THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

THE 'INTERNATIONAL' AND 'DOMESTIC' IN BRITISH LEGAL THOUGHT FROM GENTILI TO LAUTERPACHT

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DECLARATION

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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ABSTRACT

Since the end of the Cold War, the relationship between international and domestic law has become one of the most pressing conundrums in legal theory and practice. But this is an old problem of politics, society and law within and between states. Despite the current urgency, no comprehensive historical study of the concepts of 'domestic' and 'international' has been produced. This thesis fills one part of this significant gap. It examines how and why these ideas, as linked terms, emerged in the works of jurists writing in the British Isles. That development is most clearly understood as a product, response and justification of projects of empire and the kinds of legal subjecthood that empire required. This history is presented in four parts. Chapter One contends that the 'domestic' emerged from sixteenth and seventeenth century efforts to channel natural law and imperial jurisdiction into territorial authority for the early English imperial state. Chapter Two argues that the 'international' appeared in the late eighteenth century to demand the rational reorganisation of the domestic laws of all states, to further commerce, check revolution, and articulate national independence. Chapter Three shows how the domestic and international became entwined in a variety of Victorian-era projects tied to the independence of absolute imperial sovereignty and the interdependence of the globalising world. Chapter Four argues that in the interwar years the domestic and international became central to juristic attempts to transform the collapsing British Empire and wider international order, culminating with general theories of the rule of law within and between states that underpinned the post-1945 settlement. This history reveals a much more diverse set of roles and projects for the domestic and international than is imagined in current theorising. The contingency of these past meanings forms one pathway for unsettling and remaking them for today's projects.

PREFACE AND ACKNOWLEDGEMENTS

This thesis grew from interests, questions and concerns about the nature of law and legal systems, and especially their histories, that refuse to go away. My own dim political consciousness started to form in the shadows of the wars in the former Yugoslavia, the Rwandan Genocide, and the Kosovo and East Timor interventions, culminating with the American wars on Afghanistan and Iraq. The attempts to justify these conflicts and the decisions to intervene (or not), seemed to trade increasingly lazily on the humanitarian intervention mythos, which, after the supposed rupture of September 11, seemed to be subsumed into the inevitable unleashing of unbridled destruction and vengeance, with the much older paradox of doing violence for justice.

What also linked all these events was a narrative of changing laws. Bad internal laws, wrong constitutions, and international pariahs created these problems, never the international system, its laws, or the constitutions of intervening states. It was for the 'international community' to fix them, partly by doing things only internationality could claim to do: act for humanity, or democracy. After the righteousness of this kind of force had been justified, the next legal narrative was about the quotidian mission of building a legal system in places said to have none. At first this prompted the interesting and difficult philosophical question that sits below much of what I have been interested in for some time: how, exactly, do legal systems develop and generate good authority, produce justice, represent people, particularly in the spectre of injustice, violence and disorder?

These wars and their narratives, international and domestic, so often reveal what has always been problematic about progress, liberalism and civilizational missions. The forms of authority that underpin states engaged in these things is always far from the good or the just. The international legal order is the most complicated juridical space in which these questions can be explored. But its complexity is always already a function of the domestic legal orders that create it. Its power relations, material injustices, and pathologies reflect theirs. In exploring them both, together, I think something profound about the nature of law can be

found, or at least gestured at. The missions of the 1990s and 2000s both burn on. But any number of other global crises that partly sprang from them and their worldviews have attained still greater urgency: climate and environmental collapses, global structural inequality, resurgent authoritarianism — all linked to each other, and the last three decades. The power and laws that might hold some part of their resolution will, I think, inevitably call for some new bridging or collapsing or dismemberment of the division of domestic and international in its current form. This project is an attempt to understand one small part of how those concepts, the projects they supported, and the worlds in which they were formed, arrived at this point.

For the last four years and this work I am greatly indebted to a number of people and institutions.

As always, material first. The Rosalyn Higgins Trust and the Law Department of the London School of Economics and Political Science generously granted me funding to cover the United Kingdom's considerable international research student fees and a very comfortable stipend that, as far as I know, is the most generous in UK law PhD funding. I would not be here and this would not have been done without it. Many other research students here make it through on far less, and with far more precarity, than I had to endure. They should not have to do so. The Judge Rosalyn Higgins Scholarship also gave me the great privilege of meeting and corresponding with Judge Higgins, whose wisdom and enthusiasm for the project and much else besides was a great privilege. The Law Department and the School also provided generous conference funding for each year of the program, which allowed me to apply for and attend events knowing I would receive financial support for at least a few trips per year. Each was always immensely useful for meeting new and old friends, presenting these ideas in their still worse forms, and always left me rejuvenated, excited, and aware of the great privileges of academic work. As with scholarship funding, attending these meetings without undue concern over money was a privilege that must be extended to all scholars. The Modern Law Review granted me one of their scholarships for the final two years, and for that extra support and strong encouragement, I will always be humbled

and grateful. Finally, I must once again acknowledge the support of the Australian Research Council, who funded the MPhil that made this new direction in the PhD project possible.

Second, intellectual support. My primary supervisor Gerry Simpson's guidance has been a constant source of useful critiques, suggestions, permissions, wry wisdom, and most importantly an incitement to be more creative and more ambitious in scope and frame. Moments of quiet confidence, which he likely does not recall, broke up longer stretches of critical demands, and were always there to reassure me that this was going somewhere. Tom Poole as secondary supervisor provided invaluable guidance and reassurance for working through such a big range of figures and texts (on many of whom he always had wise points to make), and in the broader problem of trying to balance legal theory, history, and empire. I must also thank Devika Hovell, my initial supporting supervisor, for her extremely useful guidance in the early months, and especially her final suggestion. I owe still greater and longer held debts back to Australia: first and foremost, as always to Anne Orford for her guidance and friendship in my MPhil and many things besides, and to the rest of the Melbourne Law School faculty, especially Carolyn Evans (now at Griffith) Kirsty Gover, Shaun McVeigh, Sundhya Pahuja, Ann Genovese, Di Otto, Adrienne Stone, Cheryl Saunders, Mark McMillan (now at RMIT), Lulu Weis, Chantal Morton, Julian Sempill, Katy Barnett, Brad Jessup and Jeremy Gans. I also am very grateful to Megan Donaldson for her extremely useful advice on applications and the framing of the project in its early stages.

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and finally Lauren Benton's sage advice to 'just do one thing', to which I acquiesced about a year later. A wonderful 2016 book launch of the *Oxford Handbook of the Theory of International Law* with Anne Orford allowed me to make some esoteric points about Richard Zouche, cosmography and theory that prompted useful feedback and encouragement from Mónica García-Salmones and Geoff Gordon (Martti Koskenniemi mostly looked at me with bewilderment during the talk, so I suppose that was useful feedback too). An April 2017 workshop of the International Law and Municipal Law Interest Group of the Italian Society for International and EU Law in Pisa was a lovely opportunity to receive some very useful feedback and constructive comments from Stefano Saluzzo on Gentili, with special thanks to Daniele Amoroso for inviting me on the back of a special issue rejection and to Francesca Capone, Andrea Spagnolo, and Giovanni Zarra. The Inaugural meeting of the Liverpool Constitutional Theory group in July 2017 allowed me to try out some brief thoughts about Dicey and Westlake and the modern implications of the project, and to get detailed comments and challenges from Mike Gordon, Anne Neylon, Neil Walker, and Rob Knox, with special thanks to Ben Murphy and Katy Sowery. A strange and special workshop celebrating Philip Allott's work and utopianism with other young scholars in Kiel in 2017 came with a very helpful injunction from Allott to really try to find the origins of this mode of thinking, and allowed me to think more expansively about legal visions and utopian schemes and the recurrence of domestic and international interactions in them, with special thanks to Jens Theilen, Isabelle Haßfurther, and Wiebke Staff. The ESIL Annual Conference in Naples 2017 helped me to air further thoughts on historiography and method, later published in the *Leiden Journal of International Law*, that allowed me to cordon some of the wider questions about historiography and method that I was tempted to explore in more detail here; Gerry Simpson provided useful comments at that forum, and I thank Thomas Skouteris once again, as well as Matilda Arvidsson and Miriam Bak McKenna, as well as Anne van Aaken, Jean D'Aspremont and Carlos Esposito who provided useful feedback encouragement as Judges for the ESIL Young Scholar Prize. The Cold War V Workshop allowed me to revisit and extend some of these ideas about historiography and begin thinking about the

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INTRODUCTION: BELIEVING TOGETHER

> What happens when men believe something together, or try to believe it? What do they have to expel in order to stake territory, claim a history and form a shared identity?
>
> — Anne Enright[1]

This thesis is about men trying to believe things together. It examines not a single object of belief, but rather two ideas thought together: the systems of national law on the one hand, and the systems of international public law on the other, or, in the neat contemporary dichotomy, the 'domestic' and 'international'. Since the end of the Cold War, the relationship between international and domestic law has become one of the most pressing conundrums in legal theory and practice. But the tensions are not new. They are old problems of politics, society and law within and between states. Despite the current urgency, no comprehensive study of the emergence and development of the domestic and international has yet been produced. This thesis fills one part of this significant gap. It examines how and why the relationship between domestic and international public law emerged in the works of jurists writing in the British Isles. That development is most clearly understood as products, responses and justifications of projects of empire and the kinds of legal subjecthood that empire required.

This thesis argues that British juristic visions of the international and domestic were primarily motivated by empire and the kinds of legal subjecthood that empire demanded. They emerged, developed and changed in the descriptions, justifications and legal claims of empire. Empire is the polity without limit, driven by expansion and subjugation, justified by improvement, progress, safety and protection. Subjecthood marks the belonging and status within a polity of an individual, group, or dependent semi-sovereign; of who and what is the human being that forms part of the family, the people, the state and the empire. Far from just an interplay between constitution, statute and treaty within imperial

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1 Anne Enright, 'Diary' (2017) 39(18) *London Review of Books* 33, 35.

expansions and contractions, the domestic and international were framed for their opposites. Domesticity was not only about Britain's internal order but the orders of other states. Internationality was not only about the relations between states but the ability to act within them. Ideas of domestic law not only justified the British state to its subjects, but was used to critique the domestic orders of antagonistic European states, and to deny the validity of non-European empires and political groups. Ideas of international law were the means for Britain to express its imperial, absolute sovereignty, and to criticise and check the imperial ambitions of other sovereigns. The domestic and international acted as mediators between legal questions raised by the biggest, unbounded legal entity of the Empire and the smallest units of its cognisance in its individual subjects, from monarchs to ministers to absorbed rightless subjects. Together, they formed a means of critiquing and denying encroachments from laws beyond Britain, from natural laws of the sixteenth and seventeenth centuries, to the rival imperial claims of other powers in the eighteenth and nineteenth, ending with the collapse of the Empire in the mid-twentieth century.

This introduction lays out contemporary academic work on the domestic and international, arguing that there is a distinct lack of any history of these concepts and their interaction. It then explores the methodological questions raised by such a history, before outlining the argument of the thesis, its structure, and the value of its contribution.

I Contemporary Visions

Contemporary international and public law scholarship on the domestic and international in the fields of international and public law in the Global North form three major phases that roughly map onto the last three decades. From 1989 to 2001, jurists fixed on the questions of interaction in the newly globalised liberal-democratic world, where the relationship fixed on the expansion of international institutions and the joint globalisation of liberal international law and liberal-

democratic constitutional ordering.[2] These studies examined constitutional barriers to implementing new multilateral treaties in adherence to human rights or neoliberal trade requirements, humanitarian interventions in service of markets or democratisation,[3] the incursion of global problems into local courts,[4] and, at the more abstract level, questions about the endurance or transformation of concepts of 'sovereignty', 'self-determination' and 'state' in the globalised world,[5] the spread of constitutional ideas from the Global North throughout the world,[6] and the 'spectres' of the failed socialist international,[7] or possibilities of a renewed Third World project.[8] From 9/11 and the Iraq War, these questions shifted to focus on more egregious forms of violence: the expansion or control of executive powers to combat terrorism and 'failed states' and the curtailing of human rights in favour of security,[9] to the implementation of trade sanctions, to new conceptual fixations on global public or administrative law,[10] legitimacy,[11] and constitutionalism

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2 Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *EJIL* 503; David Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow' (1994) 4 *Transnational Law & Contemporary Problems* 329.

3 Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443.

4 Karen Knop, 'Here and There: International Law in Domestic Courts' (1999) 32 *NYU Journal of International Law and Politics* 501.

5 Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *MLR* 1; Karen Knop, *Diversity and Self-Determination in International Law* (CUP, 2002); Neil Walker (ed), *Sovereignty in Transition* (Hart, 2003).

6 Vladlen Vereshchetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National Law' (1996) 7 *EJIL* 29.

7 Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (Routledge, 1994); Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP, 2000).

8 BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Sage, 1993); Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (1999) 32 *NYU Journal of International Law and Politics* 243; Peter Fitzpatrick, '"The New Constitutionalism": The Global, the Postcolonial and the Constitution of Nations' (2006) 8 *Law, Democracy and Development* 1.

9 Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 *Harvard Law Review* 1791.

10 Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3 and 4) *Law and Contemporary Problems* 15.

11 Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *EJIL* 907.

unmoored from territorial states,[12] and new appraisals of the imperial histories of international law in that violent moment.[13] Since the 2007 Global Financial Crisis and the resurgent 'populism' and 'anti-globalism' ten years hence, the domestic and international again formed spectres for each other: nationalist visions that invoke sovereignty to threaten and retreat from the liberal international order with strains of protectionism, chauvinism and isolationism,[14] to renewed attempts to transform and reshape global neoliberal capitalism to reassert the rights of states against multinational corporations and their parent states, particularly in the Global South.[15]

A range of visions of the relationship of domestic and international law exist today. Their variety and vagueness reflect the many uses to which the relationship has been put. We read of tensions, clashes, fragmentation, and splits in the violent categorisations, where the laws, rules, principles and ideals of each sphere jostle with those of the other for supremacy.[16] We see the imagery of divisions, barriers, gaps, and boundaries in the geographical or quasi-natural accounts, which might either suggest the specificity of different legal cultures that cannot or should not

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12 Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP, 2010); T Kleinlein, 'On Holism, Pluralism, and Democracy: Approaches to Constitutionalism beyond the State' (2010) 21 *EJIL* 1075.

13 Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP, 2004); Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP, 2005).

14 James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 *MLR* 1; David Singh Grewal, 'Three Theses on the Current Crisis of International Liberalism' (2018) 25 *Indiana Journal of Global Legal Studies* 595; Hannah Woolaver, 'From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal' (2019) 30 *EJIL* 73; Martti Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (Asser, 2019).

15 John Linarelli, Margot Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP, 2017).

16 See, eg, Orford, 'Locating the International' (n 3); Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP, 2011) 256.

be bridged,[17] or the fluid state,[18] or conversely projects of 'global' or 'transnational law' that displace the domestic–international dichotomy and flatten legal cultures,[19] or the barriers around institutions and lives in the public and private.[20] In healing or therapeutic accounts, we are urged to seek out dialogue, translation, balance, fertilisation, symbiosis, convergence, integration, mutuality, unity or harmony between the spheres.[21] And still others offer pathways of dissolution, decolonisation or indigenisation of both domestic and international laws, in projects for radically reshaping both categories.[22] The purposes to which these images can be put are also varied. They can fit interventionist projects, like the invocation of the responsibility to protect or democratic legitimacy to peel back sovereignty or justify the replacement of a domestic constitutional order entirely, or where the laws of intellectual property and contract interpose themselves in the public laws of developing states.[23] They can support projects of reshaping, as when principles plucked from domestic constitutions are said to inform or limit or require the reform of international legal structures and processes.[24] They can also

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17 See, eg, Anthea Roberts, *Is International Law International?* (OUP, 2017); Joseph HH Weiler, 'The Geology of International Law — Governance, Democracy and Legitimacy' (2004) 64 *ZaöRV* 547; Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP, 2016).

18 Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (Federation, 2005).

19 See Karen Knop, 'Elegance in Global Law: Reading Neil Walker, *Intimations of Global Law*' (2017) 8 *Transnational Legal Theory* 330; Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20 *Indiana Journal of Global Legal Studies* 605.

20 A Claire Cutler, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law' (1997) 4 *Review of International Political Economy* 261; Kim Rubenstein and Katharine G Young (eds), *The Public Law of Gender: From the Local to the Global* (CUP, 2016)

21 See, eg, Kumm, 'Cosmopolitan Turn' (n 19); Eyal Benvenisti and Alon Harel, 'Embracing the Tension between National and International Human Rights Law: The Case for Discordant Parity' (2017) 15 *ICON* 36.

22 Peter Fitzpatrick, 'Ultimate Plurality: International Law and the Possibilities of Resistance' (2016) 1 *Inter Gentes* 5; Irene Watson, 'First Nations and the Colonial Project' (2016) 1 *Inter Gentes* 30, and, with a more doctrinal focus, Roberts (n 17).

23 Anne Orford, *International Authority and the Responsibility to Protect* (CUP, 2011); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (CUP, 2011).

24 Devika Hovell, 'Due Process in the United Nations' (2016) 110 *AJIL* 9.

sometimes serve no explicit project, but instead reflect a kind of background chauvinist obliviousness, in the many instances where principles accepted as the centre of one system — due process, sovereignty, the rule of law; all manner of highly contested but purportedly simple and clear ideas — are claimed to be lacking in another state, and then insisted upon.

While questions of the domestic and international are everywhere for public and international lawyers and jurists alike, no comprehensive account of the emergence and development of the relationship between them has yet been produced. Instead, scattered studies have examined select aspects, places and timelines in which the domestic and international were debated. Many works have focused on the well-known continental debates of the 1920s and 1930s in Germany and Austria.[25] Some studies 'revisited' the origins of theories of the relationship told through histories of case law.[26] Other works looked to historical antecedents to deepen understandings of present dilemmas, particularly to understand those general systems by analogy to earlier state systems.[27] Still other studies place the interaction at a more everyday, administrative level of colonial laws and their 'hybrid' international character, external to the imperial state,[28] or the imperial uses of public law ideas and doctrines.[29] Perhaps the most promising perspectives

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25 See, eg, Hauke Brunkhorst, 'Critique of Dualism: Hans Kelsen and the Twentieth Century Revolution in International Law' (2011) 18 *Constellations* 496; Richard Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past' (2009) 22 *LJIL* 251.

26 See especially Roger O'Keefe, 'The Doctrine of Incorporation Revisited' (2009) 79 *BYIL* 7; Earlier studies combine judicial and theoretical examinations: Joseph Gabriel Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 *BYIL* 66; Edwin D Dickinson, 'Changing Concepts and the Doctrine of Incorporation' (1932) 26 *AJIL* 239; H Lauterpacht, 'Is International Law a Part of the Law of England?' (1939) 25 *Transactions of the Grotius Society* 51.

27 Marlene Wind, 'The European Union as a Polycentric Polity: Returning to a Neo-Medieval Europe?' in JHH Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (CUP, 2003) 103; Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (CUP, 2017).

28 See Martti Koskenniemi, 'Colonial Laws; Sources, Strategies and Lessons' (2016) 18 *JHIL* 248; Lauren A Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (HUP, 2016).

