Chapter 3
From Freedom and Equality to Domination and Subordination: Feminist and Anti-Colonialist Critiques of the Vattelian Heritage

Tony Carty and Xiaoshi Zhang

Abstract The chapter takes as its starting point Pieter Kooijman's critique of Vattel's thinning out of the concept of authority in international law, one which attaches to the idea of state equality the possibility for each state to insist upon its own standards to the exclusion of any objective standards in the conduct of international relations. The chapter traces Vattel's contextual background in major Enlightenment shifts which set up a pernicious triad of thinkers such as Mandeville, Smith and de Sade. These thinkers make of post-Enlightenment economic and social relations a struggle of Master and Slave, most easily and clearly depicted in feminist studies, but also finding expression in imperialist relations and in particular, the unequal relations between the West and China, with the continuing inconclusive debate about unequal treaties. The chapter uses close study of a possible 'anti-feminist' novel, and feminist critique thereof, as well as a fairly extensive critique of the place of China in the recent history of international law, to argue that the present return of China to the position of a world power able to challenge the global system, could auger ill for post-Vattelian international law. Feminist critique is used to show that the post-Enlightenment ethical-cultural resources of international law are not equal to offering a country such as China more than a 'masculine' resort to its own self-strengthening. A search for alternatives ways to constructive dialogue are imperative, but, as Kooijmans shows, after Vattel the task of the international lawyer to contribute effectively is immeasurably disadvantaged.

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3.1 Introduction

In *The Doctrine of the Legal Equality of States* Kooijmans recognises the central importance of Vattel in contributing to an interest driven, power politics, 'fatally interfering with the normative character of law.'[1] Of course he is referring to Vattel's classic 1758 text which, following the standard assessment of Nussbaum, has had great influence in the practice of inter-state relations.[2] Kooijmans begins his consideration of Vattel by citing his most celebrated formulation of the equality principle.[3] In his *Preliminaries* Vattel says that men are naturally equal and a perfect equality exists in their rights and obligations, as proceeding from nature; that nations are composed of men, so that the same applies to them, so that 'power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.'[4]

This paper will agree with Kooijmans in taking Vattel's declaration as authoritative for the discipline of international law, treating him as the modern exponent of the legal expulsion of hierarchy from international relations. It is

[1] Kooijmans 1964, at 87.

[2] Ibid., at 83.

[3] Ibid., at 84.

[4] De Vattel 1999, para 18. (The numerous paragraph references used in this paper are reproduced in the text itself).

important to appreciate that Vattel was not exactly expounding what he regarded as positive law in the sense of conventional law. For him, equality was derived from nature. More particularly, it came from what he mysteriously described as 'voluntary law'. Under the rubric of *Foundation of the voluntary law of nations*, Vattel expounds that as

> nations are *free, independent and equal* – and since each possesses *the right of judging,* what conduct she is to pursue … the effect of the whole is to produce, at least externally … a perfect equality of rights between nations … in the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment, *so that whatever may be done by any one nation may be done by any other; and so they ought, in human society, to be considered as possessing equal rights.*[5]

After quoting the same passage,[6] Kooijmans comments that this absolute conception of equality is an obstruction for what he calls a primary natural law, which would imply objective norms for the behaviour of states. As Kooijmans indicates, what Vattel is arguing for is each state following its own standards, giving full play to national interest.[7] In other words, the great likelihood of severe conflict and the absence of any standard above individual nations are built into Vattel's schema – as such standard, indeed, is also absent in relations of individual men for the resolution of such conflicts. Vattel continues to say that '[e]ach nation in fact maintains that she has justice on her side in every dispute that happens to arise; and it does not belong to either of the parties interested, or to other nations, to pronounce a judgment on the contested question.'[8] As Kooijmans puts it, the consequence of this doctrine is 'essentially a loss of authority and a loss of depth for international law. Led by utilitarian motives and surrender to actual practice, he finally deprives natural law … of actual validity'.[9]

It is seen how Kooijmans stresses the utility and national interest aspect of Vattel's thinking. Martti Koskenniemi provides an authoritative introduction to how these central aspects of Vattel's thought belong as an integral part of the European Enlightenment and in the development of international law thinking as an integral part of that same Enlightenment.[10] Koskenniemi appreciates the slippery nature of the concept of 'voluntary law' within which Vattel embeds his formulation of equality. It is that part of the law which takes account of the specific nature of the international system. It reflects the 'presumed consent' of states to what 'they would consent if they possessed full knowledge of their interests and their relative position at each moment vis-à-vis their rivals'. This is not an equation of 'voluntary law' with actual rules attributable to treaty or tacit custom, says Koskenniemi: 'something is not in accordance with a nation's interest merely

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[5] Ibid., 1999, para. 21 (emphasis added).

[6] Kooijmans 1964, at 84-85.

[7] Ibid., at 85.

[8] De Vattel 1999, para. 21.

[9] Kooijmans 1964, at 86.

[10] Koskenniemi 2011, at 73-75.

because a nation happens to do it'.[11] Instead, in Koskenniemi's view, '[v]oluntary law is what professional expertise tells us is needed for a nation's "bonheur et perfection"'. The voluntary law is firmly grounded, he says,

> in the 18th century reality, where progressive elements can be chosen, which look for a more harmonious existence in the future. Like Mandeville's *Fable of the Bees,* voluntary law's dual realist/idealist structure consecrates the liberal world-view under which private vices become producers of the greatest public good.[12]

Koskenniemi ends his chapter equivocally by saying that Vattel 'buys freedom from Empire and the public law of the State at the cost of capitalism and expert rule.'[13]

This paper will explore more fully the negative implications of Vattel's theory of voluntary law and equality, being embedded so fully in the 18th century Enlightenment optimism. Koskenniemi has made clear that voluntary law corresponds not to what states happen to do, but rather to what, happily, conforms to a harmonization of their interests. It is in this sense, that voluntary law expresses an equilibrium of desire, something corresponding also to Adam Smith's doctrine of the hidden law of the market. While the market is an impersonal force and the voluntary law is a normative system of presumed consent, nonetheless the former also presumes that individuals pursue their interests, while the latter presumes the same, with the added proviso that they do so with a maximum knowledge and intelligence as to what their interests are. The paper builds upon insights provided by D-R Dufour, that the equilibrium of desire, about which Mandeville was so optimistic, quickly developed into the 'delights' of domination and subordination. This development received the fullest philosophical exposition by the Marquis de Sade at the end of the 18th century, before becoming 'codified' in Hegel's dialectic of 'Master and Slave' in his *Phenomenology of the Spirit.* While it is possible for 'desires' to be exchanged, there is nothing in the logic of the pursuit of interest, whether by individual men or by nations, which says that where 'desires' clash, each should not insist on the triumph of their own 'desires'. Indeed, the most exquisite 'desire' is precisely where one's own 'desire' absorbs, quashes or eliminates the 'desires' of the other, while still leaving a certain place for the exchange of 'desires'.[14] Kooijmans himself fully appreciates this radical character of Vattel's destructiveness when he also comments on the effect of his doctrine of equality. Vattel himself retained an ideal of an ethical 'droit nécessaire'. A later generation dispensed with this already purely ethical dimension of Vattel's thinking 'thereby sublimating a system of power-politics to a system of valid law and fatally interfering with the normative character of law.'[15]

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[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Dufour 2009.

[15] Kooijmans 1964, at 87.

This paper will open up and explore for international law and legal theory generally the issues of intellectual history raised by Dufour. The central feature of the Enlightenment concept of legal relationship is the contract or treaty, whether in private or international law. Ostensibly, all relationships are consensual. Vattel characterizes precisely these relationships as the source of 'perfect legal rights', which can be enforced. However, a continued close reading of his text reveals that he recognizes the conflict of interpretations of treaties as inevitable. Here, the absence of any objective standard means that disagreements can only be resolved through the threat or use of force, followed, through war, with a peace treaty which is, by its nature, coerced. The remarkable conclusion of this analysis is that, far from having no theory of relationship implicit in his radical individualism, where each is completely free to set and follow his own standards, Vattel's theory goes directly to the heart of Hegel's 'Master-Slave' relationship. It is the nation most able to impose the certainty of physical death and extinction on the other whose legal perspective, outlook or viewpoint always prevails.

