2

Early International Law and the Foreigner

From its earliest conceptions (European) international legal theory contemplated the foreigner's mobility in terms of rights: rights to set forth and travel, to sojourn, to hospitality, to trade, and to share in common property.[1] Free movement rights[2] all found voice in the work of early international jurists, including rights of passage, the right to leave one's country,[3] the right of asylum, and (perhaps most striking for the modern international lawyer) the right to enter and reside in the territory of *another* state.[4] Likewise, the right of necessity played a significant and evolving role in shaping how international law framed and conditioned the foreigner's stay.

By any measure, this presents as a dazzlingly impressive array of rights. It contrasts starkly with the widely held (current) assumption that the foreigner has – and has always had – less rights than the citizen vis-à-vis the imperial or

[1] For some early reflections, see Eve Lester, 'Imagining the "Promise of Justice" in the Prohibition on Racial Discrimination: Paradoxes and Prospects' [2007] *International and Humanitarian Law Resources* 8 <www.worldlii.org/int/journals/IHLRes/2007/8.html>.

[2] The notion of free movement is used here in a broad sense rather than in the stricter contemporary sense of the right to freedom of movement within the territory of a state.

[3] For a study focusing on the right to emigrate, see Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12(1) *Melbourne Journal of International Law* 27.

[4] See, eg, below, 59, 65. Cf *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 13. Although in modern international law there is no general right to enter and reside in the territory of another state, a number of regional economic blocs have made provision for entry and residence of citizens of member states in other member states. See, eg, *Council Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States* [2004] OJ L158/77, arts 5–7; Economic Community of West African States, *Protocol relating to Free Movement of Persons, Residence and Establishment*, Doc No A/P.1/5/79 (signed and entered into force provisionally on 29 May 1979) art 2.

sovereign power.[5] So, what do we make of this rights framework? Does it tell an originary story of universal human rights that has somehow gone awry and is now ripe for renewal? Who *was* the 'foreigner' in early conceptions of international law? Why did he[6] enjoy these rights? And is the casting of the foreigner as an outsider (welcome or unwelcome) with lesser rights than the citizen a timeless given? Or is the juridical figure of the foreigner a *contingent historical artefact* on which we need to reflect critically?[7]

This is the first chapter in the genealogy of the foreigner-sovereign relation. Overall, the genealogy helps explain how policies such as mandatory detention and planned destitution have come to be characterised as lawful and legitimate responses to unsolicited migration by locating migration lawmaking within a longer jurisprudential tradition. The purpose of this chapter is to make visible *who* the figure of the foreigner was in early conceptualisations of international law. My central argument in this chapter has three elements: first, that the foreigner is a mutable figure and, therefore, that there is nothing inevitable about her 'outsider-ness'; second, that her mutability was shaped by historical contingencies;[8] and third, that when the foreigner was a privileged European insider there was no discourse of 'absolute sovereignty'. The chapter serves as a kind of prehistory of 'absolute sovereignty', in that it enables us to trace how the claim of 'absolute sovereignty' emerged as a common law doctrine (Chapter 3) and, in turn, became entrenched as a constitutional doctrine (Chapter 4).

In summary, my argument is that the 'foreigner' in early international law was conceptualised as an insider, not an outsider, a 'civilised' European, not a 'barbarian' non-European. In other words, the foreigner was a figure of privilege and power conceptually aligned with, rather than opposed to, the sovereign. As such, being a foreigner was historically an enabling, rather than residual, status, and there is nothing inevitable about the foreigner's outsiderness. Indeed, whether imperialists, aristocrats, men of letters, or merchants, it

[5] This assumption has its origins in the French Revolution, which invented (although not *ex nihilo*) both the nation-state and the modern institution (and ideology) of citizenship: see, eg, William Rogers Brubaker, 'The French Revolution and the Invention of Citizenship' (1989) 7(3) *French Politics and Society* 30, 30.

[6] On use of the male and female pronouns in this book, see Chapter 1, 15 n 49.

[7] Friedrich Nietzsche, *On the Genealogy of Morals: A Polemic* (Douglas Smith trans, Oxford University Press, 1996) 8 [trans of: *Zur Genealogie der Moral: Eine Streitschrift* (first published 1887)]; David Owen, *Nietzsche's Genealogy of Morality* (McGill-Queen's University Press, 2007) 6. See Chapter 1, 22.

[8] As we will see in Chapter 3, an increased mobility of a non-European (free or indentured) labour force in a period of colonial expansion was pivotal in shaping the foreigner as a non-European outsider.

was quite natural for foreigners to cross borders[9] precisely *because* they were European.

In this chapter, the sixteenth century, where the common historical narrative of European public international law begins, is my starting point. This is because it is European international legal theory that has – for better and worse – had global contemporary impact.[10] The chapter is divided into four parts, in which I examine selected treatises of four key international jurists: Vitoria, Grotius, Pufendorf, and Vattel – canonical authorities in public and international law and, more specifically, in the juridical framing of the foreigner-sovereign relation. In each instance, I consider the context in which the jurist was writing, who his foreigner was, and how he framed the foreigner's rights.

That each jurist holds an authoritative place within the canon is well established. Vitoria's contribution as a leader in the Salamanca School included theorisation of relations between (European and non-European) peoples – notably the Spanish and the 'barbarian' Indians – as an international legal problem (*ius gentium*).[11] Treatises of Grotius, whose work was strongly influenced by Vitoria,[12] are studied for the place Grotius is widely regarded to hold in international legal scholarship as the father of international law.[13] Grotius' texts offer important insights into both the juridical framing of relations between European and non-European nations and peoples as well as intra-European relations. Pufendorf's post-Westphalian texts are examined for their integration of the foreigner into sovereign relations between nation-states. Finally, Vattel is examined both for the authority he carries as a leading international jurist and, more specifically, because his authority is still invoked in the assertion of 'absolute sovereignty' in migration law and policymaking in

[9] Lucien Febvre (1878–1956), '*Frontière*: The Word and the Concept' in Peter Burke (ed), *A New Kind of History: From the Writings of Febvre* (K Folca trans, Harper & Row, 1973) 208, 214. Indeed, as Febvre observed at 214, "the *frontière* only existed for soldiers and princes, and only then in time of war".

[10] Nevertheless, the first international legal treatise was written by an Islamic jurist, Mohammed ibn al-Hasan (al-Shaybānī), towards the end of the eighth century, with multivolume Islamic international legal treatises emerging over the next two centuries: Christopher Weeramantry, *Justice without Frontiers: Furthering Human Rights* (Martinus Nijhoff, 1997) vol 1, 136; John Kelsay, 'Al-Shaybani and the Islamic Law of War' (2003) 2(1) *Journal of Military Ethics* 63; Muḥammad ibn al-Ḥasan Shaybānī (ca 750–804 or 5), *The Islamic Law of Nations: Shaybānī's Siyar* (Majid Khadduri trans, Johns Hopkins Press, 1966).

[11] Francisco de Vitoria (c 1486–1546), *Political Writings* (Anthony Pagden and Jeremy Lawrance eds, Jeremy Lawrance trans, Cambridge University Press, 1991) xiii.

[12] See, eg, David Kennedy, 'Primitive Legal Scholarship' (1986) 27(1) *Harvard International Law Journal* 1, 76–7.

[13] Ibid 77.

Australia.[14] I turn first to Vitoria, whose work in the sixteenth century marked the emergence of a public international legal discourse in Europe.[15]

2.1 FRANCISCO DE VITORIA (c 1485–1546)

A "scholar of empire",[16] Vitoria offered, after the event, both a justification for the Spanish colonisation of the Indies and an apology for its excesses.[17] On the one hand, an abiding sense of economic entitlement, racial and religious superiority, and duty to pursue a Christianising and civilising mission in the New World meant that Vitoria's international law and legal discourse[18] needed to legitimise Spanish travel, Christianisation, and profiteering in Indian territory in the service of imperial interests.[19] On the other, although it may at first seem counter-intuitive, his construction of the 'barbarian' Indian as a legal subject is best understood as a *raison d'état* – that is, as a gesture of (Spanish) self-interest. This is because the barbarian was made subject to the law yet unworthy of its protection, subjugated rather than outlawed.[20] So, what does the barbarian's status tell us about who the foreigner was? Did Vitoria imagine the foreigner to be an outsider? Was the barbarian a foreigner? Or was the foreigner someone else? To make visible who Vitoria's foreigner was, it is important to consider first the context in which he was writing.

[14] See especially *Robtelmes v Brenan* (1906) 4 CLR 395, 400 (Griffith CJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29–30 (Brennan, Deane and Dawson JJ) ('*Lim*'); *Al-Kateb v Godwin* (2004) 219 CLR 562, 632–3 (Hayne J); *Ruhani v Director of Police (No 2)* (2005) 222 CLR 580, 276 n 6; *Plaintiff M47-2012 v Director-General of Security* (2012) 251 CLR 1, 313 n 243; *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 177 (Kiefel and Keane JJ). See also *Ruddock v Vadarlis* (2001) 110 FCR 491, 520 (Beaumont J).