29 Thomas Poole, *Reason of State: Law, Prerogative and Empire* (CUP, 2015); Dylan Lino, 'The Rule of Law and the Rule of Empire: AV Dicey in Imperial Context' (2018) 81 *MLR* 739.

have come from historians with new interests in the international and global forms of law and political thought, in recent work that has dealt with international political thought,[30] and neoliberal projects to dissolve the legal barriers within and between states for homogenised global capitalism,[31] where law and legal thought are important, but not necessarily the central story.

Perhaps the most profound image of the domestic and international that reflects both its contemporary importance and the problems of exploring the depths of its history is Philip Allott's characterisation of it as a 'crude split'. Allott mused that there must have been a 'tragic day in the history of humanity when the subtle and complex concept of law was crudely split into two — national law and the law between nations.'[32] Had this tragedy not occurred, thought Allott, international law could have been made 'to play the wonderfully creative functions of law in the self-constituting of all forms of society … serving the common interest of all-humanity'.[33] This is a mythic history, in the deep time of law, that cannot be clearly glimpsed because of the entrenchment of the split in our training, minds, and lives. The problems of the late twentieth century showed that this division must have been made somewhere in law's labyrinthine histories, too murky to discern and yet in evidence everywhere. In the meantime, any creative or constitutive role for law remains unfilled and marred by the divide between nations.

Despite the poetry of Allott's vision, this thesis shows that while the split might seem inevitably crude, it can be explored. Given the clear gap in historical inquiries into the origins of these ideas, it must be. It did not crack on a single day. It was not the product of a single mind. Nor was it only a split — it was also a shaping, an ordering, a moulding, an expulsion. In the long process of events and

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30 Jennifer Pitts, *Boundaries of the International: Law and Empire* (HUP, 2018); David Armitage, *Foundations of Modern International Thought* (CUP, 2012).

31 Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (HUP, 2018).

32 Philip Allott, 'The Concept of International Law' in *The Health of Nations: Society and Law Beyond the State* (CUP, 2002) 289.

33 Ibid.

juristic writings, what really emerges is a long, complex fissure that twisted over time, serving a range of purposes for different writers that were, most often, intimately connected with debates over empire, and used different ideas of state, people, community, authority, power and law itself to respond to those past world events that touched on the domestic and international forms of law.

II METHODS: TERMS, TEXTS, THOUGHT, TAXONOMY

The contemporary visions of the domestic and international examined above, combined with Allott's crude split, provide a starting point for the taxonomy of the motifs of interactions, purposes and projects for the domestic and international used in this thesis, as well as its broader considerations around method: its approach to legal texts, jurists, 'legal thought' and the category of 'British'. While each of these elements are specific to this thesis, they also relate to wider concerns in the historiography of international and public law.[34] This part explores the methodological questions first, before outlining the taxonomy of motifs.

A first methodological problem is how to approach the terms 'domestic' and 'international'. This project looks for them and especially the links between them as wide, messy ideas used with a range of meanings and connotations, within different contexts, and serving different projects. This is not a narrow history of, say, differing accounts of the doctrine of incorporation, which would mainly reflect the language and decisions of courts, and fix a thin idea of interaction between domestic and international laws as primarily institutional, about incorporation in legislation. While that is an important story, it is only part of it, and confining the focus to this doctrine would presume sizable limits to these ideas. Rather, 'messiness' points to juristic thinking about the domestic and international that involves looking for analogies, links, mirroring and rhetoric that might not necessarily involve these words, but reflects the kind of internal and external spaces and movements of law and legal ideas that is constant. This project

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34 See further Martin Clark, 'Ambivalence, Anxieties / Adaptations, Advances: Conceptual History and International Law' (2018) 31 *LJIL* 747; Maks Del Mar and Michael Lobban (eds), *Law, Theory and History: New Essays on a Neglected Dialogue* (Hart, 2016).

sometimes takes the 'domestic' very literally in legal texts, as invocations of the relation of the family and patriarchal authority, or the spread of families, that are then related to images of the state, the imagined state of nature, the legitimacy of the sovereign or the international community. These literal domestics can be analogies, or histories, or justifications. But in other works, particularly more sophisticated legal doctrinal treatments, terms like 'civil law', 'internal law', 'municipal law', and 'national law' are used to describe what today would be called domestic. Where those usages appear, the question becomes why those terms, in this scheme, at this time? Similarly, the international can take many forms. Legally, it appears in terms like the law of nations, the law between nations, or in vaguer and more contested terms that are linked but distinguished — to different extents by different jurists — like divine, natural or universal law, *jus gentium*, or the common law of mankind. The international also holds wider senses linked to law, but resting more essentially in politics or economics or philosophy, looking to the morals or principles of cosmopolitanism, humanity, civilisation, liberty, commerce or progress. And finally, it can be 'translated' back into the past, as when 'international' was used in the early twentieth century translations of the Latin texts of Gentili and Zouche, originally written long before its invention.

This approach to terms leads to the wider question of archive and what counts as a juristic text. The main archive for this history is the written, printed, publicised, circulated, read and used works of British legal thought. Some of these works are artefacts of cloistered thought, addressed only to other jurists or small circles of private readers. Others are polemical, addressed to wide public audiences and dealing with law's place in the most pertinent issues of the day. This thesis uses these texts and the projects of their authors as the material for guiding a history of the domestic and international. That requires highlighting their links, commonalities, disagreements, and divergences, while also retaining parts of their messiness, incoherence and the fact that they frequently do not speak to each other. There is a risk of imposing too much coherence. The silences, gaps and missed connections, and the unclarity in their works should be retained, to resist the urge to cover the gaps and elisions in their theories, to preserve the partiality and inconclusiveness of these texts, and the ways in which their central ideas might

not seem convincing, or do not seem to clearly link themselves to the contexts in which they were written and to which they respond. That, in turn, is an aspect of this project's resistance against evaluating any of these ideas, in the sense of contending which is a 'correct' or persuasive concept of domestic or international, and indeed resisting the common path of identifying the 'pivotal' thinkers or moments that forged the path to the supposed wisdom of any particular present conception.

This leads to the next issue of what, precisely 'legal thought' is, and the methodological questions raised by focusing on it. Cognisant of recent suggestions that international and public law history is too fixated on ideas,[35] or too resistant to the need to contextualise and avoid anachronism,[36] or too overtly political,[37] this thesis takes up a specific mode of engaging with ideas and legal thought that focuses on the jurist[38] and juridical thought.[39] Legal concepts are not approached here as engines of change, or as significant or influential ideas that shaped the world, though they may well have that effect. Rather this project seeks to reconstruct, arrange and contextualise the legal theories of a range of jurists that engaged with ideas of the domestic and international to see how they used them in their projects and visions for the world and its laws. While some jurists selected here have long been 'influential' or 'significant', chosen time and again as central characters in the pantheon of Western legal thought, others are more obscure, or rarely read as relevant to public or international law. Either way, they appear here because they illustrate the different uses and content that ideas of the domestic and

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35 Benton and Ford (n 28) 21–22.

36 Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 *JHIL* 7; Kate Purcell, 'On the Uses and Advantages of Genealogy for International Law' [2019] *LJIL* 1.

37 JWF Allison, 'History to Understand, and History to Reform, English Public Law' (2013) 72 *Cambridge Law Journal* 526.

38 S Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1 *London Review of International Law* 63.

39 Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in Mark Toufayan et al (eds), *Droit International et Nouvelles Approches Sur Le Tiers-Monde: Entre Répétition et Renouveau* (Société de législation comparée, 2013) 97.

international could have for their visions, projects and worlds. Legal thought is interesting because it purports to describe present laws accurately, to sometimes provide visions of how they ought to be understood or reformed, and often to relate these descriptions and aspirations to conditions of politics, society and economics. With their minutiae, weight, tediousness, and polemics, juristic works are carefully planned ruminations. What they argue, and what they elide, is important. Each text marks a point at which the projects and worlds of these writers made their way into the intellectual traditions of public and international law.

Projects and worlds lead to the confinement to 'British' legal thought. This thesis works with a tradition of legal thought that is recognisably 'British' and yet still complex, contested and largely resistant to clear definitions. Britishness is suggestive of several shared characteristics and experiences: a shared history, particular legal training and cultures both for public and international law in their theories and practices, and certain images of government, state, constitution and law.[40] Yet some of these characteristics pose challenges for this project. First, 'British' is an amorphous category in geographic, temporal and juristic terms: it risks anachronism (not least that there was no polity of 'Great Britain' before 1707) and vagueness, in that it has always been an essentially contested idea. Second, British approaches to law and legal thought supposedly rest on an aversion to systematicity and theory itself. The law is the product of parliament and the courts, not the writings of any non-official person or body, regardless of how convincing or reasonable those writings are. British — and especially English — legal philosophy typically focuses on defining and understanding the content of core concepts like law itself, the rule of law, or the nature of sovereignty, approached as an analysis of the meaning of words at the level of language alone,

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40 See, eg, DHN Johnson, 'The English Tradition in International Law' (1962) 11 *ICLQ* 416; Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP, 2012); Shaunnagh Dorsett and Ian Hunter, *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, 2010); Shaunnagh Dorsett and John McLaren (eds), *Legal Histories of the British Empire: Laws, Engagements and Legacies* (Routledge, 2015).

rather than their social, political or economic contexts.[41] The strength of this refusal is a reminder that the writings of jurists, within or about the law and government of any state or empire are always already political. The claimed aversion to theory rests on cardinal principles that are themselves up for debate. Third, and finally, Britishness raises a seemingly basic contradiction for this study in the risk of parochialism. How could the international be illuminated by the work of scholars from one national group? How could the domestic, in these writers, be anything other than parochial?

One remedy for each of these problems is the focus on empire. Britain as an imperial polity has long been constructed as both a domestic and international thing; the binding and rebinding of several nations, alternating between violence and then political–legal settlements that formed its constitutional accretions. This constitutional story is marked by treaties of union and contested principles of inter-governmental interaction. Its foundations lie in a range of legislative texts, shaped by principles, doctrines and rules that are never fixed. There are some profound but little noted parallels between the fields examined here. British constitutionalism closely maps the growth and nature of the system of international law. Both have core texts, principles and doctrines, inescapably indeterminate, that emerged from a long historical struggle between polities and peoples, with philosophical roots in the transformations of natural law, the influx of scientific positivism, and the political philosophies of liberalism and welfarism, among others.[42] Constitutional and international law have always formed a twinned problem for Britain, paradoxically always present in legal principles, opinions, morality and always said to be respected and adhered to, but also simultaneously incapable of being seen clearly, fixed into accepted definitions, based always in custom and power expressed in the language of laws. But most

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41 See, eg, Neil Duxbury, 'English Jurisprudence between Austin and Hart' (2005) 91 *Virginia Law Review* 1. For the Scottish side of this divide, see Douglas M Johnston, 'The Scottish Tradition in International Law' (1978) 16 *Canadian YBIL* 3.

42 See further Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP, 2012).

importantly the empire has always been a place where many kinds of laws moved and met.[43] The ebb and flow of Britain's reach as a global power came with a complicated export of ideas about government and law through force, colonisation, and trade, to the extent that polemical histories could call the high point of British imperial power in the late nineteenth century the 'age' of British international law.[44] Britishness and empire in a sense must be the focus of a study of the domestic and international, because it is inevitably at the centre of internal and external forms of power and hence law. It also joins the separate trends in the 'turn to empire' in international legal history[45] and, more recently, in histories of British public law,[46] together insisting that all concepts in public law and international law ought to be treated historically.

Despite this attention to methodological problems, this thesis nonetheless employs a largely conservative frame. It fixes on the published texts of male legal scholars, usually themselves elites or servants of elites, working in and thinking about one of the world's most powerful, long-lived imperial polities, whose projects frequently coincide with their own. But in going back to these texts and figures with the insights of critical legal historiography in mind, we can see anew just how and where the assumptions about justice, the self, family, community, race, power and authority came to be entwined in the legal ideas of domestic and international. While the question of judging figures of the past has excited plenty of contemporary debate,[47] for the purposes of this project it is somewhat beside the point. Legal and historical analysis cannot withhold judgment on the figures of the

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43 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (CUP, 2001).

44 See Wilhelm G Grewe, *The Epochs of International Law*, tr Michael Byers (De Gruyter, 2000).

45 From at least Anghie, *Imperialism* (n 13) to, most recently, Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP, 2019).

46 Most recently and clearly in Poole (n 20); Lino (n 20), but also as a general point in, eg, Martin Loughlin, 'The Historical Method in Public Law' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (OUP, 2018) 982.

47 See Martti Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law' (2014) 22 *Rechtsgeschichte* 119.

past, because we know that the structures they helped build were and remain frequently, deeply unjust, even by the standards of their day. But any judgment ought to take place with self-criticism in mind; that understanding their projects, well-intended or not, is really a guide to how we can and should understand today's world, and to better guide our own projects and attempts to work against legal and political structures that make the world a worse place. Moral judgments may or may not be useful for that aim.

More importantly, there is a sense in which we cannot be done with these figures because they are not done with us. We cannot will a different canon into existence. Instead, we can unpack and critique that canon, asking how and why it was constructed in the way it appears now, to whose benefit, and how it might be re-examined, as the means to creating a different canon, and thereby dismantling this one. Their lives and works are not so much opportunities for judgment as prompts to ask how and why we ended up with them still with us; to ask how the ideas abhorred today were moved into, and remain unexcavated, from the sediment of public and international legal thought.

In her project on the 'uses of use', a project of 'following words around',[48] Sara Ahmed makes the point that in writing of utilitarianism and the inescapability of dealing with dead white male authors, she does not write 'to' them but rather 'of them', in that what she is following is what 'leads to who, to who has been deemed to come up with something'.[49] This project follows similar leads, to who we would deem to have come up with these ideas. It is not written 'to' them to insist on their authority, or as the genealogical font of these ideas — the 'fathers' of international or public law — but instead 'of' them, because they persist, inescapably for the moment, in our juridical present like spectres of long dead, adopted and imagined family members. While this risks reinscribing their presence deeper still, the risk is worth taking and lessened, provided that it is motivated by some material,

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48 Sara Ahmed, *What's the Use? On the Uses of Use* (Duke UP, 2019) 13, see also 3ff.

49 Sara Ahmed, 'Useful' (2017) <https://feministkilljoys.com/2017/07/07/useful/>.

contextual grounding; of asking and exploring why, and at what costs these ideas took these shapes in their writings. What kinds of conditions produced these jurists, and led them to think the way they did? What kinds of lives did their works pre-suppose, idealise, require and make necessary? And, to return to Anne Enright, what did they believe together, expel, claim and form in writing the domestic and international into law and our own shared lives?

These general points about method and methodology all filter into a specific set of ways of thinking about the relationship between domestic and international law that is used throughout this thesis. This project uses a rough taxonomy of motifs to unify these disparate eras and projects, each of which points to kinds as well as purposes of interaction between the domestic and international. The 'roughness' of this taxonomy emphasises that this is not a rigid categorisation into which all instances of theorising the domestic and international fit (or rather must be fitted). Indeed, its elements might be better thought of as a grammar, a rubric, a map, a set of cardinal points, or a field guide to seeing the connections and differences between these juristic works. Four useful motifs that recur throughout these works are allegory, analogy, order and exclusion.

Allegory points to the metaphors, images or similes that liken the domestic to the international, or vice versa. Most commonly, allegory uses an everyday idea to suggest the operations of law; the use of general social or political meanings that we might call 'domesticity' or 'internationality' to provide content or illustrations for law and legal ideas. Perhaps the most powerful image of domesticity is the patriarchal family, used consistently as a measure and model for state power, colonial expansion, and international subjecthood. This image appears in other guises like the nineteenth century bourgeois social club as an allegory for the 'family' of nations, or the imagined primitive or 'state of nature' community as a mirror of legal development for domestic and international societies alike. Internationality, likewise, appears in the use of cosmopolitan sentiments, imperial protection and guidance, or 'world courts', idealised or real, as allegories to guide the development of domestic laws.

Analogy is a more technical, legalistic form of argument that is similar to allegory; the drawing of comparisons or contrasts between rules, principles, ideas or institutions of domestic law and those of international law, and vice versa. Given the professed 'common law' or 'pragmatic' bent of much of British legal theory, it is perhaps unsurprising that almost every jurist examined here uses analogy in some form, and many use it frequently, but it is also a hallmark of civil and natural law methods. These are technical legal arguments, the everyday work of juristic texts, showing similarities and distinctions, to try to draw out the essential commonalities between domestic and international law, or to illustrate where and why they are fundamentally different.

Order takes many forms, but it is a more systematic expression of hierarchy and disciplining. It includes the creation of architectures, schemas or hierarchies on how to sort the rules of international and domestic law, which might rest on the basis of wider principles, political considerations, or a more technical juridical arranging that weights and sorts different rules, principles and ideas into an ornate taxonomy of interactions. Ordering draws connections and conjunctions between laws and jurisdictions to make them seamless or overlapping. It might use the tensions of encounters as the basis for a call to similarity or congruence. It might serve unification by linking different spheres of law, insisting on convergence, similarity or harmonies between different meanings, as in the insistence that international law is simply, naturally, part of the law of the land. The more disciplinary side of ordering involves some resistance to unification, and moving something down the order to make it subordinate to another principle, as where the domestic is used to reject an intrusion by a supposed rule of international law, or the international is invoked to override the domestic; usually of another state or people.

Exclusion is the more destructive, nakedly powerful and chauvinist form of ordering; the denial and rejection of another legal order, sometimes to the point of denying its lawfulness at all. It proceeds from encounters between different legal systems or ideas, where they are seen as conflicting or in tension or rivalry. This is a wide and important category that takes on a range of forms, especially so given

the context of empire. It looks to tensions, clashes, impositions, adaptations and spreading of domestic ideas that might be resolved, pressed or mediated through claims about international law. It also touches on the critiques of the internal laws of other nations or peoples that follow internationalised 'universal' or 'civilisational' principles. It covers the gradual demand that non-European systems must conform and measure up to European — or often specifically British — ideas about government and law, usually coming with demands about reforms or foreign controls. Exclusion involves the expulsion, rejection or removal of things from an order, the harshest form of disciplining. It points to ideas that are 'foreign' or beyond the pale, and part of neither domestic nor 'true' international law. And it covers those imperial forms of domestic and international law that allow or demand the reorganisation of the internal orders of others, alongside their subjugation into subjects of empire. This is perhaps the most important purpose, because it is most plainly at work where jurists use law to stake territories, claim histories and form shared identities.

III Structure, Argument, Contribution

How, then, does this history of the concepts of domestic and international unfold?

Chapter One contends that early uses of 'domestic' emerged to discipline and channel rival universal ideas in natural law to establish the authority of the English imperial state, inside and outside the British Isles. It shows how the domestic was at the foundation of new accounts of sovereign authority in the sixteenth and seventeenth centuries. This forms the 'legal theology' of the domestic; its reaction to, incorporation and secularisation of universalising religious and quasi-religious argumentation in the laws of nature and nations, adapting those into discourses of commonwealth and empire. What precedes the later term of 'international' is universal forms of law that are grounded in and emanate from the domestic sovereign: ideas of commonwealth that justify and order legal power beyond the territorial confines of the British Isles.