Having explained the dynamics of the place of treaty in Vattel's system of international law, we will look to Dufour to explain the dynamic of how the apparent freedom of contract leads to the amoral anti-freedom of the master-slave relationship. The context of his writing is his argument that Euro-American, Western civilization has been led into a crisis of all normativity by the interest-based logic of capitalism, an argument which precisely parallels the impact which Kooijmans could see that Vattel was having on the tradition of normativity in international law. The pathway away from the Christian ethos of Augustine and Pascal (the equivalent being for Kooijmans, Vitoria, Suarez and Gentili),[16] through the supposedly enlightened hedonism of Mandeville to Adam Smith, leads ineluctably to the Sadean logic of 'Master-Slave' Relations. This pathway has brought the West to the brink of disaster not only in economic relations but also in all aspects of public and private life.

Next we will explore historically how far some strands of feminist critique (beginning with G. Lloyd)[17] can unravel the responsibility of phallocentric logic for the aggressiveness of the Enlightenment legal theory of capitalism and of international law which so easily turns the apparently consensual contract into a master-slave relationship It will focus acutely on the aspect of the 'Master-Slave' relationship, which is 'the representation of the other', forcing the other to accept one's own representation of it. This aspect is developed by Sartre and by de Beauvoir and leads to an exploration of the place of pornography in human relationships. Pornography is the key concept that comes out of Dufour's analysis to explain the public space at the present time.

The essential break which Dufour sees de Sade as making with Mandeville and Adam Smith is that, while it may often be convenient simply to exchange desires,

[16] Ibid., at 89.

[17] Lloyd 1984.

exchange is not necessary. The logic of expanding individual desire does not require it. This insight leads to the exploration of the possibility that the concepts of contract/treaty are really rhetorical flourishes of phallocentric legal logic, the framework within which coercion takes place. Formal consent appears to be on offer, but in practice pressure leads to a blurred acquiescence, in which the 'slave' acquiesces in the fulfilment of the desires of the 'master', while setting in train a very ambivalent exchange with the 'master' as to whether there has been consent. The development of this process is illustrated with an exposition of the hyper-successful recent novel of E. James, *Fifty Shades of Grey*.[18] The focus of our attention in this novel is on the negotiation of the dominant-subordinate contract, various draft terms of the contract and whether it ever comes to signature.

We go on to argue that the coerced gender relation in the novel is parallel to the relation between the west and late Qing China. In this way, we bring the discussion back to more familiar grounds of international law by choosing to explore the long history of the coerced treaty, the unequal treaty in its most celebrated context, Western relations with China. The topic is appropriate because, as we will show, Western international law doctrine is unrepentant as to the legality of the treaties imposed on China. Anchee Min has written a recent novelistic interpretation of this history in *The Last Empress*. She also uses the same sexual metaphor of domination to describe the negotiation with foreign powers following the Boxer Rebellion. Li Hongzhang's (Chinese negotiator) first response after being presented with the drafts of the treaties drawn up by the foreign powers was 'My country is being raped.'[19] In Sect. 3.7 of this paper, Vattel will be once again introduced through the form of his follower and adapter in the Chinese context, Henry Wheaton. Our discussion of Chinese international legal experience stresses the pornographic gaze, as the most basic element of the exercise of European power over China. This reduced China to a picture of opium infested, sodomite ridden, and concubine dominated, effeminates, who were asking to be disciplined and punished into becoming suitable partners in the Western system of exchanges. The paper stresses the exasperation of the West with the indifference of the Chinese who, in turn, appeared to experience no desire for them and who had to be compelled into relationship with the West. In this exercise, the rhetorical role of treaty and consent is pivotal. China had to be made to sign treaties. The nature of its consent is as controverted as the consent of Anastasia in *Fifty Shades of Grey*. Even today the most orthodox Western commentators insist that China can only have signed and been legally bound. Any other conclusion contradicts the logic of treaties as known to the liberal West. We explore the evidence that the Qing Empire was 'delighted' to submit to and to 'pleasure' the West in whatever way it

[18] James 2012.

[19] Min 2007, at 390.

pleased,[20] but that, subsequently, China has tortured its own consciousness with the idea that, to borrow the phrase of Ruskola, it is a state which has been raped.[21]

3.2 Vattel, from Conscience to Commitment to Coercion[22]

Vattel moves imperceptibly from a belief in the freedom of conscience of each nation, to a belief that their rights can be protected as a matter of external law, through agreement; to a belief that each nation has the freedom to determine whether and what is the extent of agreement; to a belief that differences are to be resolved, if necessary, through force. All of these beliefs are accompanied by an anxiety that nations are always changing in the weight of power they enjoy in relation to one another, and where a consortium of states imagine, as a matter of conscience of course, that an individual nation is a real threat to them, they may resort to coercion to reduce its power. This anxiety is in effect to place the whole law of treaties, contract and consent within a context of endless change of power balance and, while not abolishing the very idea of treaty, it makes it entirely dependent upon whatever the necessities of power struggles among nations should dictate. Nations may still resort to treaties/contracts where the struggles of power have not reached beyond a certain point, a matter for their absolute discretion, but, it is more likely that the same nations will use the rhetoric of the sanctity of obligations to render culpable the nation forced into the role of victim.

So Vattel recognises a central role for treaties in creating enforceable rights. This concerns the duty to observe promises.

> There would no longer be any security, no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises. This obligation is, then, as necessary as it is natural and indubitable, between nations that live together in a state of nature, and acknowledge no superior upon earth, to maintain order and peace in their society.[23]

While Vattel in this chapter appears to expound a liberal, commercial view of treaties as transactions – the parties cannot claim these turn out to be more burdensome than expected –,[24] he goes much further in Ch. 15, to argue that the keeping of promises is a sacred obligation, breach of which is of concern to all

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[20] http://www.china.com.cn/aboutchina/txt/2008-11/14/content_16768240.htm Accessed 27 July 2012. The Empress herself said her desire was to do whatever would please the West. Its support secured her throne against internal unrest.

[21] Ruskola 2010.

[22] The first part of this section, until the consideration of Koskenniemi's article, has already been published in almost the same form in Carty's contribution to the collective volume on De Vattel 1999. See Carty 2011a.

[23] De Vattel 1999, para. 163.

[24] Ibid., paras. 157-158.

nations and not just the one to which the promise is made.[25] The *ethos* at work is quite clear. Vattel says that

> [b]etween bodies politic, – between sovereigns who acknowledge no superior on earth, – treaties are the only means of adjusting their various pretensions, – of establishing fixed rules of conduct, – of ascertaining what they are entitled to expect, and what they have to depend on. But treaties are no better than empty words, if nations do not consider them as respectable engagements, – as rules which are to be inviolably observed by sovereigns, and held sacred throughout the whole earth.[26]

At the same time, he does not wish to forget his liberal credentials and thinks one must be able to make a distinction between reasonable doubt about the extent of obligations and manifest bad faith. So, according to Vattel

> we should be careful not to extend this maxim[27] to the prejudice of that liberty and independence to which every nation has a claim. When a sovereign breaks his treaties, or refuses to fulfil them, this does not immediately imply that he considers them as empty names, and that he disregards the faith of treaties: he may have good reasons for thinking himself liberated from his engagements; and other sovereigns have not a right to judge him. It is the sovereign who violates his engagements on pretences that are evidently frivolous, or who does not even think it worth his while to allege any pretence whatever, to give a colourable gloss to his conduct, and cast a veil over his want of faith, – it is such a sovereign who deserves to be treated as an enemy to the human race.[28]

While it may appear from the above text that Vattel thought one could distinguish between reasonable and unreasonable behaviour with respect to treaty rights, however, it is when we come to consider Vattel's thought systematically, we can see how his doctrine on the settlement of disputes makes his treaty law, as every other aspect of his so-called 'Perfect law', giving rise to enforceable rights, a play of power just as Kooijmans says it must. In Ch. 18 on methods of resolving disputes, Vattel says that

> [i]n *doubtful causes* which do not involve essential points, if one of the parties will not accede either to a conference, an accommodation, a compromise, or an arbitration, the other has only the last resource for the defence of himself and his rights, – an appeal to the sword; and he has justice on his side in taking up arms against so intractable an adversary.[29]

It appears to us he is saying that from each perspective, the other is intractable, where that 'other' will not accede to a peaceful means of resolving disputes, e.g. arbitration. Yet, subjectivity so prevails that it might appear a nation can resort to force even where the other side has not formally refused e.g. arbitration. The first nation may still have such necessary and prudent regard to its own security as to

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[25] Ibid., para. 218 and further.

