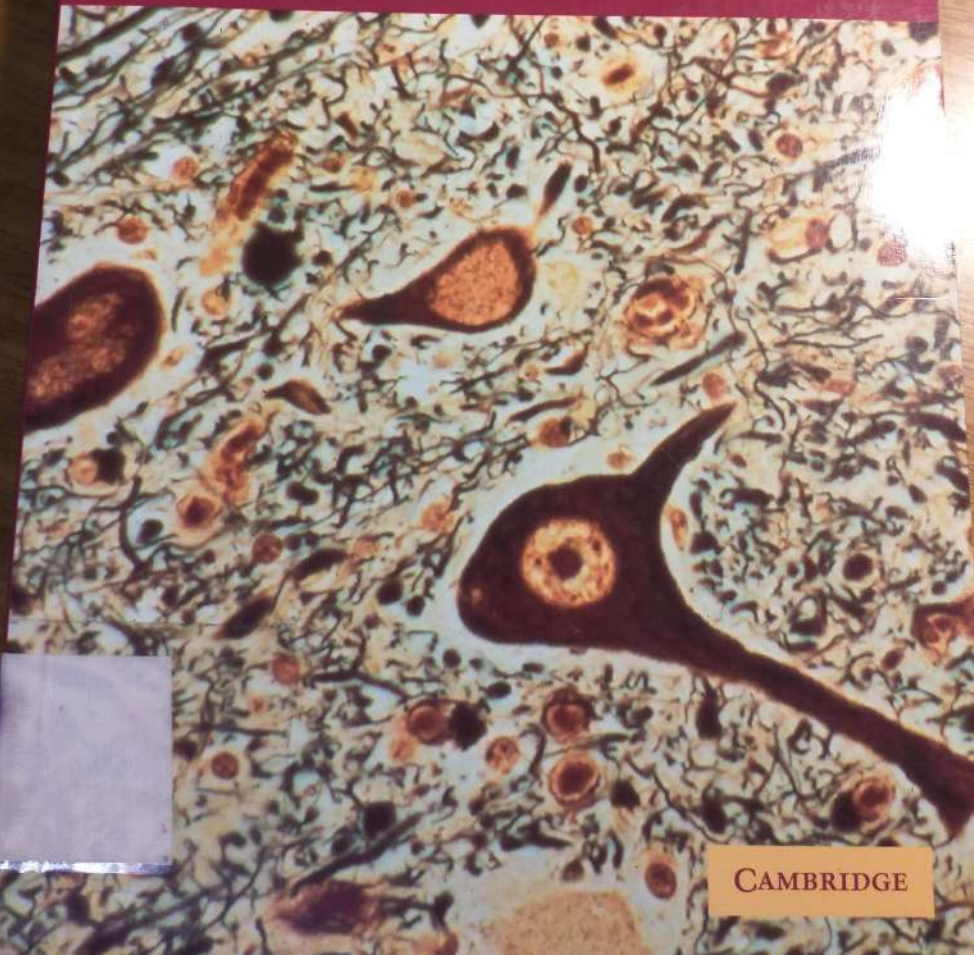


# The Health of Nations

Society and Law beyond the State

PHILIP ALLOTT



CAMBRIDGE

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THE HEALTH OF NATIONS  
Society and Law beyond the State

The human world is changing. Old social structures are being overwhelmed by forces of social transformation which are sweeping across political and cultural frontiers. A social animal is becoming the social species. The animal that lives in packs and herds (family, corporation, nation, state . . . ) is becoming a member of a human society which is the society of all human beings, the society of all societies.

The age-old problems of social life – religious, philosophical, moral, political, legal, economic – must now be addressed at the level of the whole species, at the level where all cultures and traditions meet and will contribute to an exhilarating and hazardous new form of human self-evolving.

In this book Philip Allott explores the social and legal implications and potentialities of these developments in the light of the general theory of society and law which is proposed in his groundbreaking *Eunomia: New Order for a New World*.

PHILIP ALLOTT is Professor of International Public Law in the University of Cambridge and a Fellow of Trinity College, Cambridge. He was formerly a Legal Counsellor in the British Foreign and Commonwealth Office.

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*pathemata mathemata*

for my dearest brother Roderick  
(1936–1999)

*speculum in speculo*



*Vain is the word of a philosopher which does not heal any suffering of man. For just as there is no profit in medicine if it does not expel the disease of the body, so there is no profit in philosophy either, if it does not expel the suffering of the mind.*

Epicurus (341–270 BCE), Fragment 54, in C. Bailey, *Epicurus, The Extant Remains* (Oxford, The Clarendon Press; 1926), p. 133.

*Natural health is the just proportion, truth, and regular course of things in a constitution. 'Tis the inward beauty of the body.*

Anthony Ashley Cooper, Earl of Shaftesbury (1671–1713), *Characteristics of Men, Manners, Opinions, Times* (1711) (ed. J. M. Robertson; Indianapolis, Indiana University Press; 1964), II, pp. 267–8.

*Truly, the earth shall yet become a house of healing.*

Friedrich Nietzsche (1844–1900), *Thus Spake Zarathustra* (tr. R. Hollingdale; Harmondsworth, Penguin; 1961), pp. 102–3.

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## PREFACE

### The social species

The landscape of the human world is changing. A *social animal* is becoming a *social species*. Human social consciousness is becoming the social consciousness of the whole human species. Among all the species of social animals, one species is becoming the social species.

*Biological* history tells the story of the evolution of the human species by natural processes. *Human* history is the story of the self-evolving of the human species through the work of the human mind. The self-evolving of the human species is a by-product of the self-ordering of human beings, within the private mind of each human being and within the public minds of all human societies.

The three co-ordinates of our self-consciousness – as individual human beings, as intermediate societies, as the society of all-humanity – are the ordering structures of the ceaseless process of our self-constituting as persons and as societies. As the human species re-creates itself as the social species, the human mind faces new challenges, new in kind and new in scale, at every level of human self-constituting, at every level of human self-consciousness.

### Social pathology

We are excited by the new possibilities of human self-constituting at the level of the species. Unused reserves of human potentiality can be released and realised, bringing into fruitful collaboration new levels of human energy, creativity, intelligence, to serve the highest aspirations and the highest ideals of all-humanity. We know that we will be writing a new page in the better story of human self-evolving.

We know also that there is another story within human history, the story of the social effects of evil. The private minds of human beings



and the public minds of human societies interact in the process of their mutual self-constituting. It is a process which is wonderfully productive and creative but which includes also a vicious cycle of reciprocating pathology, as every form of human evil is reproduced and magnified at the social level.

As a social animal becomes the social species, we are anxious about the new possibilities of social pathology, as social systems take power over every aspect of all human life everywhere, as they take power over our minds, our wills, our hopes, our ideals, our species-nature, our species-consciousness, and as they take power, finally, over our idea of what it is to be human. The globalising of human society is also a globalising of social evil.

### Social idealism

Societies constitute themselves in the form of ideas. *Nation, state, government, family, war, peace, justice, law, health, happiness.* These, and countless others like them, are structures of ideas. We live and die for ideas. Ideas are the biology of the human mind. As a social animal becomes the social species, the challenge to the self-creating and self-ordering human mind has never been greater.

Each human society is an infinitely complex and dynamic structure of ideas. The health of a society, its degree of well-being, is determined by the ideas which take actual effect in the process of its day-to-day self-constituting as a society. To reform or redeem a society is to change those determining ideas. Our quality of life is a function of the quality of our ideas.

The unifying theme of the studies contained in the present volume is a philosophy of *social idealism*, a belief in the capacity of the human mind to transcend itself in thought, to take power over the human future, to choose the human future, to make the human future conform to our ideals, to our best ideas of what we are and what we might be.

### Practical theory

The ideas which take actual effect in the process of day-to-day social self-constituting are, in the first place, what we may call *practical theory*. Practical theory is a society's way of explaining itself to itself, explicitly

or implicitly, in the course of its everyday activity. As a carpenter applies practical theory to the making of a table, so a society applies practical theory to the making of its own social reality.

Behind practical theory lies what we may call *pure theory*, a society's way of explaining its practical theory to itself. A theocracy may explain itself in terms of a particular religion. A democracy may explain itself in terms of a particular theory of social contract. A capitalist society may explain itself in terms of a particular theory of human behaviour. A geometer can explain the pure theory of the carpenter's practical theory. Behind pure theory lies what we may call *transcendental theory*, a theory of theory, our way of explaining to ourselves the nature of explanation, the nature of ideas, the nature of the mind.

In *Eunomia. New Order for a New World*,<sup>1</sup> I have sought to provide, at the levels of *transcendental* and *pure* theory, a philosophical basis for the new international society, the society of all human beings, the society of all societies. The essays in the present volume are intended to provide the groundwork of the possible *practical theory* of the new international society, that is, the practical theory of the social self-constituting of humanity at the level which lies beyond the self-constituting of states and nations.

### Law

In the drama of a society's self-constituting, law plays the leading structural role. It is for this reason that the future of international law is crucial to the future of international society. The interaction of social reality and society's ideas produces *law*, so that law can act as the anatomy and the physiology of the body politic within which social reality can develop in co-operation with society's ideas.

Law creates an infinitely complex network of legal relations linking every single member of a society with all other members – relations of a relatively settled character, conditioning human behaviour, individual and social, within relatively settled limits. In this way, social reality develops, within relatively settled limits, in accordance with society's ideas as they are enacted in the law and as they are expressed through its day-to-day interpretation and application.

<sup>1</sup> Throughout the present volume, references to '*Eunomia*' are to P. Allott, *Eunomia. New Order for a New World* (Oxford, Oxford University Press; 1990/2001).

In the European Union, an attempt has been made to transcend the society of nation and state by constructing a complex legal system, enacting and expressing certain political and economic ideas. The grave problems besetting the process of European integration prefigure the problems which will beset the self-constituting of an international society which is self-consciously the society of all societies, transcending all subordinate forms of society.

The challenge of creating purposively a new European social reality formed by and forming a new kind of European public mind is mirrored and greatly magnified at the level of international society. The problem of creating the theoretical basis for a true international law of a true international society, formed by and forming a new public mind of all-humanity, is as daunting as it is exhilarating.

### The other human future

Humanity cannot continue on its present self-destructive course, a course determined and distorted by large-scale socio-pathological phenomena – scandalous social injustice, chronic instability and violence within and between societies, widespread and deep-rooted public-realm corruption, the dehumanising of the human individual by morbid social forces.

Human self-perfecting through the unlimited potentiality of the better forms of human self-socialising remains as a permanent challenge, in an everlasting struggle between public good and public evil. Humanity's capacity for such self-transcending depends on the ideas which it forms of itself and of its possibilities, of its reality and its ideals. The present volume seeks to assist in the making of a better human future by contributing to that necessary process of human self-imagining and self-creating.

### Method

This volume is radically syncretic in aspiration, drawing together ideas from many different fields. A major purpose is to encourage younger scholars and intellectuals, in particular, to have the courage to cross the arbitrary and artificial mental frontiers which have done so much harm to the creative potentiality of the human mind. Holistic diseases of the

human world need homeopathic remedies produced from within the total potentiality of the human mind.

The author's hope is that younger scholars and intellectuals, in particular, will be inspired to reconnect with their intellectual inheritance, to explore new and better lines of thought, to search out new and better connections between ideas, ideas which may still be of redemptive value even if they are ancient ideas. Nothing could be more necessary or more urgent. Knowledge is not merely to be known, but also to be used.

*Dare to think! Dare to know! Dare to speak! Dare to hope!*

Trinity College, Cambridge



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## PART I

### Society and law

What is society? What is law?