Part One argues that Alberico Gentili presented the first thorough account of the interactions of domestic and international laws as part of his project of describing

Protestant humanist commonwealths for the Elizabethan Empire. Gentili arranged the domestic and international to aim at commonwealth, amity and the unity of humanity in works on ambassadors, wars and empire, using analogies and allegories to order and unify the world and its polities. Part Two contends that in the English Civil Wars and Cromwell's Commonwealth and its aftermath, the domestic fulfilled a range of wider uses in the works of five jurists, and firmly emerged by the end of the seventeenth century. This emergence began with Richard Zouche's pivotal shift from the law of nations to the laws between peoples, which was built from detailed domestic analogies. John Selden's works sought to ground imperial jurisdiction in the genealogies of nations dating back to biblical families. Thomas Hobbes explored analogies to leagues within and between families and nations to understand the spread of empire as the propagation of the Commonwealth's children. James Harrington considered empire as based on the division of 'foreign and domestic', which underpinned a messianic mission to spread British laws over the world. Finally, in John Locke's post-1688 federative power, parliament is tied to the law of the land and the executive to the law of nations, inaugurating the basis of the 'modern' understanding of the relationship of domestic and international law.

Chapter Two argues that the 'international' appeared in the late eighteenth century as part of projects of sentiment and political economy that demanded the rational reorganisation of the domestic laws of all states to further commerce, check revolution, and finally articulate national independence. Part One shows how Jeremy Bentham's first writings rejected William Blackstone's Lockean split of 'imaginary' law from 'real' municipal law, grounding Bentham's early works on systems of morals and legislation that led to his coining of the term 'international'. This distinguished laws between states from those within them, leading Bentham to express early hopes that these projects would counteract national prejudice and serve peace. Meanwhile, Adam Smith's parallel account of the international, based on domestic sentiment, reoriented it towards the science of political economy that formed a new set of 'natural' laws, and like Bentham urged the reorganisation of internal government.

Part Two then explores three legacies of Bentham and Smith's visions of the international, which, following the loss of the American colonies and the French Revolution, became intensely fixed on internal constitutions. First, Edmund Burke's reactions to the French Revolution used a 'law of civil vicinage' to support interventions to contain the revolutionary–imperial project and its corruption of natural laws. Secondly, Bentham's later works similarly critiqued the natural law arguments of the revolution, but prompted his turn away from international law to the reform and rationalisation of constitutional systems that culminated in his 1820s attempts in the constitutional code to extend duties of good government to all nations. Finally, while John Austin's account of international law being not strictly 'law' that rested on centring the domestic commanding sovereign would prove pivotal, it is in the works of Travers Twiss that the Benthamite and Smithian themes of sentiment, utility, and political economy are used to ground a theory of international law build on national independence.

Chapter Three shows how the height of the Victorian empire prompted the entwining of the domestic and international in a variety of doctrinal projects tied to independence and interdependence. Part One examines ideas of 'independence' tied to Parliament's position as the focus of imperial and international law enactment. Far from insular, A V Dicey's theories of absolute parliamentary sovereignty were significantly inflected by ideas of internationality. Wider debates over the juridical nature of the empire in its domestic, British Isles form, and its international reach turned frequently to local self-government and imperial restrictions on international personality. Finally, international lawyers like John Westlake used domestic law as a new source of analogies to expand the reach of international law to support imperial claims in the 1890s by undermining or rejecting the reality of non-European domestic laws.

Part Two then examines four rival uses of the tensions between the domestic and international in projects grouped around interdependence; the use of international law to reorder and coordinate systems of domestic law throughout the world. James Lorimer used interdependence as a basis for his project of racialised 'relative equality' that rejected any strong distinction between domestic and

international law, and used domestic systems as a basis for international legal subjectivity. Meanwhile liberal imperial jurists, including Dicey and Westlake, used interdependence to rethink the concerns of domestic law, to emphasise states as aggregates of their 'men', which, in Lassa Oppenheim's influential doctrinal move, grounded a sharp distinction between domestic and international legal subjecthood that insisted only states were the real subjects of international law. Karl Marx and Friedrich Engels' more juridical texts marked socialist reactions to liberal ascendancy, epitomised in their vision of '*the* [First] International' that sought to join the class orders of states across borders, criticised the capitalist underpinnings of domestic and foreign policy alike, and sought to build international solidarity by political capture of the institutions of each state. Finally, the military confrontation that loomed over these projects by the early twentieth century provoked new attempts to coordinate domestic and international law in peace plans that would culminate in the framework of the League of Nations and its aims of developing international law to guide states and reorganise empire.

Chapter Four argues that in the interwar years the domestic and international became central to juristic attempts to transform the collapsing British Empire and wider international order, culminating with general theories of the rule of law within and between states that underpinned the post-1945 settlement. It focuses on the parallel lives and works of two foundational figures in modern public and international law, Ivor Jennings and Hersch Lauterpacht, examining how each used the domestic and international to understand these transformations.

Part One begins with transformations of empire. Jennings' first works consistently argued that the international status of dominions was a question of imperial not international law, and maintained the absolute powers of the Crown over colonies and mandates, even where those grants stemmed from the League. Meanwhile, Lauterpacht analysed the constitutionalization of the international legal community that he initially saw as demonstrating the misguidedness of analogising domestic and international law, which maintained the errors of personified states that stood in the way of genuine international community.

Part Two examines their joint turn towards the rule of law in the 1930s and 1940s. Jennings argued that imperial administration had changed domestic public law, and that Parliament was practically constrained by the system of international law, giving rise to his account of the rule of law in its internal and international forms, the latter of which demanded re-establishing the post-1945 world along the lines of British liberalism. Lauterpacht expanded his idea of the functions of international law to reject its supposed inadequacy and insist that domestic and international laws must both serve the same purposes which limited the internal absolutism of the state and made adjudication necessary.

Part Three considers their post-war projects amidst the collapse of the Empire and new ideas of commonwealth. Jennings' plan for a European federation modelled its international connections on Britain's imperial-constitutional law, while Lauterpacht's proposal for an International Bill of the Rights of Man drew on the British constitutional tradition to propose the reorganisation of the domestic laws of all nations around human rights; a new commonwealth of all humanity.

Recapitulating the arguments of these chapters, the Conclusion shows how the domestic and international played diverse roles in service of many different projects of empire. It argues that recognising the diversity and contingency of these ideas and their imperial imbrications can serve as one path towards new projects of rethinking international and constitutional law alike, in Britain and beyond, in which dissolving or reworking the distinction away from its earlier forms becomes both necessary and achievable.

What, finally, is the contribution of this thesis? It makes a first attempt at understanding the emergence, development and change in two central and inextricable concepts of today's legal thought and practice. It ranges over a great many texts and thinkers to reconstruct their arguments, place them in context and conversation with each other, and to describe and explore the many uses to which they put the domestic and international. It not only lays the ground for further work to understand the domestic and international for theorists in other juristic traditions, but — more ambitiously — it clarifies that both categories and their relation are fluid and contingent; that they can be rearranged, reformed or

potentially dissolved. This history reveals a much more diverse set of roles and projects for the domestic and international than is imagined in our current theorising and understanding of the development of these ideas. The contingency of their past meanings provides one path for unsettling, remaking or dissolving the distinction. That project is one part of reshaping law amidst present global discontents; of dealing with and redressing the imperial, extractive past with which the relationship between domestic and international is intimately bound; of believing something different together.

COMMONWEALTH AND EMPIRE: LEGAL THEOLOGIES OF THE DOMESTIC, 1585–1690

I INTRODUCTION: PRE-HISTORY AND LEGAL THEOLOGY

This chapter examines the 'pre-history' of the domestic and international in the sixteenth and seventeenth centuries. British jurists used the domestic and international to describe and justify the internal ordering of the early English state and Empire, most importantly in relation to legal claims, problems and projects external to it. Throughout this time, the forms of legal authority recognisable today as 'domestic law' were in the process of coalescing around the growing institutions of sovereign, parliament, and courts, becoming attached to ideas of territory, jurisdiction, commonwealth and empire. By the end of this development, the domestic began to resemble its contemporary meanings of common and statute law, tied closely to an idea of jurisdiction that was predominantly based in territory and property; the 'law of the land', pronounced, supervised, and changed by Parliament alone. Bentham's 1780s neologism 'international' is of course absent from the English texts examined here. But it does appear in the early twentieth century anachronistic translations of the Latin works of Gentili and Zouche. This chapter uses the term 'international' to point to its predecessors in this period, the precursors to the later coinage: forms of morality, politics and law that moved beyond single jurisdictions, especially inter-sovereign, universal and natural laws. Clarifying exactly what kind of law this was, and using it to understand, justify or limit the power of sovereigns, foreign and domestic, formed important projects for these jurists, pursued as part of the coalescing of domestic law.

In exploring this pre-history, this chapter uses a frame of 'legal theology'. Just as political theology examines the secularisation of religious ideas into civic and political discourse,[1] legal theology, as it is used here,[2] points to the importance of

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[1] See, eg, 'Editors' Introduction' in Carl Schmitt, *Political Theology II* (Polity, 2008) 5–6.

[2] Others have used the phrase too: see, eg, Peter Fitzpatrick, 'Legal Theology: Law, Modernity and the Sacred' (2008) 32 *Seattle University Law Review* 321.

religious debates and ideas in providing the prompts and foundations for secularised juridical thinking.[3] These jurists engaged in a process of establishing the nature and limits of forms of authority that would today be termed domestic and international, and like their successors, employed these concepts to understand imperial ideologies, civil wars, interventions, and the legitimacy and authority of sovereigns and states, foreign and domestic. In this foundational moment, jurists used the 'domestic' in a range of moral and political meanings, most significantly as analogy or allegory for explaining the origins, nature and authority of sovereigns to their people and each other. One particularly significant, frequently recurring allegory involves the domestic as paternal power, which included ideas about the household, patriarchal authority, family genealogies, enslavement, guardianship and marriage, with examples drawn from Roman and Christian religious–legal discourses. Traditions like humanism and the civil law, and contested ideas like sovereignty, authority and jurisdiction formed a secular grammar with which jurists articulated a domestic sphere of law. In various ways, they broadened it out to ideas of commonwealth and empire, placing it in conversation with or reaction to universal natural law, papal jurisdiction, biblical allegories, and sectarian conflicts in Europe and England.

Part One examines Gentili's works, which used extensive analogies between civil law and the law of nature and nations to begin laying the foundations of a domestic legal sphere, dealing with issues of ambassadors, war, and empire as part of his project of building a Protestant humanist commonwealth. Part Two turns to five juristic attempts to understand the domestic during the Civil Wars and Cromwell's Commonwealth, which culminated in the emergence of the basis of the 'modern' division of domestic and international law in Locke's work.

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3 This is not an uncommon emphasis, particularly in public law histories: see, eg, Martin Loughlin, *Foundations of Public Law* (OUP, 2010); Eugene H Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton UP, 1957).

II GENTILI'S PROTESTANT HUMANIST COMMONWEALTHS, 1585–1608

A *Introduction*

Henry VIII's split from the Catholic Church in 1533 was a domestic and international legal event: a dispute over the legality of the annulment of a marriage that ended with Henry's declaration that the Pope no longer held supranational jurisdiction over England's spiritual affairs.[4] The Elizabethan Settlement re-established that status, confirming Elizabeth I as the Supreme Governor of the Church of England. Edward VI's minority reign between those of Henry and Elizabeth afforded court counsellors the opportunity to begin to reorient the monarchy away from prerogative and towards parliament, a project they consolidated in the early decades of Elizabeth's reign to lay the basis for English imperial ambitions.[5]

As a jurist and occasional advisor to Elizabeth during this imperial expansion, Alberico Gentili (1552–1608) used a variety of domestic analogies and allegories to begin to order the encounters between multiple legal systems. Exploring the conflicts and tensions between domestic and international rights and duties, Gentili dealt with a range of legal orders — the historically-persistent Roman civil law, the law of nature and nations, religious laws and other moral and political ideas about diplomacy, sovereignty, government and war — that had not yet been collapsed, as they would be in the late eighteenth century, into solely 'internal' and 'international' laws. What links this development together is Gentili's project of humanist commonwealth, set against religious universalised hegemony in ideas of supreme jurisdiction, unlimited by law, typified in the spectre of the Pope. His legal theology was of turning religious and universalising conflicts into ones

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4 GW Bernard, *The King's Reformation: Henry VIII and the Remaking of the English Church* (YUP, 2005).

5 See further Stephen Alford, *Kingship and Politics in the Reign of Edward VI* (CUP, 2002); John F McDiarmid (ed), *The Monarchical Republic of Early Modern England* (Routledge, 2016); AN McLaren, *Political Culture in the Reign of Elizabeth I* (CUP, 1999); K MacMillan, *Sovereignty and Possession in the English New World* (CUP, 2006).

arrangeable, understandable and resolvable through the language of laws, rights and duties; ultimately, in the mould of a Protestant humanist commonwealth.

B *Ambassador and Sovereign, Unity and Discord*

Counsel lay at the foundations of Gentili's first consideration of the problems of the domestic and international raised by ambassadors. As counsellors on the external affairs of states and conduits between sovereigns, ambassadors began to proliferate throughout Europe in the early sixteenth century. With the foreign affairs projects of Henry VII and a range of popes for peace plans, alliances and strengthening imperial hierarchies, these temporary envoys and diplomatic missions led to the development of the embassy as a permanent institution, and with it the possibility of near-constant diplomatic communication between polities throughout Europe.[6] While undoubtedly an old institution, ambassadors and permanent embassies became the primary movers of treaty negotiations and representatives of the wills of foreign sovereigns, and took on a new legal importance as the conduit through which sovereigns — and their jurisdiction and authority — now met and communicated constantly. The connection of legal systems was not, however, always confined to sovereign relations. Ambassadors, who were often merchants, frequently pursued their own private interests, with or without the permission of their sovereign. Their immunity from certain domestic laws of their receiving countries, derived from their status as sovereign representative, sometimes led to contract and property disputes, and these activities — again, sanctioned by their sovereign or not — could run against the public powers of their receiving sovereigns.[7] One such episode, not around trade but treason, prompted Gentili's first consideration of the domestic and international.

In 1580, Gentili and his family fled his native Perugia, where in 1571 he had obtained his doctorate in civil law and was a judge and scholar, to escape religious

6 See generally Garrett Mattingly, *Renaissance Diplomacy* (Houghton Mifflin, 1955).

7 See further Dante Fedele, 'The Renewal of Early-Modern Scholarship on the Ambassador: Pierre Ayrault on Diplomatic Immunity' (2016) 18 *JHIL* 449.

persecution for their Protestant faith. Moving through the Holy Roman Empire, staying briefly in Tübingen and later Heidelberg (where Gentili briefly held a chair in law), the Gentilis arrived in England in August 1580. Falling in with some of Elizabeth's late-reign counsellors, among them the poet-ambassador Sir Philip Sidney, Gentili became Reader and then Regius Professor of Civil Law at Oxford. In 1584, Gentili provided legal counsel to Elizabeth on the Mendoza affair, convincing the Queen that she could expel, but not execute, the Spanish ambassador for his involvement in a treasonous plot to replace her on the throne with Mary. Building on his consideration of this dispute, the following year Gentili published his first major work, *De Legationibus*, on the rights and duties of ambassadorial legations.[8]

In his consideration of the Mendoza case, Gentili began by noting that ambassadors are to remain safe at the court of another, even an enemy. Sovereigns can expel them at their whim and should 'use every means of anticipating the ambassadors, if they should plan any mischief', but may not allow anyone to do them physical harm.[9] As the ambassador's status is given by the law of nations, he can only be tried under that body of law, and not under the civil law of any particular state. While much of this immunity covers an ambassador's protection from civil suits (particularly contract disputes), for Gentili's purposes the major, difficult question was an ambassador's involvement in conspiracy against the sovereign. Gentili conceived of this as both a civil and international law crime, but on different grounds: 'To plan and plot the death of a sovereign is a heinous crime in civil law; it is a crime under international law also, but not on the same

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8 On Gentili's early life, see Thomas Erskine Holland, *An Inaugural Lecture on Albericus Gentilis* (MacMillan, 1874); Peter Haggenmacher, 'Grotius and Gentili: A Reassessment of Thomas E Holland's Inaugural Lecture' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (OUP, 1992) 133. On Gentili's humanism see Richard Tuck, *The Rights of War and Peace* (OUP, 1999) chs 1–2. On Gentili and Sidney, see especially Christopher N Warren, 'From Epic to Public International Law: Philip Sidney, Alberico Gentili, and "Intercourse among Enemies"' in *Literature and the Law of Nations, 1580–1680* (OUP, 2015).

9 Alberico Gentili, *De Legationibus Libri Tres*, tr Gordon J Laing (OUP, 1924) 96.

grounds'.[10] Without articulating the precise difference, Gentili turned to differences in procedural requirements under civil and international law for witnessing contracts, then promising to clarify it in the passages to come.[11]

The difference between civil and international law begins to emerge in Gentili's use of general ideas about sovereign equality, self-defence, and the preservation of unity over discord. Sovereigns are entitled to 'repel violence' against them, but that right has its limits, and contravening them involves a grave offense against international law. In this instance, because a sovereign can order an ambassador's departure, that option becomes the appropriate limit, and the sovereign cannot put the ambassador to death. In explaining this reasoning, Gentili analogised sovereign–sovereign interactions to those between private individuals: 'The principle of international law holds equally for all, and the principle which controls the relation of private individual to private individual is unquestionably the same as that which controls the relation of public personage to public personage, and of ambassador to king, because an ambassador also is the personal representative of a sovereign.'[12] And yet the power remains with the receiving sovereign to exercise alone, rather than in a civil suit between sovereigns (impossible for lack of an authoritative judge), or even by diplomatic negotiation: the sending sovereign need not be consulted about the offence, and an ambassador may be dismissed for a wide range of lesser offences or slights, such as insulting the receiving sovereign. The distinctions rested on the purpose of these prohibitions. Treason and lèse-majesté alike are wrong at the international level because they offend the purposes of the law of nations, namely by going against its aims of 'bring[ing] men together' and dissuading 'the promotion of dissension and discord'.[13] It is this promotion of unity, and avoidance of discord, at which ambassadors, sovereigns, and the laws within and beyond states and empires ought to always aim.

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10 Ibid 97.

11 Ibid 98.

12 Ibid 112.

13 Ibid 118.

While the Mendoza problem provides the clearest example of international laws limiting a sovereign's domestic powers, much of the general theorising in *De Legationibus* also examines the tensions between the domestic and international: the origins of embassies; the devolution of sovereign power to ambassadors; the restrictions on embassies of subjects; and the kinds of constitutional orders that can send ambassadors. The remainder of this part explores these in turn.

Gentili's origin stories about the meanings and purposes of ambassadors provide a first, strong link of domestic and international in the importance of ambassadorial rituals of sovereign authorisation, and the ambassador as the figure that goes beyond the collected families of the nation in order to constitute it, and give it its international personality. Gentili first looked to the office of ambassador in Roman law meanings of 'legate'; a person representing or assuming a superior's function, either military or civilian (from the staff of a magistrate), or to state a sovereign's position on a particular question.[14] This delegation of the powers of an office to another for the purposes of communication stems from legal ritual, conducted within the sending state, where the sovereign consented to delegate to the ambassador the power to represent the people of Rome.[15] Only 'fetial priests' could be ambassadors; a family-like college formed on patriarchal lines, headed by the *pater patratus*, with extensive rituals, ceremonial insignia and attire, all of which Gentili described in detail. Fetial priests took up special ambassadorial functions of forming alliances, declaring war, seeking redress, ordering a person to leave a place, or surrendering a person, and treaties made without the presence of two fetial priests were 'wholly invalid'.[16] Gentili endorsed the poet Catullus's line that 'the land which is without thy sacred rites cannot give guardians to its boundaries'.[17] Without the ritual of sovereign investiture, and the fetial college, Rome could not hold authentic borders. Telling the second, biblical story more

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14 Ibid 3.

