was resistance to the cession of Louisiana or whether the population implicitly accepted the new sovereign power, the account by François Barbé-Marbois is again very useful.<sup>144</sup> He reported that in spite of all the precautions taken, “several accidents were occasioned by the diversity of language, usages, and habits, as well as by the regret which many felt at seeing broken for ever the ties that had united them to another people.”<sup>145</sup> However, the change of sovereignty that occurred for the inhabitants of Louisiana on December 20, 1803, wrote Barbé-Marbois, was very different than that of 1762 between France and Spain, which “had caused such violent commotions, and led to the shedding of the blood of the colonists, who were discontented with a new

138. See Barbé-Marbois, *supra* note 118, at 274.

139. *Id.* at 275. See also the account found in Hubert-Robert, *supra* note 128, at 344, according to which Napoleon said the following:

Que les Louisianais sachent que nous nous séparons d’eux avec regret, que nous stipulons en leur faveur tout ce qu’ils peuvent désirer, et qu’à l’avenir, heureux dans leur indépendance, ils se souviennent qu’ils ont été Français, et que la France, en les cédant, leur a assuré des avantages qu’ils n’auraient pu obtenir sous le gouvernement d’une métropole d’Europe, quelque paternel qu’il puisse être; qu’ils conservent pour nous des sentiments d’affection et que l’origine commune, la parenté, le langage, les moeurs perpétuent l’amitié.

140. See Barbé-Marbois, *supra* note 118, at 275.

141. For another very similar report of Napoleon’s announcement concerning the sale of the whole of Louisiana, see Sloane, *supra* note 115, at 517.

142. See *supra* note 106–07 and accompanying text.

143. Law of Nations, *supra* note 4, at 432–33 (emphasis added).

144. See also Hubert-Robert, *supra* note 128, at 363–64.

145. Barbé-Marbois, *supra* note 118, at 335.

sovereignty.”<sup>146</sup> In the 1803 case, people tacitly accepted the territory transfer and, indeed, did not resist the new American sovereign, and this is said to be because “[t]he treaty had only placed Louisiana in the situation most favourable for liberty.”<sup>147</sup>

### III. CONCLUSION

Accordingly, it is possible to conclude that the cession of Louisiana to the United States did meet the conditions prescribed in *Droit des Gens* for a valid transfer of territory. Although the individuals affected by the cession, the Louisianians, were not consulted and did not explicitly consent to the transfer, Vattel’s territory transfers scheme as a whole was not breached in 1803 with the *Treaty between the French Republic and the United States, concerning the Cession of Louisiana*. Indeed, it comes out clearly from the foregoing analysis that the situation then, with the perceived threat of British invasion of the French colony, makes it possible to argue in favour of the exception provided for in cases of extreme necessity or danger to public safety. In this context, the consent requirement is relaxed so that the people’s silence can be deemed enough for the necessary approval or ratification of a treaty transferring a part of the national territory. This is no doubt what happened in the case of Louisiana.<sup>148</sup>

---

146. *Id.*

147. *Id.* On the implicit consent to the cession of Louisiana by the affected population, see also the testimony of A. Lafargue, *The Louisiana Purchase: The French Viewpoint*, 23 *La. Hist. Q.* 107, 111:

I am trying to point out that from the time the Treaty of Fontainebleau was signed in 1762 and subsequently ratified by the Treaty of Paris of 1763 to the day of the signing of the Louisiana Purchase Treaty on April 30, 1803, any number of events occurred to show that Louisianians had become imbued with the spirit of democratic freedom and liberty and that the Louisiana Purchase after all was the culminating point of attempts to establish here a system of government which, because of its liberal character and the justice of its institutions, *would meet with the full approval of the inhabitants of the Mississippi Valley*.

(emphasis added).