[26] Ibid., para. 19.

[27] That is, the faith of treaties, the duty to observe them.

[28] De Vattel 1999, para. 222.

[29] Ibid., para. 333.

have recourse to arms without every conciliatory measure being already expressly rejected.[30]

> it is sufficient that she have every reason to believe that the enemy would not enter into those measures with *sincerity*, – that they could not be brought to terminate in a happy result, – and that the intervening delay would only expose her to a greater danger of being overpowered.[31]

The only qualification appears to be that the attacker must provide grounds for this distrust of the other by being able to justify his conduct *in the eyes of all mankind*.[32] Therefore, despite the legal character of a treaty where differences of its interpretation develop into serious conflict, the new situation will give each state all the more freedom to decide that the potential enemy is not sincere in trying to reach an understanding.

The so-called voluntary law is no more precise and secure from subjective interpretation than the natural law from which it has its origin. All normativity is dissolved into opinion, which is not salvaged by the fact that it should appear, from time to time, that one nation should become so threatening that most others come together to protect themselves. That same nation could just as well be the scapegoat, which holds the rest of the community together by becoming its sacrificial victim, as described by René Girard in his numerous writings.[33]

All of this appears clear to us in the vital paragraph 335 whereby Vattel uses his disquisition on peaceful settlement of disputes to dissolve the whole of *The Law of Nations.* Despite the liberality of spirit that is attributed to Vattel, he begins this paragraph by assuming that morality is only the refuge of the weak and will last among the strong only so long as hypocrisy pleases. It will be the same with nations. In this way the natural conscience of nations eats into their perfect rights and their voluntary law.

> When, therefore, a nation pretends that it would be dangerous for her to attempt pacific measures, she can find abundance of pretexts to give a colour of justice to her precipitation in having recourse to arms. And as, in virtue of the natural liberty of nations, each one is free to judge in her own conscience how she ought to act, and has a right to make her own judgment the sole guide of her conduct with respect to her duties in every thing that is not determined by the perfect rights of another (Prelim. § 20), it belongs to each nation to judge whether her situation will admit of pacific measures, before she has recourse to arms. Now, as the voluntary law of nations ordains, that, for these reasons, we should esteem lawful whatever a nation thinks proper to do in virtue of her natural liberty (Prelim. § 21), by that same voluntary law, nations are bound to consider as lawful the conduct of that power who suddenly takes up arms in a doubtful cause, and attempts to force his enemy to come to terms, without having previously tried pacific measures. Louis XIV, was

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[30] Ibid., para 334.

[31] Ibid.

[32] Ibid. (emphasis in original).

[33] For instance, Girard 2005, or Girard et al. 1987. So the distinction between 'reasonable' and 'unreasonable' disengagement from treaty obligations drawn by De Vattel 1999, at para. 222, could be drawn to serve as scapegoating of the 'unreasonable' state.

> in the heart of the Netherlands before it was known in Spain that he laid claim to the sovereignty of a part of those rich provinces in right of the queen his wife. The king of Prussia, in 1741, published his manifesto in Silesia, at the head of sixty thousand men. Those princes might have wise and just reasons for acting thus: and this is sufficient at the tribunal of the voluntary law of nations. But a thing which that law tolerates through necessity, may be found very unjust in itself: and a prince who puts it in practice may render himself very guilty in the sight of his own conscience, and very unjust towards him whom he attacks, though he is not accountable for it to other nations, as he cannot be accused of violating the general rules which they are bound to observe towards each other. But if he abuses this liberty, he gives all nations cause to hate and suspect him; he authorizes them to confederate against him; and thus, while he thinks he is promoting his interests, he sometimes irretrievably ruins them.[34]

What Vattel portrays systematically is the inevitability of differing world views, perspectives, imaginings, which will inevitably clash and lead to trials of strength. He resorts to extremely well known episodes of recent diplomatic history, widely regarded as the most notorious examples of Machiavellian power struggles – the machinations of Louis XIV and Frederick II – to show that central to the dynamic of treaty law interpretation is a struggle to the death among nations.

This conflict of interpretations leads to war to resolve the conflict. As the outcome of the conflict rests upon strength, this is why we equate Vattel's theory of 'dispute resolution' with the usual interpretations of Hegel's 'master-slave' relationship. To decide who is 'master' and who is 'slave' is, in this sense an integral part of Vattel's doctrine of the freedom, independence and equality of states. Conflicts of treaty interpretation lead to war. War is obviously a fight to the death, so it is the victor in war who succeeds to impose his interpretation on the vanquished. In Book 3, which is devoted to the concept of War, paragraph 26 of Chapter 3 requires a definite injury to a perfect right as a precondition of a right of employing force or making war. Once again, where nations start wars on mere pretexts they will become enemies of the human race and all nations will have a right to join in a confederacy to punish them.[35] If the case is doubtful there is the usual duty to take conciliatory measures, and equally the right to use force against the one who is not conciliatory.[36]

Nonetheless, the dynamic of forceful resolution of differences of perspectives appears again, in a form related to the very foundations of Vattel's 'voluntary law'. It is Vattel's fundamental principle of respect for difference of opinion.

> It may however happen that both the contending parties are candid and sincere in their intentions; and, in a doubtful cause, it is still uncertain which side is in the right. Wherefore, since nations are equal and independent (Book II. § 36, and Prelim. §§ 18, 19), and cannot claim a right of judgment over each other, it follows, that in every case susceptible of doubt, the arms of the two parties at war are to be accounted equally lawful, at least as to external effects, and until the decision of the cause. But neither does that circumstance deprive other nations of the liberty of forming their own judgment on the

[34] De Vattel 1999, para. 335.

[35] Ibid., para. 34.

[36] Ibid., para. 38.

> case, in order to determine how they are to act, and to assist that party who shall appear to have right on his side; nor does that effect of the independence of nations operate in exculpation of the author of an unjust war, who certainly incurs a high degree of guilt. But if he acts in consequence of invincible ignorance or error, the injustice of his arms is not imputable to him.[37]

It is James Brierly who has long ago remarked, along with Kooijmans, that the system of Vattel represents the breaking of all social bonds in favour of individual freedom. Brierly also identifies the problem as centrally resting in the freedom, independence and equality of states, expressed in Vattel's 'voluntary law'. Vattel makes each state the sole judge of its own actions, accountable for its observance of natural law only to its own conscience.[38] This accountability reduces natural law to 'little more than an aspiration after better relations between states'.[39] Or to borrow Kooijmans' words again, Vattel's legal regime sublimates a system of power-politics to a system of valid law.[40]

3.3 The Law of Nations of the Enlightenment as a Frame for the Free Markets of Nations

As has been seen earlier, Koskenniemi explains how historically the Voluntary Law of Nations of Vattel is on par with the liberal world view under which private vices produce the greatest public good.[41] Continuing his history of the place of international law in the Enlightenment Koskenniemi explains how the efficacy of the 'Law of Treaties' can only be understood in the context of the economic and other material relations of states. This is a bold judgment that the primary intellectual and cultural vigour of the Enlightenment rests not with law but with economics. While it does not necessarily presage gratuitously vicious behaviour by states towards one another, these will, nonetheless only act for their own advantage. Koskenniemi comments on David Hume's views about treaties, that '[i]t is only with arguments about the "advantages of treaties" that a stable and realistic sphere of the international seems to emerge. This is not a sphere of law, however, but of economics.'[42] Koskenniemi explains the context of the new natural law approach, which sought to make 'self-interest appear consistent with life in society'. He quotes the same famous remark from Adam Smith, as does Dufour, that our dinner comes not from the kindness of the butcher and brewer or the

[37] Ibid., para. 40.

[38] Brierly 1963, at 38.

[39] Ibid.

[40] Kooijmans 1964, at 87.

[41] Ibid., at 86; Koskenniemi 2011, at 73-75.