15 Ibid 6–7.

16 Ibid 28ff.

17 Ibid 28, and see 28–48.

briefly, Gentili saw Moses' sending of ambassadors as the point at which 'a state had developed from the family' of the Hebrews.[18]

But Gentili moved beyond the particularities of either Rome or the Bible, promising that his multiple historical examples would 'show that the institution of embassies, with their maintenance, rights, and dignity, has existed among all nations' including, explicitly, barbarian states.[19] In this general history, Gentili located the origins of ambassadors in the division of humanity into states, and the necessity of their jurisdictional interactions. As an institution, the embassy arose with human progress out of the 'state of nature', following 'the separation of the nations, the foundation of the kingdoms, the partition of dominions, and the establishment of commerce'.[20] An ambassador or embassy could have no meaning or use in the state of nature, but only after the formation of polities with 'contiguous territory'.[21] That proximity led naturally to the making treaties to promote friendship and prevent violence between them, and with this neighbouring communities gained the capacity to 'respect … the common good [and] adopt customs or laws of a reciprocal nature'; that is, to coordinate, where possible, their local laws in service of a wider common good.[22] In each of these origin stories, the ambassador is the figure that both constituted the nation, and allowed it to represent itself as a polity beyond and above its constituent families.[23]

These origin stories supported Gentili's more general definitions of the ambassador, embassy and sovereign that emphasised the devolution of sovereign power to a subject through law, which moved those domestic powers into the

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18 Ibid 51.

19 Ibid 50.

20 Ibid 49–51. Gentili's 'state of nature' is that 'depicted by Lucretius in his incomparable poem': see further Titus Lucretius Carus, *On the Nature of Things*, tr Martin Ferguson Smith (Hackett, 2001).

21 Gentili, *De Legationibus* (n 9) 51.

22 Ibid.

23 Ibid. On Gentili's origins story here as an Epicurean addition to Roman law, read through the city, see Annabel S Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton UP, 2011) 189–90.

international realm. At the outset of *De Legationibus*, Gentili defined ambassadors in religious terms, as 'one who in the name of the state or of a person still more sacred has been sent without the right of supreme command to a state or person still more sacred to say or do something in the interest of the state or sacred person by whom he has been sent'.[24] Ambassadors are endowed with limited powers, sent to a polity of similar rank, to act for particular purposes and in the interests of the sending sovereign. But they also filled a special position in the legal order of the receiving sovereign. Ambassadors are a class of foreigner not subject to their receiving sovereign, and these immunities kept the 'distinction of sovereignties' intact: 'For if he who represents a prince is a subject of the sovereign to whom he is accredited, the prince himself is a subject in the person of his representative'.[25]

Gentili's account of internal embassies served to bolster this sacredness of the state's domestic order on the international stage, leading to extended arguments examining and denying the legitimacy of embassies sent from subjects to sovereigns to remedy domestic issues. Groups of subjects do not hold a right of embassy to their prince, or to the prince of any other nation. The fundamental reason for this was the inequality of princes and subjects, and the position of true ambassadors as sovereign representatives not bound by the domestic laws of other states: 'That subjects have no right of embassy with their ruler is evident from the fact that we cannot be on an equality with potentates and rulers'.[26] Subjects are bound by the laws of the state, while an ambassador 'assumes equality with the sovereign to whom he is accredited' and is not bound by that state's regulations or ordinances.[27] For subjects to gain ambassadorial powers, they must contest the constitutional order. A faction in a civil war must make a claim 'by word and deed' to the 'whole organisation of the state, or half of it' to gain the right of embassy, as holding now between two equal combatants who claim to be sovereign.[28]

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24 Gentili, *De Legationibus* (n 9) 7.

25 Ibid 51.

26 Ibid 85.

27 Ibid 84–5.

28 Ibid 82.

Embassy rights hold between mere enemies in warfare, so ‘still more’ should they hold where the objective of each faction is not to destroy the state but control it: ‘Such men are merely adversaries’ and their civil war is not an annulment of the ‘civil code of nations’ but rather the ‘confusion’ of domestic law.[29]

Gentili also explicitly denied the right of colonists to send embassies to an imperial sovereign. Gentili saw ‘very clear evidence’ of a prohibition on internal colonial embassies in Livy’s account of the Roman Senate’s refusal to receive or grant the usual diplomatic protections to embassies from the colonies, as these rights are ‘framed for foreigners, not citizens’.[30] Yet Gentili carved out an exception for private citizens carrying on their own private business with foreign sovereigns. Subjects might be in contact with foreign rulers, but only to exercise their private powers in private negotiations.[31] These commercial embassies do not gain immunity from the ‘civil ordinances’ of their receiving states: they are not full representatives of their sovereign (unless, Gentili again notes, the business also involves ‘state rights’),[32] but rather private citizens of the world.

Embassies could also play domestic roles, although only when sent from sovereign to subjects. Domestic embassies were a tool of communicating the commands of a sovereign to subjects, whether they are populations, officers or subject princes: ‘A prince, if confronted by a serious situation in regard to which he desires his subject to be advised, will send ambassadors to him’.[33] Ambassadors did not just communicate a sovereign’s wishes, they also had the ‘power to command’, and ambassadorial ‘service’ is more like an imperial or military assignment: ‘service on an embassy sent by subjects is either imposed upon certain persons as a duty to the fatherland, or assigned to volunteers’.[34] Embassies thus served a unifying

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29 Ibid 83.

30 Ibid 85.

31 Ibid 86.

32 Ibid 88.

33 Ibid 12.

34 Ibid 13.

purpose: to bolster the constitutional order of the state by precluding internal embassies from subjects, and by allowing the sovereign to speak to subjects.

Empire motivated a qualification to the general prohibition on embassies sent by subjects, and the status of rebels. While Gentili had explicitly denied the rights of colonists to send internal embassies, he allowed subjugated or defeated states the right of embassy. This exception is set on the basis of a kind of dormant or temporarily subdued but enduring domestic legal order in subject states. Generally, Gentili contended that a polity's power to send and receive embassies is not hampered by its dependence on another polity,[35] made especially clear in the instances of dependencies of trading republics like Venice,[36] the Irish embassies to Queen Elizabeth, and popular embassies to the King of Scotland.[37] The only instance in which internal embassies might be sent to the subject's own sovereign is where rebellious groups latch on to a formerly independent polity now dependent, conquered or subjugated. The prohibition on rebel embassies does not apply to peoples 'who have abandoned an alliance, a treaty or even a friendly vassalage', with Gentili asking '[h]ow often did the Volscians, the Latins, the Spaniards and innumerable others rebel against the Romans?'[38] Intra-imperial revolts revive a right of embassy held prior to their revolt and lying in abeyance, reviving the formerly independent polity and returning to equal juridical status with their former imperial sovereign.

Keeping with his inclusion of non-European systems in the international order, Gentili contended that the power to send ambassadors does not hinge on particular kinds of internal religious or political organisation. Gentili's explanation for the universality of this power reveals his rejection of looking behind the state to the form of its constitutional order, confessional status, or any other characteristics

35 See ibid 11, discussing the comparative 'ranking' of connection through embassy, based on the degree of independence.

36 Ibid 88.

37 Ibid 12.

38 Ibid 78.

that might be used to deny a polity the international right of legation. The power to send ambassadors depends not on the justice of a regime, but on the actual possession of effective force controlling subjects; thus tyrants hold equal powers to just rulers.[39] Turks, Persians and other non-Christians, as well as excommunicated polities or princes, hold equal rights to send and receive embassies. Gentili justified this by stating that religion, as a 'science of divine worship and habits of observance', is a law subsisting between man and God, not man and man as the law of nations is (a view consistent with his Protestantism).[40] Finally, barbarians and polities with minimal or no domestic legal ordering can send embassies, though Gentili merely cited a range of examples without drawing a general rule from them. Any group lacking statehood — brigands, pirates, and others — cannot hold rights of embassy. They had 'utterly spurned all intercourse with their fellowmen' and 'endeavour[ed] to drag back the world to … savagery' and the state of nature of individual interests alone.[41] Consequently, they cannot claim the rights of embassy that exist to serve the unity, intercourse and connection of humanity. Gentili's view of embassy rights thus rested on the refusal to consider the justice or legitimacy of domestic constitutional orders relevant to sovereign status, revealing a wider purpose of embassy rights as serving the communication and unity of mankind through the law of nations.

As the central text of the first, orthodox Renaissance humanist phase of Gentili's work, largely modelled on Cicero,[42] *De Legationibus* conceptualised the ambassador as an office that concentrates and holds a quasi-sovereign power of communication as a portion of the power and authority of the sending sovereign, and acts as the sovereign's representative in another polity. Disputes like the Mendoza affair showed that ambassadors could be the source of transgressions not

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39 Ibid 75.

40 Ibid 91.

41 Ibid 79.

42 Diego Panizza, 'Political Theory and Jurisprudence in Gentili's De Iure Belli: The Great Debate between "Theological" and "Humanist" Perspectives from Vitoria to Grotius' in Pierre-Marie Dupuy and Vincent Chetail (eds), *The Roots of International Law* (Nijhoff, 2014) 214 n 4.

just against the ordinary laws of the realm, but of foreign interventions against a constitutional order. Gentili's ideas about the domestic and international began in the house of the ambassador. But Gentili's wider project of clarifying the office, rights and duties of ambassadors was also about the laws governing the internal and external actions of polities. It raised a range of questions about domestic and international laws, and formed a first articulation of Gentili's ideas of a communicative, humanist global order. The question of when a sovereign may breach ambassadorial protections, and on the basis of which laws, was the crucial issue in *De Legationibus*. In dealing with it, Gentili used international law to discipline and limit domestic sovereign power. This limitation served his wider project of drawing the domestic and international together, to unify them in service of a world commonwealth.

C *Humanist Commonwealths and the Rights of War and Intervention*

By the time the Spanish Armada had failed to invade England in 1588, Gentili had published the first book of his masterwork, the *De Iure Belli*; 'On the Laws of War'. After publishing the second and third books in 1589, Gentili thoroughly revised and extended the text, publishing the three new books together in 1599, before producing his 1599 consideration of Roman imperialism, his 1605 discourses on absolute kingship, the union of British Crowns and civil life under tyrants, and his account of his own arguments before English admiralty courts from 1600 until his death in 1608 (unpublished in Gentili's lifetime). Each grappled with sovereignty, law and empire within the wider universal ideals of commonwealth and human unity. Intellectually, Gentili's later works moved from the Ciceronian humanism of *De Legationibus* to a Machiavellian republican absolutism, in which 'natural jurisprudence' as the science of politics and morality was set over and above scholastic or civil law thinking, and where the law of nations came from practice, experience and the principles of civic humanism,

which he now saw as a guide to government within states.[43] Together this would form a different path to the same ideals of pan-human commonwealth.

This section and the next examines how Gentili's later works used the domestic and international to articulate his vision of this commonwealth. Whereas *De Legationibus* dealt with problems of the interaction of domestic and international, it is in *DIB* that Gentili articulates a much clearer system of the interaction of legal orders, and, most importantly, becomes the first British jurist to theorise natural law and the law of nations as overlapping and the same. This meant polities and sovereigns could, by analogy, be bound by the same laws that governed individuals prior to the founding of the civil state.[44] Relying heavily on analogy and allegory, Gentili's unification of the law of nature and nations led him to a series of questions about its relationship to civil and religious laws, also tied to a set of moral injunctions towards peace, harmony, good government and trade. His late works moved from considerations of private and public disputes and wars, to sovereign rights to change internal laws, to imperial expansions.

Gentili began *DIB* with an account of the nature of disputes within and between polities that relied on a close connection between private disputes under civil law and those between sovereigns, used to illustrate the limits to the rights and powers of citizens and sovereigns alike. While wars resemble disputes between private citizens, they must be public and official — between two sovereigns — and necessary. Not only will sovereigns refuse to acknowledge an 'earthly judge' or superior over them, such submission would make them no longer sovereign.[45] But war is not a simple right of sovereigns. It can only follow attempts to settle disputes

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43 Ibid 213–4. On Gentili's humanism generally, see Tuck, *Rights* (n 8) 16ff.

44 Brett (n 23) 82–3. For a careful reading of the overlap of *ius gentium* and natural law in Gentili, see Francesca Iurlaro, 'The Burden of Reason: *Ratio Probabilis*, *Consensio Omnium* and the Impact of *Humanitas* on Alberico Gentili's Theory of Customary International Law' (2017) 38 *History of Political Thought* 409, 428ff.

45 Alberico Gentili, *De Iure Belli Libri Tres*, tr John C Rolfe (Clarendon, 1933) 15.

peacefully and through legal argument, and these closely map the resolution of civil disputes.

Gentili saw argument and force as merely two 'modes of contention', and while the law directs citizens never to use force, for sovereigns the exhaustion of legal argument is necessary before force may be used.[46] In explaining this, Gentili drew an analogy between private and inter-sovereign disputes, asking why should disputes between citizens be settled by arbitration, but not those of sovereigns, especially 'when the former are often greater than these public ones, or at any rate much less clear'?[47] Indeed, judging sovereigns is arguably easier: the most experienced judges would be arbitrators, and hear and decide these cases with 'the whole world … for witnesses and spectators'.[48] Arguing that it is 'absurd' to suggest that inter-sovereign disputes cannot be decided by the 'subtleties and fictions' of the civil law but must be based on the law of nations only, Gentili stated that the civil law applies to sovereigns too: '[T]he law which is written in those books of Justinian is not merely that of the state, but also that of the nations and of nature'. Consequently, '[t]his law therefore holds for sovereigns also, although it was established by Justinian for private individuals … Does it then cease to be the law of nations and of nature because it has been posted up for the citizens to read?'.[49] Here, Gentili drew a strong connection between the civil law and the law of nature and nations, arguing that while they are not identical, the civil law is 'not wholly unlike' the law of nature and nations.[50] The civil law differs in some states, but the parts that are similar throughout the world can form part of the law of nature and nations. This echoes Gentili's earlier point on custom that linked domestic and international authority; that just as the rules and laws of a state are made by the majority of its citizens 'just so is the rule of the world in

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46 Ibid.

47 Ibid.

48 Ibid 16.

49 Ibid 17.

50 Ibid.

the hands of the aggregation of the greater part of the world'.[51] But differences may be appropriate to the different spheres, and there must be limits of which disputes, domestic or international, can give rise to legal or military actions.[52]

Having linked the civil law to the law of nature and nations on reasons for war, Gentili returned to the rights of war to outline a clearer hierarchy of the kinds of legal and moral concerns that ought to order bodies of law in general. Considering whether the actions of citizens can ever found a sovereign's right to war, Gentili argued that while offences by individuals cannot be ascribed to their communities, they can nonetheless harm another community. Dealing specifically with whether merchants providing munitions to Spain against England's interests might constitute that kind of harm, Gentili drew a distinction between the law of nations and of nature. The traders' right to profit is based in the law of nations and concerns 'private citizens', while the English desire to maintain their safety is a law of nature that concerns 'kingdoms'. Maintaining safety trumps the right to trade, and this flows through each element of the dispute: 'Let trade therefore give way to the kingdom, man to nature, money to life'.[53] Gentili then expounded a detailed hierarchy of which things should take preference in deciding legal disputes, privileging the sacred over profane, public over private, and safety over wealth, all linked explicitly to the idea of commonwealth, and shifting into the language of community rather than that of sovereign.[54]

Following Cicero, Gentili argued this 'public part of the world' involved the collective restriction of individual freedoms to avoid harms and injustices to both the commonwealth and private citizens, subjects and foreigners alike.[55] Private

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51 Ibid 9. Iurlaro provides an improved translation that reinforces the analogy of city and world government I emphasise here: 'As the government and the legislation of the *civitas* is in the power of the majority, so is the government of the world in the hands of the assembly of the major part of the world': Iurlaro (n 44) 429.

52 Gentili, *DIB* (n 45) 16.

53 Ibid 101.

54 Ibid 101–2.

55 Ibid 102.

citizens are part of both the international and domestic forms of this wider human commonwealth. Gentili thought the traders in this case ought to have 'restrained' themselves or be restrained by their fellow citizens, even if the English did not take any actions against them, and moreover should be 'pleased' at these restrictions because they benefit the world by avoiding war.[56] Finally, Gentili linked these private actions to the nature of the 'public', which he saw as the actions of a legitimate assembly, taken by the greater part of the community, rather than the disorganised actions of individuals, who the community is obliged to restrain.[57] Sovereigns, by implication, remain only able to pursue disputes and wars, and cannot assemble to agree to a set of norms about conduct; it is the community that restrains its citizens, as domestic or international actors alike.[58]

This treatment of reasons for war led to Gentili's use of the domestic and international to explain the relationships between subjects and sovereigns in instances of changing internal laws, particularly following conquests, in support of interventions, or under peace treaties. Here, Gentili drew a range of analogies and connections to explore which civil law rules endured, and which became subject to the principles of the law of nature and nations.

Gentili argued for strict limitations on the right of sovereigns to change the religions or internal laws of other polities. Religious difference was never a sufficient motive to make war necessary because religious laws are between 'men and god' not 'men and men', and consequently, no individual can claim their rights are violated or interests harmed by others' religious differences.[59] Moreover, religion is necessarily part of all states, and even those following 'evil religions', think themselves to be following the good.[60] Gentili extended this reasoning to the

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56 Ibid.

57 Ibid 103–4.

58 See further Andreas Wagner, 'Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth' (2011) 31 *OJLS* 565, 577–8.

59 Gentili, *DIB* (n 45) 40–41.

60 Ibid 41.

internal arrangements of foreign polities, distinguishing between internal civil enemies (who the sovereign must fight) and those abroad with different internal laws. As with religion, citizens of other states who live under different laws do not do one's own state any harm or actionable injury, and as they are not subjects, a sovereign cannot wage war against them on the basis of difference.[61]

These moves towards a humanistic restriction on religious wars becomes clearer still in Gentili's extensive examination of interventions to support civil wars against foreign sovereigns. Here, Gentili articulated a vision of a legitimate commonwealth and rights of resistance grounded in a globalised union of humanity, rejecting the analogy of disputes between private subjects and sovereigns on the basis of this union of humanity, which restricted the power of sovereigns against their subjects: 'the subjects of others do not seem to me to be outside of that kinship of nature and the society formed by the whole world … if you abolish that society, you will also destroy the union of the human race, by which life is supported, as Seneca nobly says.'[62] Ensuring that sovereigns are not 'exempt from the law' or 'bound by no statutes and no precedents' requires 'someone to remind them of their duty and hold them in restraint'.[63] But Gentili explicitly rejected any supervising higher sovereign, again on the basis of the difficulties of resolving inter-sovereign disputes, because the 'generally recognized kinship of all men with their fellows' applies to the similar status of different sovereigns.[64] This kinship is essentially the same as the 'supervision' or arbitration involved in wars between sovereigns, and while it would be wrong for a foreign sovereign to settle a dispute between private citizens, and although magistrates can resolve disputes between subjects and their sovereign, where 'a dispute arises regarding the commonwealth, there are no competent judges in the

61 Ibid.

62 Ibid 74.

63 Ibid.

64 Ibid.

state, nor can there be any'.[65] Disputes about the commonwealth itself requires a genuine civil war, in which foreign sovereigns may intervene on the basis of humanity.