## International law and the international Hofmafia

### Towards a sociology of diplomacy

Representative aristocracy – The Great Game – Public Law – The New Law of Nations – The new aristocracy

*The present state of international society is a product of its past states. But who was responsible for making the past of international society? It was a clique of cliques, a conspiracy of one small part of the governing classes of those national societies which used diplomacy and war as the continuation of crude politics by other means.*

*The externalising of their internal social power somehow managed to override the profound differences of their national social systems, their profoundly different forms and degrees of social development, so that absolutist monarchies and republican city-states, and all intervening social forms, could interact in a game in which they were also the masters of the rules of the game (the so-called law of nations). They even purported to recognise rules about war (the mass murder of human beings and the mass destruction of property).*

*Still more mysteriously, the game of externalised social power somehow managed to survive revolutionary transformations within some of the national societies, so that an international governmental absolutism continued, unabated and unabashed, while very new social theory and social practice transformed every other aspect of the holding and exercise of public power.*

### Representative aristocracy

13.1 '[T]he Sieur Clement Venceslas Lothaire, Prince of Metternich-Winneburg-Ochsenhausen, Knight of the Golden Fleece, Grand Cross

of the Royal Order of St Stephen, Knight of the Orders of St Andrew, of St Alexander-Newsky, and of St Anne of the First Class, Grand Cordon of the Legion of Honour, Knight of the Order of the Elephant, of the Supreme Order of the Annunciation, of the Black Eagle and the Red Eagle, of the Seraphim, of St Joseph of Tuscany, of St Hubert, of the Golden Eagle of Wurtemberg, of Fidelity of Baden, of St John of Jerusalem, and of several others; Chancellor of the Military Order of Maria-Theresa, Trustee of the Academy of Fine Arts, Chamberlain, Privy Councillor of His Majesty the Emperor of Austria, King of Hungary and Bohemia, his Minister of State, of Conferences, and of Foreign Affairs.<sup>1</sup>

13.2 The principal Plenipotentiary of the King of France and Navarre to the Congress of Vienna was another self-conscious aristocrat, one who claimed a nobility more ancient and more interesting than that of Metternich. 'The Sieur Charles Maurice de Talleyrand-Périgord, Prince of Talleyrand, Peer of France.' Thus did the relentlessly self-recreating Talleyrand choose to identify himself on this occasion. His list of French and foreign honours ends tantalisingly with 'the Order of the Sun of Persia, etc., etc., etc.' The Plenipotentiaries of His Majesty the King of the United Kingdom of Britain and Ireland included 'the Right Honourable Robert Stewart, Viscount Castlereagh', and 'the Most Excellent and Most Illustrious Lord Arthur Wellesley, Duke, Marquess, and Earl of Wellington, Marquess of Douro, Viscount Wellington of Talavera and of Wellington . . . Duke of Vittoria, Marquis of Torres Vedras, Count of Vimeira in Portugal.' The list of his distinctions also ends with a bathetic 'etc., etc., etc.' The other British Plenipotentiaries were the Earl of Clancarty, Earl Cathcart and Lord Stewart.

13.3 Who were such people? Whom and what did they represent? The *Règlement on the Precedence of Diplomatic Agents*, also adopted at the Congress of Vienna (19 March 1815), provided that only the first class of *Employés Diplomatiques*, namely, Ambassadors, Legates and Nuncios, have *le Caractère représentatif*.<sup>2</sup> The representative character of the plenipotentiaries at the Congress of Vienna was no doubt beyond question as a matter of diplomatic convention, but their representative character as a matter of social fact is a much more complex matter.

<sup>1</sup> Act of the Congress of Vienna, 9 June 1815, list of plenipotentiaries (present author's translation), in C. Parry, *The Consolidated Treaty Series* (Dobbs Ferry, NY, Oceana Publications Inc., 1969), LXIV, pp. 454–5.

<sup>2</sup> *Ibid.*, pp. 2–3.



13.4 Every human being has a worldview, a view of the world seen from a unique perspective, a reality-for-one-self. The worldview of the inhabitants of a world mapped and measured by the *Almanach de Grotta* is a consciousness of belonging to a race apart, a chosen people. Metternich, Talleyrand, Castlereagh and Wellington, for all the differences of their social status and life-experience, shared an old-regime aristocratic worldview, a sense of the exceptional rights and responsibilities attaching to their exceptional social status, including especially their natural right and responsibility to determine the lives of whole nations. But they shared also a sense that they were living in the last days of the old social order which they and their kind had dominated. A new order of things (to adopt the Roman formula for revolutionary change) was arising out of the disasters of war and revolution, a new world in which the right to govern the lives of others seemed, as always, a precarious prize to be won in an obscure game of chance, but, thanks to the French Revolution, it had clearly become a new kind of game with new kinds of players. Metternich (1773–1859; Austrian Foreign Minister 1809–48), *magister ludorum* of the Congress of Vienna, who 'swam as happily as a fish in a glittering pool';<sup>3</sup> truculent defender of the old order and suave master of the old diplomacy, nevertheless concluded, as early as 1820, that his life had 'coincided with a terrible time', that he had been born either too soon or too late, condemned to perform the task of shoring up 'crumbling buildings'. 'I should have been born in 1900 and had the twentieth century ahead of me.'<sup>4</sup>

13.5 The Congress of Vienna was the last great party of the old order dancing on its own grave. It epitomised the best and the worst of the old order of international government. It contained the seeds of that form of international government which has dominated human social development from 1815 to the present day, the government of a form of international polity which may soon be surpassed.

13.6 Aristocratic international government had been well adapted to the old social order. Its greatest practitioners – Wolsey, Richelieu, Metternich, Bismarck – were not merely courtiers or diplomatists nor even merely courtier-diplomatists. They were international politicians.

<sup>3</sup> H. Treitschke, quoted in A. Milne, *Metternich* (London, University of London Press; 1975), p. 18.

<sup>4</sup> Quoted in F. Herre, *Metternich. Staatsmann des Friedens* (Köln, Verlag Kiepenhauer & Witsch; 1983), p. 360.

The stage of their political activity and their political ambitions was the great theatre of the world, that is to say, all-Europe and Europe's interests in the rest of the world. It is a mistake to suppose that they were merely conducting the external relations of their respective countries, that they were merely playing the game of diplomacy. They were managing the political and social development of their countries in a market-place of the most intense cultural, political, social and economic competition. The internal and the external realms were in an inseparable continuum, each an aspect of the other. To survive and prosper as a separate national identity and a separate political and economic entity was a particular mode of co-existing with other identities and entities. The inescapable presence of many others was a permanent part of the forming of the tenuous national self.

13.7 Cardinal Wolsey (1471–1530), himself of humble origin, managed to turn himself into a second self of the English king, combining his own shamelessly ambitious and obsessively industrious personality with that of his new-style Renaissance monarch (Henry VIII), a monarch who was himself a monster of dissolute energy, defining himself, and hence the English nation, in competition with monarchs and nations of much greater market-power. But Wolsey had a second power-base and a second horizon of ambition. He was a prince of the Church, with a distant eye on the possibility of himself becoming Pope. Wolsey sought to manage the politics of all-Europe, a Europe full of other ambitious and erratic monarchs and courtiers, not least King Francis I of France and the Emperor Charles V. His manoeuvres and machinations were only sometimes successful, but he was struggling to manage an immensely complex and dynamic international situation, setting patterns of international politics which survive to the present day.<sup>5</sup>

13.8 When power of personality is combined with a powerful ideology, the combination is liable to be much more powerful than mere personal ambition. Cardinal Richelieu (1585–1642) was yet another of the formidable politician-clerics who have played so large a part in the history of European politics. But, unlike Wolsey, he had an all-consuming belief. He believed in France. He devoted the power of his mind and his will to the actualising of his idea of France, an idea embodied in the

<sup>5</sup> See S. J. Gunn, 'Wolsey's foreign policy and the domestic crisis of 1527–8', in *Cardinal Wolsey. Church, State and Art* (eds S. J. Gunn and P. G. Lindley; Cambridge, Cambridge University Press; 1991), pp. 149–77, and the editors' Introduction, pp. 1–53.



absolute sovereignty of the French monarchy. His diplomacy was not the conduct of the external relations of France. It was a continuation of the self-constituting of France by other means. Above all, it was a post-Reformation self-constituting, a struggle to reintegrate a society, and a European society of societies, which had been torn apart by the disintegration of western Christianity.<sup>6</sup>

13.9 It is an irony of the aristocratic old order that such figures of great power may be said to have had a truly representative character. They embodied the internal order of their respective societies, and they embodied the reality of the co-existence of those societies. The old diplomacy used the generic term 'Power' (*puissance*) to reflect the extraordinary diversity of the polities participating in the business of self-constituting through competitive co-existence, ranging from the most pompous monarchies to the most republican of city-states, and including the supra-national institution and agencies of the Church of Rome and the multinational institution of the Holy Roman Empire. In international co-existence generated a sort of virtual court of the courts, a court without frontiers, an invisible *Hof* of the *Höfen*, in which cardinals and bishops and ambassadors, resident and ad hoc, and soldiers of fortune of all kinds could mingle with the courtiers of countless national courts of every degree of political significance and insignificance. There were no rules about who could participate in the international court of courts but, as at Versailles or Schönbrunn or Potsdam or St Petersburg, mere presence as part of what we may call the international *Hofmafia*<sup>7</sup> did not confer any automatic degree of power or influence or even of prestige. Within the old aristocracy there was, and still is, an acute sense of delightful and painful inter-familial inequalities. The world of the old diplomacy was no less fiercely realistic about the relative powers of the various Powers.<sup>8</sup>

<sup>6</sup> On the centrality of the religious question in Richelieu's foreign policy, see M. Carmona, *Richelieu. L'ambition et le pouvoir* (Paris, Fayard; 1983), pp. 274–7. On Richelieu's legacy, see *ibid.*, pp. 716ff.

<sup>7</sup> The word *Hofmafia* (court-mafia) is borrowed from A. Wheatcroft, *The Habsburgs. Embodying Empire* (London, Penguin; 1995), p. 248.

<sup>8</sup> 'We cannot... have European affairs decided by the Princes of Lippe and Lichtenstein,' said the Prussian representative Hardenburg, when Talleyrand was seeking to insinuate France into the inner council of the leading powers by posing as the champion of the minor powers. Comte de Saint-Aulaire, *Talleyrand* (tr. G. F. Lees and F. J. Stephens; London, Macmillan & Co.; 1937), pp. 263–4.

13.10 The orientalising and medievalising of the French monarchy, culminating in the megalomania of the Palace of Versailles and the crazily fastidious rituals of French court-life, was a reasonable plan of action to consolidate a difficult polity condemned to exist in a geographic and political situation which was, and always would be, precarious. The misfortune was that the idea of France became the most seductive of all courtly brand-images. It misled the rulers and the courtiers of countless other polities into a fantasy-world of micro-Frenchism, managing and mismanaging their randomly accumulated domains from their minuscule Versailles. The Reformation had conferred on the lesser monarchs and the princelings of Northern Europe, including the English King, a delightful opportunity for unjust and fortuitous enrichment, at the expense of the Church of Rome, a crude redistribution of wealth perfumed with an odour of hypocritical sanctity. French absolutism was a counter-revolution, undoing the revolutionary potentiality of Renaissance humanism. To the European *Hofmafia* it was a stay of execution and an incitement to self-justification and self-indulgence.

### The Great Game

13.11 So long as international society was nothing more than the co-existence of diverse polities competing in their self-constituting, international government necessarily reflected the dominant ideas, philosophical and political, of that self-constituting. The old aristocratic international order was a world still haunted by the medieval world of competitive pomp and ceremony, in which war and diplomacy were the games which kings and their courtiers played. The making of a nation was the making of a brand.<sup>9</sup> Louis XIV was simply the most outrageously successful of the masters of collective illusion, a virtuoso in the personifying of the 'state', that last great masterwork of the medieval courtly imagination. The personifying of the state, in the internal sense, might take the absolutist form proposed by Bodin or the collectivist form proposed by Hobbes, but, in either form, it was a convenient generic conception, consistent with unlimited diversity of actual forms of internal social order, and consistent with extreme inequality in the capacity of

<sup>9</sup> The conferring of pseudo-chivalric orders (the Garter, the Golden Fleece, de l'Esprit, and the countless etc., etc., etc. orders) was, and is, the licensing of a courtly trade-mark.



individual nations to control or even influence the external conditions of their social self-constituting.

13.12 Within the aristocratic old order of Europe, treaties had always been a useful instrument of diplomacy – to tie down the troublesome, to intimidate third parties, to deceive the unwary, to create a temporary illusion of stability, even occasionally to further objectives of common interest (for example, the series of commercial treaties between France and England from the days of Richelieu onwards).<sup>10</sup> The only effective rules of the aristocratic game were unenacted minimum conditions of co-existence, a network of understandings and expectations, rules of international competition, the product of centuries, if not millennia, of chaotic but instructive experience, only sporadically and tenuously conceived of as *legal* rules.