[42] Koskenniemi 2008, at 30.

baker, but from their own interest.[43] So, says Smith, we should address not their humanity but their self-love.[44] The question was still whether an impartial spectator could encourage a secondary sociability in a society of self-centred individuals.[45] What appeared to be useful for long-term happiness had to be an argument that reflected the possibilities of long-term interest. As Smith could see, the weakness of international law was that there was no legislature or judicial system to resolve disputes.[46] Therefore, as the Physiocrats and others such as Frederick II also realized increasingly in the 18th century, 'the proper language for modern *salus populi* would have to be that of political economy'.[47] Neither international law nor its treaty law maxim *pacta sunt servanda* could expect to hold out against the egotistical interest of individual states, and, anyway, these states were armed with the unlimited discretion to judge what their treaty obligations might be, which Vattel had accorded them.

Koskenniemi further explains that the first resort of *raison d'état* appeared to be mercantilism, a zero sum game of states in their struggles with one another. However, liberalism soon came up with an invisible law of economics which will reconcile conflicting interests. The abolition of import restrictions and free trade encourages the individual, as the nation, to pursue his own advantage, which, at the same time, works to the advantage of society and the world.[48] The study of one's own advantage automatically works to that of the society. Here Smith makes an important move. The political is concerned with irrational, negative passions, while the economic realm turns our passions into beneficial and calculable interests. These interests can be subjected to a universal system of rational exchanges.[49]

Where people are concerned only to fulfil their needs, with free economic activity given full reign, welfare and happiness will be produced.[50] Koskenniemi sees that the Enlightenment confidence in the peaceful global effects of free market economics has carried over into the mentality of 21st century international lawyers. This harmony, as is said 'by a very large part of professional international lawyers in the past half century, emerges from viewing the international world in terms not of politics but of economics'. This is international law as a universal commercial society. As heads of state proliferate at the UN representing increasingly insignificant political communities in the General Assembly, 'the crowd retreats to drinks in the adjoining lounge'.[51]

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[43] Ibid., at 64.
[44] Ibid.
[45] Ibid.
[46] Ibid., at 65.
[47] Ibid.
[48] Ibid., at 66.
[49] Ibid., at 67.
[50] Ibid.
[51] Ibid.

3.4 From Mandeville, Through Smith, to de Sade: The Way to the Perverse City

The single most radical element of Dufour's apparently outrageous intellectual history is to trace the link, as a matter of intellectual history, from Mandeville to Smith and then to Sade. Indeed, the starting point is a fateful remark by Pascal in his *Thoughts,* fragment 106, '[t]he grandeur of man is to have drawn from concupiscence such a beautiful order'.[52] Classical Greek and especially Christian thought was built on the pillar of reining in the passions and ensuring their permanent subordination to reason. Love of the other, ultimately of God, had to be the exclusive alternative to love of the self. For the classical La Rochefoucauld, self-love makes men idolaters of themselves and tyrants of others if fortune gives them the means.[53] Mandeville's *Fable of the Bees,* in contrast, is about the liberation of passions as the way to opulence, their control leading to misery.[54] Mandeville preaches in the *Fable:* 'Be as greedy, egoist, as wasteful for your pleasure as you can be, for, this way you will do the most for the prosperity of your nation and the happiness of your fellow citizens.'[55] It is this idea which is white-washed without acknowledgement by Adam Smith,[56] the word 'vice' replaced by 'self-love'.[57]

Dufour, explains that *homo aequalis,* the victor over *homo hierarchicus* is the product of the economic ideology from the 18th century. We leave a holistic world, transcendent, dominated in Europe by a totality represented by a divine thought[58] to which one must submit, to enter instead to a world dominated, in Smith's cosmic structure, by a play of forces resting upon a principle of attraction. The human world is organised, although humans do not know it, by a play of forces resting upon personal interest, which plays the role of attraction, comparable to Newton's law of gravity for physical beings, an organising principle as an invisible hand, a modernised divine design.[59] There is a place for discipline, but it is, in Smith's world, a discipline for the poor, the sick and the victims of whatever calamity, who should realize what the order and the perfection of the universe requires that they accept.[60] The ravages in the 'third world', especially in the Americas, still served the purpose, in Smith's eyes, of bringing the survivors the

[52] Dufour 2009.
[53] Ibid., at 112.
[54] Ibid., at 30.
[55] Ibid., at 133.
[56] Ibid., especially at 150.
[57] Ibid., at 133.
[58] Ibid., at 139.
[59] Ibid., at 143.
[60] Ibid., at 158.

fruits of European progress, industry and the arts, without which these empires could never have become civilised or cultivated.[61]

It was Augustine who realized that love of the self subordinates the common good, through an arrogant domination; that the self-love is a rival of God, requiring everything for itself and wishing to make the other submit to its interest.[62] It is precisely this realization de Sade follows in *The New Justine ch. 12.* Egoism is the first law of nature and of reason. 'We ought only to hold sacred what delights us'.[63] In *The Philosophy of the Boudoir* de Sade repeats a principle taken from Mandeville: Men are made honest through their own egotism, when they realize their happiness depends on their virtue and this is the most sure of laws among men.[64] For de Sade, relationship with the other is simply not necessary. The other is nothing but the object of my enjoyment.[65] Of course the desire of the other may resist one's own desires. So, for myself to enjoy, it is necessary that the other does not. Hence, it comes to the fact that the exaltation of my ego requires me to be a tyrant. De Sade writes: 'il n'est point d'homme qui ne veuille être despote quand il bande';[66] 'l'idée de voir un autre jouir comme lui le ramène à une sorte d'égalité quit nuit aux attraits indicibles que fait éprouver le despotisme alors'.[67] Dufour concludes from this analysis that 'laissez faire' is to allow the construction of a demonic enterprise, essentially pornographic.[68]

Contrasting two texts of Smith and de Sade, Dufour italicizes the phrases of Smith – give me that of which I have need and you will have of me what you need –, and de Sade – loan to me for a moment the part of your body which can satisfy me and enjoy yourself that part of me which is agreeable to you, if you please.[69] But how free will the exchange really be? Dufour notes how de Sade helps us to question the ambivalence of the dimension of consent in exchange. Might there not be a secret clause in the maxim of exchange? The true world of self-love, in perversion, takes what it wants. In de Sade's words '[j]e ne te demande rien…je prends et je ne vois pas que de ce que j'use d'un droit sur toi, il doive résulter qu'il me faille abstenir d'en exiger un second'.[70] Dufour concludes by explaining that the essence of this coercion is that one aims to undo the other, to twist her body into parts, by dissecting and singling out her particular sexually potent organs, to disorganize her.[71] The depersonalizing focus on particular aspects of the sexual anatomy of the other

[61] Ibid., at 152.
[62] Ibid., at 60, 165.
[63] Ibid., at 169.
[64] Ibid., at 170.
[65] Ibid., at 172.
[66] Ibid., at 173.
[67] Ibid., at 174.
[68] Ibid.
[69] Ibid., at 178.
[70] Ibid., at 179.
[71] Ibid., at 185.

such as penis, anus, mouth, vagina, or whatever means which relates only with the individual organs rather than the body, and thereby denies the body any possibility of personality or subjectivity.[72]

3.5 An Illustration of a Sadean Contract from a Hyper-Best Selling Woman's Novel

Literatures represent a vision of the world. A well-received novel indicates recognition of the author's vision of the world. Every individual has an experience, which has little relevance with regard to what the state authorities declare openly. This experience is the way to relate oneself to the materials of a culture, 'something passed over in silence'.[73] Literature is a good way to understand how law is accepted by a flesh and blood person. If a popular work does not represent the *status quo*, then it may successfully transform the mind and imagination of the reader. In both cases, *Fifty Shades of Grey* is worth examining.[74]

In Hegel's well known 'Master-Slave' Paradigm,[75] the process to obtain the certainty of self is achieved in two stages. Self-consciousness can achieve its satisfaction only in another self-consciousness. As Lloyd explains, self- consciousness is certain of itself only by overcoming the other's self-consciousness, cancelling its otherness.[76] He has to be certain in his own self-consciousness and then enter into the struggle to cancel self-consciousness of the other in order to satisfy himself that his consciousness is the objective truth. In the novel, Grey is sure of himself which he hides from the public and even family, thereby blocking any relationship of mutual dependence. He further assures himself by drawing Anastasia gradually into an ever darker sexual situation, culminating in her humiliation, a several times repeated spanking as 'punishment' for her 'defiance'. Anastasia tries to resist Grey's 'biased, kinky as hell, distorted worldview regarding sex'.[77]

What makes the novel so typical from the perspective of capitalist, liberal society is that the whole novel hovers around Grey's offer of a contract and the invitation of Anastasia to accept it. There is even an ancillary non-disclosure agreement as a pre-condition to the beginning of relations. To make their struggle more interesting from a legal perspective is the involvement of a contract with clear descriptions of what shall be done by the dominant and submissive. Contract as a consensual agreement seems to be incompatible with the whole idea of master

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[72] Ibid.