In dealing with the legal effects of such civil wars, Gentili first reiterated that the law of nations does not apply to citizens: again, wars exist between sovereigns alone. But Gentili does offer a detailed account of how resistant citizens can achieve international status through mimicking and challenging a state's domestic law. Dissidents must achieve the institutions of state — a senate, treasury, and a body of 'united and harmonious citizens' — to gain the rights of either making a peace treaty with the sovereign or taking over the state.[66] This establishment of a 'rival' commonwealth evidences its power and makes the insurrection 'public', which makes the sovereign's war against the rival necessary, and then puts the rival 'on an equality' with the sovereign which, as in an inter-sovereign war, is a juridical equality that depends on the ability to resist violence, even where there is a great disparity in power.[67]

But these contests lead Gentili to articulate a wider, common law of mankind that supervenes over the rights of sovereigns and the duties ordinarily owed to them, equally binding subjects and sovereigns alike in all wars and supporting interventions, epitomised in Gentili's extended quotation from Seneca:

> Add besides the golden words of Seneca: 'Whatever the bond of affection by which any one was united to me, his violation of the common law of mankind has brought it to naught. If such a man does not attack my country, but is troublesome to his own land, and although remote from my nation harasses his own, yet that depravity of mind cuts him off from me none the less, and makes him, if not my enemy, at least hateful to me. And in my eyes a consideration of the duty which I owe to the human race is prior and superior to that which I owe to any individual'. This is surely true, or else we

65 Ibid.

66 Ibid 23–5.

67 Ibid 74.

> put sovereigns on a different plane from all other men, if we decide that they have the right to act according to their whim and caprice.[68]

These sentiments on the common law of mankind and duties to humanity are superior to those owed to any person or sovereign and thus limits the domestic authority of all sovereigns. To expand on where such interventions might be justified, Gentili drew an allegory with the restraint of family relations: 'We defend sons against fathers who are unjust', and slaves against cruel masters, and in all these cases the right is of protecting subjects against the inhumanity of bad masters.[69] Turning then to defend English interventions in the Low Countries, Gentili raised an analogy with private law, likening the rights of private citizens to use their property for their advantage as the basis of a sovereign right to support others who are their friendly, common relations.[70]

Finally, in dealing with peace and occupation, Gentili again employed a variety of analogies that linked the civil law and the law of nature and nations. In exploring the relations between sovereigns and non-subjects, Gentili drew an analogy with civil law agreements to outline a hierarchy of duties under natural law, the law of nations and the civil law: 'A prince who makes a contract with his subjects is bound to them by natural law, by the law of nations, and by the civil law. Agreements which are informed with natural justice and equity must be kept by the very greatest ruler, even when made with his own subjects. … Surely if the prince were not bound to others, others would not be bound to him; this is demanded by the law of mutual relations.'[71] Here the general principles of keeping agreements extended to constitutional settlements and peace treaties alike, ultimately rooted in a natural law of mutual obligation.

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68 Ibid 75.

69 Ibid 76.

70 Ibid 76–8.

71 Ibid.

Gentili's treatment of the limits to an occupying sovereign's rights to change internal laws shows another side of this link. Peace treaties aimed at establishing equal rights between polities and hence friendship,[72] usually allowing each party to live according to its own laws, as part of the friendly preservation of mutual dignity.[73] Accordingly, sovereigns had no right to modify the religious and civil laws of conquered peoples, not on the basis of mutual obligation but rather ideas of harmony and natural change. While a conqueror can force the vanquished to adopt its government, it can only force its religion on them if their customs are 'alien to humanity and to all religion'.[74] Gentili saw religious worship as an 'indissoluble bond' that is stronger than ties of 'kinship' or 'mutual good will', and its source in nature means its many forms should be tolerated, and only curtailed where contrary to nature, namely atheism or agnosticism.[75] But natural law also permits sovereigns to gradually change religious customs and laws, and gradually change uncivilised peoples in the customs 'demanded by the laws of nature, of nations, and of the state'.[76] Gentili thus supported a wide right to change the civil laws and social customs of others.[77] But the guiding principle remained harmony. Diversities in languages and manners of life go against harmony, but harmony must be gradually cultivated rather than ordered by the conqueror. This, explicitly, is a movement from natural law into the civil laws of a conquered state: the 'victor should impose nothing upon the vanquished which is contrary to the law and design of nature … And what is a part of the law of nations and of nature must also be a part of the civil law'.[78]

Gentili's analysis of warfare and disputes thus employed a range of analogies between civil law, the law of nature and the law of nations, in which he explored

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72 Ibid 353, and see generally bk 3, ch 13.

73 Ibid 376.

74 Ibid 341.

75 Ibid 340.

76 Ibid 341.

77 Ibid 344.

78 Ibid 346.

the connections and unities between these spheres, and announced his theory of the overlap of the law of nature and nations. Private legal disputes formed the basis for Gentili's account of legal recourse to warfare. Civil war contestations of the constitution itself could give rise to sovereign rights to intervene. Finally, sovereigns remained limited in the kinds of changes to the domestic laws, religions and customs of conquered foes. All relied on careful, extensive links between civil, natural and international law.

D *Imperial Sovereigns*

Gentili's most innovative uses of the domestic and international appeared in his treatment of empire and imperial–colonial relations. Gentili used a series of analogies to domestic public law to justify the Roman spread of the civil law throughout its empire to make those principles universal. He also examined the hierarchies of empires in dependent sovereigns, which he likened to sovereign–subject relations. But the most significant analogy was Gentili's right under the law of nations to trade and commerce, which he used to understand and defend imperial claims to territory in the New World, and then to articulate James I/VI's protective jurisdiction extending beyond Britain's shores.

In his 1599 *Wars of the Romans*, Gentili used the relationship of domestic and international, and a series of domestic allegories, to defend the spread of Roman civil law by empire. In this dialogue, Gentili's imperial defender praises the spread of Roman law by allegories of domestic families. Rome was the '[p]arent of arms and laws', in that spreading its empire by force also 'offered the cradle of the beginnings of law' to conquered and incorporated peoples.[79] Their lives were improved by the civil law; they were 'brought over by our laws to a more cultivated way of life'.[80] Gentili's defender uses a maternal allegory to illustrate Rome's spreading of law through force as aimed at peace and unity: 'She [Rome]

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79 Alberico Gentili, *The Wars of the Romans: A Critical Edition and Translation of De Armis Romanis*, ed Benedict Kingsbury, Benjamin Straumann and David A Lupher (OUP, 2011) 351.

80 Ibid 349.

is the only one who has received the defeated to her bosom. And she has protected the human race with a shared name in the manner of a mother, not a ruler; and she has called citizens those whom she has subdued, and has bound together far distant regions with a bond of duty. To her peaceful ways we all owe it that the traveller makes use of regions as though they are his ancestral lands, that we are all now one people.'[81] This peace is a product of conquest and the civil law, which remains one of the only persistent, live remnants of the empire, which, owing to its rationality, has spread even beyond Rome's original conquests.[82]

But Gentili's imperial defender also argued that the fall of the Empire was the source of divergence in laws which led, inevitably, to wars between peoples. With divergences in the formerly unified civil law, the laws between cities 'burst asunder' leading to 'the wars of all, of all peoples among themselves'. He ended the dialogue with an attempted haunting denunciation of differences in laws and a panegyric to the solidity of empire:

> And are you laughing here, Picenus? Is the world laughing? And do you still laugh when the world's peoples differ in customs, laws, languages, sacred rites, and thoughts? But if the look of the globe and the faces of all mortal men are saying anything to me, then we have triumphed over you, and all lament the now sundered unity of hearts and sigh for Roman piety, liberality, trustworthiness, magnanimity, peace, security, justice—and for the Roman Empire, from which, in all of its justice, fairness, and goodness, they lament that they have been withdrawn.[83]

Similarly in *DIB* Gentili noted that the Roman Empire's civil law, codified by Justinian, gained a universality that could be resurrected. Its universality was such that 'if the empire were destroyed, the law itself, although long buried, would yet rise again and diffuse itself among all the nations of mankind'.[84] The resurrection of Roman civil law, then, could be the basis of returning to unity between polities,

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81 Ibid 347.

82 Ibid 351.

83 Ibid 355.

84 Gentili, *DIB* (n 45) 17.

partly by its universality and hence incorporation into the law of nature and nations. This was not just a defence of Rome but also a guide for Elizabethan English imperial projects to unify the world through their laws.[85]

If Rome furnished the possibilities of peace through unified civil laws, the Roman conception of the powers of the emperor also formed the basis for Gentili's understanding of the interlocking sovereignties of contemporary empires addressed in *DIB* and the 1605 *Three Royal Discourses*. In *DIB*, Gentili made several remarks on empire that illuminate parts of his views on dependency and inter-sovereign connections, and the nature of legitimate rule. Though he frequently discussed both the Roman and Holy Roman Empires, Gentili was preoccupied more with feudal subjugation, imperfect sovereignty, and histories of imperial wars and diplomacy, than with empire as a general concept, or as a specific kind of polity different from ordinary sovereigns. This relates to his general points about the status of hierarchies of sovereigns. Dependent and feudal princes, despite their title of 'prince', do not hold real sovereignty or genuine jurisdiction, because they acknowledge a higher sovereign.[86]

But Gentili's most sustained discussion of empire and sovereignty relates to the change from the Roman Empire into the Holy Roman Empire, as bestowed by the Pope on Charles. Here Gentili again conceived of the relations of sovereign and subject as a kind of mutuality, illustrated by an analogy between feudal lord–subject relations that Gentili applied to imperial hierarchies: 'the relations of the sovereign and his subjects are mutual; they are bound to defend him, and he them. The lord and the vassal are mutually dependent, the prince and his subjects; as the latter are bound to render loyal obedience, so the lord is expected to rule justly'.[87] Subjection imposes an 'equal obligation' on the superior, which Gentili analogised

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85 On *Wars of the Romans*' relation with England's justifications for wars against Spain, see further Diego Panizza, 'Alberico Gentili's *De Armis Romanis*: The Roman Model of the Just Empire' in Benedict Kingsbury and Benjamin Straumann (eds), *The Roman Foundations of the Law of Nations* (OUP, 2010) 53, 57–8.

86 Ibid 20, 50.

87 Ibid 113–4, quoting Justinian, *Digest* III [ii].

to mutual faith between debtors and within monastic orders.[88] These oaths of fidelity prevent either from severing the tie and bind each to good faith. Similarly, 'the people' are limited in their ability to transfer absolute power. Applying this to the Pope's power to grant imperial rule to Charles, Gentili insisted 'we mean that the Pope and people together transfer the power' and likened this to Roman transfers of imperial power, noting that when Rome 'granted, bestowed, and handed over all its sovereignty and power, even over itself, to the emperor, the emperor was not … looked upon as a kind of commissioner, and the people did not retain any rights in the government'.[89] Here, again, Gentili brought the legacies of Rome and its legal forms into the present day to argue that empires endure in ways that other polities may not; they endure even if a small part remains, and need not maintain the same languages, institutions or laws to remain continuous: 'Such features may change the form of an empire, but not the empire itself'.[90]

This endurance is used to read the international spread of Rome into the domestic constitutional laws of Britain and the Crown in *Three Royal Discourses*.[91] In his tracts on absolute kingship and the Anglo-Scottish union of crowns, Gentili conceived of internal and external sovereignty in absolute, Bodinian terms.[92] The emperor holds absolute legislative power, committed to him by the people, and is thus not bound by the existing civil laws, holding absolute power to change them at will.[93] 'The civil law says that the *princeps* is unbound by the laws and that law is whatever pleases the *princeps*', and, coming from Roman law, it is not foreign

88 Ibid 113–4, quoting Justinian, *Digest* III [ii].

89 Gentili, *DIB* (n 45) 115.

90 Ibid 119.

91 On the Union, see further Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500–2000* (CUP, 2008).

92 Claire Vergerio, 'Alberico Gentili's *De Iure Belli*: An Absolutist's Attempt to Reconcile the Jus Gentium and the Reason of State Tradition' (2017) 19 *JHIL* 1, 17–18. On the Union generally, see Alain Wijffels, 'A British *Ius Commune*? A Debate on the Union of the Laws of Scotland and England during the First Years of James VI/I's English Reign' (2002) 6 *Edinburgh Law Review* 315.

93 Benjamin Straumann, 'The *Corpus Iuris* as a Source of Law between Sovereigns in Alberico Gentili's Thought' in *Roman Foundations* (n 85) 101, 104–5.

but incorporated into the basis of English law.[94] Noting that sovereigns hold greater authority than that of fathers over sons or masters over slaves, Gentili conceived this authority as residing within the interstices between international and domestic law: sovereigns are bound by divine law, the laws of nature and the law of nations, but are superior to their own domestic laws, and, as in the discussion of disputes in *DIB*, this supremacy over the domestic makes sovereign submission to adjudication impossible.[95] Gentili's argument here relied on taking 'sovereignty as popular consent' in Roman constitutional law, reading it into the position of James I/VI as the King of England and Scotland, and then generalising it to all sovereign princes.[96]

Gentili's other significant imperial use of the domestic and international was to conceptualise the acquisitions in the 'New World' and justifications for war there, affording Indigenous peoples some legal autonomy in resisting the encounter with the Spanish.[97] Gentili argued that commerce and free trade can justify wars of imperial expansion. Spanish conquest would be justified if the inhabitants prohibited commerce, because commerce is justified by the law of nations, and that law cannot be changed by Indigenous opposition to it. But Gentili argued that this was not the Spanish justification, as they aimed not at free commerce or spreading Christianity to a resistant population,[98] but complete dominion over the lands of the Americas. The Spanish 'regarded it as beyond dispute that it was lawful to take possession of those lands which were not previously known to us; just as if to be known to none of us were the same thing as to be possessed by no one', invoking both the Roman private law principle of *res nullius* and the Pope's

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94 Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (OUP, 2016) 278, translating Alberico Gentili, *Regales Disputationes Tres* (Antonium, 1607) 9.

95 Straumann (n 93) 106.

96 Ibid 107, 111–12.

97 On Gentili and empire generally, see Anthony Pagden, '"Making Barbarians into Gentle Peoples": Alberico Gentili on the Legitimacy of Empire' in *The Burdens of Empire: 1539 to the Present* (CUP, 2015) 75.

98 Gentili, *DIB* (n 45) 123.

grant of dominion in the New World in the Papal Bull *Inter Caetera*.[99] But Gentili also argued that Indigenous resistance to commerce does not necessarily justify war. Resistance to strangers is common to all 'uncivilized peoples' and it only stops 'one phase' of commerce; commerce is only properly prohibited when all trade is prohibited.[100] The laws of nature privilege trade and commerce over sovereign claims to territory, and discipline the international rights of sovereigns to expand their empires.

This position became clearer in Gentili's wider treatment of the sea in *DIB*. Gentili's views of sovereign authority over the sea rested on the sea's representation as a place that holds both a privileged status governed by natural law, and also where the laws of various sovereigns thrust and conflict.[101] Starting from the premise that seas are open to all, and their use common to all, Gentili insisted that seas and their shores and rivers cannot be shut off by any one.[102] He rejected the argument that seas and rivers can be possessed to exclude others, calling that a 'vain circumlocution' that violates natural law.[103] But polities can hold jurisdiction, dominions, and protectorates over parts of the sea near their shores. Here, Gentili drew a public distinction and outlined which rights belong to no one and which to the sovereign. Just as things that are 'common to all' to use are the property of no one, all public things, including things privately owned but meant for public use, are under the jurisdiction and protection of the sovereign.[104]

This international jurisdiction is not like its domestic exclusive form. As the sea is open by nature it can be closed to no one.[105] Nor is the 'public' here a sovereign's own population, but the whole of humanity. When the sovereign closes the sea to

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99 Ibid 89.

100 Ibid.

101 Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (CUP, 2009) 121.

102 Gentili, *DIB* (n 45) 91.

103 Ibid.

104 Ibid 92.

105 Ibid 91–2.

others, he refuses them a 'privilege of nature' and gives foreign sovereigns a cause for war.[106] Instead, sovereigns as protectors act as magistrates of the law of nations: '[t]here is jurisdiction even over the deep; otherwise no magistrate will punish crimes committed at sea … Such a magistracy belongs to the law of nations and its jurisdiction also; therefore [it] must necessarily be everywhere where they are needed. … very many things are put in the hands of the sovereign on the sea as well as on the land; and these no one who sails the seas will evade.'[107] Here, Gentili made the sea a *res communis* that is open to all mankind, with jurisdiction over the coasts aimed at ensuring openness and preventing piracy, ultimately enforced by sovereigns on the sea. Gentili's position here rests on essentially theological and moral arguments that reflected his projects of describing a modern cosmopolis of unified humanity.[108] Commerce is morally excellent because there is a natural right to the universal enjoyment of the goods of nature. Divine wisdom in distributing these various good things of life throughout the world made commerce necessary. It also created the conditions through which the common bonds of humanity can be maximised.[109]

In his final work, the *Spanish Advocations*, Gentili came to see this protective sea jurisdiction as a compound of domestic and international legal rights and duties that extended the sovereign's power vastly further than the shore. In 'Of the Protection of Sea-Territory', Gentili framed James's control over the sea in unlimited, imperial terms based on a mix of sovereign edict and treaty obligation under James's peace with Spain.

Gentili began by arguing that territory applied equally to land and water. Endorsing the historical claims of the Venetians, Genoese and Pisans, he contended that holding a port grants a state jurisdiction over the sea that extends

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106 Ibid 92.

107 Ibid.

108 Diego Panizza, 'The "Freedom of the Sea" and the "Modern Cosmopolis" in Alberico Gentili's *De Iure Belli*' (2009) 30 *Grotiana* 88, 95.

109 Ibid.

from the port, up to the borders of another state. As applied to England, the 'sway of our King [James I/VI] extends far toward the south, the north, and the west'; control of land in Ireland extends control of the sea westwards to Spain's 'Indian realms', and southwards towards Spain itself. The basis of this claim is a mix of James's domestic sovereign edict powers combined with the enactment of a treaty obligation: '[I]mmeasurable is the broad jurisdiction of our King upon the sea. Nor is this jurisdiction maintained by the enforcement of a certain royal edict in which certain boundaries are laid down, beyond which the King refuses to have his territorial power extended in connection with these acts of war between the Spaniards and the Dutch.'[110]

Instead, the peace treaty between Spain and England, under which each was bound to protect the other's subjects 'throughout that far-extending jurisdiction', formed a second basis for the claim, and limited that jurisdiction according to 'right' rather than 'convention': 'Nor is this declaration of the King's rights (and thus to be accepted the more readily) made in an edict, but it is an entirely new arrangement, and law. For a declaration introduces nothing new and changes nothing; but this edict does change much, if the territorial power of the king really extends much beyond those boundaries as now fixed.'[111]

Gentili then rejected the suggestion that the obligation to afford protection to the Spanish would be limited to 'a curtailed territory within which alone our King were able to afford protection to Spaniards'.[112] Responding to the claim that the edict had long fixed the boundaries — as a kind of self-declaration of the limits of James's realm on the sea — Gentili offered an argument that bolstered English law's 'specialness', contending that for these purposes the specifics of the edict or its usages within England are not relevant to the law of nations: 'What has our own peculiar English law to do with foreigners? Likewise, as the proverb has it, there is much English law locked up in the breasts of our judges, but foreign kings

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110 Alberico Gentili, *Hispanicae Advocationis Libri Duo*, tr Frank Frost Abbott (OUP, 1921) 35.