13.13 Such a shared consciousness was a conservative constitutionalism characteristic of an aristocratic ruling class. There was a background consciousness of 'the peace', in the medieval legal sense – *la paix* (justices of the peace, breach of the peace) – and a rudimentary value-system which was neither communitarian nor merely amoral. It was a transnational class-consciousness, a shared commitment to stability as the necessary basis for the continued enjoyment of social privilege, and a shared understanding of the idea of machiavellian princely *virtù*, the normal and necessary self-seeking of, and on behalf of, the first servant of the state (to borrow Frederick the Great's tiresome formula), a combination of pragmatic self-interest and half-remembered notions of chivalry.

13.14 A succession of great crises had threatened to unsettle the unwritten constitution of Europe, beginning with the century-long struggle caused by the Reformation, that is to say, by the disintegration of the supranational social system of the Church of Rome. The great treaty settlements (Westphalia 1648, Utrecht 1713, Vienna 1815) were restabilising events, re-establishing the European constitutional order, the dialectical resolution of stability and change. The central feature of each crisis, and hence of each dialectical reconstituting, was the problem of the relationship between internal politics and external politics. And the same problem and the same task of conservative reconstituting would

<sup>10</sup> Of the treaty of 1786 Talleyrand said: 'it reflects those liberal principles which are appropriate to great nations and from which France... would gain the most if they were universally adopted in the commercial world.' G. A. Morlot and J. Happert, *Talleyrand – une mystification historique* (Paris, H. Veyrier; 1991), p. 70.

be manifested in the making of the League of Nations (1919) the United Nations (1945) and the European Union (from 1952).

13.15 The consequences of the French Revolution were remarkably similar to those of the Reformation. The Reformation had been a transformatory event within Europe, as a society of societies, and within each separate society, leading to extremes of both intra-national and international violence. Like the Reformation, the French Revolution, and its Napoleonic sequel, challenged the old constitutional order of Europe not only by the force of arms but also by the force of ideas.<sup>11</sup>

13.16 Already in 1792 the British government analysed the double nature of the challenge, as evidenced by the decree of the French National Convention of 19 November, 'in the expressions of which all England saw the formal declaration of a design to extend universally the new principles of government adopted in France, and to encourage disorder and revolt in all countries, even in those which are natural'.<sup>12</sup> 'England will never consent that France shall arrogate the power of annulling at her pleasure, and under the pretence of a pretended natural right, of which she makes herself the only judge, the political system of Europe, established by solemn treaties, and guaranteed by the consent of all the powers.'<sup>13</sup>

13.17 The revolutionary challenge of the French Revolution was a challenge to the constitutional structure of the old aristocratic

<sup>11</sup> 'The present revolution in France... is a revolution of doctrine and theoretic dogma... The last revolution of doctrine and theory which has happened in Europe is the Reformation... [The effect of the Reformation] was to introduce other interest in all countries than those which arose from their locality and natural circumstances.' E. Burke, *Thoughts on French Affairs* (1791) (London, Dent (Everyman's Library); 1910), p. 288. De Tocqueville took the same view. '[As a result of the Reformation], former interests were superseded by new interests, territorial disputes by conflicts over moral issues, and all the old notions of diplomacy were thrown into the melting-pot – much to the horror and dismay of the professional politicians of the age. Precisely the same thing happened in Europe after 1789. Thus the French Revolution, though ostensibly political in origin, functioned on the lines, and assumed many of the aspects, of a religious revolution.' A. de Tocqueville, *The Old Regime and the French Revolution* (1856) (Garden City, NY, Anchor Books; 1955), p. 71.

<sup>12</sup> H. Temperley and L. Penson, *Foundations of British Foreign Policy 1792–1902* (Cambridge, Cambridge University Press; 1938), p. 4.

<sup>13</sup> *Ibid.*, p. 7. We may recall the reverse situation, namely, Cardinal Mazarin's concern in 1646 that the British monarchy would be replaced by a republic. He instructed the French Ambassador 'to bring into play every sort of contrivance and adopt every kind of expedient... to avert so great a calamity'. J. R. Seeley, *The Growth of British Policy* (Cambridge, Cambridge University Press; 1903), pp. 419–21.



international order in the sense that it threatened to unsettle fundamentally and irremediably the two axes or dimensions of that order – the horizontal axis of the international oligarchy of ‘the powers’ and the vertical axis of the interface between the internal and the international.

### Public Law

13.18 In a communication of 19 January 1805 to the Czar of Russia, the British Prime Minister outlined British war aims. At the end of the war it would be necessary ‘to form a Treaty to which all the principal Powers of Europe should be Parties, by which their respective Rights and Possessions, as they then have been established, shall be fixed and recognized... It should re-establish a general and comprehensive system of Public Law in Europe, and provide, as far as possible, for repressing future attempts to disturb the general tranquillity, and above all, for restraining any projects of Aggrandizement and Ambition similar to those which have produced all the Calamities inflicted on Europe since the disastrous aera of the French Revolution.’<sup>14</sup>

13.19 The strange expression ‘Public Law in Europe’ was certainly not a reference to international law, in the modern sense. It was a reference to a central structural feature of the old international order, namely, its horizontal axis. The ‘Game of Publick Safety’ as Castlereagh would call it in a celebrated state-paper of 1820,<sup>15</sup> was the management of international politics on the basis of an oligarchy of ‘the powers’. In the same note of 1805, Pitt called for ‘the closest Union of Councils and Concert of Measures’ to manage the restored Public Law of Europe.<sup>16</sup> Oligarchy in the form of ‘union’ and ‘concert’ would reappear in the Council of the League of Nations, the Security Council of the United Nations, and the Council of the European Union. The Vienna constitutional structure met the challenge of the French Revolution to the horizontal aspect of the old aristocratic order of war and diplomacy. There remained the problem of the vertical axis, the relationship of international politics to internal politics.

13.20 The expression ‘public law’ became a *Leitmotiv* of the Congress of Vienna, daringly appropriated by Talleyrand himself, who had so

<sup>14</sup> Temperley and Penson, *Foundations* (fn. 12 above), p. 18.  
<sup>15</sup> *Ibid.*, pp. 48–63, at p. 59. <sup>16</sup> *Ibid.*, p. 11.

recently been a close collaborator of the greatest of the violators of that ‘public law’.<sup>17</sup> But whereas the British aristocratic view of constitutional development had been, for a thousand years, a never-ending struggle to incorporate social change into the fabric of social stability, at Vienna the expression began to be confused in the minds of the continental *Hofmafia* with the idea of ‘legitimacy’, which was something much closer to defending, by force if necessary, the internal political status quo of the old aristocratic constitutional order, a holy alliance to defend the past against the future.<sup>18</sup>

13.21 Lord Castlereagh put into words a perennial British general policy of opposing all general policies in the field of international affairs. ‘The principle of one State interfering by force in the internal affairs of another, in order to enforce obedience to the governing authority, is always a question of the greatest possible moral as well as political delicacy... [T]o generalize such a principle and to think of reducing it to a System, or to impose it as an obligation, is a Scheme utterly impracticable and objectionable... No Country having a Representative System of Government could act upon it, – and the sooner such a Doctrine shall be distinctly abjured as forming in any Degree the Basis of our Alliance, the better.’<sup>19</sup>

‘One of the general principles which Her Majesty’s Government wish to observe as a guide for their conduct in dealing with the relations between England and other States, is, that changes which foreign Nations may chuse to make in their internal Constitution and form of Government, are to be looked upon as matters with which England had no business to interfere by force of arms, for the purpose of preventing such Nations from having Institutions which they desire. These things are considered in England to be matters of domestic concern, which every Nation ought to be allowed to settle as it likes. But an attempt of one Nation to seize and appropriate to itself territory which belongs

<sup>17</sup> In a famous riposte, Talleyrand (1754–1838), when challenged by the Czar on this very point, said: ‘Sire, that is a matter of dates.’ Saint-Aulaire (fn. 8 above), pp. 264–5. On another occasion, Talleyrand reproved the Czar for saying that ‘The convenience of Europe is law.’ ‘This language, Sire, is alien to you and your heart disowns it.’ Talleyrand insisted that the Congress adopt as a rule that all proposals ‘should conform to public law and the experience of Europe’ (p. 264).

<sup>18</sup> For Metternich’s own explanation of the Holy Alliance, see vol. 1 of his *Memoirs*, quoted in G. Bertier de Sauvigny, *Metternich* (Paris, Fayard; 1986), p. 277.

<sup>19</sup> Temperley and Penson, *Foundations* (fn. 12 above), p. 61.



to another Nation, is a different matter; because such an attempt leads to a derangement of the existing Balance of Power, and by altering the relative strength of States, may tend to create danger to other Powers; and such attempts therefore, the British Government holds itself at full liberty to resist, upon the universally acknowledged principle of self-defence.<sup>20</sup>

13.22 This profoundly ambiguous solution to the problem of the vertical axis of international politics became the essence of the Vienna constitutional system: on the one hand, the systemic separation of internal and international politics; on the other hand, a supervisory role for certain powers, acting as managers of international constitutional order. In other words, the new international constitutional order rested on a dialectical negation of a negation: the systemic separation and the practical inseparability of the national and international political orders. The apologists of this new-old order had available to them and their successors a perfectly adapted system of ideas to gain acceptance of the new order, in Vattel's conception of international society as consisting of 'free, equal, and independent' states or nations, 'free persons living together in a state of nature', subject to a legal system deriving from their consent.<sup>21</sup> This noble lie, or opportune falsehood,<sup>22</sup> institutionalises, and thereby seems to justify, the gross real-world inequality of social development and social power of the participants in international society, rather as the corresponding noble lie at the root of liberal democracy institutionalises, and thereby seems to justify, gross social inequalities within national societies.

13.23 It has been customary to praise the intelligence and wisdom of the old-order aristocratic actors at Vienna, the makers of a constitutional order which, as historians have repeatedly said, prevented a general European war for 100 years.<sup>23</sup> From the perspective of the end of the long and tempestuous twentieth century, we might better say that what they achieved was that the old international order of war and

<sup>20</sup> *Ibid.*, p. 136.

<sup>21</sup> E. de Vattel, *The Law of Nations or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and Sovereigns* (1758) (tr. C. G. Fenwick; Washington, DC, Carnegie Institution; 1916), p. 7.

<sup>22</sup> Plato, *Republic*, III, 414.b.

<sup>23</sup> For a dissenting opinion, see Morlot and Happert, *Talleyrand* (fn. 10 above), p. 809. 'In fact, the Congress of Vienna laid the basis for British hegemony in the Victorian era, the making of the Bismarckian empire, and the decline of France.'

diplomacy would rule the world from its grave for two more centuries; that, for two centuries, the social development of international society would fail to match the social development of national society; that, for two more centuries, international law would continue to be nothing more than the minimal rules of a game of international politics played by an international oligarchy in an unresolved relationship with the game of national politics; and hence that the grossest inequality of national social development would be concealed behind the dishonest façade of the sovereign equality of states. By so ingeniously covering revolutionary instability with a veneer of reactionary stability, they made inevitable the catastrophes of the twentieth century, including Europe's thirty-year civil war, the wasteful absurdity of the Cold War, and the prolonged suffering of countless human beings at the hands of gross abusers of public power, political and economic, national and international.