[73] Carty 2000, at 168.

[74] James 2012.

[75] See, for instance, the famously intelligible Pinkard. Pinkard 1996, at 53-63.

[76] Lloyd 1984, at 89.

[77] James 2012, at 132.

and slave relation. Two parties in a contractual relationship are supposed to be equal and an agreement is not valid unless both parties put their signature on it.

However, the underlying phallogocentric logic of the draft contract determines that Anastasia has to respond to all the definitions provided by Grey in what is for him a standard contract. Anastasia is his sixteenth submissive. The definitions have to do with what Dufour recognizes as a pattern of 'disorganizing' Anastasia's personality: oral sex, anal sex, vaginal and anal fisting, paddling, spanking and especially gagging and blind folding.[78] The seemingly equal idea of a contract is always a matter of what Grey will do to Anastasia. There are no clauses about what Anastasia may do to Grey. This is an archetypal 'unequal treaty'. One can only wonder how such terms could be acceptable in a contract where there is no measure of duress or undue influence. In any case it is a seemingly equal contract where coercion takes place.

Anastasia adores the typical modern successful male, a top business executive with unlimited financial, intellectual and physical power. She wants a normal relationship with a man like Christian Grey so much that she is unable to decline the twisted offer. She is trapped in the dilemma that she has to cancel herself to fit into the lifestyle and sexual habits of Grey. Otherwise she will lose her knight in shining armour. She is presented with a choice to consent or not to the contract with basic rules set out by Grey when on her side she wants hearts and flowers. She wants love and intimacy, in the words of Drucilla Cornell.[79] Is there any possibility of absolute insistence of interpretation of contract on Anastasia's side? It seems not. The magical attractiveness of Grey and his weapon of sex[80] have pushed her to the corner with no real choice. At one point, Anastasia's roommate Kate asks her, 'What's wrong? What did that creepy good-looking bastard do?' She replies 'Oh, Kate, nothing I didn't want him to.' Anastasia has not realized that she is gradually on the way to objectification by Grey.

Yet, from the very beginning, at the time of discussion of the non-disclosure contract she is already lost to him. She says 'Christian, what you fail to understand is that I wouldn't talk about us to anyone anyway. So it is immaterial whether I sign an agreement'.[81] On the contrary, she believes the subjugation is her own choice and not the coercion from powerful, attractive, domineering Grey. At one point, during a mealtime conversation where she agrees with him that she wants him, she thinks to herself, 'How can he seduce me – solely with his voice? I am panting already – my heated blood running through my veins, my nerves tingling.'[82] Step by step, Grey acquires her acquiescence to fulfill his own desires, at the same time, making Anastasia believe that pleasure is intended to be mutual. When she asks '"What do I get out of this?" He shrugs… "Me" he says simply.

[78] Ibid., at 164-175.

[79] Cornell 1993, at 102.

[80] James 2012, at 201 and 224.

[81] Ibid., at 96.

[82] Ibid., at 224.

"Oh my", she thinks to herself'.[83] Therefore, Anastasia blindly accepts that the contract is mutual without noticing that she has no say to the contents.

To be fair to Grey, and in the sense of wanting each other, Grey and Anastasia are in a mutual relationship. The clash of desires is made obvious by Grey's insistence on the details of the contract and Anastasia's inclination for a normal date. In other words, their desires for each other are on differing terms. And different interpretation is a constant source of instability in the relationship, with Anastasia frequently running away from Grey.[84] She knows she can always escape. Anastasia is aware that the contract of dominant/submissive is legally unenforceable. Grey's explanation is that the written contract represents a consensual arrangement. In any case, he will not go to court for such a contract. The purpose is to show that he will not coerce anything on Anastasia if she does not consent. This explanation is in accordance with what Vattel would have agreed on in his law of treaties that two parties voluntarily enter into a contractual relationship.

Anastasia is in such an unsecured and dangerous situation that she has no strength to bargain as an equal party to the contract, she is doomed to lose whatever she decides. She finally acquiesces to Grey's proposal. Her subconscious immediately screams at her: 'holy shit, I've just agreed to be his sub'.[85] She is not a natural submissive, yet she acquiesces to what Grey desires from her and consequently becomes what she does not wish to be.

At one point, Anastasia protests at the punishment and argues that she has not signed the contract yet. Grey's response is that Anastasia has no choice and he will hold her against her will if necessary. He does not hide his reason for his behaviour, 'I want you to behave in a particular way, and if you don't, I shall punish you, and you will learn to behave the way I desire.'[86]

Clearly, the above declaration is the essence that lies behind the contract. Far from being consensual, the powerful and advantageous party's viewpoint prevails with the extinction on the other. When Anastasia tries to return the first edition of *Tess of d'Urbervilles*, she argues that she was not a submissive yet when Grey bought the present.[87] However, to Grey, there is no room for different interpretations to the contract. Anastasia has agreed now and that is the end of discussion.

Anastasia is unsatisfied with the unequal relationship they have. She is punished for rolling her eyes, so when she sees Grey roll his eyes twice at the family dinner, she could not help but wonder, 'Why can he do that when I can't? I want to roll my eyes back at him, but I do not dare, not after his threat in the boathouse.' Here is the plain and cruel reality. The supposed equal parties are not equal in face of power struggles. Anastasia is trapped. She does not want to lose him but she also

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[83] Ibid., at 101.

[84] Ibid., at 229.

[85] Ibid., at 245.

[86] Ibid., at 287.

[87] Ibid., at 251.

would just like more, more affection, more playful Christian, more … love.[88] Unfortunately, she does not have the right to interpret their contract implied by her acquiescence.

At the end of the book, Anastasia finally realizes that Grey will never accept her interpretation of their relationship. She has glimpsed the extent of his depravity and he is not capable of love – of giving or receiving love. 'My worst fears have been realized. And strangely, it's liberating.'[89] The worst fears have been of losing Grey. However, losing Grey means getting out of the repressive contractual relationship. Therefore, Anastasia feels a strange liberation from her worst fears. She returns all the material compensations Grey has given her, and admits that she only accepts them under sufferance and she does not want them anymore.

At the end, the quotations from *Tess of the d'Urbervilles* become true. Rules and standards are set down by the dominant, and the submissive is only the victim. Contractual terms and conditions cannot guarantee an equal status. Anastasia compares herself with Tess and feels similar pain for the relation to the man she submits to. 'Why didn't you tell me there was danger? Why didn't you warn me? Ladies know what to guard against, because they read novels that tell them of these tricks…' (Tess says to her mother after Alec d'Urberville has had his wicked way with her.)[90] 'I agree to the conditions, Angel; because you know best what my punishment ought to be; only-only-don't make it more than I can bear.'[91]

3.6 Feminist Approach to the Master-Slave Relation, Also in the Light of *Fifty Shades of Grey*

Drucilla Cornell argues that writings about woman have significance for the development for the way we think about 'heterosexual' love. She believes the writing of Nietzsche reveals that Woman stands in his play as the very figure of death and sensuality.[92] Nietzsche's metaphor of Woman as the figure of death does not ultimately celebrate her difference; rather, it risks her obliteration.[93] By discussing the work of male philosophers in the last century and the female character in their work, Cornell tries to argue that these works unfold the masculine desire to dominate in a relationship. The magnificent heroine is abandoned in Nietzsche's work because her self-consciousness is unable to be cancelled. She represents a threat to the certainty of the male subject.[94] Cornell is criticizing the male fantasy