111 Ibid 36.

112 Ibid.

will not suffer themselves to be confined there.'[113] The Spanish would not consent to be bound by the usages of English law unknown to them, and so those points are irrelevant.[114] Gentili concluded by reiterating that the defined limits on the sea are provided by the law of nations, eminent domain and jurisdiction: 'Let them remember that other things, once undefined, are defined today'.[115] In a later argument, Gentili made protection a duty coming from both the peace treaty with Spain as well as a general common law obligation to keep the King's peace: both the common law and the special rights of the treaty compelled the King to punish Dutch nationals for 'roughly handling' Spaniards within the realm.[116]

The provenance of the *Spanish Advocations* and these arguments provides a suitable conclusion to Gentili's final years and views on the domestic and international. In 1600 Gentili had left Oxford to practise at Gray's Inn, transferring his teaching duties to his deputy. With James's ascension following Elizabeth's death in 1603, England made peace with Spain, and in 1605 James granted Gentili permission to act as counsel to the Spanish Embassy on admiralty cases brought in England against the Netherlands following Dutch attacks on Spanish vessels. After he died in London in 1608, Gentili's reflections on these cases and arguments were edited by his brother and published in 1613. Consequently, these are not works of systematic theory or necessarily reflections of Gentili's genuinely held views, but rather the arrangements of what Gentili saw as the strongest arguments made in local courts on behalf of foreign sovereigns. They suggest Gentili's efforts to implement some of his ideas about universal commonwealth in advocacy. His arguments deftly used analogies and principles drawn from a range of jurisdictions, from Roman civil law to the law of nature and nations to various national laws. There are glints in this text of Gentili's practical attempts to unify humanity through law in domestic courts and the adjudication of disputes between

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113 Ibid.

114 Ibid 37.

115 Ibid 38.

116 Ibid 67.

sovereigns and their private citizens according to the law of nations. The *Advocations* reflect the application of Gentili's approach to the domestic and international that he had expounded in his more systematic juristic texts.[117]

E *Conclusion*

Gentili's works explored a range of areas in which international considerations limited the sovereign's powers, using analogies, allegories and ordering. His treatment of ambassadors engaged in treason dealt with this question directly, and his more general theorisation of the nature of embassies shows their close relationship to founding and allowing the state to have real international personality. Gentili's mature works explored a range of problems of the relationship — from inter-sovereign disputes to civil wars to occupations to empire to sea jurisdiction — dealing with questions of law's internal and external forms to pursue projects of humanist Commonwealths in Protestant theological terms. He offered a clear legal theology of which laws beyond the state's control might bind and restrict it. Each of these interactions always in service not of a superior sovereign like the Pope, but rather the ideals of humanism and a unifying commonwealth among the polities of the world. Gentili began to use the universal ideas of Roman civil law and the law of nature and nations to move towards a genuine 'international' system of laws: that states might begin to agree between each other to create new international laws, to restrict their domestic sovereignty in concert and in service of this humanist commonwealth. But this possibility of international justice nonetheless came from the rightly ordered domestic state.

III Citizen, Sovereign, Nation, System, 1640–90

A *Introduction*

Whereas Gentili sought to unify the world through various forms of humanism and used the law of nature and nations and Roman civil law to articulate that expansive vision, British jurists writing through the English Civil Wars,

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117 On the links between *DIB* and *HA* on issues of sea jurisdiction, see Lauren Benton, 'Legalities of the Sea in Gentili's *Hispanica Advocatio*' in *Roman Foundations* (n 85) 278.

Cromwell's Commonwealth, and after instead looked to external laws for restraints, pacification and a model for the state that could ground an idea of domestic law as primarily national.[118] This part presents five portraits of jurists who illustrate this emergence. Gentili's successor Richard Zouche introduced the idea of laws between peoples that emphasised the connections and similarities between internal civil law and his new systematic account of the law of nations, drawing detailed analogies between these levels to shift both towards a primitive positivism, where all laws were changeable by peoples and sovereigns. John Selden likewise used the language of laws between peoples, theorising a taxonomy of levels of legal ordering that included the 'domestic civil law', and was grounded on biblical genealogical allegories that were part of his wider project of making national, imperial law predominant. Thomas Hobbes' well-known account of international and domestic power included an overlooked but significant emphasis on analogies between different kinds of leagues within and between families and nations, which Hobbes used to link the absolute power of the household to sovereign power and then to colonial expansions, as part of his conjoining of the law of nature and nations and its close relation to civil law. James Harrington's account of empire split it into 'foreign and domestic' that made the justice and ordering of each sphere dependent on the opposition of control over land and laws that Harrington ultimately used to articulate a messianic imperial mission for Britain to spread its laws throughout the world. But it is with John Locke's post-1688 account of the federative power that the beginnings of the 'modern' account of the domestic emerged, in which parliament is responsible for the laws of the land, the executive for the powers of the law of nations, and where conflicts and tensions between domestic and international laws are to be resolved by constitutional convention and prudence.

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[118] On wider legal, political and constitutional thought around the Civil Wars and after, see, eg, Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642* (CUP, 2006) chs 6–8; Richard Tuck, *Philosophy and Government 1571–1651* (CUP, 1993) chs 6 and 7.

B *Laws between Peoples: Richard Zouche's System*

Gentili's main legacy within Britain lay in the works of Richard Zouche (1590–1661), who, like Gentili, was Regius Professor of Civil Law at Oxford from 1620. Zouche continued Gentili's approach of dealing with the problems around domestic and international law by attempting to order them through drawing analogies between them. What Zouche's main work managed to achieve was a clearer systematisation of them as spheres of law, based on a strong emphasis on divisions between nations which necessitated rules for their interaction and — most importantly and innovatively — the development of international law through agreements between polities, epitomised in Zouche's introduction of the term '*jus inter gentes*' — law between peoples — as the more accurate description that emphasised the ability of polities to agree to new laws between them. To T E Holland, who revived Gentili and Zouche's legacies in the late nineteenth century, Zouche stood as the intellectual forebear of Bentham's 'international', as the 'founder' of positivism in international law, and the author of the first 'proper' international law treatise, in that his *Exposition* dealt with international law as a system or sphere of law, rather than focusing on a specific topic like war, peace or diplomacy.[119]

System is central for understanding Zouche's outlining of a clear ordering of domestic and international laws. Zouche's systematising project began with his first major work, the 1629 *Elementa Jurisprudentiae*, the first English work of general jurisprudence that outlined a complete system of laws. Addressed to 'the studious youth of Great Britain', and guiding them in working towards mastering the *ius commune*,[120] the *Elementa* covered general principles, procedure, the rules of private law, public law (the law 'between private persons and princes'[121]), and then feudal, ecclesiastical, maritime, military and 'fecial' — international —

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119 See Thomas Erskine Holland, 'Introduction' in Richard Zouche, *An Exposition of Fecial Law and Procedure, or of Law between Nations*, tr JL Brierly (Carnegie, 1911) i, xii–xiii.

120 Richard Helmholz, 'Richard Zouche (1590–1661)' (2013) 15 *Ecclesiastical Law Journal* 204, 205.

121 Zouche, *Exposition* (n 119) vii.

law.[122] Zouche's project for the next decades was to gradually fill each of these mapped spheres with a dedicated treatise. Zouche's aspiration to system runs not just through his major work of international law, the *Exposition*, but through his earlier work as well. In a juvenile poem, *The Dove; or, Passages of a Cosmography*, Zouche mapped out an epic descriptive journey through the world, taking the view of the dove released by Noah after the flood.[123] Like the *Elementa*, the poem is a mapping exercise that emphasises sight and discerning the true state of things; most importantly, the geography and character of polities and peoples in the world of 1613. The cosmography that is explicit in the *Dove* — mapping and accounting for the relations of heaven and earth; the ideal and the real; morality and politics — remains implicit in the *Elementa*'s aim of describing law in its ideal and real operations. This is also the structure that Zouche's system of international law, the *Exposition* of 1650, would pursue.

Central to Zouche's system and his lasting innovation in the *Exposition* was the entrenchment of the term '*jus inter gentes*' — the law between peoples — as the more 'accurate' or 'specific' replacement for the *jus gentium* or law of peoples used by Gentili and all others. In addition to natural laws established among and 'respected by all alike', and observable in the commonalities between domestic laws within different states, Zouche adds a second meaning that he 'choose[s] to describe as "*Jus inter Gentes*" or Law between Nations': the law 'observed in common between princes or peoples of different nations'.[124] This meaning is founded in the division between nations. It springs from and exists because of those divisions. Division leads first to intercourse and inevitably to wars, epitomised in Zouche's echo of the language of the *Digest*: 'by this law … nations are separated, kingdoms founded, commerce instituted, and lastly, wars

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122 Richard Zouche, *Elementa Jurisprudentiae* (Nevilsoni, 1629).

123 Richard Zouche, *The Dove: Or Passages of Cosmography* (Slatter, 1839).

124 Zouche, *Exposition* (n 119) 1.

introduced'.[125] The very existence of different nations means that law must exist between them in some form.

Zouche's new *jus inter gentes* incorporated a range of sources from both domestic civil and international laws. The various compacts, conventions and treaties concluded by single nations is one source of the law between nations: 'the solemn promise of a state establishes law, and whole peoples, no less than single persons, are bound by their own consent'.[126] This kind of international law can exist only between nations or peoples holding sovereign power, as well as those holding a 'universal and supreme power of deciding questions concerning the community between nations both in peace and in war' — namely, Emperor and Pope.[127] Whereas the *jus gentium* — the law common to all peoples — consisted of shared categories of private law that were found in the domestic laws of various nations (property, status, contract) that reflected the divisions of Roman private law, the new *jus inter gentes* were the laws made between polities that took their authority from that agreement, rather than just the fact of similarity or common heritage. This more specific sphere of law existed only between states in their relations with each other: it is confined to their agreements and consent, demonstrated by what they actually do when invoking law or right.

Zouche's emphasis on the law between peoples was built on new ideas of sovereignty and peaceful ordering, and it is here that he began to use domestic analogies and allegories to articulate international legal order. Drawing on Jean Bodin's *De Republica* and Hobbes' *De Cive*,[128] Zouche conceptualised sovereignty as a kind of binding together of citizens, families and nations 'so that

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[125] Ibid.

[126] Ibid 2.

[127] Ibid 3.

[128] Note Armitage's doubt about whether Zouche had actually read Hobbes's work while writing the Exposition: David Armitage, *Foundations of Modern International Thought* (CUP, 2012) 68. The parallels between Zouche's emphasis on domestic patriarchal government as the basis for eventual international order does, however, bear strong parallels with Hobbes in *De Cive* (see below).

all are deemed to will and to act together'.[129] By binding their internal populations together to will and act singularly, nations may then bind each other to legal obligations. But sovereignty and international subjecthood lies only in these kinds of bonds, and not all polities are bound appropriately. The 'majority of men' lay 'outside Sovereignty': they have their own will, and 'act not as a people but as single persons, so that there are as many actions as there are persons, and if one in the number has not consented to or assisted in an act he is not deemed to have done it'.[130]

Zouche's account of ordering, peace and justice deepened this vision of law between states through domestic analogies, specifically through a comparison of internal, constitutional order with external international order. Zouche initially defined peace as a specifically 'legal concord' between princes and peoples, living 'one with another in security' through observance of the law between them.[131] Building on St Augustine's image of 'ordered concord' as peace based on justice, Zouche explored two meanings of peace. The first is 'moral peace', analogous to patriarchal family home life: 'when a man's affections agree with his domestic duties, or when the members of a family agree with the head or father of a family'.[132] This forms a model for a wider 'civil peace', where subjects agree with the prince. Building on these internal forms of peace are several different forms existing between superiors and equals on the international stage: 'the concord of neighbour with neighbour, state with state, kingdom with kingdom'.[133] Peace results only when princes and peoples have 'united in a concord agreeing with justice', and discord flows from 'depraved reason and corrupted customs' leading

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129 Zouche, *Exposition* (n 119) 2.

130 Ibid.

131 Ibid 1.

132 Ibid 3.

133 Ibid 2.

in turn to 'ill-affected[ness]' between those who 'recognize no superior [and] have none to restrain them'.[134]

But it is the alignment of familial (moral), state (civil) and international peace that guarantees ordered concord based in justice; a linking of constitutional order to international order. Order requires peace within the state, indicated by the presence of a civil government, 'which may be Paternal, Royal, or Popular' and conditions of friendship or alliance with other states: 'To community between nations belongs first the status or condition of peoples among themselves, which depends on their organization and rule, and in so far as it is voluntary and acceptable to its subjects may be called "civil government."'.[135] Zouche's original source of civil government and later international order is thus domestic and patriarchal. Government emerges first in parents and the household, with absolute power in the paterfamilias, and it is only with the 'propagation of numerous descendants' that national power comes to belong to chiefs, which Zouche notes were, in sacred terms, 'patriarchs'.[136]

With this theoretical exposition about the nature of peace, order, government and justice in place, the remainder of the *Exposition* explored 'questions' about the precise nature of these legal relations between nations at peace and war. These questions touch frequently on the problems of the interaction of internal and international legal ordering. As a set of civil law disputations, Zouche offers the strongest arguments for each side of a question, rather than arguing for one conclusion or other. The relationship of domestic to international law appears here as a tension or set of possibilities, rather than a doctrinal account dictating which laws take precedence.

Among Zouche's treatment of domestic and international questions in these discussions, three themes emerge. The first concerns how changes in internal

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134 Ibid 3.

135 Ibid 4.

136 Ibid.

government affect the international legal order, arising when the 'condition of a prince, or people, or their subject … is changed, or lost'.[137] These are often imperial questions. Zouche discussed the claim of the 'German Emperor' to be Roman as well, whether 'imperial dignity' is granted by the Pope, whether the Emperor holds sovereignty over other kings and princes, and the effect of dependency as protection or dominion.[138] Others dealt with the nature of constituent power and succession following a change of government, where Zouche considered the state as a 'relation between the parts which govern and are governed' and also as a 'legal association' whose obligations can endure a change of government.[139]

The second was the encounter with other legal systems. Considering whether it 'detracts from the majesty of a prince of people to admit laws from other sources?', Zouche noted that imposing laws on another people against their will is a 'sign of subjection', but acknowledged that foreign laws can only be taken up 'freely and voluntarily', and might be adopted only insofar as they do not conflict with local laws: 'when the law of the land fails, it is right to have recourse to the laws of others', namely, other written civil laws.[140] Zouche ends this section citing John Selden's *Fleta*, with the example of England's mixed post-reformation jurisdictions, noting that the repudiation of papal jurisdiction meant that Canon Law is accepted in England only 'in so far as it is not repugnant to the statutes of the royal prerogative and customs of the realm' — a formulation prescient of the implied supremacy of domestic law — and that likewise Roman Civil Law is accepted as the basis for military and maritime law because the common law does not cover these areas.[141] A final example of this type of encounter is Zouche's brief consideration of constitutional law, in which he discusses the principle from

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137 Ibid 61.

138 Ibid 61–4.

139 Ibid 66.

140 Ibid 64–5.

141 Ibid 65.

Calvin's Case, noting that the kingdoms of England and Scotland were not distinct, despite their different crowns, laws and customs.[142]

Third and finally, Zouche touched on the analogies of domestic and international laws in questions of ownership. Most significant among these is Zouche's exposition on the debates between Grotius, Selden and William Welwood on whether the sea can be appropriated by occupation. Here, Zouche focused on the debate over Spanish acquisitions in America and presented only the English arguments (thus presumably endorsing them alone), concluding that the Pope could not make the Indies Spanish property as England did not recognise the Pope's prerogative, 'much less authority binding on princes who owed him no obedience', to give Spain possession, and noting that 'prescription without possession is of no effect'.[143] Here, civil law principles on possession are used to international effect.

As with Gentili's *Spanish Advocations*, Zouche's presentations of sides of questions and disputes makes it difficult to discern or attribute any clear doctrine that he endorsed. But Zouche's *Exposition* makes it clear that the tensions and conflicts between the rules and principles of the domestic and international spheres of law would be pedagogically useful for training civil lawyers. His theoretical foundation for those explorations emphasised the importance of sovereigns and peoples to develop international law by binding each other through treaties and conventions. Zouche's systematising and ordering of these legal spheres makes the need to consider conflicts between international and domestic laws an inevitable part of a complete legal argument. Precisely how those tensions might be resolved — particularly to privilege an English, nationalist conception of domestic law that would override or limit rival international laws — would emerge more clearly in the jurists that followed Zouche.

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[142] Ibid 68.

[143] Ibid 80.

C *'But Where Are All Nations?': John Selden and the Nationalisation of the Law of Nature and Nations*

Despite Holland's revival story, Zouche was not the only jurist engaged in a project of systematising, ordering and reconceptualising the law of nations in terms of positive law and laws between peoples. John Selden's (1584–1654) mature works sought to do the same, but pursued a clearer project of British Empire, a nationalist rethinking of domestic law, which was part of another form of argument that emphasised laws between peoples and ultimately drew on Hebraic laws and history and an idea of holy commonwealth.[144]

While Gentili's and Zouche's international fame arguably exceeded that of Selden, Selden was undoubtedly more prominent within England, particularly for his thinking on law.[145] What brought Selden particular notice within and beyond England was his most famous work on international law, *Mare Clausum*, in which he disagreed with Gentili on the question that perhaps best illustrates the combination of domestic and international legal sources in the seventeenth century; the possession, ownership and control of the seas. Initially completed in 1618, *Mare Clausum* was used in James I/VI's negotiations with the Dutch over disputed fishing rights. But James blocked its publication, and it did not appear until Selden was urged by Charles to revise and publish it in 1635, and by then it also responded to Grotius's *De Iure Belli ac Pacis*.[146] *Mare Clausum* was, explicitly, a defence of British Empire and the right to dominate the seas, and

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[144] On which, see especially Reid Barbour, *John Selden: Measures of the Holy Commonwealth in Seventeenth-Century England* (University of Toronto Press, 2003).

[145] On Selden's life, see Paul Christianson, *Discourse on History, Law, and Governance in the Public Career of John Selden, 1610-1635* (University of Toronto Press, 1996); GJ Toomer, *John Selden: A Life in Scholarship* (OUP, 2009).

[146] See further Richard Tuck, 'Grotius and Selden' in JH Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (CUP, 1991) 499.