### The New Law of Nations

13.24 The cognitive and conative dissonance concealed within the ingenious Vienna settlement – the defiant voice of the past and the uncertain voice of the future, legitimacy versus public law – was very soon exposed. Metternich called George Canning (1770–1827) 'a malevolent meteor hurled by divine Providence upon Europe'.<sup>24</sup> In his two terms of office as British Foreign Secretary (1807–9 and 1822–7), Canning managed to introduce a new way of talking about international politics. He became the voice of that international political monism, as we might call it, of which William Gladstone (1809–98) and Woodrow Wilson (1856–1924) would be the most notorious apostles. International political monism resolves the problem of the relationship between national and international politics by denying their conceptual separation. National and international politics belong to a single political and moral value-order. Such a view is intended to negate the old-order aristocratic view of war and diplomacy as value-free or value-neutral instruments of national politics on a horizontal plane of oligarchy. Canning, passionate and combative practitioner of national politics, burst onto the international stage speaking of another kind of legitimacy, of what would later

<sup>24</sup> Quoted in H. Nicolson, *Diplomacy* (London, Oxford University Press; 1939), p. 73.



come to be known as national self-determination, a new vertical axis of international politics. He invoked the idea originally as a war-time strategy, to arouse national resistance across Europe to Napoleonic hegemonism.<sup>25</sup> He invoked it to oppose the threat of Prussian domination of Germany.<sup>26</sup> In the case of the independence of the Spanish American provinces, he justified Britain's early recognition as the mere recognition of a fact, of 'their political existence as States'.<sup>27</sup>

13.25 Gladstone took the new rhetoric further. 'Certain it is that a new law of nations is gradually taking hold of the mind, and coming to sway the practice, of the world; a law which recognises independence, which frowns on aggression, which favours the peaceful, not the bloody settlement of disputes, which aims at permanent and not temporary adjustment; above all, which recognises, as a tribunal of paramount authority, the general judgment of civilised mankind. It has censured the aggression of France; it will censure, if need arise, the greed of Germany. *Securus judicat orbis terrarum*. It is hard for all nations to go astray. Their ecumenical council sits above the partial passions of those, who are misled by interest, and disturbed by quarrel. The greatest triumph of our time, a triumph in a region loftier than that of electricity or steam, will be the enthronement of this idea of Public Right, as the governing idea of European policy; as the common and precious inheritance of all lands, but superior to the passing opinion of any. The foremost among the nations will be that one, which by its conduct shall gradually engender in the mind of the others a fixed belief that it is just. In the competition for this prize, the bounty of Providence has given us [the British] a place of vantage; and nothing save our own fault or folly can wrest it from our grasp.'<sup>28</sup>

<sup>25</sup> 'I discharged the glorious duty... of recognizing without delay the rights of the Spanish nation.' Temperley and Penson, *Foundations* (fn. 12 above), p. 24. The recognition was of Ferdinand VII as King of Spain in 1808 while Britain was still in a state of war with French-dominated Spain. There followed the successful campaign led by Wellington (the Peninsular War) to restore Spanish independence from France.

<sup>26</sup> '[S]ubjecting to [Prussia]... the neighbouring Countries which are as much entitled as Prussia to the recovery and maintenance of their Independence, is a Project in which there would be as little of Policy as of Justice.' *Ibid.*, pp. 26-7.

<sup>27</sup> *Ibid.*, p. 79.

<sup>28</sup> W. E. Gladstone, 'Germany, France and England', published (anonymously) in the *Edinburgh Review* (October 1870), quoted in H. C. G. Matthew, *Gladstone 1809-1874* (Oxford, Clarendon Press, 1986), pp. 181-2. Twenty years earlier, Gladstone had said that the law of nations was 'a great and noble monument of human wisdom, founded on the combined dictates of

13.26 International political monism has always seemed to non-believers to be merely an advanced stage of hypocrisy. The strange fact was noted that value-based international politics, especially as preached by Canning and Gladstone,<sup>29</sup> seemed to serve British national interests, including the interests of British capitalism, quite as effectively as any old-order pragmatic diplomacy.<sup>30</sup> For most of the managers of the aristocratic old order, hypocritical moralising was worse than an embarrassment; it was a mistake. It gave rise to false expectations, especially in the minds of the masses, and was liable to complicate the management of a world which was still playing the old-order games of war and diplomacy.

13.27 Gladstone's thoughts on the 'new law of nations' were published during the Franco-Prussian War, after the battle of Sedan, when he was trying, by direct and indirect means, to dissuade Bismarck from annexing Alsace and Lorraine.<sup>31</sup> It was above all in the making of Germany, the delayed nation,<sup>32</sup> that there was manifested with awful clarity the perilous legacy of the Congress of Vienna – the survival of the old international order of war and diplomacy within the unresolved relationship between international and national politics.

13.28 Bismarck (1815-98) was the Richelieu of Germany. With the stubborn arrogance of an ancient land-owning family, he pursued a single idea – the making of an all-German state under the domination of Prussia. The manic militarism of Frederick II of Prussia (1712-86), called the Great, had made Prussia into a power capable of acting as one of the leading 'Powers' at the Congress of Vienna. Frederick's obsession with things French, and his distaste for Germany and things German,

sound experience'. J. Morely, *The Life of William Ewart Gladstone* (London, E. Lloyd, 1908), 1, p. 274.

<sup>29</sup> Canning was a protégé of William Pitt, Prime Minister 1783-1801 and 1804-6, himself the son of the dominant politician of the previous generation, who had led Britain during the Seven Years War (1756-63). Canning knew and admired the young Gladstone, whose father lived in Canning's parliamentary constituency and who, as a schoolboy at Eton, wrote verses in praise of Canning.

<sup>30</sup> For Gladstone's combination of realism and moralism in international politics, see R. A. P. Sandiford, 'Gladstone and Europe', in B. L. Kinzer (ed.), *The Gladstonian Turn of Mind* (Toronto, University of Toronto Press, 1985), pp. 177-96.

<sup>31</sup> Bismarck did not enjoy Gladstone's preaching and used to refer to him as Professor Gladstone. In old age, on a visit to Kiel (1895), Gladstone met Bismarck, who presented him with an oak-tree which was planted at the Gladstone estate at Hawarden Castle. Watching Kaiser Wilhelm II reviewing the new German fleet at Kiel, Gladstone said: 'This means war.' P. Magnus, *Gladstone. A Biography* (London, John Murray, 1954), p. 429.

<sup>32</sup> See H. Plessner, *Die Verspätete Nation* (Stuttgart, W. Kohlhammer Verlag, 1959).



had meant that it was left to others to create an idea of Germany as a potentiality and to actualise that potentiality as a fact. The fact of Prussia and the idea of Germany combined to produce, a century later, a 'power' to rival France and Britain. For Bismarck, as for Richelieu, internal and external politics were, indeed, in an unbroken continuum, with the latter to be used as part of the former, and with the use of force, as it had been for Frederick, acting as a necessary continuation of national politics. For Bismarck, politics was, as he said, the art of the possible, and diplomacy was accordingly the highest art-form of politics. Within such a worldview, even mighty France was nothing more than 'an unavoidable pawn on the chessboard of diplomacy'.<sup>33</sup>

13.29 Under Bismarck's leadership, and in conformity with the Vienna constitutional order, the German ruling class were able to postpone, for a century, the development of post-1789 democratic institutions, choosing instead the intensive rationalising of old-order institutions, thereby pioneering the development of a new kind of courtly government, the professional civil service. Early and energetically, Germany joined in the new economic order of the Industrial Revolution and capitalism, even if, at one time, it sought to resist, at least for the time being, the globalising of capitalism (free trade) promoted by British politico-economic hegemonism, using the 'infant industry' argument which would be used again in relation to the economies of developing countries in the modern post-imperial period.<sup>34</sup>

13.30 For Max Weber, Gladstone was the classic example of the ideal-type 'democracy-leader'.<sup>35</sup> For the young Woodrow Wilson, whose grandfathers were British, Gladstone was 'the greatest statesman that ever lived' and he remained an obsessive presence in Wilson's troubled psyche for the rest of his life.<sup>36</sup> Wilson certainly reproduced many of the character-traits of his hero, including a belief in the redeeming power of

<sup>33</sup> H. Kissinger, *Diplomacy* (New York, Simon & Schuster; 1994), p. 125. It is interesting to compare Cavour's management of the unification of Italy, achieved with more diplomacy and less blood and iron. Cavour experienced pangs of anguish concerning the unworthy deeds which international politics requires of international politicians.

<sup>34</sup> F. List's *Nationale System der politischen Ökonomie* was published in 1841.

<sup>35</sup> W. Mommsen, *Max Weber und die deutsche Politik 1890-1920* (Tübingen, J. C. B. Mohr; 1959/1974), p. 433.

<sup>36</sup> E. M. Hugh-Jones, *Woodrow Wilson and American Liberalism* (London, Hodder & Stoughton; 1947), p. 7. For an idiosyncratic psycho-biography of Wilson, see S. Freud and W. C. Bullitt, *Thomas Woodrow Wilson. A Psychological Study* (Boston, Houghton Mifflin; 1966).

ethically based politics, a power which could be extended to the whole world in accordance with a doctrine which came to be called liberal imperialism. It has been suggested that Wilson the internationalist was strongly influenced by a fashionable turn-of-the-century set of ideas which saw human social progress as a matter of increasing, and increasingly rational, 'social control'.<sup>37</sup> This social-Darwinist, proto-Weberian ideology resonated also with the characteristically pragmatist behaviourist and social psycho-therapeutic strands in American thinking. Wilson welcomed the advent of the United States to the ranks of the imperial powers, through the acquisition of Cuba and the Philippines in 1898, on the ground that it opened up the possibility of a new kind of civilising mission, bringing democracy, capitalism and Christianity to those peoples who lacked these blessings of civilisation. International politics would no longer be based on mere material interest, but would rather seek to establish a 'spiritual union' among the people of the world.<sup>38</sup> American involvement in international politics in the twentieth century was dominated by a notorious tension between the advice of the first President, in his Farewell Address, to avoid 'foreign entanglements' and an urgent desire to share America's exceptionality with the rest of the world. Isolationism and internationalism have been dialectically resolved in something akin to Britain's nineteenth-century policy, from Castlereagh to Salisbury, of 'splendid isolation', that is to say, disentangled entanglement in international politics.

13.31 It is not wrong to personalise Wilson's participation in the disaster of the Paris Peace Conference (1919).<sup>39</sup> An American president of exceptional thoughtfulness and sensitivity, fuelled by an obsessive, almost pathological, desire to change the world, collided with two

<sup>37</sup> L. E. Ambrosius, *Woodrow Wilson and the American Diplomatic Tradition. The Treaty Fight in Perspective* (Cambridge, Cambridge University Press; 1987), pp. 12ff.

<sup>38</sup> Hugh-Jones, *Woodrow Wilson* (fn. 36 above), p. 183 (speech at Mobile, Alabama, in October 1913).

<sup>39</sup> It is interesting to compare the avalanche of criticism which followed the Versailles settlement, and the manner of its making, with criticisms of the Vienna settlement. In the British House of Commons, one member (J. Lambton) spoke of 'the acts of rapine, and aggression of the club of confederated monarchs at Vienna, who appear to have met, not to watch over the interests of Europe, but as contempters of faith and justice, as the spoliators of Saxony and the oppressors of Norway'. Another (R. B. Sheridan) spoke of the 'crowned scoundrels cutting up Europe like carcass-butchers'. S. M. Alsop, *The Congress Dances 1814-1815* (New York, Simon & Schuster (Pocket Books), 1984), p. 190.



godfathers of the mafia of international politics (Clémenceau, Lloyd George), ruthless manipulators of the Vienna constitutional order, content to institutionalise in a so-called League of Nations the post-Vienna union of councils and concert of measures, if such a thing might be a means, however feeble, of tying down other still more unreliable mafiosi.<sup>40</sup> Wilson's Fourteen Points had been a manifesto of international political monism, seeking to reconcile the vertical and horizontal aspects of international politics, the internal and the external political realms. Little of that manifesto survived the drafting of the Treaty of Versailles and, with the possible exceptions of the provisions on mandates and minorities, the League of Nations Covenant proved to be a work of classic international horizontalism, a grim parody of the Vienna settlement.

### The new aristocracy

13.32 In this respect, the Paris settlement was at least prophetic. Twentieth-century international politics has seen the rise of an international ruling class of unprecedented size, power and arrogance. One point of intersection between American internationalism and the self-interest of the old-order ruling class has been the vigorous reproduction on the international plane of institutional forms reminiscent of national constitutional orders. Intergovernmental councils (cabinets of cabinets), deliberative assemblies (normally containing only representatives of governments), courts and tribunals (containing government-appointed members), bureaucratic organisms of every kind. Isolated from their national constitutional orders, unencumbered with any corresponding international constitutional order, such bodies have managed to enjoy what might be called a collective international absolutism, a life-after-death of the pre-revolutionary national *anciens régimes*.

13.33 The new-model international *Hofmafia* includes a *noblesse de cour*,<sup>41</sup> consisting of the national politicians and senior national and

<sup>40</sup> The concept of tying-down has been an obsessive theme of the old order of war and diplomacy and continues to haunt the idea of European Union. 'In my opinion, the third sound principle is this: to strive to cultivate and maintain, nay, to the very uttermost, what is called the Concert of Europe, to keep the powers of Europe in union together. And why? Because keeping all in union together you neutralize and fetter and bind up the selfish aims of each.' W. E. Gladstone (from an election speech in his Midlothian campaign, 1879), quoted in Nicolson, *Diplomacy* (fn. 24 above), p. 71–2.