[88] Ibid., at 255.
[89] Ibid., at 510.
[90] Ibid., at 54.
[91] Ibid., at 249.
[92] Cornell 1993, at 45.
[93] Ibid., at 50.
[94] Ibid., at 52.

for contributing to the suppression of woman and bringing Woman's consciousness to extinction. Feminists have been fighting for the independence of woman for ages. And women are doing extremely well in every aspect around the world. However, this recent successful fiction indicates a retreat of woman, being a return to subjugation again and an avoidance of responsibility. Women are going back to the time of suppression under the disguise of equal bargain. It is not surprising that the success of this erotic fiction attracts many criticisms from independent women. According to psychotherapist Estela Welldon, author of the books *Mother, Madonna, Whore, the Idealization and Denigration of Motherhood*, and *Sadomasochism*, '[i]t is as if women are now trying to apologize for the success they have had in a man's world.'[95]

The metaphor of Woman in this fiction goes back to the idea of Woman that Simone de Beauvoir identified in her time. 'Woman represents only the negative, defined by limiting criteria, without reciprocity.' The only absolute human type is the masculine.[96] De Beauvoir follows Hegel in holding that one consciousness will find a fundamental hostility towards another consciousness. Usually the two will struggle for dominance. The subject sets him up as the essential as opposed to the other, the inessential. Thus, the essential becomes the subject and the inessential becomes the object. An historical event may result in the subjugation of the weaker by the stronger. But 'the dependency of women towards men was not the result of a historical event or a social change – it was not something that *occurred*.'[97] The anatomy and physiology of woman which caused women's subjugation is not a historical event like the appearance of the proletariat. De Beauvoir believes that women themselves are to blame for failing to bring any change to the rigid system. 'They have gained only what men have been willing to grant; they have taken nothing, they have only received.'[98]

Anastasia in *Fifty Shades of Grey* is identical with what de Beauvoir describes above. She seems to make many progresses out of the contract and Grey enjoys several first-time experiences with her, for example, bringing her on his helicopter, Charlie Tango. But none of the experiences is what he objects to. In contrast, Anastasia accepts things she does not want and becomes more and more confused and lost. Grey-the-sovereign provides Anastasia-the-liege with material protection and undertakes the moral justification of her existence as his sub. Anastasia tries hard to resist the objectification as a girl living in the twenty first century. However, gradually she gets used to the benefit and the protection Grey provides. Contrary to the improvement brought about by many feminist advocates, Anastasia kneels down and becomes the inessential without a meaningful struggle. The book's success rings an alarm to feminist activity that women may deny a claim to

[95] http://www.guardian.co.uk/books/2012/jun/30/fifty-shades-grey-women-sadomasochism. Accessed 26 July 2012.

[96] De Beauvoir 1953, at xliv.

[97] Ibid., at xlvii.

[98] Ibid., at xlviii.

acquire the status of subject. In the words of de Beauvoir, that women are again very well pleased with their role as the Other.[99]

De Beauvoir is strict and categorical with conditions imposed on a subject. She considers it to be a moral fault if an independent subject gives her consent to conditions on her activity given by another subject. A woman without absolute transcendence will always be objectified and lose her battle against the male subject who tries to stabilize her in the form of immanence. In other words, the only way for woman to get rid of oppression and frustration is to be the essential and sovereign. She says, '[t]his means that I am interested in the fortunes of the individual as defined not in terms of happiness but in terms of liberty.'[100] Even in love, de Beauvoir argues, a woman can only love in liberty as man does if she believes in her equality and adopts the same decisiveness.[101] However, as a result, the woman who adopts the same decisiveness and chooses to reason in accordance with masculine techniques will inevitably repudiate what she has as 'different'.[102] De Beauvoir argues that equality between genders has to be absolute in accordance with the masculine value of freedom. Equal with difference is another form of condition of inequality which de Beauvoir would not accept. Therefore, for women to be really equal with men there has to be a resolute all-around cut-off from the subjugated women of the past and an absolute acceptance of the masculine values by women. In Anastasia's case, she is not to escape at last. She has to adopt similar sovereign attitudes in the relationship and fight for her equality.

As Lloyd puts it, de Beauvoir's theory of woman objectified as other is drawn from the Sartrean articulation of the struggle for dominance between lookers and looked-at.[103] This struggle for the status of looker is uncompromising. It is a fierce combat with a demand for freedom. As Cornell quotes Mackinnon, 'I'm saying femininity as we know it is how we come to want male dominance, which most emphatically is not in our interest.'[104] Mackinnon's position is that women must give up the distorted desire to be the inessential part of a male–female relationship. However, for Cornell, if in this endless struggle between genders, one is either a master or a slave, the conflict and hierarchy will not disappear even with a reversal of power putting women in the master position. Women's victory will not put an end to the fierce combat. Cornell notes the remarks by Bell Hooks that 'the very rhetoric of freedom has all too often reflected the desire to achieve the imagined position of phallic power.'[105] With the unquestionable masculine value of freedom,

[99] Ibid., at l.
[100] Ibid., at lix.
[101] Ibid., at 731.
[102] Ibid., at 743.
[103] Lloyd 1984, at 96.
[104] Cornell 1993, at 102.
[105] Ibid., at 101.

we are left with 'politics of revenge and lives of desolation, which make a mockery of the very concept of freedom.'[106]

3.7 China and Britain in the 19th Century: The Continuing Ghosts of Unequal Treaties

The West's obsessive treaty making with Qing China (running to hundreds), shows both its recognition of China as a state and its desire to colonise it at the same time. This ambiguity with the relationship was never resolved as Ruskola shows in his article *Raping Like a State*. Of the many possible interpretations of these events his is the one which corresponds most closely to the analysis of Vattel which we have based on Dufour.[107] The danger of reading social and political relationships in terms of equality could not be clearer than in Henry Wheaton's development of Vattel in the 1840s. The key international law figure in play in European and American expansion in China was Henry Wheaton, the third edition of whose *Elements of International Law,* appeared shortly after the First Opium War in 1845, three years before he died. This work was the most important Anglo-Saxon, not merely American, textbook on international law in the 19th century and it drew directly on Vattel.[108] Wheaton showed just how malleable Vattel could be when he, Wheaton, commented on the 'recent diplomatic transactions between the Chinese Empire and the Christian nations of Europe and America' in the following terms. '[T]he former has been compelled to abandon its inveterate anti commercial and anti-social principles, and to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace.'[109] The Chinese had to be taught equality, and as Ruskola shows, the West never seemed to feel that China had been taught enough.

Ruskola's argument is that the very idea of trade was described by merchants and politicians at the time as intercourse. The leading US figure W.A.P. Martin, the translator of Wheaton's *Elements of International Law,* said he wanted to 'throw open the portals for unrestricted intercourse' so as to 'unlock the treasures of the interior'.[110] Ruskola refers frequently to the Western view of China as having an effete political character, giving, in his view, more than a hint of a metaphor of sexual violence to the frequent Western use of language that 'commercial intercourse' was 'forced' on China.[111] As a consequence, given the nature

[106] Ibid., at 132.

[107] Ruskola 2010.

[108] Carty 1986, at 92 and references at 105.

[109] Wheaton 1866, at 22. An additional footnote by the editor Dana points to how the book was already translated into Chinese by a commission from the Chinese Minister of Foreign Affairs.

[110] Ruskola 2010, at 1511-1512.