[15] James Brown Scott, *The Spanish Origins of International Law: Francisco de Vitoria and his Law of Nations* (Lawbook Exchange, first published 1934, 2000 ed); Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan, first published 1947, 1954 ed); Kennedy, above n 12; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 13.

[16] Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16(1) *European Journal of International Law* 113, 117.

[17] See, eg, James Crawford, 'Foreword' in Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) xi.

[18] Williams describes law and legal discourse as "perfect instruments of empire": Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990) 8, 37.

[19] Anghie, above n 15, 251.

[20] Ibid 20. Cf *Lim* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ), discussed in Chapter 5, Section 5.3.1.2, 204–6.

2.1.1 Context: Imperialism, Conquest, and a Culture of Mobility

The Iberian Peninsula of the fifteenth and early sixteenth centuries, comprising politically and geographically fragmented kingdoms,[21] was already a society characterised by high levels of mobility. The 'discovery' of the Indies by Columbus in 1492 triggered a massive expansion of the Spanish Empire, including a significant amount of emigration from the metropole.[22] Economic hardship and the promise of wealth in the colonies served as push and pull factors for an estimated 250,000 to 300,000 emigrants from the Iberian Peninsula to the Indies,[23] an unprecedented level of emigration amongst European powers.[24]

At the same time, Spain had a cultural and religious diversity that was greater than anywhere else in Europe.[25] Spanish mobility was characterised by foreign travel to[26] and from[27] Spain for trade within Europe and across the Strait of Gibraltar,[28] as well as migratory movements that included seasonal[29] and urban migration.[30] Many migrant workers were from neighbouring countries.[31] So, the heterogeneity of Spanish society in the sixteenth century reflected often long-standing patterns of both internal and external migration. Indeed, with a prevailing "culture of mobility"[32] it was surely a society accustomed to the presence of foreigners engaged in labour and commerce.

Sixteenth-century Spain already had a long history of internecine struggles[33] and religio-racial persecution.[34] Systemic discrimination reflecting class

[21] Teofilo F Ruiz, *Spanish Society: 1400–1600* (Longman, 2001) 11, 17.

[22] David E Vassberg, *The Village and the Outside World in Golden Age Castile: Mobility and Migration in Everyday Rural Life* (Cambridge University Press, 1996) 83–4. According to Cholewinski, just under half a million people migrated from Spain to the Caribbean and to Central and South America and Mexico between 1506 and 1650: Ryszard Cholewinski, *Migrant Workers in International Law: Their Protection in Countries of Employment* (Clarendon Press, 1997) 15.

[23] Vassberg suggests that the official lists of legal emigrants were incomplete but that the best estimates are that about 250,000 to 300,000 emigrated from the Iberian Peninsula to the Americas during the sixteenth century. By contrast, the population of Castile at the time was in the order of seven million: Vassberg, above n 22, 83–4. Vicens Vives estimates that 500,000 emigrated to the Americas: Jaime Vicens Vives with the collaboration of Jorge Nadal Oller, *An Economic History of Spain* (Frances M López-Morillas trans, Princeton University Press, 1969) 291 [trans of: *Manuel de historia económica de España* (first published 1955 as *Apuntes del curso de historia económica de España*)].

[24] Ruiz, above n 21, 26. [25] Ibid 93. [26] Ibid 48, 53; Vicens Vives, above n 23, 355–7.

[27] See, eg, Ruiz, above n 21, 104; Vicens Vives, above n 23, 364.

[28] See, eg, Vicens Vives, above n 23, 301. [29] Ruiz, above n 21, 56, 60–1. [30] Ibid 41, 65.

[31] Vassberg, above n 22, 151–2.

[32] David Sven Reher, *Town and Country in Pre-Industrial Spain: Cuenca, 1550–1870* (Cambridge University Press, 1990) 299–304; Vassberg, above n 22, 175.

[33] Ruiz, above n 21, 18. [34] For example, the fourteenth-century Jewish pogroms: ibid 98–9.

distinctions defined by blood and race were commonplace.[35] The push for religious homogeneity prompted decrees of expulsion as well as the Spanish Inquisition, primarily affecting the Jews and Moors, including *conversos* (Jewish converts to Christianity) and *moriscos* (Muslim converts), as well as other 'heretics' and marginalised groups such as the Roma.[36] This context is indicative of a sociopolitical dynamic in which conversos, moriscos, and other heretics were marked as outsiders subject to expulsion. Vitoria was himself *de sangre semita* – that is, of Jewish ancestry descended from conversos[37] – so for this context to permeate his conscious thought would have been almost unavoidable. However, as the following subsection shows, even though this was the context *in* which he was writing, it was not the context *for* which he was writing. This is so notwithstanding that certain features of Vitoria's arguments may have been influenced by his personal circumstances as well as the broader exigencies of the Iberian context.[38]

2.1.2 *The Foreigner: Insider or Outsider?*

As we know, part of Vitoria's brief was to justify the Spanish colonisation of the Indies. In this connection, even his defenders such as Cavallar acknowledge that this meant that Vitoria's treatises needed to maintain imperial power interests.[39] It is no surprise, then, that notwithstanding reports of gross brutality by the conquistadors and his own outrage,[40] he generated juridical authority for the perception that the 'barbarian' Indian was racially, culturally, and religiously inferior. Thus, for example, Vitoria acknowledged in the Indians

[35] Ibid 69, 103–5; John H Elliott, *Imperial Spain: 1479–1716* (Pelican, 1963) 212–48.

[36] The Roma, believed to have first come to Europe as early as the tenth century, had a significant presence in Spain, living on the margins of society and thus the targets of social and official discrimination: Peter Bakker and Khristo Kiuchukov (eds), *What Is the Romani Language?* (University of Hertfordshire Press, 2000) 13.

[37] Berta Ares Queija, Jésus Bustamante, and Francisco Castilla (eds), *Humanismo y visión del otro en la España moderna: cuatro estudios* (Biblioteca de Historia de América, CSIC, 1993) 24.

[38] Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria* (Ashgate, 2002) 115. At n 143, Cavallar notes that Vitoria was on the government payroll and his Dominican prior had received threatening correspondence from Charles V following Vitoria's second 'unjust titles' lecture on the American Indians, in which Vitoria articulated limits on the conduct of the Spanish in bringing the 'barbarians' under their rule.

[39] Although Cavallar acknowledges that he presents a "rather benign" interpretation of Vitoria's thinking, he cannot be seen entirely as an apologist, offering as he does some more unfavourable interpretations of his work with regard to the problem of humanitarian intervention and the right to hospitality: ibid 98–112.

[40] See, eg, Vitoria, above n 11, 332, regarding the conquest of Peru; Cavallar, above n 38, 117.

attributes of method, order, and reason[41] but simultaneously cast them as "insensate and slow-witted" on account of "their evil and barbarous education".[42] He regarded them as "born in sin" but not having "the use of reason to prompt them to seek baptism or the things necessary for salvation".[43] They were described as "peasants" who could be regarded as "little different from brute animals".[44] Thus, although credited by some with crafting a legal framework that championed the rights of the barbarians,[45] Vitoria conceptualised Indians as outsiders (though not outlaws) within the imperial frame. In so doing, Vitoria maintained the power interests of the Spanish.[46] Indeed, by recognising true dominion in the barbarians,[47] jurisdiction over them could serve as an effective justification for social, political, and economic control – a control that Vitoria would later (re)claim,[48] articulating the bases on which the barbarians had passed under Spanish rule. Whether inadvertent, improvised, or intentional, the effect of this was to neutralise or negate any idea that power or control may have been wrested from the Spanish through the ideas he had earlier expressed.[49]

Vitoria's 'just titles' constructed the foreigner as a figure of privilege and power, as a rights-bearing subject who was a Spaniard, not an Indian. In doing so, it is clear that Vitoria was not encoding a broader framework of general application to outsider-ness. Had he done so, he might have formulated a framework that served and protected the interests of a different group of 'outsiders' – that is, those in Spain who were instead the targets of domestic policies and priorities of religious homogeneity that resulted in decrees of expulsion and the Spanish Inquisition. But that was not his purpose. Instead, Vitoria situated his legal framework in the New World physically, while his point of analytical and ideological departure remained always and already the 'our world' of Spanish interests. There, he privileged the foreigner (an insider), subjugated the barbarian (an outsider), and sustained empire. As the following subsection shows, this privileging is also reflected in the framework of rights accorded the foreigner.

[41] Vitoria, above n 11, 250. [42] Ibid. [43] Ibid. [44] Ibid.
[45] See, eg, Cavallar, above n 38, 75–121; cf Anghie, above n 15, 28.
[46] This was also a criticism of the *Leyes de Burgos* of 1512, which codified the conduct of the Spanish in the Americas: Ruiz, above n 21, 84.
[47] Vitoria, above n 11, 250–1.
[48] "The just titles by which the barbarians of the New World passed under the rule of the Spaniards": ibid 277–92.
[49] On the seeming incompatibility of the second and third lectures on the American Indians, cf Cavallar, above n 38, 188.