<sup>41</sup> For the hierarchy of French *ancien régime* court-life, see P. Mansel, *The Court of France 1789–1830* (Cambridge, Cambridge University Press; 1988), ch. 1.

international officials who deliberate in the global public interest in their Olympian conclaves. It includes a *noblesse de robe*, all those public servants (and international lawyers in professional practice) who devote themselves to the well-being of the people of the world, even if the people of the world have little knowledge, and less appreciation, of their work. It includes also what we may call a *noblesse de la plume*, diplomatic historians, academic international lawyers, international commentators and analysts of all kinds, and specialists in a field known as 'international relations'.<sup>42</sup> They provide intellectual sustenance and psychological reassurance to those who bear the burdens of international government.

13.34 The European Union is the greatest achievement of the new international ruling class. It seeks to resolve the perennial tension between the horizontal and vertical aspects of international politics in the most dramatic way possible. It simply fuses the internal and the external, within a system of decision-making which is neither democracy nor diplomacy, under a legal system which is neither national nor international law, regulating an economy which is both integrated and disintegrated, the whole enterprise serving a common interest which is both communal and an ad hoc aggregation of national interests. Furthermore, such a constitutional fusion, a revolution-from-outside for each member state, has the extraordinary characteristic that it is only a partial fusion, with the member states remaining in a classic horizontal relationship as regards aspects of government not included in the Union system. The complex pluralist monism of the EU system, a partial constitutional nuclear fusion, has accordingly not yet produced a commensurately energetic transformation of the external aspect of the Union itself, in its so-called Common Foreign and Security Policy, that is to say, in the form of its own participation in the horizontal international order, in place of, and alongside, the governments of its member states.

13.35 This failure is a symptom of a general indisposition of international society. Since 1945 the international ruling class has been

<sup>42</sup> There is a sect of such specialists ('realists') who treat states as real entities and the national and international realms as intrinsically separate. See B. Frankel (ed.), *Realism: Restatements and Renewal* (Ilford, Frank Cass; 1996) and contributions by various authors on the present state of 'realism' in 24 *Review of International Studies* (October 1998). The origin of such ideas is not scientific but polemical. It is to be found in a revolt in the United States against liberal internationalism (Lippmann, Kennan, Morgenthau).



preparing its own downfall, its own nemesis. It has generated an unsustainable disjunction between the vertical and horizontal components of international society. On the one hand, it has continued, with very little alteration, the old-order twin-track system of war and diplomacy, throughout the period of the Cold War, and then in the impotent inefficiency of its management of the post-Cold War situation. On the other hand, it has used the privilege of its international absolutism to intervene in national society, using the existing governmental systems of horizontal international society (treaties and intergovernmental institutions) to modify collectively and substantially not only the legal self-constituting of national societies (conditional recognition of states, human rights law, law of the sea, international criminal law) but also the substance and functioning of national law and government, in the systems of the functional UN agencies, macro-economic management (the Bretton Woods bodies), trade law (especially GATT/WTO), and environmental law. It has even sought, in a rudimentary way, to affect the international division of labour and distribution of wealth, through the law and practice of so-called 'development' and through the regulation of international investment.

13.36 Metternich, aristocratic rationalist, might well have been happier, as he supposed, in such a twentieth century. But we would be bound to tell him that, in the meantime, we have learned that the international consequences of what Edmund Burke called revolutions of doctrine and theory, such as the Reformation and the French Revolution, cannot be controlled merely by war and diplomacy. The third post-medieval international revolution, through which we are now living, is imposing a new international constitutional structure, a new relationship between the horizontal and vertical axes of international society, between the internal and the external aspects of government. A new kind of international polity and new systems of international government, superseding the ideas of war, foreign policy and diplomacy, will generate new ideas of international law and a new role and a new self-consciousness for those who will take over the determination and management of world public interest from the current successors-in-title of the age-old international *Hofmafia*.

## International law and international revolution

### Reconceiving the world

The people and the peoples of the world must find a way to communicate to the holders of public power – the international *Hofmafia* – their moral outrage at the present state of the human world. It is an outrage made almost unbearable by the complacency of those who operate the international system and the conniving of those who rationalise it, as commentators in public discussion or analysts in an academic context.

Social evil on a national scale is routinely legitimated and enforced through social theory and social practice, including the legal system, of each national society. National systems contrive to make us see social injustice, and socially caused human suffering of every kind, as incidental and pragmatic effects, however much they may violate our most fundamental values and ideals.

For 250 years, a perverted, anti-social, anti-human worldview has allowed the holders of public power to treat social injustice and human suffering on a global scale as if it were beyond human responsibility and beyond the judgement of our most fundamental values and ideals, and the holders of public power have imagined an international legal system which enacts and enforces such a worldview. And the people and the peoples of the world have simply had to acquiesce in and to live with the consequences of this disgraceful perversion of theory and practice.

It would be possible, and it is necessary and urgent, to destroy the old international unsociety and to create the theory and the practice of a true international society, the society of all societies and the society of all human beings, enacting and enforcing a true international law, the legal system of all legal systems, for the survival and prospering of all humanity.



*We must make a world-wide revolution, a revolution not in the streets but in the mind.<sup>1</sup>*

14.1 I want to think aloud about a question which is easy to state but very difficult to answer. Why do we put up with it all? That question reflects a dull pain, an anguish, an anger even, that many people feel in considering the state of the world. It would be uttered as a sentimental question, not expecting an answer, at least not expecting a practical answer. But let us, for a while, treat it as a question to be answered in practical terms.

14.2 Why do we put up with it all? Obviously it is a question which implies three other questions – and it is those implied questions that give rise to all the difficulty. What exactly is it that so troubles us in the state of the world? What is the cause or origin of the things that trouble us? What could and should we do to change those things?

14.3 Let us consider a practical example. You will have heard of the country called Nowhere, but you may not know much about it in detail. Nowhere is an independent sovereign state with a president, a government, a single political party called the Nowhere People's Party, a population of 12 million people, consisting of two ethnic groups – the Nos and the Wheres. The ratio of Nos to Wheres is two-to-one. The Nowhere People's Party is dominated by the Wheres, the smaller ethnic group. The Wheres arrived in the country in the early nineteenth century and soon came to dominate the indigenous No people.

14.4 Nowhere's economy has been a two-product economy – copper and tourism. The copper-mining industry is controlled by a multinational company centred in a country called Globalpower One. The tourism industry is controlled by Where businessmen in co-operation with various foreign interests. The menial labour in tourism is provided by the No people. In recent years Nowhere has been flourishing as an off-shore financial centre, with foreign banks and holding companies establishing offices in the capital, Nowhere City. There has been a consumer boom, with great demand for imported video-tape recorders and cocaine. Next month there is to be a state visit by Madonna Jackson, who is to be given the country's highest honour, for services to Nowenese

<sup>1</sup> Having regard to the nature and intention of this chapter, it has been left in its original form as a lecture, with additional material added in the form of footnotes.

culture. Nowhere's immediate neighbour is No-man's-land, whose population consists almost entirely of No people. No-man's-land is a multi-party state with a Westminster-style parliament. It is a poorer country than Nowhere. It has a long-standing claim to the territory of Nowhere and supports a Nowenese Liberation Army which is seeking to overthrow the regime in Nowhere. The NLA is also supported by a country called Globalpower Two. A sum of money equivalent to one-third of its Gross Domestic Product is spent every year by each country on arms, which are obtained from Globalpower One and Globalpower Two and on the international arms market. Nowhere has a written constitution containing a Declaration of Political and Social Rights. However, the President declared a State of Exception five years ago and the Declaration of Rights was suspended. The President's eldest son is the Chief Justice of the Supreme Court. His second son is Commander-in-Chief of the Nowhere Armed Forces. His youngest son is studying at Harford Business School.

14.5 I do not need to say much more. It is all very familiar. Nowhere is a member of many international organisations. It is also an object of interest to many international organisations, including the UN Security Council, the World Bank, the International Monetary Fund, leading international banks, Amnesty International and the Church of Perpetual Healing, which has missionaries in Nowhere City, in the tourist resorts and in remote villages. The President's sister is an ardent Perpetual Healer. You will not be surprised to hear that deforestation in the north of Nowhere has turned the fertile southern plain of No-man's-land into a virtual desert. Soil erosion in Nowhere is silting up the River Nouse which flows into No-man's-land, threatening a hydro-electric power-station on a tributary of the Nouse.

14.6 You react in one of two ways, when you come across news items about Nowhere and No-man's-land. Either – so what? Or – so why? Those who react with *so what?* believe that the world is as it is, human nature is as it is, and human beings are as they are, corrupt or corruptible, sometimes decent, always long-suffering, patient of the miseries and follies of the world. And societies are as they are, some progressive and some not progressive, some successful and some not successful. So it has always been through all human history, and so, presumably, it will always be. Those who react with *so why?* believe that *human beings are what they could be*, not simply what they have been, and *societies are*



*systems made by human beings for human survival and human prospering* not for human oppression and human indignity. I suppose that, from now on, I will be speaking to so-why people but hoping to be overheard by so-what people.

14.7 Let us make an abstraction of the world-situation of which Nowhere and No-man's-land are one small part. And we may thereby begin to answer the first of the three subordinate questions – what exactly do we object to in the present world situation? Here is a possible short-list, containing five intolerable things.

- (1) Unequal social development. That means that some human beings worry about the colour of the bed-sheets in their holiday-home in Provence or the Caribbean, while other human beings worry about their next meal or the leaking tin-roof of the hut which is their home.
- (2) War and armaments. From time to time, human beings murder and maim each other in the public interest, by the dozen and by the million, and bomb each other's villages and cities to rubble. And, all the time, human beings make more and more machines for murdering and destroying in the public interest, and more and more machines to prevent other people from murdering and destroying in the public interest.
- (3) Governmental oppression. In very many countries around the world, the ruling class are not servants of the people but enemies of the people, evil and corrupt and negligent and self-serving, torturing people, exploiting people, abusing people. And, in all countries, the people have to struggle to control the vanity and the obsessions of those who want to be their masters.
- (4) Physical degradation. On the planet Earth are 5 billion human beings, one species of animal among countless other societies of living things, a species which has taken over the planet, using the Earth's resources, irreversibly transforming the Earth as a physical structure and as a living system.
- (5) Spiritual degradation. Human beings everywhere are being drawn into a single mass culture dominated by a crude form of capitalism, a mass culture which is stifling all competing values and all local cultures, a mass culture which is depraving human consciousness.

14.8 You may not like that list. You may worry about other things. You may want to challenge some item on my list, to defend something

that I seem to be attacking. You will have noticed that my list of five intolerable things consists of five clichés of so-called global anxiety. We have heard about them all until we are sick and tired of them. The mass media of communication exploit them at regular intervals, enriching their everyday fodder with an occasional healthy supplement of moral fibre – the emaciated survivor of the concentration camp, the family sleeping in the street, the mutilated body, the starving baby, the naïf palmed countryside, the delirious crowd at the political rally or the rock concert, hooligans on the rampage, riot police with batons and water-cannon, drug addicts killing themselves slowly, dead fish floating on a polluted river, the television set in the mud-hut. Banal images of a reality made banal. So-why made as tedious as so-what.

14.9 And, then again, you may object that, surely, we are not simply putting up with such things. On the contrary, a lot of effort is being devoted to facing up to such things, to alleviating them, even to solving them. There are dozens of organisations and foundations and charities and conferences and good-hearted individuals worrying about each and every one of them. Surely some part of our taxes and some part of our voluntary giving is going to deal with precisely such world social problems. I will add that as a sixth cause of our anger – perhaps the most painful of all.

- (6) Social pragmatism. We treat the symptoms of world-wide disorder, because we cannot, or dare not, understand the disease. We see the effects because we cannot, or will not, see the cause.

14.10 So that brings us to the second question. What is the origin or cause of the things we find intolerable? You will say, especially if you are a so-what person, that we cannot comment on the causes of the situation of Nowhere and No-man's-land unless and until we know more of their territories and resources, their cultural characteristics, their history. Each is a sovereign independent state, with its own destiny to work out, its own possibilities, its own constraints. Who are we to know what is the best for them, let alone to do anything to bring about what is best for them?