Marchamont Nedham's translation of it during Cromwell's Commonwealth showed it could be a project of commonwealth as much as monarchy.[147]

Selden's *Mare Clausum* sought to claim ownership of the seas around Britain for its monarchs, arguing that natural law and the law of nations both made national laws and customs central to this question, and that Britain's domestic laws and customs gave it a right to the seas extending from the British Isles. This explicitly imperial and nationalist claim rested on a reordering of legal spheres, a greater role for occupation and possession, and extensive biblical allegories. Against Grotius, Selden contended that ownership of the sea was 'permissive' or 'intervenient', based on custom and usage, rather than as a necessary or universal part of the law of nations that could be commanded or forbidden. That custom and usage was proven by the 'long and continual conjunction with the British Empire', showing that the 'enjoyment and possession, or lawful prescription' over the seas was the basis of Britain's title, dominion and ownership over them.[148] Selden dubbed these sovereign seas royal 'Closets' or 'Chambers', rooms of the royal house, reflecting the language of the deeds and writs that underlay that evidence of custom and usage, and in these passages quoted Gentili's account of James's sea jurisdiction, and disagreed with a contemporary's interpretation of Gentili as limiting that jurisdiction at all.[149]

While Selden's privileging of domestic English law as the real basis of sea ownership is important, what is still more revealing of his approach to the domestic and international is the ordering of law on which he bases these arguments. Selden

147 On the contexts for the various translations and publications, especially Nedham's, see Willy Maley, '"Neptune to the Common-Wealth of England" (1652): The "Republican Britannia" and the Continuity of Interests' (2018) 33 *Seventeenth Century* 463; David Armitage, 'The Cromwellian Protectorate and the Languages of Empire' (1992) 35 *Historical Journal* 531, 533–5. Somos makes perhaps the strongest claims for Selden's links to empire and the use of religious concepts: Mark Somos, 'Selden's Mare Clausum. The Secularisation of International Law and the Rise of Soft Imperialism' (2012) 14 *JHIL* 287.

148 John Selden, *Of the Dominion, or, Ownership of the Sea*, tr Marchamont Nedham (Du-Gard, 1652) 2 Selden/Nedham usually render 'domestic' as 'Domestick'. 'Divers' is rendered as 'diverse' consistently here, though another common transliteration is 'various'.

149 Ibid 363ff, and see 371ff (discussing Gentili).

outlined a set of divisions in the meaning of 'law'. The first division was around command. Law is either obligatory (commanding or forbidding things) or permissive (allowing, but neither commanding nor forbidding, such as powers of contract).[150] The second division was in law's application as universal or specific. Both obligatory and permissive laws can relate to either 'mankind in general … all Nations', which includes natural and divine law, or 'not all' nations. Selden then outlined the ways laws may evolve and change.[151] While obligatory natural and divine laws come from 'the father of nature' and cannot change, Selden allowed for '*Additions* or *Enlargements*' (though no 'alterations') to these principles for the purposes of 'more certainty and convenience of observation'.[152] Permissive natural and divine laws, however, can be changed by sovereigns: they 'must needs be various and changeable, according to the judgement and pleasure of persons in power; and therefore subject to Repealings, Qualifications, and daily Alterations'.[153] From both additions and alterations arises '*Positive* [or] *Civil*' law, which might be 'singular and peculiar' in applying to one nation alone, or shared in common between nations.[154] Shared positive laws might bind nations to each other, or they may just be accidents of history — the reception and voluntary use of similar laws.

From all this, Selden arrives at his use of the 'domestic':

> And of this threefold kind of *Positive Law*, we may call the first the *Law purely Civil*, as it relates to any one particular civil society. The second the *Common Law of Diverse Nations*, so named from some common tie or obligation between them. The third the *Law of Some or Diverse Nations, Civil and Domestic*, by reason of that Domestic and

150 Ibid 13.

151 Ibid.

152 Ibid 13–14.

153 Ibid 14.

154 Ibid.

> Civil tie only, whereby they are bound singly among themselves, without any obligation to each other in common.[155]

Domestic laws are purely products of national agreement. They may be shared or similar by accident, but they gain their force internally from their constituent subjects, not through any obligation to another nation. Laws that cross boundaries, as a common law that binds different nations together, is a law of 'mutual obligation', and divides into 'imperative' and 'intervenient' laws of nations; the latter term very similar to Zouche's *jus inter gentes*. The 'imperial' law of nations involves imperial and dependent inter-sovereign relations, with obedience and submission to the '*Pope*'s authority and command' the prime example.[156] The intervenient law of nations arises not from command but by 'custom or compact' among nations, and relates to war, embassies, leagues, covenants and commerce, and through their consent to make alterations or additions to the universal law of nations.[157] Before turning to dominion and ownership, Selden clarified that law 'as it is received and used at home by some particular people in their Courts of Judicature, it is to be called the Law *Civil or Domestic of diverse Nations*'.[158] This ordering schema is the basis for Selden's argument that the sea may be possessed, occupied and, like land, capable of dominion; private possession is part of the permissive law of nations.

Whereas Zouche would come to emphasise divisions and boundaries of nations as a basis for laws between them by using the language of Roman civil law added to elements of biblical and humanist scholarship, Selden's emphasis drew almost exclusively from Hebraic legal history to ground the links of domestic and international laws. Selden's argument was based on a long domestic and religious allegory to Noah's division of the world and donation of command to his sons. Selden noted that Noah was the first man to hold 'private Dominion' as

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155 Ibid (emphasis original).

156 Ibid 15.

157 Ibid 14–16.

158 Ibid 16 (emphasis original).

commanded by God, 'as if [Noah] had been absolute Lord or Arbiter of the whole world', and that dividing that rule among his 'posterity' led each of his sons to settle the first nations, as linking their families and languages; 'as private Lords, and appointed Bounds according to the number of their Families … throughout all Europe', leading eventually to a general idea of princes representing their communities.[159]

Like Zouche, this division into separate territories is the starting point for the encounters of domestic and international law. This is central to Selden's treatment of the religious basis for ownership and possession. The universal natural and divine law did not expressly command or forbid this division, but rather permitted both common enjoyment and the private dominion or possession of land. The 'division of Bounds and Territories' shows the consent of all mankind for 'quitting' common ownership, and instead distributing them to 'Proprietors', which Selden analogised to the civil law principles that 'Partners or Co-Heirs' share between them things held in common.[160] Finally, he considered 'vacant' lands, and related this back to a tension of imperial and domestic laws:

> It has been truly a custom of old, and which holds to this day in the more eminent Nations, that Vacancies are his who apprehends them first by occupation; as we used to say of those we call, *no man's Goods*. This appears plain in the Imperial Law; nor do we know of any Nation where it is not received, save in those where by the ['Municipal'] Civil Law of Some Nations, any things of this nature are appropriated to their Princes, that their Subjects gain not an interest by occupation: For there others have sufficiently disclaimed the acquiring of any title by occupation; and in the present case we must ever have respect unto this Qualification.[161]

Rights to occupy vacant land appear in the ancient customs of eminent nations, in the imperative–imperial branch of laws between nations (as opposed to the

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159 Ibid 18, 19.

160 Ibid 20.

161 Ibid 21 (emphasis original). Note the [Municipal] added here reflects an asterisked note in the original text.

intervenient), and one common to all nations, except where the municipal civil laws of some nations have abrogated the rights of occupation entirely, with all land retained by the sovereign. Here 'respect' for that qualification involved allowing such a deviation in domestic law from an international norm.

Later, this division becomes foundational for identifying a natural permissive law of possession that is evidenced in various domestic legal systems. Selden contended that every sphere of law that he has delineated permitted the private dominion of the sea: natural law and the universal or primitive law of nations permitted it because it is allowed by 'the positive law of nations of every kind' — namely, the '*Law Civil or Domestic of Diverse Nations* … the *Common Law of Diverse Nations*, whether … *Intervenient* or *Imperative*' and specifically 'the Customs of almost all and the more noble Nations that are known to us'.[162] After discussing religious customs around sea dominion, Selden turned to human laws, 'matters of duty between man and man', which he saw as evidenced in laws linked to national territory, expressed now in botanical terms that emphasised the autochthony of a nation's domestic laws. Whatever 'shall be permitted by the Laws, Placards, and received Customs of diverse Ages and Nations, both ancient and modern, then it may be collected what every Clime will or will not bear, by the diligent observation of Countries, Shrubs, Trees, Plants, and other things which belong to the body of Husbandry'.[163] Those nations that have 'a Law Civil or Domestic' or a regional law ('Law common to themselves and their neighbour Nations') allowing sea dominion will be 'competent Witnesses' of a wider natural permissive law of sea dominion.[164]

But Selden then rejected the principle in Justinian and Caius that natural reason can be observed in the customs of all peoples, and is also the law of nations, asking instead 'But where are all Nations? It is not yet discovered how many there are,

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162 Ibid 42.

163 Ibid 43–4.

164 Ibid 44.

much less upon what Customs they have agreed'.[165] It is 'vain' to seek rules or directions in the customs of all nations throughout history — some do not have sea borders and thus no laws on, say, shipwrecks, and others, the 'ancient inhabitants of Africa' and the 'Aborigines', had no government, law, command or custom — and thus we should privilege the laws of the 'civilized and eminent Nations of the past and present Age', and especially the nations 'who are concerned at present' in the question of sea dominion.[166] From these principles, Selden investigated the historical evidence of sovereignty claimed over seas, and contemporary legal evidence ('Leagues and Treaties'), that he contended shows sea dominion is 'agreeable to Law'.[167]

What Selden does in this final theoretical step before turning to the evidence is attenuate the scope of universal natural law to give a privileged role to domestic law. He does this through an appeal to the physical and legal characteristics of various nations. Neither the complete number of nations, nor their customs is known; instead we should privilege the eminent nations, and their national laws and customs will be shown not by natural reason, but their geographical situation, of what the 'Clime will or will not bear'. In doing so, Selden gives a strong position to domestic law, tying it closely to nation, and allowing it a method for deviating from otherwise universal laws or what other jurists might contend is demanded by 'natural reason'. Later, he clinched this argument by rejecting Gentili's view that Roman civil law was universally binding and a source and authority for the content of the law of nations. Selden emphasised that Roman civil law's application had been broken and altered over time, and that contemporary domestic laws in European nations diverged heavily from it. The Holy Roman Empire has 'extremely altered' the laws of Justinian's *Institutes*, Spanish and French Kings have sometimes prohibited the use of Roman law in their courts, and some laws

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165 Ibid.

166 Ibid 45.

167 Ibid.

between nations run clearly contrary to the civil law, even in nations that accept and incorporate it:

> there are truly some things in the very Law of the Nations of Europe (who receive those Books, and that upon very good ground, both into their Schools and Courts, so far as the particular Laws of their Kingdoms will permit) I mean in their Law Common, or Intervenient, which are not grounded at all upon the Law of Justinian, but have had their original from Customs quite contrary thereto.[168]

This rejection of Gentili illustrates Selden's different approach to unifying humanity; not through civil law commonalities, but by emphasising the distinctness of each nation's laws, the ability to voluntarily make them common, the promise of progress through altering and making new laws between nations to clarify the natural law, and, most significantly, recognising the Hebraic origins of international law as the real means of unifying humanity.

These themes of national law and Hebraic origins are part of a wider, consistent trend in Selden's work.[169] This began in his early work. In 1616 Selden edited a new edition of Sir John Fortescue's *De Laudibus Legum Angliae*, adding a series of 'notes' in which he questioned the continuity and authority of Roman civil law, pointing out that it had not been observed during the dark ages, and was really a rediscovery and reconstruction of the jurists in Bologna; in reality, no nation had been living by it for centuries, and its new codification and universalisation went against Selden's view of national, local developments of law.[170] Against Roman law's claims to approximate or reflect natural laws between states, Selden argued that national laws could attain the status of natural laws where they endured over a long period of time, practice and interpretation, even amidst national diversity: 'Diverse nations, as diverse men, have their diverse collections and inferences;

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168 Ibid 152–3.

169 See Ofir Haivry, *John Selden and the Western Political Tradition* (CUP, 2017); Charles Leben, 'Hebrew Sources in the Doctrine of the Law of Nature and Nations in Early Modern Europe' (2016) 27 *EJIL* 79.

170 Haivry (n 169) 283.

and so make their diverse laws to grow to what they are, out of one and the same root'.[171] These early works laid the foundation for Selden's split of civil, positive laws from the natural or divine law. Similar standards or rules of civil law throughout England and Europe led, for Selden, to the presumption that natural law was not contrary to those practices, and so while all law could be traced to a general, amorphous divine law, it was really these different, specific instances of civil law that should be of interest.[172]

The connections of national to Hebraic law as a basis for ordering domestic and international law becomes still more clear in Selden's last works. Less well-known than *Mare Clausum* but a more systematic treatment of its themes, the 1640 *De Juri Naturae et Gentium (Of the Laws of Nature and Peoples*) further developed Selden's thinking on natural law and its relation to national and international law, all of which, here, were explored through and grounded on Hebrew law and scripture. Natural law was 'world wide or universal', the law of nations is part of it, and from this universal law grew different national legal systems. National laws are not objectively correct, but rather subjective expressions of common ideas and values, which we should want to emulate, and the true essence of the 'law of nations' remains evident in the laws of the ancient Hebrews.[173] All valid national laws were within the ambit of 'natural' law as binding, authoritative agreements within political communities that attempted to express an idea of justice; they were 'legitimate extensions' of natural law.[174] In 1647 Selden printed a new edition of the *Fleta*, a medieval treatise on the common law by an unknown author, attaching his own dissertation, in which he placed national identity as a history of tradition and consent at the heart of the English constitution.[175] This argument rejected the claims of a universal Roman law, and emphasised the British resistance to and expulsion of the Romans, its self-constituted republic, and the long history of

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[171] Ibid 276.

[172] Richard Tuck, *Natural Rights Theories: Their Origin and Development* (CUP, 1979) 85–6.

[173] Haivry (n 169) 279.

[174] Ibid 270, 287, 312ff.

[175] John Selden, *Ad Fletam Dissertatio*, tr David Ogg (CUP, 1925).

resisting Roman law's incursion into English law.[176] Selden's wider work, then, dovetails with the project of *Mare Clausum* of asserting national, domestic law as a central part of a general concept of law and the wider system of the law of nations, in turn relying heavily on biblical interpretation and genealogies — personal or national — from Noah.

D *Leagues Private, Familial, Colonial and Foreign: Thomas Hobbes's Domestics*

Throughout his life, Thomas Hobbes (1588–1679) served as advisor, secretary and tutor in the household of the immensely wealthy and influential Cavendish family, consistently referring to himself as a 'domestic'.[177] Significant for his clear distinctions between natural and positive laws that undergirded his self-professed 'creation' of the 'civil science' of government that examined the relations of polities to each other, and the rights and duties of sovereigns and subjects,[178] Hobbes has long been a central figure in debates over domestic and international politics and authority.[179] Recent work has argued that Hobbes' connections between domestic and international order were a project of limiting passions among subjects and sovereigns that aimed to radically transform legal relations both within and between states.[180] Others have contended that Hobbes' place as a canonical theorist of the international has rested on weak foundations and a fairly limited theorisation of the international, based on earlier, limited appreciation of his nuanced points throughout the full spectrum of his works.[181] This part likewise reads across Hobbes' major works to offer a different emphasis, arguing that

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176 Haivry (n 169) 305.

177 Thomas Hobbes, *Leviathan*, ed Richard Tuck (CUP, 1996) xiii. Like Selden/Nedham, Hobbes tends to use 'Domestick'.

178 Martin Loughlin, 'The Political Jurisprudence of Thomas Hobbes' in David Dyzenhaus and Thomas Poole (eds), *Hobbes and the Law* (CUP, 2012) 5, 7ff.

179 Among the masses of work on Hobbes, the most recent work that resonates with this project is, eg, Armitage, *Foundations* (n 128) ch 4; Anne Orford, *International Authority and the Responsibility to Protect* (CUP, 2011) ch 3.

180 David Singh Grewal, 'The Domestic Analogy Revisited: Hobbes on International Order' (2015) 125 *Yale Law Journal* 618.

181 Armitage, *Foundations* (n 128) 60.

Hobbes' works used a wide range of domestic analogies and allegories in his descriptions of different 'leagues' that were central to his account of the relationship of domestic and international law. Family authority forms a thread through his works that illuminates his treatment of law within and between nations, providing one guide to Hobbes's equation of the law of nature with the law of nations, and, in *Leviathan*, the law of nature and nations as being of the same 'extent' as the civil law.

Hobbes' earliest treatise on law, *The Elements of Law, Natural and Politic*, finished in 1640 but not officially published in Hobbes' lifetime, dealt with the spheres of positive and natural law.[182] *Elements* conceptualised the unification of individual wills into a body politic by contrasting 'dominion paternal and domestic', where subjects are conquered, with the artificial commonwealth, created by the 'mutual agreement amongst many' to voluntarily submit to a leader.[183] The law of nations appeared only in the last sentence of *Elements*, where Hobbes stated it was the 'same with the law of nature': 'For that which is the law of nature between man and man, before the constitution of the commonwealth, is the law of nations between sovereign and sovereign after'.[184] The law of nature and nations were equivalent, and inter-polity law was essentially simply natural law.

Hobbes' *De Cive*, or *The Philosophical Elements of Citizenship* published in various forms and places between 1642 and 1651, built on the foundation of *Elements*, greatly expanding on its closing point. Like Gentili, Hobbes used *De Cive* to develop an account of natural law and the law of nations in which the two overlapped.[185] At the outset, Hobbes promised to outline three kinds of duties for men: 'first as men, then as citizens and lastly as Christians', where those duties

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182 On the background, context and relationship of the three works, see Thomas Hobbes, *On the Citizen*, ed Richard Tuck and Michael Silverthorne (CUP, 1998) xii–xxiv.

183 Ibid xl (Tuck's translation from *Elements* I.19.8-11).

184 Thomas Hobbes, *The Elements of Law Natural and Politic* (CUP, 1928) 190.

185 Brett (n 23) 82.

'constitute the elements of the law of nature and of nations, the origin and force of justice, and the essence of the Christian Religion';[186] that is, a series of different spheres of duties, which need to be arranged within and by the polity.

De Cive modified the *Elements* account of domestic sovereigns, moving away from conquest to a family reproduction account, where civil law may modify a natural right of mothers over children. After laying out the now familiar Hobbesian transition from nature to government, Hobbes expanded on the contrast between paternal and artificial government raised in *Elements*, now terming the first 'natural commonwealths' as '*Paternal* or *Despotic*'.[187] Despite dropping the 'domestic' here, in a later chapter Hobbes explained the natural commonwealth through household analogies, and grounded 'paternal dominion' on the generation of offspring by parents.[188] In this account, Hobbes initially gave the mother the natural right over newborn children. But civil laws can provide for the transfer of that power to the father: 'in a commonwealth, if a man and a woman make a contract to live together, any children born belong to the father, because in all commonwealths, because they are established by the Fathers not the mothers of the family, the power of domestic government belongs to the man'.[189] Paternal power unites the father, children and any slaves into the civil person of the family which, if it grows large enough that it 'cannot be subdued without a war of uncertain outcome', is a patrimonial kingdom.[190] Here, Hobbes offered a secular, generic mythology of monarchies based in large family groupings.

As in the *Elements*, *De Cive* raised domestic family monarchies as the contrast for the more genuinely authoritative form of polity, the 'political commonwealth', which Hobbes now framed around civil law. In a political commonwealth, the crowd transforms into a people by union and subjection to a sovereign who makes

186 Hobbes, *On the Citizen* (n 182) Preface [1] 7.

187 Ibid 69–74.

188 See ibid 110.

189 Ibid 110 (emphasis omitted).

190 Ibid 112.

laws and decides disputes for their mutual protection, defence and advancement: 'These rules or measures are normally called the *civil laws* or *laws of the commonwealth* because they are the *commands* of the holder of *sovereign power* in the commonwealth … [they] are nothing other than commands about the citizens' future actions from the one who is endowed with *sovereign authority*'.[191] The sovereign collects these wills as the basis of civil law, but is not itself bound by that civil law, remaining always free.[192] Civil law gives shape and specificity to the generalities of natural law, and Hobbes acknowledged that civil laws may differ widely between different commonwealths.[193] Like Zouche and Selden, Hobbes saw civil law in positive terms, as linked to and ideally expressive of natural laws, but taking on forms that suit the country or national temperament rather than abstract principles.

