

Chapter I

The Classical Publicists

To facilitate an understanding of the historical development of the concept of the *right of forcible protection*, the earliest publicists are denominated herein as the “classical” writers. This group, spanning the Seventeenth and Eighteenth Centuries include Grotius, Wolff and Vattel. During this historical period the European State system assumed a preeminent position in the world.

A. *Grotius*. Grotius, the “father of international law,” developed two fundamental principles that have influenced much of the later thinking on the subject of the protection of the lives and property of nationals abroad.

First, he maintained that a sovereign’s concern for his subjects must be paramount. “[T]he first and particularly necessary concern,” argued Grotius, “is for subjects, either those who are subject to authority in a family, or those who are subject to a political authority.”¹

Second, Grotius contended that under the law of nations there existed a principle that “for what any civil society, or its head, ought to finish . . . by not fulfilling the law, for all this there are held and made liable all the corporeal or incorporeal possessions of those who are subject to such a society or its head.”² Grotius viewed this latter principle, which countenanced collective responsibility, as pragmatic, the “outgrowth of a certain necessity, because otherwise a great license to cause injury would arise.”³

As a corollary to this forerunner of State responsibility, Grotius considered at least two remedial measures open to the protecting sovereign: the “seizure of persons” and the “seizure of goods.” As to the former, Grotius cited the practice of the ancient Greeks, in the form of Attican law which stated: “If anyone die

by a violent death, for his sake, it shall be right for his relatives and next of kin to proceed to apprehend men, until either the penalty has been paid for the murder, or the murderers are given up.”⁴ Grotius extended this approach to justify a sovereign’s resort to self-help to protect his subjects from potential injury, stating that “there is nothing in this that is repugnant to nature, and it is the practice not only of the Greeks, but of other nations also.”⁵

Grotius also discussed briefly “the right of detention of citizens of another state in which a manifest wrong has been done to a national, in order to secure his recovery.”⁶ While admitting the existence of such a right, Grotius nevertheless rejected its utility. In this regard, he described the reasons advanced against the seizure of Ariston of Tyre by the Carthaginians. The principal argument was that if Ariston were seized “(th)e same thing will happen to Carthaginians both at Tyre and in the other commercial centers to which they go in large numbers.”⁷

With reference to the “seizure of goods,” Grotius’ second remedial measure, he cited, without discussion, the “withernam” of the Saxons and Angles and the “letters of marque” authorized by the King of France.⁸ Additionally, he pointed to Homer’s description in the *Iliad* of Nestor’s seizure of “the flocks and herds of the men of Elis in revenge for the horses stolen from his father.”⁹ Finally, Grotius recounted an instance from Roman history in which Aristodemus, the heir of the Tarquins, held Roman ships at Cumae as compensation for Tarquin property seized by the Romans.¹⁰

For Grotius, the sovereign’s right to use self-help to protect his subjects was a far-reaching one, justifying resort to force. As he put it: “Seizure by violence may be understood to be warranted not only in case a judgment cannot be obtained against a criminal or a debtor within a reasonable time, but also if in a very clear case (for in a doubtful case the presumption is in favor of those who have been chosen by the state to render judgment) judgment has been rendered in a way manifestly contrary to law; for the authority of the judge has not the same force over foreigners as over subjects.”¹¹

However, such resort to force did not include the taking of life. According to the “law of love,” “particularly for Christians, the life of a man ought to be of greater value than our property. . . .”¹²

Thus, although Grotius did not directly address the question of the protection of the lives and property of nationals abroad, he did adopt certain premises that influenced subsequent writers in the development of theoretical justifications for such protection. Subsequent to Grotius, the importance of the citizen to the sovereign, as well as the recognition of the right of a sovereign to protect

a citizen, by force if necessary, became recurrent themes in the literature on this subject.

B. *Wolff*. Wolff, writing in the mid-Eighteenth Century, elaborated upon the duty of a nation to preserve itself, a topic that had also been considered earlier by Grotius. “Every nation is bound to preserve itself,” wrote Wolff, “for the men who make a nation, when they have united into a state, are as individuals bound to the whole for promoting the common good, and the whole is bound to the individuals to provide for them those things which are required as a competency for life, for peace and security.”¹³ Thus, although Wolff did not expressly mention the protection of nationals abroad, it can be inferred that, to the extent that such protection was required “as a competency for life, for peace and security,” he believed that a State was obliged to extend its protection to its nationals abroad.

Moreover, Wolff recognized as valid the use of force to enforce a State’s rights.

“The right belongs to every nation to obtain its right against another nation by force, if the other is unwilling to allow that right. For the right belongs to every nation not to permit any other nation to take away its right, consequently also not to permit it not to allow that right. Therefore it is necessary, when one does not wish to allow a right, that the other compel it by force to allow it. Therefore the right belongs to the one nation against the other nation to obtain its right by force, if the other does not wish to allow it.”¹⁴

Indeed, a State had the right to defend itself and its rights against another State¹⁵ and to punish another State, by force, which had injured it.¹⁶ Thus, the forcible protection of nationals abroad can be brought under either of these concepts, especially the latter, without much difficulty.