14.11 I would ask you to notice three things about the two well-known unknown countries I have described, three features of their structural situation. The first is that they are not very independent. The market-price of Nowenese copper is determined in London, where



demand is related very directly to the general state of world manufacturing industry at any particular time. Nowenese tourism depends on the international holiday companies which send their packaged tourists to fill the Nowenese hotels which have been built by foreign construction companies, using cement brought halfway round the world in ships controlled by foreign shipping-lines. The off-shore companies established in Nowhere City are there because taxes are low, because few questions are asked, because the climate is pleasant. They may leave as suddenly as they arrived. And the territory of No-man's-land, its physical environment, its climate even, depend on what is done in the territory of Nowhere. And even the minds of the Nowenese people are not their own. Their values and their wants are a function of forces far beyond their control – capitalism, foreign religions, international crime, world popular culture, militarism, materialism.

14.12 Of course, Nowhere is not nowhere. It is everywhere. All the world is more or less Nowhere. Remember that the most economically successful countries in the world maintain their economies and their standard of living by selling goods and services to other countries. There must be other countries willing and able to buy. And even the most successful countries depend on the value of their currency, which depends on international economic relativities, as well as on internal economic realities. And they depend on investment which, particularly if they have a substantial budget deficit, may be foreign investment, created and terminable through decisions made elsewhere. And they depend on technology which may be originated and controlled abroad. And they depend on cultural tides which sweep across the world, shaping human events and human expectations and human anxieties. Every country, from the most prosperous to the least prosperous, is at an intersection of internalities and externalities. Our independence is a function of what we control and what we do not control.

14.13 The second thing to notice about Nowhere and No-man's-land is that their national identities do not coincide with their political identities. The No people in Nowhere feel more kinship with the No people in No-man's-land than with the Where-dominated state of which they are said to be nationals. The No people in No-man's-land feel that Nowhere and its incoming Where people have usurped some part of the No birthright. By the sound of it, they have taken the more valuable part

of the traditional No territory, the part which contains the deposits of copper and the best beaches.

14.14 We know that this problem of national identity has been one of the greatest social problems through all human history, giving rise to endless wars, endless struggle and suffering, endless oppression and exploitation. And, of course, it is very much with us today. It is hard to think of a single country in the world which is not significantly affected by one or more problems of national identity, including the United Kingdom of Great Britain and Northern Ireland. The fact is that the political frontiers of the so-called nation-states have evolved under the pressure of forces other than merely those of national identity. And yet it is the political systems of the so-called nation-states which have, somehow, acquired the power to control the social development of all the peoples of the world, to determine the well-being of humanity, to determine the future of humanity.

14.15 The third thing to notice about the structural situation of Nowhere and No-man's-land is that their population consists of human beings. They share with us the species-characteristics of human beings. They think and want and hope and suffer and despair and laugh and weep as human beings. The mothers of their sons who are killed in their wars or their prisons or their hospitals have hearts as tender as the hearts of our mothers. Their children look to the future as our children look to the future. Whether we are so-what people or so-why people, we cannot stop ourselves from feeling sympathy.

14.16 And yet somehow we stop ourselves from feeling responsibility for them. They are aliens. As human beings, we know that we are morally responsible for all that we do, and do not do, to and for other human beings, a responsibility which we cannot think away, a responsibility which we owe to a billion human beings as we owe it to one human being. Every alien is also our neighbour. And yet as citizens, we have somehow been led to believe that we are not socially responsible for them – and that even our moral responsibility is qualified by their social alienation from us.

14.17 I have mentioned three structural features of the situation of two countries which are also structural features of the world situation. They are like geological fault-lines running through the world structure. First, our single human destiny must nevertheless be pursued in isolated state-structures. Second, our national identity may be in conflict with



our legal and political identity. Third, we are not able to take responsibility for human beings for whom we know we are responsible. What I want to suggest to you is that there is a direct connection between the things which we find intolerable in the world situation and these three structural faults in the world system. And that direct connection is located nowhere else than in our own minds. It is not a matter of physics or biology or physiology or geography or history. It is a matter of philosophy – that is to say, of human self-conceiving and human self-creating.

14.18 What we have to discover is not how the present world structure came about as a story of historical events, but how the present world structure came to seem natural and inevitable. The question of causation I am considering is the question of what causes certain social and legal situations to be accepted within human consciousness. In particular, what is the origin of the consciousness which makes possible, which legitimates, which naturalises, the way in which we conceive of international society and international law?

14.19 Why do we put up with it all? We put up with it all because our consciousness contains ideas which cause us to put up with it all. Who makes our consciousness? We make our consciousness. And so, if we can change our consciousness of the world, we can change the world. It is as simple as that. That is the revolution I am proposing to you. A reconstruction of our understanding of the world in which we live, a reconceiving of the human world, and thereby a remaking of the human world.

14.20 Let us treat it as a mystery to be solved, how we got into our present state of consciousness about international society and international law. If we treat it as a mystery story, a whodunnit?, I can name one of the guilty parties and I can explain the *modus operandi*. Whodunnit? It was Emmerich de Vattel in his study with an idea. That sounds unlikely. One particular Swiss writer, writing in 1758, making a certain use of certain words. Let me put the evidence before you. I can express the same thing almost as briefly, but in a more abstract form.

14.21 Humanity, having been tempted for a while to conceive of itself as a society, chose instead to conceive of itself as a collection of states. State-societies have undergone a long process of internal social change since the end of the Middle Ages. That process has been conducted on two planes – the plane of history and the plane of philosophy. There has been the plane of historical events, power-struggles, wars and civil wars,

revolutions, institutional change, legislative reforms, everyday politics. And there has been the plane of philosophy, as human consciousness has sought ways to express what is and what might be in society, to legitimate what is, to bring about what might be.

14.22 On both planes – of history and philosophy – there have been two developments which have dominated all others in the evolving of the state-societies since the end of the Middle Ages: democratisation and socialisation. Democratisation and socialisation are words to describe two revolutions which have made the state societies we know today. So, returning to the mystery of international society, I can now reformulate the story as follows.

14.23 International society, having chosen not to conceive of itself as a society, having chosen to conceive of itself as essentially different in kind from the state-societies in their internal aspect, has managed to avoid both forms of social revolution. The social world of humanity has been neither democratised nor socialised because humanity has chosen to regard its international world as an unsocial world.

14.24 What have democratisation and socialisation meant within the state-societies? Democratisation has meant that societies became able to conceive of themselves as composed of the people, as governed by the people, and as serving the people. Socialisation has meant that societies acquired the capacity to form socially their social purposes.

14.25 The development of the idea of democracy was a response to the greatly increasing energy of national societies at the end of the Middle Ages, as their economies and the international economy developed dramatically, as humanity rediscovered the self-ordering capacity of the human mind, and hence the world-transforming possibilities not only of philosophy but also of natural science and technology, and as new areas of the world were visited, offering new possibilities for the application of human energy, individual and social energy.

14.26 The response at the level of philosophy was to take up an old idea, the idea of sovereignty: the idea that a society is structurally a unity, and that that structure depends on an ultimate source of authority, an unwilled will, which is the ultimate source of social self-ordering, the source of law in society. The idea of sovereignty was structurally necessary to turn amorphous national societies into more and more complex self-organising systems. But there was obviously an inherent anti-social danger in sovereignty, an anti-systemic, self-disabling uncertainty. Who



was to be the sovereign? How was the sovereign to be controlled? The difficulty was that the sovereign societies, as they developed, generated a particular sub-system which came to be known as *the state*.

14.27 The state came to be conceived as a public realm within society under the authority of the government. The public realm was loosely separated from the private realm, in which individuals remained, as it were, sovereign. But the state could determine for itself the limits of the public realm, by taking control of both physical power and law-making power. The development of democracy at the level of philosophy took place primarily in the development of various theories of social contract and in the ancient idea of constitutionalism. Sovereignty could be retained to provide the systematic structure of society, with its public realm under the government. But sovereignty would be reconceived to contain the idea of self-government. A society was to be a structure of sovereignty, but also a structure of self-government. And that structure came to be expressed in the new-old form of the so-called constitution embodying 'higher law'.

14.28 The development of democracy at the *philosophical* level was, of course, accompanied by dramatic developments at the *historical* level. Much blood was shed. Many suffered, in their person and their property, in the process of social change. The new philosophy, of democratic constitutionalism, had the effect of increasing the actual power of those who controlled the power of government, who actually controlled the public realm. In other words, the constitution proved to be an excellent means of organising democratic power but it proved incapable by itself of *determining social purpose*, of deciding how the great power of the state-society would be used.

14.29 Society had to find some means, at the philosophical level and at the historical level, to organise, from day to day, social willing and acting. Democracy had to become something more than constitutional democracy. That was the historical function of *socialisation*. Especially in the nineteenth century, society developed as a system for generating value. The public realm came to be not merely a realm of power but a realm of value. Through the development of a professional bureaucracy, through the reform of the legal system, through the reform of parliaments, through the universalisation of elementary education, through the reform of secondary education and the reform of the universities, through the development of mass communications (in public libraries, mass production of books, mass circulation newspapers, and then radio

and television) – through such means society became not merely a structure of political power but a system of shared social consciousness, a system for generating social values and social purposes. But communal values and social purposes would be generated not merely within the decision-making organs of government. They would be generated within the minds of the people. The social sharing of consciousness became the sharing of our most intimate consciousness.

14.30 The application of science and technology to agriculture and industry meant that the increase in social wealth was able to keep ahead of the increase in population, so that there was more wealth to be distributed, so that there was the possibility of social improvement not merely as an ideal but as an actuality. Society became a means for human self-creating, human self-perfecting through human interaction. And we have seen the wonderful results in the improvement of the living conditions and the opportunities of the mass of the people in a number of countries. The question is – what happened to the organising of the interaction between such societies, their international interaction, while all these developments were taking place internally?

14.31 What happened was that the sovereign was turned inside out and became the external manifestation of the society in question. What appeared on the international scene was not the totality of the evolved national societies. What appeared on the international scene was merely the internal public realms externalised. The internal public realms, the governments, were turned inside out like a glove.

14.32 Louis XIV is supposed to have said: *L'Etat, c'est moi* – 'I am the state'. He meant that he was the embodiment of the French nation, the embodiment of its public realm. He might have gone on to say: *Le monde, c'est nous, les états*, meaning that the international system should be regarded as consisting of the governments meeting each other externally.

14.33 The result was that we came to have an international system which was, and is, post-feudal society set in amber – undemocratised, unsocialised – capable only of generating so-called *international relations*, in which so-called *states* act in the name of so-called *national interests*, through the exercise of so-called *power*, carrying out so-called *foreign policy* conducted by means of so-called *diplomacy*, punctuated by medieval entertainments called *wars* or, in the miserable modern euphemism, *armed conflict*. That is the essence of the social process of the international non-society.

14.34 It is as if the external life of our societies were still a reflection of the internal life of centuries ago, a fitful struggle among Teutonic knights or European barons or Chinese feudal lords or Japanese shoguns. It is as if Thomas Hobbes were the world's only social philosopher. It is as if there had never been Locke and Rousseau and Kant and Hegel and Marx, let alone Plato and Aristotle and Lao Tzû and Confucius. It is as if the revolutions had never occurred – 1789 and 1917 and all the other dramatic and undramatic social revolutions.

14.35 Nowadays people believe that such an international system is natural and inevitable. Far from it. It is not necessarily natural and was not simply inevitable. And this is where we get back to Emmerich de Vattel in his study. It is not difficult to unravel the story by which the misconceiving of international society was perpetrated. I will present it as a drama in five acts.

14.36 *Act One.* In the sixteenth century, a critical question for theologians and philosophers was the question of how there could be a law applying both to the nations of Europe and to the peoples of the lands which had been newly visited or revisited. It was necessary to reconsider the question, which had been familiar to ancient Greece and Rome and medieval Christendom, of whether there could be said to be a universal legal system. The idea was proposed, particularly in Spain and not for the first time in human history, that all humanity formed a sort of society and that the law governing the whole of humanity reflected that fact.