2.1.3 On Rights: A Foreigner's Framework

A key attribute of Vitoria's foreigner was the right to travel and dwell in other countries (*ius peregrinandi*). Indeed, his theories asserted that, as long as he did no harm, his foreigner could not be barred by the barbarian from entry to the barbarian's homeland.[50] To support this, Vitoria's reasons may be grouped into three broad propositions: first, that the foreigner has a right to hospitality;[51] second, that he has a right to travel or residence; and third, that he should enjoy rights relating to entry, exile, and expulsion. This section looks briefly at each, showing that Vitoria did not conceptualise these rights as universal or cosmopolitan rights, but as reflecting contingent (European) interests in the specific context of legitimising Spanish imperialism.

2.1.3.1 The Right to Hospitality

In relation to hospitality, Vitoria reasoned that it is inhuman to treat strangers and travellers badly unless they are hostile,[52] and that borders were never intended to inhibit free movement.[53] He described expulsion or prohibition on entry as acts of war,[54] concluding that those who do no harm cannot lawfully be barred from entry.[55] Indeed, he asserted that it would be a monstrous and inhumane act to do otherwise.[56] Although qualified by the possibility of having a "special cause" (for example, "if travellers were doing something evil by visiting foreign nations"), the "humane and dutiful" obligation to extend hospitality to strangers was his starting point.[57] Drawing on the universalising edicts of divine law, which informed his natural law, Vitoria prohibited the barbarians from turning their backs on the harmless and exhorted them to welcome the stranger. Indeed, he declared that "to refuse to welcome strangers and foreigners is inherently evil."[58] Finally, he asserted that it would be

[50] Vitoria, above n 11, 278.

[51] Gaurier argues that the right to hospitality developed by Grotius, Pufendorf, and Vattel was in essence a right of conquest foundational to the law of nations: Dominique Gaurier, 'Cosmopolis and Utopia' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2013) 250, 264. The Vitorian conception of the right to hospitality may be similarly characterised.

[52] Vitoria, above n 11, 278.

[53] Ibid; see also James A R Nafziger, 'The General Admission of Aliens under International Law' (1983) 77(4) *American Journal of International Law* 804, 811; Étienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (James Swenson trans, Princeton University Press, 2004) 139–41 [trans of: *Nous, citoyens d'Europe: Les Frontières, l'État, le peuple* (first published 2001)].

[54] Vitoria, above n 11, 278. [55] Ibid 279. [56] Ibid 278–9. [57] Ibid 278. [58] Ibid 281.

contrary to the maxim "love thy neighbour" to bar the Spanish from entry into the territory of the barbarian Indians.[59]

2.1.3.2 Right to Travel and Reside

In recognising the right to travel and reside in the territory of another state, Vitoria recognised implicitly that an irrepressible peripatetic urge (whether voluntary or involuntary) predates, and cannot be contained by, the construction of nations or borders. Furthermore, he considered that their construction was never intended to inhibit free movement[60] and that to do otherwise would have been thought "inhuman in the time of Noah".[61] Although he tempered the right to travel with an obligation to do no harm or detriment to others,[62] rather than reflecting high principle, framing the obligation in this way ensured that the travel and residence of the Spanish coloniser could not be construed as causing harm. This is because Vitoria saw fit simply to *assume* the travel of the Spaniards to be neither harmful nor detrimental to the Indians and, therefore, lawful.[63]

2.1.3.3 Entry, Exile, and Expulsion

Concerning rights relating to entry, exile, and expulsion, Vitoria made three points which highlight the enormity of the affront to free movement that he perceived in the denial of entry and in acts of expulsion, banishment, or exile. In this vein, he asserted that the prohibition on entry in the first instance and expulsion in the second might be regarded as acts of war, meriting a 'just war' response. Such a response would, he said, be "within the bounds of blameless self-defence"[64] if, on account of the barbarians' cowardice, foolishness, and ignorance, the Spaniards were unable to convince them of their peaceful intentions.[65] Finally, he suggested that banishment or exile of Spanish foreigners was akin to punishing them for a crime they had not committed; indeed, he declared that it is not lawful to banish visitors who are innocent of any crime. The broad premise of each of these points is that those who do no harm cannot lawfully be barred from entry to or otherwise excluded from territory. Indeed, citing Virgil's *Aeneid*, Vitoria regarded expulsion, exile, or denial of entry of foreigners as a monstrous and inhuman act born of "barbarous customs".[66]

[59] Ibid 279. [60] Ibid 278. [61] Ibid. [62] Ibid. [63] Ibid. [64] Ibid 282.
[65] Ibid 281–2.
[66] Ibid 282; see also Hugo Grotius, *De jure praedae commentarius* (Gwladys L Williams and Walter H Zeydel trans, Clarendon Press, first published 1604, 1950 ed) ch XII, 219.

As the foregoing makes visible, Vitoria's framework privileged the rights and interests of foreigners because of *who* he understood the foreigner to be. It was an imperialist rights framework that actively diminished the barbarian Indian, even though it ascribed to her legal rights and personality. Furthermore, it did not take into account an immediate social and historical context of medieval migrations to Spain of, in particular, the Jews, Moors, and Roma and their subsequent discrimination, marginalisation, persecution, and expulsion.[67] The Jews, Moors, and Roma were outsiders, but they were not Vitoria's foreigners. Instead, Vitoria's texts reveal a style of argument according to which only a (certain kind of) foreigner could assert rights to mobility and protection – a style of argument that, as we will see, has been (re)produced and (re)shaped across time and place. In other words, we begin to see that who the foreigner is understood to be has a profound influence on the way in which the foreigner-sovereign relation is juridically authorised, shaped, and used.

This outline of Vitoria's foreigner, and his articulation of the foreigner's attendant rights, provides an important starting point for understanding how the foreigner has been conceptualised in early international law. As the following sections show, although the juridical purposes of Grotius, Pufendorf, and Vattel became more variegated through the seventeenth and eighteenth centuries, the foreigner remained a European insider in international law (as imperialist, trader, or exile), with clearly articulated rights and entitlements. In other words, in the foreigner-sovereign relation, the foreigner remained aligned with, rather than oppositional to, the sovereign. I turn now to Grotius, often regarded as the "principal forerunner" of modern international law.[68]

2.2 HUGO GROTIUS (1583–1645)

Grotius' theories drew significantly on the earlier work of Vitoria,[69] and their respective colonial contexts bear many parallels. Whether out of respect for Vitoria's theories, or as a strategy to influence (and undermine) the

[67] Vitoria deals only with the question in the context of conversion of unbelievers, concluding that conversion was not by force. See 'Lecture on the Evangelization of Unbelievers', Vitoria, above n 11, 339–51, particularly at 342–3.

[68] Edward Dumbauld, *The Life and Legal Writings of Hugo Grotius* (University of Oklahoma Press, 1969) 58; Anghie, above n 15, 13. However, this attribution has been the subject of considerable debate. See, eg, Nussbaum, above n 15. Cf Scott, above n 15; Cavallar, above n 38, 164; Weeramantry, above n 10, 136–9.

[69] This is particularly clear in *De jure praedae*: Grotius, *De jure praedae*, above n 66; see also Anghie, above n 15, 14; Cavallar, above n 38, 122; Luis Valenzuela-Vermehren, 'Vitoria, Humanism, and the School of Salamanca in Early Sixteenth-Century Spain: A Heuristic Overview' (2013) 16(2) *Logos: A Journal of Catholic Thought and Culture* 99, 118–20.

Spanish-dominated Portuguese political arena in the scramble for trade monopolies in the East,[70] his often emphatic reliance on Vitoria's theories established a cord of continuity in international legal thinking which Grotius developed in significant ways.

2.2.1 *Context: Trade Monopolies and the Thirty Years War*

One of Grotius' earliest projects was to write *De jure praedae commentarius* (*Commentary On the Law of Prize and Booty*),[71] originally titled *De Indis* ('On the [East] Indies'). It was probably commissioned by the Dutch East India Company.[72]

In the midst of court proceedings regarding the capture in the Straits of Singapore of the Portuguese ship the *Santa Catarina*, his task is said to have been to persuade public opinion that it was legitimate for the Dutch to claim as 'prize' the proceeds of such property.[73]

De jure praedae draws most strongly on the rights to travel and trade enunciated by Vitoria.[74] However, in East Asia particular international relations and trade structures, notably with respect to China and India, attracted a more nuanced European response. Cavallar has suggested that these relations and structures demanded adaptations to the colonial project that explicitly acknowledged the rights of non-European communities and individuals.[75] Although this may be arguable – and Grotius certainly described the Indians of the Orient (in contrast to the American Indians) as "neither insane nor irrational, but clever and sagacious"[76] – it is also possible to see that Grotius' primary interest was to undermine Portuguese claims on 'discovered' territories.[77] Coupled with this, he asserted the rights of trade and hospitality,[78] necessity,[79] (unarmed and innocent) passage,[80] and freedom of the high seas,[81]

[70] Cavallar, above n 38, 146, 146 n 77. [71] Grotius, *De jure praedae*, above n 66.

[72] It is commonly assumed that Grotius was on a retainer from the Dutch East India Company ('*Vereenigde Oostindische Compagnie*' or 'VOC'): see, eg, Cavallar, above n 38, 145. Borschberg considers there to be some doubt about this but concludes that *De jure praedae* was probably commissioned by the directors of the VOC: Peter Borschberg, *Hugo Grotius, the Portuguese and Free Trade in the East Indies* (NUS Press, 2011) 110.