[111] Ibid.

of this intercourse, China gradually became, to use Dufour's expression, de-organized. As Ruskola puts it: 'In short the problem of exchange was ultimately solved only by producing desire with drugs.'[112] As Marx remarked, opium so harmed China's economic sovereignty that it obtained 'sovereignty over the Chinese'.[113]

In additional support of Marx's language there is a passage in the novel by Ishiguro, *When We Were Orphans.* The novel concerns the strange disappearance of the parents of the chief character in the novel. The father had worked for a British merchant company in China in the 1920s heavily engaged in the opium trade. The mother had tried to oppose the trade of her husband, who abandoned the family and died shortly afterwards. The mother's resistance to the Opium trading of her husband's company led her to fall foul of a Chinese warlord who turned her into a sex slave and drove her insane. A confident of the family, implicated in her kidnapping, tried to explain the impossibility of having any constructive, reformist impact on British commercial policies at the time, in these terms:

> For a long time our strategy was rather naïve. We thought we could shame these companies into giving up their opium profits. We wrote letters, presented them with evidence showing the damage opium was causing to the Chinese people. Yes you may laugh, but we thought we were dealing with fellow-Christians. Well eventually we saw that we were getting nowhere. We discovered that these people, they not only liked the profits very much, they actually *wanted* the Chinese to be useless. They liked them to be in chaos, drug-addicted, unable to govern themselves properly. That way the country could be run virtually like a colony, but with none of the usual obligations …[114]

In addition, Ruskola argues that the British and other Europeans saw the issue of 'lack of respect' or exchange of insults, with charged erotic overtones of domination and subordination. The kowtow in particular was regarded as a 'violation' of the dignity of Western envoys.[115] Ruskola points to a long history of Western association of the Chinese mandarin class' purely scholarly non-military character as a mark of effeminacy, shading into a proclivity for sodomy. The Western horror of being subjected to the kowtow was associated with anxiety about supposedly widespread sodomy among Chinese. The ritual kowtow was 'a physical act at the core of imperial sovereignty that came to be regarded as simply beyond the pale of European norms of dignity… as the symbol of "total submission" as performed by a subject "on all fours like an animal"'.[116] Ruskola compares the Western reaction to this ritual as an hysteria reproducing the logic of homosexual panic: 'The proper position for honorable men was to face each other

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[112] Ibid.

[113] Ibid. See Ruskola's references at his note 145.

[114] Ishiguro 2000, at 288.

[115] Ruskola 2010, at 1501.

[116] Ibid., at 1517-1518. Ruskola's quotations are from Wittfogel 1957, at 152.

standing erect, with swords on their sides, not laying prostrate on the ground waiting to be sodomized politically.'[117]

But Ruskola argues further that in the end China's unstable status was resembling the queer status of the coolie-indentured male laborer 'neither sovereign nor colonized, neither civilized nor savage'.[118] While trade was by its nature consensual intercourse, the problem was that of the Chinese desire. In Ruskola's words,[119] '[w]hile the West's appetite was insatiable when it came to Chinese tea, porcelain and silk, the Chinese had little interest in the manufactured goods that Western merchants offered to them.'[120] The response of a British diplomat, Horatio Lay is that China must 'however much against her will … comply with the usages of Western nations, intercourse with whom she is manifestly too weak, physically, to decline.'[121] China had to be 'opened'. True economic liberalism, notes Ruskola, 'requires consent that is given voluntarily. Once obtained, consent in turn justifies anything, or as Hobbes put it, 'Nothing done to a man by his own consent can be injury'.[122] Yet, there remained for the West a tantalizing ambiguity about what it had achieved in relation to China. Ruskola says that 'the problem with the treaties that China had signed after the Opium Wars was that they included "nothing to demonstrate to the empire that it must come to its knees".'[123]

3.8 Conclusion: Contemporary Western Reflections on Unequal Treaties: And Speculations About the Public Mood in China

It has been the aim of this chapter to show just how destructive for any concept of communal global legal life the over-celebrated Enlightenment has been, with its dubious marriage of legal and economic *laissez faire.* We agree with Kooijmans' appeal to the Christian ontology of creation as it applies to international community. There is an objective order of justice whereby all God's creatures, nations and individuals have their appropriate space which must be respected in accordance with what he calls material directives or general principles of law. Individual states and the world community all have their spheres and while they depend on one another, it is never appropriate for any to absorb or, to be more

[117] Ibid., at 1518.
[118] Ibid., at 1504.
[119] Ibid., at 1505.
[120] Ibid., at 1505-1506.
[121] Ibid., at 1507.
[122] Ibid., at 1509. Ruskola quotes Hobbes 1651, at 112.
[123] Ruskola 2010, at 1519. See Morse and MacNair 1931, at 132-133.

precise, consume or eat up the other. It is clear how this created order restrains unbridled desire and unrestrained pursuit of interests at the expense of others.[124]

However, it is not surprising, as has already been shown elsewhere,[125] that Western international lawyers, still attached to the Vattelian principles of the Enlightenment, are still 'confused' or 'ambivalent' about how to describe the notion of unequal treaty. In an exhaustive consideration of the question, Mathew Craven quotes French (Reuter) and Swiss (Calfisch) authors to say, precisely now, that the doctrine of unequal treaties serves only as a 'political' argument possessing no legal status at all. De Lisle says, with respect to China, that the doctrine of unequal treaties was a self-interested position for a regime, which was a newcomer to the international legal order, dissatisfied with its content but too weak to change its rules. The concept, concludes Craven, 'seems to have been consigned to the dustbin of "redundant ideas".'[126]

In such a context of apparently obsessively forgotten ideas Craven sets himself the task of offering a speculative narrative that seeks to interrogate why the concept (or if one prefers, the phenomenon) has been so completely denied a place in what Craven calls our current imaginings of international law.[127]

One legal conclusion Craven reaches is that the Chinese inability to recognize or understand the notion of diplomatic or juridical equality made the introduction of unequal treaties necessary, from the British perspective.[128] Still, the European powers insistence upon formal equality was, Craven himself readily accepts, comprehensively undermined, presumably in moral terms, by the presence of military forces that gave the lie to the non-hierarchical relations they espoused.[129] Craven identifies that, in conceptual terms, treaties do have a bilateral character depending on the autonomy of will of the parties.[130] This is fundamental to Western, liberal, post Vattelian legal logic. Craven separates the question of coercion from the law of treaties as such and place it in a separate category, the law on the use of force. One then has to identify the question of unequal treaties as tied to the prior question whether use of coercion is regarded as unlawful.[131] Craven notes immediately the fundamental problem of the thinning of any idea of authority for which Kooijmans rightly holds Vattel responsible. Says, Craven, there is a dependence here upon the self-evidence nature of the legal assessment by the conflicting parties, i.e. the possibility of a conflict of interpretation of the events. For instance, the Treaty of Nanking might be regarded as coerced and unequal by the Chinese, but it would still be expected that the British would speak

[124] Kooijmans 1964, at 196-210.

[125] The argument has already been made in Carty 2011b, at 146-149.

[126] Craven 2005, at 337.

[127] Ibid. See also Carty 2011b, at 146.

[128] Ibid., at 355.

[129] Ibid., at 356.

[130] Ibid., at 366-367.

[131] Ibid., at 373.

about their recourse to arms as having been in self-defence.[132] To the extent that any use of coercion is likely to be accompanied by some justificatory discourse those disputing the validity of an agreement would be constantly fighting a rear-guard action.[133]

Craven is returning to the structural foundations of Vattel's *voluntary law*, the absolute autonomy of interpretation of states, including the prerogative of Britain to treat the Opium Wars as wars of self-defence if it pleases. There is no impartial third party to adjudicate claims. Craven argues, with Sir Ian Sinclair, that the threat or use of force does not strictly speaking vitiate consent to a treaty. It is a commission of a delict, if it is unlawful. Therefore Sinclair argues that consent needs to be stripped off its association with a factual absence of coercion. In the summary of Craven, consent is then less an expression of 'autonomous will' and more the formal mode of acceptance of an instrument – signified by signature, ratification or accession 'in which any psycho-sociology of "agreement" was beyond the domain of law and in which the presence or absence of duress was largely irrelevant.'[134]

International law, in this liberal tradition, which has its starting point with Vattel's *voluntary law,* remains fundamentally confused about the nature of consent and the role of autonomy in the face of conflicting desires and wills. Do notions of autonomy or absence of autonomy, duress or its absence have any common or distinctive referents? Craven's own conclusion appears primarily to wish to allow lawyers a way to escape these difficulties created for them by market liberalism.

> Lawyers could rely upon a presumption of validity as a way of insulating themselves against the possibility that consent might all too often be found defective; it was for the politicians to devise ways of ensuring that untoward influence is not exercised at the moment of negotiation.[135]

In other words, post-Vattel, the very idea of consent, in whatever formal or logical sense, disappears among the conflicting desires and consequently clashing perspectives of persons wishing to expand their own spheres of being while constantly pressurizing others to absorb them. The micro-study of gender relations, at present possibly the most sensitive area of equality studies, in *Fifty Shades of Grey,* has illustrated the acute difficulty of locating any transcendental concept of will or consent in the entangled relations of Christian and Anastasia. It is therefore hardly surprising that for Craven the very idea of consent as a separate element of 'autonomous will' in the psycho sociology of agreement has disappeared. Christian possesses Anastasia without a formal contract, while remaining outside legal definitions of rape.