'[I]nternational law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law'.<sup>1</sup>

14.37 Francisco de Vitoria (1492–1546) took the view that the basis of a universal law for all human beings was found in natural reason, the rational character of human nature, which generated what he called a law of natural society and fellowship which binds together all human beings and which survives the establishment of civil power (*potestas*) over particular peoples (*gentes*). The rules of the law of nations were to be derived from natural law and from a 'consensus of the greater part of the whole world, especially in behalf of the common good of all'.

<sup>1</sup> Francisco de Vitoria, *Concerning Civil Power* (1528), § 21; tr. G. L. Williams, in I. B. Scott, *The Spanish Origin of International Law* (Oxford, Clarendon Press, 1934) App. C, p. 11.

14.38 Francisco Suárez (1548–1617) conceived of a moral and political unity of the human race.

The rational basis, moreover, of [the *ius gentium*, the law of nations] consists in the fact that the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity, not only as a species, but also a moral and political unity (as it were) enjoined by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation.

Therefore, although a given sovereign state [*civitas*] commonwealth [*respublica*], or Kingdom [*regnum*] may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states (*communitas*) is also, in a certain sense, and viewed in relation to the human race, a member of that universal society.<sup>2</sup>

14.39 *Act Two.* In the seventeenth century, Hugo Grotius (Hugo de Groot) (1583–1645) began the process of separating the law of nations from the law of nature, but he did so precisely in order to make clear to the new sovereigns that their will was not the sole test of what is right even if it was the practical basis of what is lawful under the law of nations. The nations are sovereign and independent of each other. They are all equally governed by the law of nations which is the product of the common will of nations acting in the common interest of all nations. And they are governed by natural law, which is the product of human nature and hence indirectly is the work of God who made human nature to be as it is, including its sociability and its rationality. And they are governed by a moral order which comes directly from God.

'But just as the laws of each state [*cuiusque civitatis*] have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view

<sup>2</sup> Francisco Suárez, *On Laws and God the Lawgiver* (1612) bk II, ch. 19.9 (tr. G. L. Williams; Oxford, Clarendon Press, 1944), pp. 348–9. The passage continues as follows:

'Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner with respect to all matters: therefore, it was possible for certain special rules of law to be introduced through the practice of these same nations. For just as in one state or province law is introduced by custom, so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations' (p. 349).



the advantage not of particular states, but of the great society of states [*magnae universitatis*]. And that is what is called the law of nations, whenever we distinguish that term from the law of nature.<sup>4</sup>

14.40 *Act Three*. In the eighteenth century, an attempt was made by a German philosopher to construct a coherent and self-contained system of international law derived from natural law. That philosopher was Christian von Wolff (1679–1754). He proposed the view that the society of the whole human race continues to exist even after the creation of the nation-states.

'If we should consider that great society, which nature has established among men, to be done away with by the particular societies, which men enter into, when they unite into a state, states would be established contrary to the law of nature, in as much as the universal obligation of all toward all would be terminated; which assuredly is absurd. Just as in the human body individual organs do not cease to be organs of

<sup>4</sup> Hugo Grotius, *Of the Law of War and Peace* (1625), Prolegomena, 17, edn of 1646 (tr. F. W. Kelsey; Oxford, Clarendon Press; 1925) p. 15. The continuation of Grotius' argument should also be noticed.

'Many hold, in fact, that the standard of justice which they insist upon in the case of individuals within the state is inapplicable to a nation or to a ruler of a nation. The reason for this error lies in this, first of all, that in respect to law they have in view nothing except the advantage which accrues from it, such advantage being apparent in the case of citizens, who, taken singly, are powerless to protect themselves. But great states, since they seem to contain in themselves all things required for the adequate protection of life, seem not to have need of that virtue which looks toward the outside, and is called justice...'

'If no association of men can be maintained without law, as Aristotle showed by his remarkable example drawn from brigands, surely also that association which binds together the human race, or binds many nations together, has need of law; this was perceived by him who said that shameful deeds ought not to be committed even for the sake of one's country. Aristotle takes sharply to task those who, unwilling to allow anyone to exercise authority over themselves except in accordance with law, yet are quite indifferent as to whether foreigners are treated according to law or not... Bravery itself the Stoics defined as virtue fighting on behalf of equity. Themistius in his address to Valens argues with eloquence that kings who measure up to the rule of wisdom make account not only of the nation which has been committed to them, but of the whole human race, and that they are, as he himself says, not "friends of the Macedonians" alone, or "friends of the Romans," \* but "friends of mankind". The name of Minos became odious to future ages for no other reason than this, that he limited his fair-dealing to the boundaries of his realm' (pp. 17–18).

(\* Grotius' other notes cannot be reproduced here, but at this point he characteristically notes: 'Marcus Aurelius exceedingly well remarks: "As Antoninus, my city and my country are Rome; as a man, the world." Porphyry, *On Abstaining from Animal Food*, Book III: "He who is guided by reason keeps himself blameless in relation to his fellow-citizens, likewise also in relation to strangers and men in general; the more submissive to reason, the more godlike a man is."')

the whole human body, because certain ones taken together constitute one organ; so likewise individual men do not cease to be members of that great society which is made up of the whole human race, because several have formed together a certain particular society. And in so far as these act together as associates, just as if they were all of one mind and as these act together as the members of that society united, which nature has will; even so are the members of that society which before was between individuals continues between nations.<sup>5</sup>

14.41 *Act Four*. And then a critical event occurred. The trouble with Wolff was that his book on international law was the last volume of a nine-volume work on natural law. And it was written in Latin. Only the learned read it, among whom was Emmerich de Vattel (1714–67). He decided to communicate Wolff's volume nine to the world. But he decided not simply to publish a translation. He wrote his own book, using Wolff's ideas so far as he approved of them. On Wolff's essential theoretical point, Vattel explicitly parted company with Wolff.

14.42 Vattel agreed that there was a universal society of the human race governed by the law of nature, but the formation of the states made an important difference in the situation.

'[W]hen men have agreed to act in common, and have given up their rights and submitted their will to the whole body as far as concerns the common good, it devolves thenceforth upon that body, the State [*l'Etat*], and upon its rulers, to fulfil the duties of humanity towards

<sup>5</sup> Christian von Wolff, *The Law of Nations Treated According to a Scientific Method* (1749), Prolegomena, edn of 1764 (tr. J. H. Drake; Oxford, Clarendon Press; 1934), § 7, p. 11. Wolff also argues as follows:

'Nature herself has established society among all nations and binds them to preserve society. For nature herself has established society among men and binds them to preserve it. Therefore, since this obligation, as coming from the law of nature, is necessary and immutable, it cannot be changed for the reason that nations have united into a state. Therefore society, which nature has established among individuals, still exists among nations and consequently, after states have been established in accordance with the law of nature and nations have arisen thereby, nature herself also must be said to have established society among all nations and bound them to preserve society...'

'Since nature herself has established society among all nations, in so far as she has established it among all men, as is evident from the demonstration of the preceding proposition, since, moreover, the purpose of natural society, and consequently of that society which nature herself has established among men, is to give mutual assistance in perfecting itself and its condition; the purpose of the society therefore, which nature has established among all nations, is to give mutual assistance in perfecting itself and its condition, consequently the promotion of the common good by its combined powers' (*Ibid.*, § 7, 8, p. 11).



outsiders in all matters in which individuals are no longer at liberty to act and it peculiarly rests with the State to fulfil these duties towards other States.<sup>6</sup>

<sup>6</sup> Emmerich de Vattel, *The Law of Nations, or the Principles of Natural Law, applied to the Conduct and to the Affairs of Nations and Sovereigns* (1758) (tr. C. G. Fenwick; Washington, DC: Carnegie Institute; 1916), Introduction, pp. 5–7.

Other parts of Vattel's argument expose the tension between the universalism of the law of nature and the incipient individualism of the law of nations: 'Such is man's nature that he is not sufficient unto himself and necessarily stands in need of the assistance and intercourse of his fellows, whether to preserve his life or to perfect himself and live as befits a rational animal... From this source we deduce a natural society existing among all men. The general law of the society is that each member should assist the others in all their needs, as far as he can do so without neglecting his duties to himself – a law which all men must obey if they are to live conformably to their nature and to the designs of their common Creator; a law which our own welfare, our happiness, and our best interests should render sacred to each of us. Such is the general obligation we are under of performing our duties; let us fulfil them with care if we would work wisely for our greatest good.'

'It is easy to see how happy the world would be if all men were willing to follow the rule we have just laid down. On the other hand, if each man thinks of himself first and foremost, if he does nothing for others, all will be alike miserable. Let us labour for the good of all men; they in turn will labour for ours, and we shall build our happiness upon the firmest foundations.'

'Since the universal society of the human race is an institution of nature itself, that is, a necessary result of man's nature, all men of whatever condition are bound to advance its interests and to fulfil its duties. No convention or special agreement can release them from the obligation. When, therefore, men unite in civil society and form a separate State or Nation they may, indeed, make particular agreements with others of the same State, but their duties towards the rest of the human race remain unchanged; but with this difference, that when men have agreed to act in common, and have given up their rights and submitted their will to the whole body as far as concerns the common good, it devolves henceforth upon that body, the State, and upon its rulers, to fulfil the duties of humanity towards outsiders in all matters in which individuals are no longer at liberty to act, and it peculiarly rests with the State to fulfil these duties towards other States. We have already seen (s. 5) that men, when united in society, remain subject to the obligations of the Law of Nature. This society may be regarded as a moral person, since it has an understanding, a will, and a power peculiar to itself; and it is therefore obliged to live with other societies or States according to the laws of the natural society of the human race, just as individual men before the establishment of civil society lived according to them; with such exceptions, however, as are due to the difference of the subjects.'

'The end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be regarded as so many free persons living together in a state of nature, are bound mutually to advance this human society. Hence the end of the great society established by nature among all nations is likewise that of mutual assistance in order to perfect themselves and their condition.'

'The first general law, which is to be found in the very end of the society of Nations, is that each Nation should contribute as far as it can to the happiness and advancement of other Nations.'

14.43 Of Wolff's idea of a society of the nations, Vattel said: 'From the outset it will be seen that I differ entirely from M Wolff in the foundation I lay for that division of the Law of Nations which we term voluntary. Mr Wolff deduces it from the idea of a sort of great republic [civitas maxima] set up by nature herself, of which all the Nations of the world are members. To his mind, the voluntary Law of Nations acts as the civil law of this great republic. This does not satisfy me, and I find the fiction of such a republic neither reasonable nor well enough founded to deduce therefrom the rules of a Law of Nations at once universal in character, and necessarily accepted by sovereign States. I recognise no other natural society among Nations than that which nature has set up among men in general. It is essential to every civil society [civitas] that each member should yield certain of his rights to the general body, and that there should be some authority capable of giving commands prescribing laws, and compelling those who refuse to obey. Such an idea is not to be thought of between Nations [*On ne peut rien concevoir, ni rien supposer de semblable entre les Nations*].<sup>7</sup>

14.44 Those words have determined the course of history. They have made the world we know. Vattel has used the sovereignty theory of the

'But as its duties towards itself clearly prevail over its duties towards others, a Nation owes to itself, as a prior consideration, whatever it can do for its own happiness and advancement...'

'Since Nations are free and independent of one another as men are by nature, the second general law of their society is that each Nation should be left to the peaceable enjoyment of that liberty which belongs to it by nature...'

'In consequence of that liberty and independence it follows that it is for each Nation to decide what its conscience demands of it, what it can or can not do; what it thinks well or does not think well to do; and therefore it is for each Nation to consider and determine what duties it can fulfil towards others without failing in its duty towards itself. Hence in all cases in which it belongs to a Nation to judge the extent of its duty, no other Nation may force it to act one way or another...'

'Since men are by nature equal, and their individual rights and obligations the same, as coming equally from Nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights...'

'Since Nations are free, independent, and equal, and since each has the right to decide in its conscience what it must do to fulfil its duties, the effect of this is to produce, before the world at least, a perfect equality of rights among Nations in the conduct of their affairs and in the pursuit of their policies. The intrinsic justice of their conduct is another matter which is not for others to pass upon finally; so that what one may do another may do, and they must be regarded in the society of mankind as having equal rights.' (*Ibid.*, Introduction, pp. 5–7.)

<sup>7</sup> Preface, p. 9a.



state to disprove the possibility of a natural society among states. It is fascinating to see, through the course of his book, the word *state* coming to have its modern double meaning. It comes to refer both to the internal organisation of the public realm of a society and to the whole of a society when seen externally.