148. *But see* a letter by nineteen colonists to Prefect Laussat that expressed regrets at the cession of Louisiana to the United States: *Au citoyen Laussat préfet et commissaire pour la reprise et la remise de la Province de la Louisiane par les colons soussignés*, found in the Papers of Pierre Clément Laussat, Historic New Orleans Collection—MSS 125). These landowners wanted to secure their rights and petitioned for an immediate statehood for Louisiana, for the status of official language for French in government proceedings, as well as for the protection of their properties and plantations, including the ownership of slaves. It is certainly fair to argue that this letter does not amount to much evidence of an organized resistance on the part of the Louisianians against the transfer of their land to the United States.

The remaining question, most interesting on a theoretical and historical point of view, is this—Given that *Droit des Gens* was surely the dominant international law *doctrine* in the United States at the time and that, as it was shown, the cession of Louisiana met the conditions set out therein, why was Vattel not used to justify and rationalise American sovereignty over the former French colony in North America? This question is certainly relevant, not least because, on many other matters, lawyers, judges and politicians alike regularly referred to the writing of the Swiss author at the turn of the 19th century in the United States of America.<sup>149</sup>

As compelling evidence of the authority that Vattel enjoyed in America, suffice it to mention the study by Edwin DeWitt Dickinson. He compiled the number of times European internationalists were used before and by the Supreme Court of the United States between 1779 and 1820, with the following results:

Eighty-two cases were found in these [seventeen] volumes involving more or less important questions of international law. The figures in parentheses indicate the number of instances in which the publicist named was cited, quoted, or paraphrased. *Cited in argument*: Grotius (16), Pufendorf (9), Bynkershoek (25), Burlamaqui (9), Rutherford (18), Vattel (92). *Cited in opinion*: Grotius (11), Pufendorf (4), Bynkershoek (16), Burlamaqui (4), Rutherford (5), Vattel (38). *Quoted or paraphrased in opinion*: Grotius (2), Bynkershoek (8), Burlamaqui (2), Rutherford (2), Vattel (22).<sup>150</sup>

Accordingly, Dickinson demonstrated that Vattel had a real and comparatively great impact on American judicial decision-making on international law issues. It is also noteworthy that such references to *Droit des Gens* were on many different international law questions, such as the confiscation of enemy property,<sup>151</sup> the

---

149. See J.S. Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 Am. J. Int'l L. 547, 549:

At the time of the American Revolution the work of Vattel was the latest and most popular if not the most authoritative of the Continental writers. Citation of Grotius, Pufendorf, and Vattel are scattered in about equal numbers in the writings of the time. Possibly after the Revolution Vattel is quoted more frequently than his predecessors.

See also F.S. Ruddy, *The Acceptance of Vattel*, in *Grotian Society Papers 1972 — Studies in the History of the Law of Nations 177, 179-80* (C.H. Alexandrowicz ed., Martinus Nijhoff 1972); de Lapradelle, *supra* note 4, at xxix-xxx & xxxv-xxxviii.

150. E.D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 Am. J. Int'l L. 239, 259 n.132 (1932).

151. See, for example, *Miller v. Resolution*, 2 Dollo 15 (1781); *Brown v. U.S.*, 8 Cranch 110 (1814).

boundary of co-riparian states,<sup>152</sup> international commercial matters,<sup>153</sup> et cetera.<sup>154</sup>

The influence of Vattel, however, went considerably beyond the judiciary and, in fact, included the legislative and executive branches of the American government, as well as legal education and the academe. As Charles Fenwick succinctly explicated:

Vattel's treatise on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and in the decrees and correspondence of executive officials. It was the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration. Publicists considered it sufficient to cite the authority of Vattel to justify and give conclusiveness and force to statements as to the proper conduct of a state in its international relations.<sup>155</sup>

This achievement may only be explained by recognising that *Droit des Gens* provided legal and diplomatic answers to the current problems of international relations and governance,<sup>156</sup> which were along the lines of the core political principles and needs of the time.<sup>157</sup> "It was a 'realistic' book," wrote Martti Koskenniemi,

---

152. See, for example, *Handly's Lessee v. Anthony*, 5 Wheat. 374 (1820).

153. See, for example, *U.S. v. Arjona*, 120 U.S. 479 (1887).

154. See also Jouannet, *supra* note 3, at 15 n.22, where the author provided a list of subjects in which was rendered judicial or arbitrary decisions referring to Vattel's *Droit des Gens*.