[73] Dumbauld, above n 68, 25–6, 41.

[74] Grotius, *De jure praedae*, above n 66, ch XII, 218, 219–20; Cavallar, above n 38, 124.

[75] Cavallar, above n 38, 145–6. [76] Grotius, *De jure praedae*, above n 66, ch XII, 222.

[77] Ibid 220–22. [78] Ibid 219. [79] Ibid ch XI, 178. [80] Ibid ch XII, 244.

[81] Ibid 216 n 1, where it is clarified that Grotius' celebrated exposition of the freedom of the high seas, *Mare liberum*, first published in 1608, was a revised version of ch XII of the *De jure praedae* manuscript. Following its publication, *Mare liberum* was placed on the Vatican's *Index of Prohibited Books*: Cavallar, above n 38, 161. The predecessor to freedom of the high seas was the right to common property, a right which Vitoria asserted as extending to the "open

and used liberally the notion of 'just war' to justify the claim of 'prize'.[82] This reflected his ultimate objective of conquering the trade monopoly of the Portuguese. Indeed, his treatise bore an anti-Iberian tone suggestive of this political-economic purpose.[83]

In Grotius' later treatise, *De jure belli ac pacis*,[84] his focus shifted, from the project of asserting and mediating trading rights on the high seas and in the East to Europe. This reflected the troubled times in which he was living, marked most significantly by the catastrophic Thirty Years War. This war of religion would take the lives of an estimated four million people, either directly through conflict or indirectly through its disastrous social and economic consequences, including famine and disease.[85]

Embroiled in the religious turmoil that characterised the Thirty Years War, Grotius knew first-hand the life of a foreigner in exile. In 1619, he was sentenced to life imprisonment for an unspecified crime that would later be classed as treason.[86] In prison he was threatened with torture[87] and held incommunicado, denied permission to see his wife, children, or friends.[88] In 1621, he fled to Paris from his native Netherlands after his wife effected his dramatic escape from prison in a book chest.[89] He lived in exile in Paris (1621–31) and then, after attempting to repatriate, returned to a life in exile in Hamburg (1632–34). He later returned to Paris as an ambassador for Sweden (1635–45), until shortly before his death.[90] It was during his first exile in Paris that he wrote *De jure belli ac pacis* (1625),[91] his most celebrated work. With this context in mind, it

seas, rivers and ports": Vitoria, above n 11, 279. Grotius qualified his assertion that the seas could not be occupied and therefore constituted common property, concluding that areas such as bays and straits may be occupied. Grotius, *De jure praedae*, above n 66, ch XII, 239; see also Cavallar, above n 38, 149.

82 Grotius, *De jure praedae*, above n 66; Dumbauld, above n 68, 25–8.

83 Borschberg, above n 72, 111.

84 Hugo Grotius, *De jure belli ac pacis libri tres* (Francis W Kelsey trans, Clarendon Press, first published 1646, 1925 ed) vol 2 [*On the Law of War and Peace: Three Books*].

85 See, eg, John Merriman, *A History of Modern Europe: From the Renaissance to the Present* (W W Norton, 1996) 176.

86 Dumbauld, above n 68, 13. 87 Ibid 104. 88 Ibid 94, 110.

89 Ibid 9, 11–19; see also Atle Grahl-Madsen, 'The European Tradition of Asylum and the Development of International Refugee Law' (1966) 3(3) *Journal of Peace and Research* 278, 278. Note that the Italian publicist Alberico Gentili (1552–1608) on whom Grotius relied heavily in his work was also a refugee: Cavallar, above n 38, 156.

90 Peter Haggenmacher, 'Hugo Grotius (1583–1645)' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 1098–101.

91 Grotius, *De jure belli*, above n 84.

is no surprise that Grotius' work speaks to the movement of foreigners not only with regard to trade and commerce, but also to that of the social and political upheaval of war.

2.2.2 *Foreigners: Protecting 'Prize' and Seeking Peace*

Grotius regarded mobility as being part of the natural and advantageous order of things, integrating decisively the rights and needs of the foreigner into his later work as part of his quest to craft a "plausible intellectual foundation for a peaceful world".[92] Notably, he declared that "[i]t is not contrary to friendship to admit individual subjects".[93] This suggests that, at least in the European context, Grotius viewed migration as a presumptively benign dynamic – that is, one that overcomes adversity by providing refuge to those in need as well as facilitating trade and commerce in the interests of host communities and states. In constructing rights crucial to the foreigner (to free movement, to necessity, and indeed to non-discrimination), Grotius tempered them with limitations (discussed in Section 2.2.3) that recognised the authority of the host state and community.

However, while the intra-European context is an important dimension to understanding who the Grotian foreigner was, in *De jure praedae* he cast the foreigner in the role of imperialising trader, thus employing an imperialist perspective that, as he made explicit, drew heavily on Vitoria's work.[94] Indeed, it is clear that even the peaceful world he sought in his later treatise *De jure belli ac pacis* remained one between (European) sovereign (more or less) equals, which maintained at least implicitly the same structural diminishment of the (non-European) *un*equals that had underpinned his earlier conceptions of international law in *De jure praedae*. Furthermore, while the intra-European relations and the disruption caused by Europe's religious wars may be taken to be Grotius' immediate context in crafting *De jure belli ac pacis*, it seems clear that this later work drew on *De jure praedae* in significant respects.[95]

In *De jure praedae*, Grotius was primarily focused on the movement of people for the purposes of imperial trade and commerce in the East Indies. But who did he understand the foreigners in the East Indies to be? As noted earlier, East Asia had international relations and trade structures more clearly recognisable to the European.[96] For example, in the early fifteenth century the

[92] Anghie, above n 15, 126 n 38. [93] Grotius, *De jure belli*, above n 84, bk III ch XX, 819.
[94] Grotius, *De jure praedae*, above n 66, ch XII, 219, 221–4, 226, 262.
[95] Dumbauld, above n 68, 31.
[96] Grotius, *De jure praedae*, above n 66, ch XII, 255, 260; Cavallar, above n 38, 145.

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Chinese admiral Zheng He had led seven voyages of Ming imperial fleets comprising as many as 350 ships and thousands of crew apiece as far as India, Arabia, and East Africa. So, as Manning has noted evocatively, "when the Portuguese mariner Vasco da Gama rounded the Cape of Good Hope and entered the Indian Ocean in 1498, he was joining an existing network of trade and migration rather than creating a new one."[97] Just over a century later, it is clear that Grotius was aware of significant movements of non-European foreigners across many parts of South and East Asia, as well as between South and East Asia and East Africa.[98] Yet, although credited with rejecting the legal pretexts for taking tribal lands by force and resisting the use of international law to assert cultural or religious superiority or domination,[99] was he concerned about the rights and interests of the likes of Admiral Zheng and his cohorts? There is nothing to indicate that he was. Although there is some ambiguous – and contestable – evidence that Grotius was well disposed to protecting the rights and interests of the non-European,[100] there is scant evidence in his texts to indicate that he was seriously concerned about proclaiming or protecting their rights and interests *qua* foreigners.[101] As such, there is nothing to indicate that the Grotian foreigner was other than a European. On the contrary, the unequal power dynamics of the imperialist international law that characterised *De jure praedae*, particularly in the context of the quest for trade monopolies in East Asia, affirms the view that the Grotian foreigner was, like that envisaged by Vitoria, always and anywhere European. And, as the following subsection elaborates, as a European the Grotian foreigner enjoyed a range of enabling rights.

97 Patrick Manning, *Migration in World History* (Routledge, 2nd ed, 2013) 114.

98 Grotius, *De jure praedae*, above n 66, ch XII, 242; Manning, above n 97, 108–12; Borschberg, above n 72, 106–46, 267 n 244.

99 See, eg, Rosalyn Higgins, 'Grotius and the Development of International Law in the United Nations Period' in Hedley Bull, Benedict Kingsbury, and Adam Roberts (eds), *Hugo Grotius and International Relations* (Clarendon Press, 1990) 267, 278.

100 On the controversy surrounding Grotius' treatise on the origin of the American peoples, *De Origine Gentium Americanarum Dissertatio* (1642), see Joan-Pau Rubiés, 'Hugo Grotius's Dissertation on the Origin of the American Peoples and the Use of Comparative Methods' (1991) 52(2) *Journal of the History of Ideas* 221; Cavallar, above n 38, 144–5; Jane O Newman, '"Race", Religion and the Law: Rhetorics of Sameness and Difference in the Work of Hugo Grotius' in Victoria Ann Kahn and Lorna Hutson, *Rhetoric and Law in Early Modern Europe* (Yale University Press, 2001) 285.

101 In one instance, following Vitoria, Grotius poses what he describes as a "heretical" hypothetical in which the American Indians are "the first foreigners to come to Spain" and claim dominion over territory on the strength of divergent religious beliefs. However, it seems clear that his purpose is to subvert any Portuguese claim to dominion over the territory of the East Indies: Grotius, *De jure praedae*, above n 66, ch XII, 222.