One might try to continue these reflections with some speculation upon how China may be expected to react in the future to its historical experiences of

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[132] Ibid., at 373.

[133] Ibid., at 373.

[134] Ibid., at 374.

[135] Ibid., at 375.

unequal contracts/treaties. Here the analysis of *Treaties, Unequal*, which Anne Peters has done, is also very helpful.[136] She accepts the same conceptual framework as Craven, beginning with the remarks that 'the prejoritative term "unequal treaty" (or more polemical ones such as "coercive", "predatory" or "enslaving" treaties) refers …to the treaties between European powers, the United States of America…and…mainly Asian States'.[137] She comments that '[c]urrent international law as it stands does not accept a special legal category of unequal treaties with special legal effects.'[138] Peters' very thorough study shows the predominant experience of China in the debate. The modern notion of unequal treaties was developed by the Chinese in the 1920s and overwhelmingly scholarship has been concerned with the Chinese experience.[139]

Peters recognizes that the issue of unequal treaties has actually become part of Chinese identity. The issue

> became a focal point for nascent nationalism and was a driving force for institutional and legal reform. Notably in China, the unequal treaties also functioned as a scapegoat for interior problems and backwardness. On the other hand their abrogation became one of the aims of the Chinese revolution of 1911 and was one of the three "people's principles" besides democracy and socialism. The treaty rhetoric has been integrated into the common heritage of the Chinese.[140]

Peters traces the changing Chinese consciousness through the 19th century. To begin with Asian countries were not concerned with extra-territoriality or customs regimes, merely wishing to retain control over certain cities and prevent foreign intrusion. This was because they lacked the conceptual understanding of legal identity necessary to object. 'Only later, the standard reproach of the non-Western parties emerged that the special privileges granted by the treaties significantly aggravated war-lordism and contributed to, if not caused, instability and governance problems in the host States.'[141] Nonetheless, Peters claims that these 'changes in attitudes and subjective assessments' did not warrant any changes in legal obligations, for instance as constituting a supposed element of changed circumstances.[142]

Her characterization of the general system of international law of treaties is remarkable in its brutality and confirms very much the contempt which Dufour heaps on the whole of Western social culture attributable to the triad of Mandeville, Adam Smith and the Marquis de Sade.[143] She begins her analysis of contemporary

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[136] Peters 2007.

[137] Ibid, para. 1.

[138] Ibid, para. 2.

[139] Ibid., paras. 4 and 7.

[140] Ibid., para. 66.

[141] Ibid., para. 25.

[142] Ibid., para. 57.

[143] The word 'triad' signifies not simply triangularity but also to the underground criminal gangs that operate in Chinese communities in Hong Kong and other parts of South East Asia.

unequal treaties, with question mark, with the words: '[r]esort to economic and political pressure exploiting the extreme power disparities is a pervasive feature of inter-State relations. The result is treaties which are in procedural or substantive terms unbalanced'.[144] Peters gives a very comprehensive picture of unequal treaties usually connected with the United States, concerning its military bases and its opposition to the International Criminal Court, as well. Peters correctly identifies the legal situation as one going to the foundational structure of international law. So she says, in language which would make Christian Grey smile, 'the freedom of the will of States is as yet no requirement of the validity of international treaties, mostly because an international institution which could effectively secure the genuine voluntariness of consent is lacking'.[145]

Peters appears to argue that this is an anomaly of international society which lacks the sense of community of national society, with its more developed domestic contract law.[146] However, her conceptual confusion really goes to the very absence of any conceptual logic or coherence in the post-Enlightenment concept of autonomous will, as also with Craven's vanishing of this element from what he calls the 'psycho-sociology of agreement'. So Peters says: 'The concept of a treaty is premised on the concept of contractual freedom (or in the inter-State context: sovereignty). By upholding unequal or otherwise unfair treaties, international law accepts the imbalances in social and political power that are reflected in international treaties.'[147] How can Peters continue to use the word 'treaties' at the end of the last sentence? The reason is that the whole idea of 'unequal' is itself unconvincing to her. So she continues: 'The concept of unequal treaties is extremely vague. Both the prerequisites and the legal consequences of the inequality of a treaty are unclear. Which types of power or influence are relevant? How would they be measured? At what point would the inequalities in bargaining power and in the contents of the treaty be so intolerable as to flaw a treaty?'[148] One can imagine Mandeville, Smith, de Sade laughing at the very idea of an international law of treaties. If one is to call for a global, compulsory system of adjudication, as Peters does – an impossible demand – one might as well simply accept, as Dufour insists, that we are now in a jungle which it is only obfuscating to characterize as legal.

The feminist theoretical reflections on the novel, *Fifty Shades of Grey* point to a morally desolate adoption of 'masculine'; standards to cope with contemporary society. This is merely a signal for reliance on one's own strength, without pathetic appeals to equity, fairness, compassion or any other emotion that might indicate mutual respect or empathy. The feminism of de Beauvoir and MacKinnon is one of combativeness, of grinding down the cult of Christian Grey, wherever its shows its brutish face. There is a parallel in Chinese debates about how to confront Western

144 Peters 2007, para. 60.
145 Ibid., para. 71.
146 Ibid, paras.71-73.
147 Ibid, para. 73.
148 Ibid, para. 75.

international law since the late 19th century. It is a reference to the so-called self-strengthening movement. This was premised on the idea that there is no ethical content whatsoever to Western international law or civilization and the only hope for China was a simple increase in its material strength.[149] It is arguable that this ethos of self-strengthening is the fundamental driving force of contemporary China.

In an important recent survey of contemporary Chinese thought about China's place in world society, Zhu Liqun offers a sophisticated account of China's peaceful rise, in terms of a Confucian style civilization.[150] Zhu is aware of the tradition of nationalist historiography which would call for a settling of scores. She addresses this question directly:

> Before China's adoption of the reform and opening up policy, it had a revolutionary relationship to the international system. Its policy was aimed at overthrowing the old world order and constructing a new one. By integrating itself into the international marketplace and international society through its reform and opening up policy, it has gradually changed into an insider of the international system, become a *status quo* state and thus no longer seeks to overthrow the current international system.[151]

While this vision may be taken at face value as sincerely held, both by Chinese intellectuals and by the government, the analysis of this chapter would point in almost the opposite direction. Without having to look backwards, China will inevitably become, to employ the language of Simone de Beauvoir and Catherine Mackinnon, the 'Master' and the West, Europe and America, 'the Slave'. This is precisely the implication of China becoming the insider in the international market, which can only function with domination and subjugation, with winners and losers. China's export drive to Europe and America is fuelled by Chinese credit to these markets and by outposting of US and European businesses to China. Of course there is a dynamic in this relationship which makes the 'Master' also dependent on the 'Slave'. This is only to highlight the profoundly destructive character of post-Enlightenment human relations, following the triad highlighted by Dufour, and only humbly imitated by Vattel. The point is that the absence of any inbuilt ethical restraints to this now global civilization can only intensify its inherent instability.

That is one context in which to be troubled by the constant Western carping at lack of good governance in China, not to mention the China threat, supposedly attributable to the scape-goating domestic policies of the Chinese regime, of which the rhetoric of unequal treaties and one hundred years of humiliation are a part. Indeed, the recent notorious collective volume of Chinese opinion, under the title *China Is Unhappy,* gives expression to precisely the same spirit of revenge as can

[149] On the debates around social Darwinism among turn of the century Chinese intellectuals see in particular Svarerud 2007, especially at 190–230.

[150] Zhu 2010.

[151] Ibid., at 39.

be found in the feminism, which takes on the imitation of the masculine. One of the authors, Wang Xiaodong, responded to the interruption of the Olympic Torch procession through France with the following menace:

> Now that the balance of power between China and the West has changed, the time when we have to please you unilaterally is gone. In the future, when our strength further grows, if you do not please us, we will beat you.[152]

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[152] Song et al. 2009, at 41. (our translation)

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