14.45 Vattel's book was written in French, which was in those days the international language of the ruling class from London to St Petersburg. The book was archetypally eighteenth-century – elegant, clear, rational, easy to understand, full of good sense and worldly wisdom. Vattel himself was the very model of an eighteenth-century gentleman – cultivated, leisured, occasionally leaving his study to take part in public affairs and diplomacy. And his book, unlike Wolff's, was read by everyone who mattered, was on the desk of every diplomat for a century or more. It was a book which formed the minds of those who formed international reality, the international reality which is still our reality today.

14.46 *Act Five*. In the nineteenth century, natural law ceased to have any hold on the mind of most philosophers, let alone diplomats and politicians. Natural law was swamped by utilitarianism, positivism and Marxism. Natural law was dead beyond resurrection.

14.47 Throughout the nineteenth century social and legal philosophers continued to emit streams of discordant ideas about the true nature of international law. They might have saved themselves the mental effort. Vattel-minus-natural-law filled comfortably the busy minds of those whose job it was to act internationally. And their seemingly rational reality became international society's actual reality. The natural-law framework of Vattel simply evaporated, leaving an international society consisting of so-called *states* interacting with each other in a social wasteland, subject only to a vestigial law created by their actual or presumed or tacit consent. International society would be, and would remain, an unsocial inter-statal system.

14.48 It must have been an agreeable discovery for post-revolutionary ruling classes when they found that, internationally, they could continue to deal with each other government-to-government, as in the good old days, free of the encumbrances of democracy and socialisation, and yet, oddly enough, sustained in the atavism of a permanent international old regime by such famously progressive words as *sovereignty* and *freedom* and *equality*.

14.49 In the course of the nineteenth century, the law of nations came to be known as international law, giving a veneer of spurious universalism to a law which knew itself now to be merely inter-statal.<sup>8</sup> The voice of invincible Anglo-American common sense became the representative voice of self-misconceiving international society and its law.

'International law consists in certain rules of conduct which modern civilised states regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.'<sup>9</sup>

14.50 Late in the nineteenth century there came to be newly unified and newly powerful states, bringing an immense increase of economic and political and military energy into an international system which was undeveloped, unsophisticated, unable to socialise the overwhelming volume of the new social energy. We have lived with the consequences in the twentieth century. We are living with the intolerable consequences today.

14.51 It is a speculation which is not only of intellectual interest. It is a might-have-been of history with a significance which is still practical.

<sup>8</sup> Jeremy Bentham (1748–1832) had proposed the change of name in his *Introduction to the Principles of Morals and Legislation* (1790; 1823 edn) II, p. 256. Cf. Bentham's footnote in the 1823 edition (W. Pickering & E. Wilson): 'The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of the law which goes commonly under the name of the law of nations: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor d'Aguesseau has already made, I find, a similar remark: he says that what is commonly called *droit des gens*, ought rather to be termed *droit entre les gens* (*Oeuvres* (1773 edn) II, p. 337).' The substance of Bentham's proposal had also been anticipated by Zouche in his *Juris et iudicii feialis, sive iuris inter gentes* (1650), explicitly substituting the phrase *ius inter gentes* for the traditional *ius gentium*. See Wheaton, *Elements of International Law* (Lawrence's 2nd annotated ed, London, Sanson Low; 1864), pp. 19–20, where Lawrence's note traces the gradual acceptance of Bentham's proposal in English and other languages.

<sup>9</sup> William Edward Hall, *A Treatise on International Law* (Oxford, Clarendon Press; 1880), p. 1. Cf. L. Oppenheim, *International Law – a Treatise* (London, Longmans, Green & Co.; 1905): 'Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law. States are by their nature certainly not equal as regards power, extent, constitution, and the like. But as members of the community of nations they are equals, whatever differences between them may otherwise exist. This is a consequence of their sovereignty and of the fact that the Law of Nations is a law between, not above, the States.' (ch. 2, § 14, pp. 19–20).



If Christian von Wolff had written in simple lucid French like Vattel, or in excited and exciting French like that other Swiss citizen of great influence, Jean-Jacques Rousseau, the world's conception of itself might have been fundamentally different, the history of the world might have been different, the story of the twentieth century might have been different.

14.52 Instead, we have the world as it is, a human world which human beings in general think is natural and inevitable but which requires each of us to be two people – with one set of moral judgements and social aspirations and legal expectations within our own national society, and another set of moral judgements and social aspirations and legal expectations for everything that happens beyond the frontiers of our national society. And the post-Vattel ethos which supports this wretched spiritual and psychological dislocation has turned itself into an articulated system which is all too familiar. I will call it the *old regime* of the human world and of its law. I will epitomise it in eight principles. And then, finally and equally briefly, I will put before you a *new view* of the human world and its law.

14.53 The *old regime*, which subtends everybody's everyday view of the human world and its law, can be stated as follows:

- The human world consists of a collection of states, approximately 190 of them, together with a number of intergovernmental organisations (so-called international organisations).
- International law is made by and for the states and international organisations, which are the only legislators and the only subjects of international law.
- Individual human beings and non-governmental entities of all kinds, including industrial and commercial enterprises, are not subjects of international law.
- International law organises the interaction of the states, that is to say, the interaction of their public realms, the governmental aspect of their social activity.
- Other international transactions are a matter for international law only in so far as they involve action by governments, either international action, or consequential internal action.
- The internal realms of the state are independent of each other, protected by a formidable series of defensive concepts – sovereignty, the sovereign equality of states, sovereignty over territory, domestic

jurisdiction, political independence and territorial integrity, non-intervention. From behind these conceptual barricades, each state is free to formulate its own policies and pursue its own interests.

• States are thus, as Vattel proposed, inherently free and equal and independent sovereigns. International law is accordingly conceived as an act of sovereignty by which states choose to accept limits on the exercise of their natural freedom.

• The only international responsibility for governmental activity is thus a form of legal responsibility, called state responsibility, for a breach by one state of another state's rights. And that breach takes one of three forms – a breach of territorial rights (property wrong), a breach of a general duty owed to another state (delictual wrong), a breach of a treaty (contractual wrong).

• Beyond this, there is no systematic conception of an international society at all – no international social purposes, no international morality, no international moral responsibility, no international social accountability, no systematic international economy, no systematic international culture. And the people of the world do not govern themselves internationally. If anything, they have only a marginal effect on the international activity of their own government.

• International social progress comes, if at all, as an incidental external consequence of internal activities, and as a more or less random outcome of so-called development assistance, and, especially, as a by-product of the wealth-creating and wealth-distributing effects of international capitalism, including rudimentary co-operation among some of the governmental managers of international capitalism (in GATT, the IMF, OECD, the European Community, the Group of Seven).

14.54 What can we do about it? What should we do about it? You will not be surprised to hear that the solution I propose is conceptual. I do not propose institutional change, whether root-and-branch or Fabian. I do not propose that we take up arms to expropriate the expropriators. I do not propose that we use the power of the people to disempower the powerful. What we will take up is not the power of arms but the power of ideas. We will let our best ideas of society and law flow into our imagining and our understanding of the human world. By *best ideas* I mean ideas that are philosophically fruitful, psychologically empowering, morally inspiring, practically effective. Within ourselves we can find unrealised



best ideas of society and law which are an inheritance secreted from more than 5,000 years of intense social experience. We will, at last, take up our best ideas of society and law. We will make them into humanity's ideal. We will choose them as the programme of a revolution.

14.55 The new view of the human world and its law may also be expressed in the form of eight principles.

- International society is the society of the whole human race and the society of all societies. In other words, everything human that happens in the world is part of the social process of international society.
- We, the people, are members of international society – as are all the countless subordinate societies that we form, including, among many others, the family, the industrial and commercial corporation, the state-societies, and non-governmental and intergovernmental international organisations.
- International society has a constitution like every other society, which carries the systematic structure of society from its past to its future, determining the way in which all social power is created and distributed throughout the world.
- The state-societies and intergovernmental organisations are constitutional organs of international society, with special functions and powers in relation to the world public-realm, functions and powers delegated by international society under the international constitution and under international law.
- International law is the law of international society, the true law of a true society. It is made, like all other law, through the total social process of international society, in which we all participate, the people of the world and all our subordinate societies, including the state-societies.
- The constitution of international society, like any other constitution, is not finally fixed. It is a dynamic thing, liable to unceasing change under the pressures of international society, constantly reformed by the ideas and aspirations of humanity. The era of unsocial inter-statal society is ending – the era of international relations, state-power, foreign policy, diplomacy and war, the era of the old international law. The era of social international society has begun.
- The responsibility of the state-societies, as organs of international society, is not merely a matter of property, delict and contract. Nor is

their responsibility merely legal responsibility. Their primary responsibility is for abuse of power. All governments everywhere are socially and legally responsible for the way in which they exercise the powers delegated to them by international society. And the same is true of all those individuals and societies, including industrial and commercial corporations, which exercise social power affecting human survival and prospering.

- International law, like all law, is inherently dynamic – developing structurally and systematically, developing substantively, flowing into new areas, embodying and responding to the social development of the world – human rights law, environment law, natural resources law, sea law, space law, telecommunications law, intellectual property law, economic law of all kinds, and international public law to control the use and abuse of public power.
- International society and international law embody the social purposes which humanity chooses for itself and which are realised in the social power, legal and non-legal social power, which human beings exercise with a view to human survival and prospering.

14.56 Our consciousness extends throughout the world, passing freely across political frontiers. Our sympathy extends to the whole of humanity. Our moral and social responsibility extends to the whole of humanity and to the whole of the physical world which we transform by our actions. But our social ideals and our social possibilities are trapped and stifled within the mental structures which divide and disable the human world, structures which human consciousness has made and which human consciousness can remake.

14.57 The necessary revolution will free human consciousness from its self-subjection, from its self-disabling, from its self-destroying, allowing our ideas and our ideals, as well as our willing and our acting, to include the whole world, the physical world and the human world. The necessary revolution will leave us free to make and remake a human society which does not abolish our national societies but embraces and completes them.

14.58 The necessary revolution is a world revolution. The world revolution is a revolution not in the streets but in our minds.

*The scales of the understanding are not quite impartial, and one arm of them, which bears the inscription: Hope of the future, has a mechanical advantage. This is the sole error which I cannot set aside, and which in fact I never want to.*

Immanuel Kant (1724–1804), *Dreams of a Spirit-Seer*, pt. 1, ch. 4 (tr. E. Goerwitz, ed. F. Sewall; London, Swan Sonnenschein; 1900), p. 365.

*Self-love but serves the virtuous mind to wake,  
As the small pebble stirs the peaceful lake;  
The centre mov'd, a circle strait succeeds,  
Another still, and still another spreads,  
Friend, parent, neighbour, first it will embrace,  
His country next, and next all human race...*

Alexander Pope (1688–1744), *Essay on Man*, Ep. 4, lines 361–72.

*That thy way may be known upon earth, thy saving health among all nations.*

Book of Psalms (tenth–fourth century BCE),  
Psalm 65, v. 2 (King James version, 1611).

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The human world is changing. Old social structures are being overwhelmed by forces of social transformation which are sweeping across political and cultural frontiers. A social animal is becoming the social species. The animal that lives in packs and herds (family, corporation, nation, state...) is becoming a member of a human society which is the society of all human beings, the society of all societies.

The age-old problems of social life – religious, philosophical, moral, political, legal, economic – must now be addressed at the level of the whole species, at the level where all cultures and traditions meet and will contribute to an exhilarating and hazardous new form of human self-evolving.

In this book Philip Allott explores the social and legal implications and potentialities of these developments in the light of the general theory of society and law which is proposed in his groundbreaking *Eunomia: New Order for a New World*.

PHILIP ALLOTT is Professor of International Public Law in the University of Cambridge and a Fellow of Trinity College, Cambridge. He was formerly a Legal Counsellor in the British Foreign and Commonwealth Office.

Cover illustration: Light micrograph of a nerve cell (neuron) in a section of tissue from the human brain. The light brown circle in the cell's centre contains the nucleus. Around this is the cell body, from which thin processes (called dendrites and axons) spread out to other cells. The brain consists almost entirely of billions of cells like this. Together they form the complex interconnected circuitry that controls everything we do, from planning a war to falling in love. Image courtesy of J. S. K. / Science Photo Library.

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