2.2.3 On Rights: A Matter of Mobility and Necessity

Grotius' conception of international society emphasised certain rights (notably property rights) that were common to all human beings.[102] He constructed a legal framework with three elements: natural law (*ius naturae*), the law of nations (*ius gentium*), and volitional divine law (*divinum voluntarium*).[103] Drawing authority from these legal genres, Grotius' framework of rights focused primarily on questions of mobility and necessity. This framework acknowledged and integrated the inherent tension between the autonomies of the sovereign on the one hand and the migration of the foreigner on the other. It did so by conditioning many of the rights articulated. That is, it vested rights in foreigners themselves as well as authority on the part of states to admit migrants and exiles.[104] The rights of passage, temporary sojourn, and necessity are illustrative. However, the right to enter and reside, to which I turn first, weighs more strongly in favour of the foreigner.

2.2.3.1 The Right to Enter and Reside

Grotius recognised foreigners as having the right to enter and reside in the territory of another state, whether temporarily or permanently.[105] In particular, he considered legitimate the right of passage for those desirous of "[carrying] on commerce with a distant people"[106] and the right of temporary sojourn for the purposes of health, shelter, "or for any other good reason".[107] Likewise, he regarded "those who have been driven from their homes" as having the "right to acquire permanent residence in another country".[108] So, although not explicitly asserting the *obligation* to grant asylum, such an obligation seems implicit in his articulation of the individual's right to asylum and his acknowledgment of the futility of exile where there is nowhere for the exiled person to go.[109] This is also true of the right of those expelled from their homes to acquire a permanent residence in another country.[110] Finally, Grotius considered that the rights of *a people* were not extinguished by migration, whether such migration was of the people's own accord or under compulsion.[111]

[102] Cavallar, above n 38, 150.
[103] Grotius, *De jure belli*, above n 84, Prolegomena, 24, bk I ch I, 41; Dumbauld, above n 68, 64.
[104] Grotius, *De jure belli*, above n 84, bk III ch XX, 819–20. [105] Ibid bk II ch II, 192, 201–2.
[106] Ibid 196–7. Grotius first developed this argument in *De jure praedae*, above n 66, ch XII, 216–20: Cavallar, above n 38, 147.
[107] Grotius, *De jure belli*, above n 84, bk II ch II, 201. [108] Ibid 201–2.
[109] Grotius quotes Livy Perseus: "What is accomplished by sending any one into exile, if there is not going to be a place anywhere for the person exiled?": ibid bk III ch XX, 820.
[110] Ibid bk II ch II, 201. [111] Ibid bk II ch IX, 314.

2.2.3.2 Rights of Passage and Temporary Sojourn

Grotius articulated the right of passage as a right only to be exercised "for legitimate reasons", amongst which he included forced migration or trade and commerce.[112] From the point of view of the migrant, right of passage must first be demanded; but then if refused it may be made by force, as long as passage is demanded "without evil intent".[113] As such, passage could be both legitimately asserted and (if ill intentioned) resisted. In analytical (and contextual) contrast to Vitoria, benign purpose was not to be assumed. Furthermore, Grotius asserted that the right of temporary sojourn must be for "good reason" and the right to acquire a permanent residence in another country subject to the obligation to "observe any regulations which are necessary to avoid strifes".[114]

In relation to the right of necessity, Grotius concluded that the right to enjoy basic necessities by non-citizens might temper the authority of a state to condition their presence in its territory. For example, Grotius articulated a primitive state of community ownership that may be revived by necessity, or the imperative of survival; the right of necessity, he said, overrode the right to private ownership because the enjoyment of private ownership remained embedded with an obligation to "depart as little as possible from natural equity".[115] By drawing no distinction between the content of its enjoyment for citizens and foreigners (remember that contextually both citizen and foreigner were European), Grotius made clear that the right of necessity must also be understood as extending to foreigners.[116] Its scope included food,[117] clothing,[118] and health.[119] However, in a gesture of reciprocity among sovereign equals and their subjects, Grotius also conditioned such rights. Necessity, he declared, should be "unavoidable", cannot be exercised in case of equal need, and should carry with it an obligation of restitution "whenever this can be done".[120] Again, he made no distinction between the foreigner and the citizen.

[112] Ibid bk II ch II, 196–7. [113] Ibid 198. [114] Ibid 201–2. [115] Ibid 193.

[116] Ibid 192–5.

[117] See, eg, ibid 192, where Grotius indicates that foreigners have an equal right, unless forbidden by law, to own the "wild animals, fish and birds" they have caught.

[118] Cavallar, above n 38, 148.

[119] Grotius, *De jure belli*, above n 84, bk II ch II, 201; see also Nafziger, above n 53, 810. In other words, (European) foreigners were also entitled to what have been described in the contemporary context as 'survival rights': Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Clarendon Press, 1995) 194.

[120] Grotius, *De jure belli*, above n 84, bk II ch II, 194–5.

2.2.3.3 Right to Non-Discrimination

The final right of immediate import is the right of foreigners to non-discrimination on the basis of nationality. Grotius articulated this right such that any rights to which foreigners are also entitled – as compared to matters of privilege or favour – "cannot be denied to one people alone, except on account of previous wrong-doing".[121] This prohibition on discrimination would seem to be concerned with distinctions between different groups of foreigners rather than between foreigners and the citizenry, as Grotius' starting premise is that he is only dealing with rights to which foreigners as well as citizens are entitled. "Things permitted" other than rights – in other words, things granted as a favour – were not included in Grotius' conception because, he said, they did not fall within the law of nature.[122] A concession that citizens have different rights to foreigners seems implicit here, but the nature of the rights that he asserted in this context – "to hunt, fish, snare birds, or gather pearls, to inherit by will, to sell property, and even to contract marriages"[123] – included significant rights of a social and economic nature and rights of survival or necessity as well as other rights that might be considered important for an individual to lead a dignified life, or, in Grotius' words, "the right to such acts as human life requires".[124] Again, this framing would seem to make clear that the Grotian foreigner was, always and everywhere, a European and, in that sense, an insider.

To conclude, therefore, even with the spatial shift from international law's imperialising reach to the intra-European context, we can see that the foreigner's European 'insider-ness' remains. This is because the point of analytical and ideological departure is that the foreigner (like the citizen) is an insider in (intra-European) sovereign relations with (more or less) equal rights even though he is physically outside his country of citizenship. Again, therefore, we see that there is nothing inevitable about the foreigner's 'outsider-ness' in the foreigner-sovereign relation; on the contrary, Grotius was casting the foreigner in his own image. And as Section 2.3 shows, Pufendorf took a similar approach.

2.3 SAMUEL PUFENDORF (1632–1694)

Over the course of a prolific career, Pufendorf published a number of treatises that dealt directly with the rights of foreigners largely through the prism of toleration, understood as a right to freedom of religion, albeit a right lacking an

[121] Ibid 204–5. [122] Ibid 205. [123] Ibid. [124] Ibid 203–4.

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abstract, theoretical character.[125] A trilogy of Pufendorf's treatises are of particular interest:[126] *De jure naturae et gentium libri octo* (1672);[127] *De officio hominis et civis juxta legem naturalem libri duo* (1673);[128] and *De habitu religionis Christianae ad vitam civilem* (1687),[129] which has been regarded as an appendix to *De officio hominis*.[130]

Pufendorf's work was informed by the Thirty Years War of religion and the subsequent effects of the Revocation of the Edict of Nantes.[131] Most importantly for present purposes, Pufendorf's treatises, like those of Grotius, clearly anticipated, indeed assumed, mobility to be part of the natural order of things and necessary for the purposes of self-preservation,[132] particularly in the face of religious intolerance. However, neither his defence of intellectual freedom and robust toleration of religious, scientific, and philosophical ideas nor the necessary corollary of free movement would be clear through an examination of his text without also having an understanding of the context in which he was writing.[133] The following subsection contextualises the work of Pufendorf in order to make visible his conceptualisation of the foreigner-sovereign relation, specifically his emphases on the foreigner's rights to mobility and self-preservation and his insistence on the sovereign's tolerance of the foreigner.

[125] Detlef Döring, 'Samuel von Pufendorf and Toleration' in John C Laursen and Cary J Nederman (eds), *Beyond the Persecuting Society: Religious Toleration before the Enlightenment* (University of Pennsylvania Press, 1998) 178, 184–92.

[126] The selection of Pufendorf's work examined in this genealogy is intended to provide an illustration of the work of Pufendorf as it relates to the figure of the foreigner and the rights to which the foreigner was entitled.

[127] Samuel Pufendorf, *De jure naturae et gentium libri octo* (C H and W A Oldfather trans, Clarendon Press, first published 1688, 1934 ed) [*On the Law of Nature and Nations [Peoples] in Eight Books*].

[128] Samuel Pufendorf, *On the Duty of Man and Citizen according to Natural Law* (James Tully ed, Michael Silverthorne trans, Cambridge University Press, 1991) [trans of: *De officio hominis et civis juxta legem naturalem libri duo* (first published 1673)].