155. C.G. Fenwick, *The Authority of Vattel, Part I*, 7 Am. Pol. Sci. Rev. 395, 395 (1913).

156. Some contend that Vattel's success derived, at least in part, from the many ambiguities and inconsistencies found in his work. See, for example, H. Lauterpacht, *The Function of Law in the International Community* 7 (Clarendon Press 1933) (referring to his "elegant manner of evasion"); see also Nussbaum, *supra* note 87, at 159, who spoke of "the striking ambiguity of his formulas and [...] the inconsistency of many of his conclusions." See also M. Wight, *Western Values in International Relations*, in *Diplomatic Investigations—Essays in the Theory of International Politics* 89, 199 (H. Butterfield & M. Wight eds., Allen & Unwin 1966), who wrote that "it is part of his charm (and no doubt of his lasting influence) that he contains inconsistent arguments that can be used to support contradictory policies."

157. See Remec, *supra* note 21, at 56, who explained: "Vattel's system of international law received through this synthesis a very 'modern form,' primarily because it fitted actual contemporary practice so well, which it sought to justify in high moral terms." See also P.F. Butler, *Legitimacy in a States-System: Vattel's Law of Nations*, in *The Reason of States—A Study in International Political Theory* 45, 57 (M. Donelan ed., Allen & Unwin 1978):

Vattel, I suggest, recognised the major components of political life that were identified in eighteenth-century Europe: the sovereign, the individual, the transnational moral order, and property. He also dealt with these components in a way that settled their relative moral

“especially useful for diplomats and practitioners, not least because it seemed to offer *such compelling rhetorics for the justification of most varied kinds of State action.*”<sup>158</sup>

One should ask all the more: Why was there no reference to Vattel’s *doctrine* in the case of Louisiana? The simplistic answer is that there was no need to utilise *Droit des Gens*, because the cession was not contentious in the United States. But this argument would explain the lack of reference to the Swiss author in judicial proceedings,<sup>159</sup> not in the political arena where he had frequently been used before.<sup>160</sup> In Congress, Vattel was not considered relevant because of the nature of the issues that the Louisiana purchase was deemed to raise, which had nothing to do with the international law validity of the cession (based, in large part, on the consent of the affected population). Instead, the main concerns voiced and debated before both the House of Representatives and the Senate revolved around the American constitution.

Indeed, when President Jefferson called a special session of Congress in October of 1803<sup>161</sup> to ratify the *Treaty between the French Republic and the United States, concerning the Cession of Louisiana*, a resistance movement had mobilized and argued that expansion was not authorised by the constitution of the Union.<sup>162</sup> As

---

significance. Acceptance of the general thrust of his arguments contributed to the maintenance of the balance of power system.<sup>6</sup>

158. M. Koskenniemi, *From Apology to Utopia—The Structure of International Legal Argument* 89 (Lakimiesliiton Kustannus 1989) (emphasis added); *see also* J.S. Reeves, *La communauté internationale*, 3 R.C.A.D.I. 1, 37–38 (1924).

159. Interestingly, in the 1878 *Advisory Opinion of the Supreme Judicial Court of Maine on a Question of Collective Naturalization*, in *A Selection of Cases and Other Readings on the Law of Nations—Chiefly as it is interpreted and Applied by British and American Courts* 257, 258 (E.D. Dickinson ed., McGraw-Hill 1929), the theory of territory transfers used is very reminiscent indeed of Vattel’s:

The territory in question being acquired by treaty, the government transferring it ceases to have any jurisdiction over it. It no longer owes protection to those residing upon it, and they no longer owe it allegiance. The inhabitants residing upon the territory transferred have the right of election. They may remove from the territory ceded if they prefer the government ceding the territory. If they elect to remain, their allegiance is at once due to the government to which the cession has been made, and they are entitled to the corresponding right of protection from such government.