C. *Vattel*. The first writer to focus directly upon the protection of nationals abroad was Vattel. Amplifying Grotius’ concern for the citizen, as well as his justification for a State’s enforcement of its rights against another State, Vattel argued that:

Whoever offends the State, injures its rights, disturbs its tranquillity, or does it a prejudice in any manner whatsoever, declares himself its enemy, and exposes himself to be justly punished for it. Whoever uses a citizen ill, indirectly offends the state, *which is bound to protect this citizen*; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.¹⁷

Thus, building upon the Grotian premise that a State has a right to protect its citizens, Vattel argued that forcible protection not only was justified, but that it was an obligation owed by States to their citizens.

To illustrate the breadth of the principle of protection, Vattel used several hypothetical and real examples. For instance, “[t]he sovereign who refuses to cause reparation to be made for the damage done by his subject, or to punish the offender, or, finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.”¹⁸ Vattel cited the example of King Demetrius’ imputed responsibility for the murder of a Roman ambassador by one of the King’s subjects in this regard.¹⁹ In that case, after King Demetrius delivered the guilty persons to Rome for appropriate punishment, the Roman Senate sent them back, “resolving to reserve to themselves the liberty of punishing that crime, by avenging it on the King himself, or on his dominions.”²⁰ It is interesting to note that Vattel, although agreeing that the King ultimately was responsible for the acts of his subject, found the Senate’s conduct unjust, as appropriate reparation had been offered by sending the guilty persons to Rome. Vattel’s analysis of this incident, applicable to many of the instances of forcible protection described herein, was that the Senate’s decision was “but a pretext to cover their ambitious enterprises.”²¹

Another instance, described by Vattel, where forcible protection may be exercised is when a State “accustoms and authorizes its citizens indiscriminately to plunder and maltreat foreigners. . . .”²² In the face of such a situation, “all nations have a right to enter into a league against such a people, to repress them, and to treat them as the common enemies of the human race.”²³ As instances of this use of the principle of protection, Vattel cited the “guilt” of the nation of the Usbecks for the robberies its citizens had committed, as well as the hypothetical justification for a Christian confederacy against the Barbary States, “in order to destroy those haunts of pirates, with whom the love of plunder, or the fear of just punishment, is the only rule of peace and war.”²⁴

Vattel’s seeming endorsement of a broad right of forcible protection was tempered somewhat by his concern with the concept of sovereignty. “We should not only refrain from usurping the territory of others,” argued Vattel, “we should also respect and abstain from every act contrary to the rights of the sovereign. . . . We cannot, then, without doing an injury to a state, enter its territories with force and arms. . . . This would at once be a violation of the safety of the state, and a trespass on the rights of empire or supreme authority vested in the sovereign.”²⁵ Thus, “[t]he prince . . . ought not to interfere in the causes of his subjects in foreign countries, and grant them his protection, *excepting in cases* where justice is refused, or palpable and evident injustice done, or rules

and forms openly violated, or, finally, an odious distinction made, to the prejudice of his subjects, or of foreigners in general.”²⁶

Being the first of the classical international law writers to expressly discuss the protection of nationals abroad, Vattel’s analysis is not particularly far-reaching. The right to protection that he initially developed is qualified by his later emphasis on the rights of the sovereign. The fact remains, however, that Vattel recognized a State’s right (obligation) to forcibly protect its citizens abroad by avenging the wrongs done to them and punishing their aggressors, at least in cases of flagrant injustice.²⁷

NOTES

1. H. Grotius, *De Juri Belli Ac Pacis* Bk. II, Ch. XXV, at 578 (F. Kelsey trans. 1925).
2. *Id.*, Bk. III, Ch. II, at 624.
3. *Id.*
4. H. Grotius, *De Juri Belli Ac Pacis* Bk. III, Ch. III, at 625 (F. Kelsey trans. 1925).
5. *Id.*
6. *Id.* at 626.
7. *Id.*
8. *Id.* at 626-27
9. *Id.* at 627
10. *Id.* at 628
11. *Id.* at 627
12. *Id.* at 628
13. C. Wolff, *Jus Gentium* 22 (J. Scott ed. 1934).
14. *Id.* at 138-39.
15. *Id.* at 139.
16. *Id.*
17. E. Vattel, *The Law of Nations* 161 (J. Chitty ed. 1883) (emphasis added).
18. *Id.* at 162.
19. *Id.* at 163.
20. Vattel, however, also offered justifications for forcible measures directed against culpable States in the hypothetical situations of the “robber-nation” of the Usbecks and the pirate-ridden Barbary States. See E. Vattel, *The Law of Nations* 163 (J. Chitty ed. 1883).
21. *Id.*
22. *Id.* at 163.
23. *Id.*
24. *Id.*
25. *Id.* at 169.
26. *Id.* at 165 (emphasis added).
27. *Id.*