[129] Samuel Pufendorf, *Of the Nature and Qualification of Religion in Reference to Civil Society* (printed by D E for A Roper and A Bofvile, 1698) [trans of: *De habitu religionis Christianae ad vitam civilem* (first published 1687)], via Early English Books Online <http://eebo.chadwyck.com/home>.

[130] Ibid.

[131] The Revocation of the Edict of Nantes targeted Calvinist Protestants (the Huguenots) in France, forbidding Protestant baptism, worship, and education, and requiring the conversion to Catholicism of Protestant ministers or their departure: *Edict of Fontainebleau*, proclaimed 18 October 1685.

[132] Use of the term 'self-preservation' in relation to the individual in this context contrasts strikingly with its use as a justification for state action in the construction of an absolute sovereign right to exclude (even friendly) aliens. See Chapter 3.

[133] John C Laursen (ed), *Religious Toleration: 'The Variety of Rites' from Cyrus to Defoe* (St Martin's Press, 1999) xv. Laursen makes this point in relation to the intricacies of toleration debates, but it applies equally and by extension to attendant rights to free movement.

2.3.1 Context: War and Peace, Prison and Persecution

Like Grotius, Pufendorf and his family had first-hand experience of the terrors of the wars of religion, which were concluded by the Peace of Westphalia in 1648. Pufendorf was born in Saxony in 1632, in the midst of the Thirty Years War. One of eleven children from a poor Lutheran family, he was among the seven who survived.[134] Later, in 1658, while tutor to the family of Sweden's special envoy in Copenhagen, Pufendorf was imprisoned for eight months along with the other members of the ambassador's retinue. This followed the unexpected revival of war against Denmark by the Swedes.[135] He would also bear witness to the expulsion of the Huguenots from France following Louis XIV's Revocation of the Edict of Nantes.[136]

Writing in the wake of the Peace of Westphalia, Pufendorf's work retained many of the natural law underpinnings that characterised that of Vitoria and Grotius. It was in prison in Copenhagen that Pufendorf wrote his first major work, *Elementorum jurisprudentiae universalis libri II*.[137] After his release in 1659, suffering serious illness and almost dying in a shipwreck, he moved to study in Leiden and later to teach in Heidelberg (1661–68) and Lund (1668–77). He then moved to Stockholm (1677–88) as royal historiographer.[138]

In 1688, Pufendorf was called to the court of Friedrich Wilhelm of Brandenburg in Berlin.[139] Friedrich Wilhelm was known for his "toleration politics",[140] which appear to have drawn him to Pufendorf. Friedrich Wilhelm had issued the Brandenburg Tolerance Edict (1664), which gave equal rights

[134] Michael Seidler, 'Pufendorf's Moral and Political Philosophy' (19 March 2013) *The Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/entries/pufendorf-moral/>, citing Detlef Döring, 'Biographisches zu Samuel Pufendorf' in B Geyer and H Goerlich (eds), *Samuel Pufendorf und seine Wirkungen bis auf die heutige Zeit* (Nomos Verlagsgesellschaft, 1996) 23–37.

[135] Seidler, above n 134.

[136] Also known as the Edict of Fontainebleau, issued in October 1684, the Edict of Nantes was issued in April 1598 and granted a measure of freedom of religion, conscience, and worship to French Protestants, the Huguenots, establishing an uneasy truce and era of religious pluralism. For more on the Edict of Nantes, see Ruth Whelan and Carol Baxter, *Toleration and Religious Identity: The Edict of Nantes and Its Implications in France, Britain and Ireland* (Four Courts Press, 2003). It is in the light of these events that Grahl-Madsen treats the modern European tradition of asylum as dating from 1685: Grahl-Madsen, above n 89, 278.

[137] Samuel Pufendorf, *Elementorum jurisprudentiae universalis libri duo* (W A Oldfather trans, Clarendon Press, first published 1672, 1931 ed).

[138] Knud Haakonssen, 'Samuel Pufendorf (1632–1694)' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2013) 1102.

[139] Samuel Pufendorf, *The Political Writings of Samuel Pufendorf* (Craig L Carr ed, Michael J Seidler trans, Oxford University Press, 1994) 4.

[140] Seidler, above n 134.

to Lutherans and Calvinists and which prohibited open criticism of other religions by priests. Later, he issued the Edict of Potsdam (1685) in direct response to the revocation in the same year of the Edict of Nantes[141] by Louis XIV. The Edict of Potsdam provided for the safe passage of French Protestants (Huguenots) to Brandenburg-Prussia and authorised them to hold church services in their native French.[142] The *dragonnades* policy of Louis XIV (1681), designed to harass and intimidate the Huguenot population in France, had already caused the flight of thousands to seek asylum in England, Germany, Holland, Switzerland, and the North American colonies.[143] These numbers would rise to an estimated 200,000 people following the Revocation of the Edict of Nantes.[144] After issuing the Edict of Potsdam, Friedrich Wilhelm's Brandenburg-Prussia received an estimated 20,000 French Huguenots; the edict also triggered migration by the persecuted of Russia, the Netherlands, and Bohemia.[145] With this as his context, Pufendorf clearly anticipated, indeed assumed, mobility to be part of the natural order of things.

2.3.2 *Becoming a Foreigner: An Act of Self-Preservation*

Pufendorf recognised the right of an individual to flee to the protection of another state for the purposes of self-preservation, particularly as an expression of freedom of religion. In the same connection, he gave expression to the right of passage, asserting that "no one can question the barbarity of showing an indiscriminate hostility to those who come on a peaceful mission".[146] In *De habitu religionis Christianae*, Pufendorf offered, among other things, a rationale for the toleration politics that had informed Friedrich Wilhelm's offer of asylum to the Huguenots embodied in the Edict of Potsdam. Indeed, it was this treatise, dedicated to Friedrich Wilhelm, which is said to have prompted his appointment to the Brandenburg court.[147]

[141] The revocation of the Edict of Nantes is also known as the declaration of the Edict of Fontainebleau (1685).

[142] John Stoye, *Europe Unfolding: 1648–1688* (Blackwell, 2nd ed, 2000) 272.

[143] Ibid 263–74. [144] Ibid.

[145] See, eg, Grahl-Madsen, above n 89, 278; Stoye, above n 142, 270.

[146] Pufendorf, *De jure naturae et gentium*, above n 127, bk VIII 365; Nafziger, above n 53, 811.

[147] David Saunders, 'Hegemon History: Pufendorf's Shifting Perspectives on France and French Power' in Olaf Asbach and Peter Schröder (eds), *War, the State and International Law in the Seventeenth Century* (Ashgate, 2010) 211, 215. The Brandenburg-Prussian refuge in the Palatine region to which the doctrine of religious toleration gave rise would, however, be short-lived; in 1689 the Palatinate became a target of Louis XIV's armies, which devastated the region, forcing the refugees further east: Tim Blanning, *The Pursuit of Glory: Europe 1648–1815* (Penguin, 2008) 87.

Reflecting this post-Westphalian context, it would seem that Pufendorf's international legal theories were less about imperial ambition and expansion than navigating post-Westphalian sovereign relations among European equals. This may explain why, as in Grotius' later work, there is less in Pufendorf's work that is indicative of the foreigner as coloniser and more about the status and attributes of legal subjects, whether citizen, resident, sojourner, or alien.[148] His focus appears instead to have been on the rights, statuses, and attributes of the foreigner – still a European – as émigré and exile *in Europe*. Thus, as Section 2.3.3 shows, under threat of injury or hostile intent, he took the view that it is preferable "to emigrate", "to look out for oneself by fleeing", or "to place oneself under the protection of another state".[149] Likewise, he recognised that such departure and entry into the jurisdiction of another state may be compelled by extreme necessity or by hostile force.

2.3.3 *On Rights: Mobility as a Consequential Right*

In articulating a rights framework for the foreigner, Pufendorf can be understood as treating mobility as a right, but more as a right of self-preservation consequential to other rights than as a right in itself. Specifically, he reaffirmed the rights to engage in trade and commerce and to freedom of conscience and religion.

To Pufendorf, inter-state trade and commerce remained a key feature of social and economic life and, as he acknowledged, did not compel the coalescence into one state of those who engage in trade and commerce between each other.[150] In this sense mobility must be understood as a necessary corollary of the right to engage in trade and commerce. Perhaps more significantly, Pufendorf recognised the right of an individual to flee the state in which she is a citizen. Contextually, the premise of this right to free movement was the right to freedom of conscience and religion and, in the interests of self-preservation, gave rise to a consequential right to claim the protection of another state.[151] He recognised that some states do not permit emigration without their express consent or the surrender of a surety[152] – that is, where exit is controlled or otherwise authorised. However, he regarded it as "preferable that a free man be understood to have reserved for himself a license to emigrate at his discretion".[153] While the price for this appears to have been the loss of citizenship,

[148] The colonial world was within his conscious thought, but with less prominence: Pufendorf, *De jure naturae et gentium*, above n 127, bk VIII ch XI § 6 1355–6.
[149] Pufendorf, *Political Writings*, above n 139, 237. [150] Ibid 205. [151] Ibid 237.
[152] Ibid 264. [153] Ibid.