160. *See, for example*, the debate over American neutrality in the war between France and England in the House of Representatives in 1794, recorded in the *Annals of Congress*, 3rd Congress, at 754. Likewise, *see* the debate on a similar issue in 1797, recorded in the *Annals of Congress*, 4th Congress, 2nd Session, at 2230, 2231, and 2234.

161. *See* the debates reported in the *Annals of Congress*, 8th Congress, 1st Session.

162. *But see* DeConde, *supra* note 116, at 186:

Accepting the anti-Louisiana rhetoric as representing the Federalist

William Sloane put it, “the vital question was whether the adjustment of new relations was constitutional,”<sup>163</sup> which was answered in the affirmative by the Republicans.<sup>164</sup> On the other side, the Federalists were opposed to expansionism and “contended that the executive had usurped the powers of Congress by regulating commerce with foreign powers and by incorporating foreign soil and foreign people with the United States.”<sup>165</sup> In the end, the polemic proved relatively short and, on October 26, 1803, the motion on Louisiana was approved in the House of Representatives and, for its part, the Senate ratified, 24 to 7.<sup>166</sup>

Accordingly, it is clear that the debates in Congress on the purchase of Louisiana centred on the legality of the transaction under the American Constitution and that politicians were not interested in the validity of the cession in international law.<sup>167</sup> The principal

---

party’s stance, scholars usually depict Federalists as political opportunists who quickly cast aside their commitment to broad constitutional construction just to embarrass the Jeffersonians. By reversing their positions on constitutional interpretation, Federalists and Republicans both appear to have placed the practicalities of politics ahead of consistency in principles. *Actually Federalist opponents of the purchase, however vocal, comprised a minority, mainly from New England, within their own party.* Most Federalists appear to have remained faithful to their party’s earlier expansionist credo. *Like most other Americans, they wanted Louisiana.*

(emphasis added).

163. Sloane, *supra* note 115, at 519.

164. It must be noted, however, that Jefferson had his reservations on whether the Constitution allowed acquisitions of foreign territories. See T.J. Farnham, *The Federal-State Issue and the Louisiana Purchase*, 6 La. Hist. 5, 7–8 (1965).

165. Sloane, *supra* note 115, at 519. Later the author wrote: “The treaty, they asseverated, was therefore unconstitutional and, even worse, impolitic, because we were unfitted and did not desire to incorporate into our delicately-balanced system peoples different in speech, faith, and customs from ourselves . . . .” *Id.*

166. See DeConde, *supra* note 116, at 187. See also Farnham, *supra* note 164, at 25: “Colonel Pickering and his [Federalist] apostles realized that they were in the minority on the Louisiana question, but until the end, they refused to realize how small their numbers actually were.” On the seminal role of John Breckinridge, President’s Jefferson’s leader in the Senate, in managing to pass the motions in Congress to complete the Louisiana purchase, see L.H. Harrison, *John Breckinridge and the Acquisition of Louisiana*, 7 La. Studies 7 (1968).

167. This is not to say, however, that the will of the population affected by the cession of Louisiana was totally discounted and ignored. See Barbé-Marbois, *supra* note 118, at 322–23:

The senators who opposed the ratification, men deserving of esteem, but advocates of rigorous theories, invoked in support of their argument those maxims of universal justice, which necessity and even expediency so often silence. “Congress,” they said, “had not the power of annexing by treaty new territories to the confederacy. *This right could only belong to the whole people of the United States.*” *These senators likewise required the free acquiescence of the Louisianians.*

object of discussion in Congress thus explains why Vattel's writing on territory transfers was not considered of any use at the time. This last element of the foregoing analysis demonstrates that *Droit des Gens*—which was undoubtedly the dominant international law doctrine in the United States then—was not ignored *per se* in the case of Louisiana. As the paper attempted to show, moreover, reference to Vattel could have been made to justify and rationalize the transfer in 1803 because, indeed, the conditions he prescribed for its validity in international law were no doubt met.

---

“This was their natural right; and the formal consent of the two people was,” according to them, “indispensable; namely, the consent of the one party to belong to the Union, and that of the other to enlarge its territory. Neither the constitution nor any act that had emanated from them had authorized the president to conclude such a treaty.” (emphasis added).