Pufendorf considered such an émigré to be a (Socratic) "citizen of the world" rather than "someone assigned to a certain lump of soil".[154]

As a corollary of mobility, Pufendorf constructed legal subjects with a hierarchy of attachment that is more nuanced. In his estimation, the ("native or naturalized") citizen enjoyed full rights,[155] the resident partial rights,[156] the sojourner a less stable form of temporary attachment, and the alien (who, he said, intends to remain a short time) no attachment at all.[157] He was mindful, however, of the "poverty of language" that compels the use of a single word to express both status and attributes.[158] Applying this reasoning, 'alien' may denote the status of an individual, but it may also be considered an attribute because it is conceived as a passive quality.[159] Here, Pufendorf hinted at the attendant risks of assuming attributes to inhere in status, not least because "several statuses can exist concurrently in the case of a single person".[160] So, while he denied that the status of citizen inheres in the resident alien, foreigner, or temporary inhabitant,[161] he nevertheless characterised them as 'citizens of the world'.

In exploring whether a people is bound to endure a prince's indignities and abuses, whether contractual, social, physical, or legal, Pufendorf was clear about the right to flee and seek refuge elsewhere:

> Even when a prince threatens the most dreadful injury with a hostile intent, it is preferable to emigrate, to look out for oneself by fleeing, or to place oneself under the protection of another state.[162]

Here, Pufendorf departed from Grotius, who he regarded as wrongly asserting that there is no right of a people to leave a state as a group. The Grotian logic appeared to gesture to the continued existence of society through the consolidation of sovereignty,[163] but Pufendorf argued that if there is an individual right to emigrate, it would follow that such a right should also apply to groups, even if it serves to weaken the state from which they have come.[164] However, he did not equate this with withdrawal of sovereignty. Rather, he said, it is vital that the individual or group physically leave the territory of the state:

> For otherwise there would be supreme confusion of sovereignties, if whole cities were permitted to withdraw themselves from the sovereignty of their own state at their pleasure and either subject themselves to another sovereignty or establish their own special commonwealth thereafter.[165]

[154] Ibid. [155] Pufendorf, *On the Duty of Man and Citizen*, above n 128, 138. [156] Ibid.
[157] Pufendorf, *Elementorum jurisprudentiae universalis*, above n 137, 16. [158] Ibid.
[159] Ibid. [160] Ibid. [161] Pufendorf, *Political Writings*, above n 139, 216. [162] Ibid 237.
[163] Grotius, *De jure belli*, above n 84, bk II ch V, 254; cited in Pufendorf, *Political Writings*, above n 139, bk VIII ch 11, 265.
[164] Pufendorf, *Political Writings*, above n 139, bk VIII ch 11, 265. [165] Ibid.

At the same time, Pufendorf recognised that such departures and entry into the jurisdiction of another state may be compelled by "extreme necessity"[166] or by "hostile force".[167] In so doing, he effectively recognised that the right to survival and to asylum is "licit not only for individual citizens – at least those bound by no other bond than the common bond of citizens – but also for whole cities and provinces, where there appears to be no other way of promoting their welfare".[168]

In sum, therefore, to give leverage to the rights to self-preservation, freedom of religion, and conscience, and to engage in trade and commerce, the right to freedom of movement has to be understood as a consequential right implicit in the mobility that inhered in the figure of the foreigner. Like Vitoria and Grotius before him, this was a framework of rights conceptualised by Pufendorf for the European, a 'foreigner' whose 'insider-ness' in international law gave him – as a (Socratic) 'citizen of the world' – mobility as a right consequential to other rights. I now consider the texts of the Swiss jurist Vattel, writing in the eighteenth century.

2.4 EMMERICH DE VATTEL (1714–1767)

Vattel was fundamentally a natural law theorist, even though it has been argued that he "prepared the ground for the era of uninhibited positivism."[169] His most influential treatise, *The Law of Nations*, was first published in 1758.[170] There is no doubt that the invocation of Vattel has had enduring significance in the making of migration law in the common law world,[171] not least in the context of Australian jurisprudence.[172] This is because the theories of Vattel

[166] Ibid 264. [167] Ibid 265. [168] Ibid.

[169] Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42(1) *American Journal of International Law* 20, 36.

[170] Vattel's purpose of making the theories of Christian Wolff accessible was consciously and discerningly made: Emmerich de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and of Sovereigns* (Joseph Chitty ed and trans, Lawbook Exchange, first published 1854, 2005 ed) x–xv [trans of: *Le Droit des gens; ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (first published 1758)]; Stéphane Beaulac, 'Emer de Vattel and the Externalization of Sovereignty' (2003) 5 *Journal of the History of International Law* 237, 267–8; Martti Koskenniemi, '"International Community" from Dante to Vattel' in Vincent Chetail and Peter Haggenmacher (eds), *Vattel's International Law from a XXIst Century Perspective/Le Droit International de Vattel vu du XXIe Siècle* (Martinus Nijhoff, 2011) 51.

[171] In the context of migration lawmaking, interpretations of Vattel's theories of sovereignty are discussed in Chapter 3: see also Nafziger, above n 53; Satvinder S Juss, *International Migration and Global Justice* (Ashgate, 2006) 13.

[172] See Chapters 3–4.

and his construction of law are regarded as highly responsive to notions of state sovereignty, a factor attributable at least in part to the context in which he was writing.

2.4.1 *Context: Conflict, Trade, and Religious Antipathy*

Vattel was born a subject of the king of Prussia in 1714 in the principality of Neuchâtel. The son of an ennobled Protestant minister and the daughter of Neuchâtel's counsel at the Prussian court, Vattel was of aristocratic background but of limited means and therefore impelled to offer his services for remuneration, which he did as a diplomat. Although it would seem that the positions he held were modest and his functions light, this gave him time to write.[173]

The Law of Nations was written in the gathering storm of the Seven Years War and published at its height. This was a war with multiple intra- and extra-European flashpoints driven by the antagonisms of competing colonial and trade interests among European powers.[174] An examination of Vattel's text also suggests an awareness of the human realities of migration, informed not only by the general recognition of rights to free trade and commerce, but also in large measure by continuing Catholic-Protestant antipathies that had long driven conflict, persecution, and flight.[175] Indeed, it would seem that the Vattelian framework of rights for the foreigner – which Vattel regarded as proceeding from natural law[176] – had a strong nuancing effect on his conceptualisation of the foreigner-sovereign relation. Vattel's foreigner was, like the Vitorian, Grotian, and Pufendorfian foreigners before him, a 'civilised' Christian European. The analysis of Vattel that follows affirms the view that early international law's foreigner was an insider, not an outsider – a figure whose mobility was privileged and enabled by international law, neither diminished by nor residual to it.

2.4.2 *Foreigners: Free Movement and a Just Assistance*

An important dimension to Vattel's theories is that they were grounded in the view that there is an equality between sovereign states that secures for their people the bond of a common humanity,[177] a bond whereby states will not

[173] Beaulac, above n 170, 242–3.
[174] Daniel Marston, *The Seven Years' War* (Routledge, 2012).
[175] Vattel, above n 170, bk I ch XII §§ 125–157. [176] Ibid xi.
[177] Ibid bk I ch XIX § 229. Cf Chapter 1, Section 1.1.1, 11–14.

"refuse a retreat to the unfortunate" and will do so free from "unnecessary suspicion and jealousy" or "groundless and frivolous fears".[178] We return to the same question: who is Vattel's foreigner? Or, put another way, between whom is this bond of a common humanity shared?

Like Grotius and Pufendorf, but unlike Vitoria, Vattel was principally focused on relations between different populations within Europe. His immediate context was the even more narrowly bounded but culturally and linguistically diverse region of Switzerland, comprising multiple small but independent principalities that were yet to federate. For these principalities, trade and other relations were well understood to give rise to mutual obligation and the social and economic imperatives of a (European) mobility. However, that is not to suggest that Vattel was not concerned with the wider world, for he undoubtedly was.

Vattel recounted a story which demonstrates that he too was influenced by the foreigner-barbarian dichotomy so strongly framed in the influential treatises of Vitoria. It is the story of Captain Bontekoe, a Dutchman, who,

> having lost his vessel at sea, escaped in his boat, with a part of his crew, and landed on an [Indonesian] coast, where the barbarous inhabitants refusing him provisions, the Dutch [justly] obtained them sword in hand.[179]

Vitoria also cited the highly restrictive practices of China and Japan, where "all foreigners are forbid to penetrate without an express permission".[180] In contrast, there is no evidence that he regarded Chinese or Japanese travellers as enjoying, for example, rights as foreigners in Europe. Rather, his reference to China and Japan served simply to contrast those countries' restrictive practices with the more liberal practices in Europe, where "the access is everywhere free to every person who is not an enemy of the state".[181]

The only exception that Vattel cited to the free movement he promoted as a liberal European virtue was that of people he described as "vagabonds and outcasts"[182] – probably a reference to the Roma and other socially or culturally marginalised populations. This suggests that Vattel's foreigner, for whom he outlined a host of significant rights, was still a European in (or from) Europe.

[178] Vattel, above n 170, bk I ch XIX § 231. [179] Ibid bk II ch IX § 120.
[180] Ibid bk II ch VIII § 100. [181] Ibid. [182] Ibid.

2.4.3 *On Rights: Sovereignty and the Duties of Humanity*

Although Vattel located considerable power and choice in the hands of the sovereign, there are some critical provisos in his work affecting the sovereign's relation with the foreigner. For example, he described a right to emigrate as arising from several sources, including as a natural right.[183] Moreover, he asserted that the state must "not refuse human assistance to those whom tempest or necessity obliged to approach their frontiers".[184] This proviso is typical of the way in which Vattel qualified sovereign power. For example, he declared that

> Since the lord of the territory may, whenever he thinks proper, forbid its being entered . . . he has, no doubt, a power to annex what conditions he pleases to the permission to enter. This, as we have already said, is a consequence of the right of domain.[185]

Then, immediately following these observations, Vattel added a critical qualifier, which he posed as a rhetorical question:

> Can it be necessary to add, that the owner of the territory ought, in this instance, to respect the duties of humanity?[186]

Anticipating the possibility that the entry of foreigners may be resisted, Vattel later cautioned that "no nation can, without good reasons, refuse even a perpetual residence to a man driven from his country", unless "particular and substantial reasons prevent her from affording him an asylum".[187] In this connection, Vattel declared that such reasons should be "free from unnecessary suspicion and jealousy" and should not refuse a retreat to the unfortunate "for slight reasons, and on groundless and frivolous fears".[188]

Likewise, Vattel stated that there were cases in which the sovereign "cannot refuse an entrance into his territory".[189] This, he said, included a "duty towards all mankind" that might oblige the sovereign "to allow a free passage through, and a residence in his state."[190] Vattel also addressed the right of innocent passage, which was intended to safeguard "the general right of traversing the earth for the purposes of mutual intercourse, of carrying on commerce with each other, and for other just reasons."[191] Thus, subject only to the qualification that passage would be "prejudicial or dangerous", the sovereign was, he

[183] Ibid bk I ch XIX §§ 225–6. Here, he endorses the protection accorded to the Huguenots by Friedrich Wilhelm Brandenburg-Prussia, discussed above, 69–70.
[184] Vattel, above n 170, bk II ch VII § 94. [185] Ibid bk II ch VIII § 100. [186] Ibid.
[187] Ibid. [188] Ibid bk I ch XIX § 231. [189] Ibid bk II ch VIII § 100. [190] Ibid.
[191] Ibid bk II ch X § 132.

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said, "bound to grant a passage for lawful purposes, whenever he can do it without inconvenience to himself".[192] Moreover, he said that the sovereign "cannot lawfully annex burdensome conditions to a permission which he is obliged to grant, and which he cannot refuse if he wishes to discharge his duty, and not abuse his right of property."[193]

Thus, for Vattel, the foreigner-sovereign relation was significantly affected by his view that an important collection of rights necessarily attends the foreigner and that the power to exclude her should only be exercised in extreme circumstances. In this connection, Vattel articulated the right to emigrate and a range of related rights, including the rights to leave and reside elsewhere, to travel and sojourn, to reside in a foreign country (including as a result of exile or banishment), and the right of necessity. He also underscored the concomitant obligation of hospitality.

2.5 THE FOREIGNER: ALWAYS AND ALREADY EUROPEAN

This genealogical reading of Vitoria, Grotius, Pufendorf, and Vattel has noticed *who* the figure of the foreigner was for each jurist. By reading their texts in a way that is attentive to the genre of their writing – and the way in which language, purpose, time, and context shaped their arguments – we have seen how the meaning of 'foreigner' is mutable. The way in which the figure of the foreigner was framed by each jurist was contingent upon his context and purpose, as well as by time and place. For the most part, the foreigner within the foreigner-sovereign relation was one of two types. On the one hand, he was an intra-European foreigner for whom migration was framed as a human necessity and reality (as trader or exile). On the other, he was an imperialist who, carrying a host of self-proclaimed rights in his pocket,[194] could conquer and claim the coastlines of the New World. Thus, by treating the figure of the foreigner as an historical artefact, shaped and rationalised by contingent events that vary temporally and spatially, we see that her juridical history repudiates the inevitability of her outsider-ness.[195]

To frame the figure of the foreigner as a European insider, each jurist has drawn on a range of legal genres and developed a repertoire of rights and topics

[192] Ibid. [193] Ibid; see also at bk II ch VIII § 100.

[194] I am grateful to Olivia Barr for this evocative image of the imperialist wandering the world with his own law stuffed in his pocket.

[195] Owen, above n 7, 6. Cf Thomas Nail, *The Figure of the Migrant* (Stanford University Press, 2015), in which Nail develops an interesting political theory of the migrant that characterises the foreigner as a static political figure in contrast to the migrant who lacks both static place and membership.

moulded and shaped to suit the interests of *his* foreigner. So, for example, biblical injunctions and natural law precepts shaped Vitoria's exhortations to welcome strangers and travellers and to offer them hospitality. These were, in turn, framed as rights of the foreigner under the law of nations (or peoples) (*ius gentium*). However, although tempered by an obligation on the foreigner to do no harm to the 'barbarian' Indian, this obligation may be understood as an empty gesture in view of Vitoria's (ex post facto) assumption that the travels of the Spanish foreigners were neither harmful nor detrimental to the 'barbarian' Indians, and their intentions peaceful. Finally, then, if the foreigner's peaceful attempts to assert his rights were not met with barbarian acquiescence, those rights were framed in ways that meant they could be lawfully obtained by force ('just war'). This pattern of argument tells, above all, an imperialist story of (European) dominance and self-interest.

As this chapter has traced, over time and depending on context, the repertoires and patterns of argument that were used to shape the figure of the foreigner and, in turn, outline a rights framework became more complex. Thus, as my examination of Grotius, Pufendorf, and Vattel suggests, their juridical purpose and outlook was (in contrast to Vitoria's) not purely imperial, even though, as we have seen, the styles of argument voiced by Vitoria retained a continuing relevance and resonance. Rather, conceptualisations of the foreigner as a (European) insider also related to governance of intra-European mobility and attendant social, economic, and political relations, including in the context of Catholic-Protestant tensions.[196] This suggests that wherever the work of international law was situated physically, its point of analytical and ideological departure remained Europe and the European.

So, the foreigner was – always and anywhere – a European insider in early international law. In contrast, the non-European remained a 'barbarian' outsider, enclosed in a legal framework within which she was accorded (at best) implied rights but no corresponding power to enforce them. Thus, although from time to time we have seen the non-European vested with a right to share in common property and to trade, such rights were qualified. Furthermore, we have seen no reciprocal right to emigrate – that is, for a non-European to become a foreigner on European soil. This reminds us that early international law did not seriously contemplate the non-European as a foreigner entitled to benefit from legal rights and protections on that account.

[196] Ian Hunter, 'Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations' in Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, 2010) 11, 12.

In the intra-European context, it is evident that the way in which each jurist thought about the relation between the sovereign and the foreigner, as a bearer of individual (and occasionally collective) rights, was more nuanced. While Grotius, Pufendorf, and Vattel each tempered their foreigner's rights framework with sovereign authority, they were (for the most part) framing mobility (including in some instances a perpetual or permanent residence) as a natural *modus vivendi* between nations and peoples. To do this, they expanded their repertoire of rights and topics to emphasise such rights as freedom of religion and the right (of the individual) to self-preservation.[197] In this way, they gave traction to the political-economic imperatives of mobility, upholding the interests of both people and the state. However, as we know, the people, the states, and their respective interests were all European.

In summary, this chapter has made visible the mutability of the foreigner as a juridical figure. It has shown how conceptualisations of the foreigner as a (rights-bearing) European insider in early international law do not square with the current assumption that the foreigner is – and has always been – an excludable outsider with less rights than the citizen. In other words, it has shown that because early conceptualisations of the foreigner – as European imperialist, émigré, or exile – treated foreignness as an enabling rather than residual status, there is nothing inherently or inevitably 'outside' about the juridical figure of the foreigner. Rather, it tells us that the figure of the foreigner is a juridical artefact whose status and rights have been shaped by historical contingencies in furtherance of certain political-economic interests. And importantly, the analysis suggests that the characteristics of the foreigner of early international law – a figure of privilege and power – explain why there was no discourse of 'absolute sovereignty' during that period.

This chapter has provided an entrée into a complex institutional story of the ideas, practices, and forms of engagement that have, over time, shaped the foreigner-sovereign relation. It sheds light on the particular styles of argument that have been used to produce, sustain, and shape how the foreigner within the foreigner-sovereign relation is conceptualised. Together with the remaining two chapters in the genealogy, this will enable us to see in Part II, with greater clarity, how these styles of argument continue to be discursively (re)-produced and (re)shaped by contemporary lawmakers.

[197] The way in which self-preservation became reshaped as a right of states is taken up in Chapter 3.

Chapter 3 argues that the foreigner became a more complex figure within the foreigner-sovereign relation as the political-economic context of human mobility changed. It focuses on the nineteenth century, a period in which we see the alignment of the foreigner with the sovereign wane and 'absolute sovereignty' emerge as a common law doctrine – a tool for the exclusion of a new kind of foreigner.