In positioning the commonwealth as still bearing only natural rights vis-à-vis other commonwealths, Hobbes drew an analogy to individual men, albeit in the imagined state of nature. Whether paternal or artificial, all commonwealths took on the personal qualities of men in the state of nature, and the natural law rights and duties that applied there also apply to 'whole commonwealths, peoples or nations', and are equivalent to the 'laws and rights of nations'.[194] Each commonwealth was, vis-à-vis other peoples, commonwealths or nations, a huge aggregated person, acting with universal freedom and in the same 'jural vacuum' as individuals in the state of nature.[195] Unlike Zouche and Selden's explorations of expansions and alterations to the law of nations along the lines of civil law, Hobbes' equivalence aimed to restrict both natural law and the law of nations. Rather than articulating the legal links between polities, Hobbes's treatment of

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191 Ibid 79 (emphasis original).

192 Ibid 84.

193 Ibid 86–7.

194 Ibid 156.

195 Noel Malcolm, *Aspects of Hobbes* (OUP, 2002) 446.

internal and external law grew from the general principle the sovereign acts to protect the 'safety of the people'.

That principle is the basis of Hobbes' linking of internal and external law in *De Cive*. All duties of all sovereigns are encapsulated in the principle that 'the safety of the people is the supreme law', where the 'people' is the crowd that constitutes the commonwealth, who are owed not just survival but a good life along the lines of their aims in instituting the commonwealth.[196] This 'good life' is a question of internal and external law and power, delineated into four categories: defence from external enemies, internal peace, acquisition of wealth consistent with public security, and full enjoyment of 'innocent liberty'.[197] External defence is made necessary by the hostility of commonwealths in the state of nature, leading to Hobbes' well-known passage: that commonwealths are naturally in a state of hostility towards each other, that an absence of war is not peace but an intermission of security based not on agreements but on the strengths of adversaries.[198] Earlier, Hobbes argued agreements are impossible in the state of nature for want of the fear of coercive power that the civil state provides, which makes genuine agreements between sovereigns impossible.[199] Similarly, clarifying the content of any natural law duties was impossible, with Hobbes resisting the usual explanation that it was revealed in the various laws of civilised nations, and arguing instead that no one, philosopher or sovereign, can 'pass judgment on the wisdom, learning and morals of all the nations'.[200] What needed no interpretation, however, was the sovereign's natural duty of defending its constituent people against external enemies — forming the boundary between people and other sovereigns — read in *De Cive* in everyday terms: preparation for war by intelligence gathering,

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196 Hobbes, *On the Citizen* (n 182) 143–4.

197 Ibid 166.

198 Ibid 145.

199 Ibid 37.

200 Ibid 32.

fortification, the training of armies, the hoarding of money, and providing a good civic life.[201]

The 'good life' aspect most relevant here was ensuring 'internal Peace', which Hobbes elaborated as sound domestic policy. The sovereign must provide both education and laws to promote sound civil philosophy and 'root out' the 'evil doctrines' that inspire men to sedition, eradicate poverty by ensuring equal burdens, establish a system of honours and offices to channel individual ambitions, and combat 'factions' within the polity.[202] With this final point Hobbes introduced an important link between internal discord and the possibility of foreign interventions. As a possible and untenable 'commonwealth within the commonwealth', any faction vying for sovereign power is a 'new union of citizens' that is either bound to an external foreigner (either another prince, or even simply a foreign citizen), or else a new commonwealth, a different pact of mutual self-defence that is created against the legitimate one.[203]

In dealing with the results of civil discord, factional contests, and foreign leagues, *De Cive* returned to bring the law of nature and nations and the civil law back into connection, here in considering threats to the sovereign. For Hobbes (and contra Gentili) treason transgressed natural rather than civil law, and traitors and rebels are convicted by natural right: 'not as bad citizens, but as enemies of the commonwealth, and not by the right of government or dominion, but by the right of war'.[204] But like Gentili, Hobbes saw religious tolerance as a question of civil law. Judging religious doctrines, including those that commanded obedience another sovereign prince or authority (that is, the Pope), remained a civil law question because the sovereign must judge whether that doctrine conflicts with civil obedience, and thus must be suppressed as a threat to peace.[205] Beyond these

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201 Ibid 145.

202 Ibid 146–9.

203 Ibid 149.

204 Ibid 166.

205 Ibid 81.

special cases, and in their everyday operation, civil laws aimed generally at securing the goods of life by detracting from a natural law of otherwise untrammelled liberty, limiting each citizen equally to secure the safety and prosperity of them all. No similar form of civil law is possible between sovereigns, as they retain the natural rights and duties of defending their respective constituents; no civil law-like mutual agreement can abrogate that natural right.

With *Leviathan*, published during Cromwell's Commonwealth, Hobbes's treatment of the international and domestic turned to 'associations'; a much more pronounced emphasis on peace beyond self-defence and a more prominent treatment of colonial expansion and empire.[206] Here, there is a new role for analogies to the family in explaining the legal authority justifying projects of empire.

Leviathan largely reiterates the view of sovereign internal and external powers in *De Cive*, but with personalised allegories. Outside a system of civil government, war is the natural condition, and remained so between sovereigns, reflected in Hobbes' well-known passage on the sovereign as gladiator: 'in all times, Kings, and Persons of Sovereign authority, because of their Independency, are in continual jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another', in a posture of war.[207] In this vivid, anthropomorphic analogy, the sovereign as gladiator is ever jealous precisely because of their state of independence. The lesser noticed end of this image — 'But because they uphold thereby, the Industry of their Subjects; there

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206 On Hobbes and colonial laws, see further, eg, Christopher Warren, 'Hobbes's Thucydides and the Colonial Law of Nations' (2009) 24 *Seventeenth Century* 260; Patricia Springborg, 'Hobbes, Donne and the Virginia Company: Terra Nullius and the "Bulimia of Dominium"' (2015) 34 *History of Political Thought* 113

207 Hobbes, *Leviathan* (n 177) 88. On this passage and its later readings and arguable misinterpretations, see especially Tuck (n 8) 138ff, emphasising its humanist account of fear and its justifications and Malcolm (n 195) 435–55 (reading it as 'jural and negative', with jural relations absent outside the state). See also Larry May, *Limiting Leviathan* (OUP, 2013) 180–3, who reads Hobbes's points on gladiators and leagues to distinguish between the degrees of power needed to avoid anarchy at the domestic (stronger) and international (weaker) level.

does not follow from it, that misery, which accompanies the Liberty of particular men' — emphasises that jealousy, independence and war-readiness is what allows domestic prosperity and any relief from the ordinary misery of the state of nature, which remains always impossible between sovereigns. Hobbes now also saw the external rights of making war and peace with other polities as linked to the sovereign 'judging when it is for the public good' to do so,[208] shifting the emphasis towards considerations of internal order and prudence rather than war and treaty-making being a natural right exercisable at will.

Hobbes' treatment of conquest, colonisation and empire is founded on the links between these images of domestic and artificial authority, and the internal and external aspects of power and law in Hobbes's contrast of domestic and international society. The first move is Hobbes' examination of 'leagues'. Hobbes returned to his enduring theme of paternal and despotic dominion, giving a still more refined version of the *De Cive* account of 'domestic authority', but linking it in *Leviathan* to empire. Great families are similar to little monarchies, and regardless of the despotism of their rule, the rights, duties and powers over conquered nations are the same for despots as for commonwealths.[209] This domestic analogy then becomes important for Hobbes' delineation of permissible and impermissible leagues within and beyond the state.

In a detailed and extensive analogy between family and sovereign, Hobbes saw families as forms of 'domestic government' that are both lawful private associations and limited by the civil law, not requiring any formal constituting by the sovereign, and yet closely mimicking the sovereign's absolute power:

> Private Bodies Regular, and Lawful, are those that are constituted without Letters, or other written Authority, saving the Laws common to all other Subjects. And because they be united in one Person Representative, they are held for Regular; such as are all

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208 Ibid 126.

209 Ibid 142. On Hobbes's wider use of gender analogies, see especially Joanne H Wright, 'Going Against the Grain: Hobbes's Case for Original Maternal Dominion' (2002) 14 *Journal of Women's History* 123.

> Families, in which the Father, or Master orders the whole Family. For he obliged his Children, and Servants, as far as the Law permits, though not further, because none of them are bound to obedience in those actions, which the Law has forbidden to be done. In all other actions, during the time they are under domestic government, they are subject to their Fathers, and Masters, as to their immediate Sovereigns. For the Father, and Master being before the Institution of Commonwealth, absolute Sovereigns in their own Families, they lose afterward no more of their Authority, than the Law of the Commonwealth takes from them.[210]

While domestic power is private and absolute unless limited by civil law, connections between private citizens are not. 'Leagues' of private citizens, seemingly of any kind, 'savour of unlawfulness' and are like 'factions or conspiracies': each is unnecessary in the Commonwealth, because the people must look to the sovereign to obtain justice.[211] Maintaining private armies or pursuing family feuds is unlawful and a mark of a lack of civilization.[212]

In describing these lawful and unlawful leagues, Hobbes draws a domestic–foreign connection. He emphatically rejects any leagues between foreign powers and individual citizens. Insurgent groups, whether subjects or foreigners, that 'by authority from any foreign Person, unite themselves in another's Dominion, for the easier propagation of Doctrines, and for making a party, against the Power of the Commonwealth' are unlawful.[213] Hobbes then turned immediately to alliances and leagues between sovereigns, reiterating that without force, they remain simply a loose connection of promises, similar to those permissible in the state of nature, and illustrated in pacts between sovereigns:

> For a League being a connection of men by Covenants, if there be no power given to any one him, or Assembly (as in the condition of mere Nature) to compel them to performance, is so long only valid, as there arises no just cause of distrust: and

210 Ibid 162–3.
211 Ibid 163.
212 Ibid 164.
213 Ibid 163.

> therefore Leagues between Commonwealths, over whom there is no humane Power established, to keep them all in awe, are not only lawful, but also profitable for the time they last.[214]

Hobbes's discussion here moves swiftly from private, family rule, to private armies and family feuding, to insurgencies of foreign princes, to ordinary treaties between sovereigns, forming a series of close analogies to illustrate Hobbes's ordering of the different levels of domestic and international laws and powers.

The next, more important instance of sovereign authorisation of a league is in the spreading of colonies as 'children' of a Commonwealth. Earlier, Hobbes had used similar family analogies to explain the spread of Roman law and government by conquest. He noted that, following a conquest, a sovereign may also sell or grant their right to govern to a 'stranger', not as a form of subjection to a foreigner, but rather as a kind of skill or prudence, raising the example of the Romans making their government 'digestible' by granting conquered peoples Roman privileges and names, making them part of the family of Rome.[215]

In turning to colonies, Hobbes reiterated the family analogy, and now linked empire to domestic government. Plantations and colonies are the 'Procreation, or Children of a Commonwealth': a body of men under the authority of a governor sent to inhabit a 'Foreign Country', either uninhabited, or 'made void' by war.[216] Once settled, the colony's relationship to the Commonwealth is either of unity or independence, made clear in the licence under which they were sent, and the connection they have to the Commonwealth, which Hobbes couched in the terms of maternal and paternal control. Colonies that become 'a Commonwealth of themselves' are discharged of subjection to their sending Sovereign, which is called their 'Metropolis, or Mother', who 'requires no more of them, than Fathers require of the Children, whom they emancipate, and make free from their domestic

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214 Ibid.

215 Ibid 137–8.

216 Ibid 175.

government, which is Honour, and Friendship'.[217] If they remain 'united to their Metropolis', then they are not free from domestic government but 'Provinces' of the original Commonwealth.[218] Thus the 'Right of Colonies (saving Honour, and League with their Metropolis,) depends wholly on their Licence, or Letters, by which their Sovereign authorised them to Plant'.[219] The kind of league existing between metropolis and colony reflects the power used by the sovereign.

Hobbes' account of colonies sits between his extended treatment of the legal ordering of civil and natural laws. Hobbes opened this discussion with the 'nourishment' of a Commonwealth, and used the language of 'foreign' and 'native' to divide the commodities needed maintain the 'body' of the Commonwealth, which he understood through property.[220] Again noting that property and inheritance are impossible in the state of nature, Hobbes emphasised that civil law is the basis of property, but the fairness of its distribution a part of the sovereign power dealing with justice.[221] While subjects may exclude each other, they can never exclude the sovereign from their lands, as any future redistributions by the sovereign will be guided by the 'common Peace and Security'.[222] Likewise, the sovereign retains power over subjects' foreign commercial endeavours.[223] Having noted these powers, Hobbes distinguished between 'counsel' and 'command', where the latter is the basis for his definition of 'civil law': law is generally not counsel but command, and the civil law is the law commanded by the person of the Commonwealth.

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217 Ibid.

218 Ibid.

219 Ibid 175–6.

220 Ibid 171.

221 Ibid.

222 Ibid 172.

223 Ibid 173–4.

This ordering exercise is significant because it is here that Hobbes conceptualised the civil and natural law as 'contain[ing] each other' and being 'of equal extent'.[224] Laws of nature are 'not properly laws' but rather 'qualities that dispose men to peace, and to obedience', including 'moral virtues' like 'Equity, Justice, [and] Gratitude'.[225] With the settling of a commonwealth, civil law is established, and this sovereign power demands subjects obey civil laws. But because of the 'differences of private men' about what equity, justice or morality require, the sovereign's civil laws are needed as the 'ordinances' by which the law of nature becomes 'part of the Civil Law in all Commonwealths of the world', and, reciprocally, obedience to civil law, as justice, becomes a 'Dictate of the Law of Nature'.[226] Hobbes concluded that civil and natural law are not different 'kinds' but rather different 'parts' of law; the former written, the other unwritten. Civil law abridgements of natural rights are the means of achieving peace and unity in a commonwealth.[227]

All the foregoing leads to Hobbes's final passages in this part of the *Leviathan*, in which he turned directly to the interaction of civil law, the law of nature and the law of nations. Reiterating that the law of nations is equivalent to the law of nature, Hobbes concluded by emphasising that each sovereign has the same right to procure the safety of 'his People' as any individual person.[228]

> And the same Law, that dictates to men that have no Civil Government, what they ought to do, and what to avoid in regard of one another, dictates the same to Commonwealths, that is, to the Consciences of Sovereign Princes, and Sovereign Assemblies; there being no Court of Natural Justice, but in the Conscience only; where not Man, but God reigns; whose Laws, (such of them as oblige all Mankind,) in respect

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[224] Ibid 185. On this passage and its interpretations, see especially Ross Harrison, 'The Equal Extent of Natural and Civil Law' in David Dyzenhaus and Thomas Poole (eds), *Hobbes and the Law* (CUP, 2012) 45.

[225] Hobbes, *Leviathan* (n 177) 185.

[226] Ibid.

[227] Ibid.

[228] Ibid 244.

> of God, as he is the Author of Nature, are *Natural*; and in respect of the same God, as he is King of Kings, are *Laws*.[229]

Natural law still provides directions to individuals in the state of nature, but these directions are not for the adjudication of anyone, but rather the conscience of each individual prince or assembly. These are aspects of prudence and counsel, rather than clear commands, and ultimately, only God can judge the sovereign's internal or external actions.

Hobbes' works used multiple analogies and allegories of the domestic, while also articulating an idea of the international that, on its face, seems limited. Hobbes's otherwise brief direct treatment of the international in his account of the law of nature and nations as equivalent, and then closely linked to the civil law, becomes, however, much more nuanced in his domestic comparisons. These ideas are used to link private family, public sovereign, and external imperial law and power. Hobbes's treatment of leagues shows a more substantial account of the links between the spheres of familial, public and imperial sovereign power, which provides the foundation of his views on the relations of civil law and the law of nature and nations.

E *'Empire is of Two Kinds': James Harrington's Revolutionary System*

Perhaps the strongest, radical juristic account of commonwealth, empire and the international and domestic appeared after Hobbes, in the last years of the Commonwealth. James Harrington's *Oceana* (1656) was a radical restatement and reorganisation of the internal workings of a polity; a written Constitution promising a utopian republican form of government.[230] On some accounts, Harrington's *Oceana* was very much a reaction to Hobbes' *Leviathan*, and a rival account of absolute sovereignty.[231] Oceana is a very thinly veiled British Isles and

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229 Ibid (emphasis original).

230 On Harrington's life and work, see Rachel Hammersley, *James Harrington: An Intellectual Biography* (OUP, 2019); JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (CUP, 1987) ch 6.

231 Arihiro Fukuda, *Sovereignty and the Sword: Harrington, Hobbes, and Mixed Government in the English Civil Wars* (OUP, 1998).

overseas empire. Harrington's idealised Commonwealth is not removed from history or Europe but rather saw Cromwell's England as a revolutionary opportunity to construct a new vision of government.[232] This vision rested on the division of 'law's empire' into the foreign and domestic. The justice of his state was based on protection, reordered land ownership and the rotation of offices; opposing strict absolutism with a form of aristocratic government. Despite this radical moment and the burning questions of political authority, diplomacy, treaties and the rights of intervention and regime change that characterised Harrington's day,[233] *Oceana* only briefly mentions the terms 'natural law' and the 'law of nations'. It did not use the language of civil or common law, but was instead cast in what Pocock calls the 'earlier vocabulary' of secular republicanism that took people as citizens rather than subjects, 'a creature who used intelligence to define himself rather than to acknowledge binding law'.[234] But it still had plenty of resonance with these categories. With his more general use of the term 'law', Harrington made internal and external forms of it central to his schema. His language of law's empire is about the exercise of sovereign power within and beyond the state, understood in the language of property, force, protection, and reason.

Harrington's model of government began with 'domestic empire' as a kind of dominion. Noting that whoever can provide bread for a people places them 'under his empire', Harrington announced that:

> Empire is of two kinds, domestic and national, or foreign and provincial.
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> Domestic empire is founded upon dominion.
>
> Dominion is property real or personal; that is to say in lands, or in money and goods.[235]

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232 James Harrington, *The Commonwealth of Oceana and the System of Politics*, ed JGA Pocock (CUP, 1993) xvi–xvii.

233 See further JC Davis, 'Narrative Constitutionalism and the Kinetics of James Harrington's Oceana' in Dennis Galligan (ed), *Constitutions and the Classics* (OUP, 2014) 169, 172ff.

234 Harrington, *Oceana* (n 232) xii–xiii.

235 Ibid 11–12.

Harrington's division of empire and government was based on land and property. The proportional distribution of property and force — its 'balance'— indicated the kind of state and its justice. Single landowners and force-wielders are monarchs and tyrants; few concentrated landholdings and armies typify nobilities, mixed monarchies and oligarchies; lands distributed to the whole people is a commonwealth, and force remaining with the people is anarchy.[236]

Turning from domestic to 'foreign empire', Harrington argued that the balance of force and property appropriate to 'foreign or provincial empire' is the precise opposite of what is required in the domestic sphere. 'National or independent empire' is exercised by those that hold 'the proper balance of dominion in the nation', while 'provincial or dependent empire' was 'not to be exercised' by landholders, 'because that would bring the government from provincial and dependent to national and independent'.[237] Justice in domestic government required a wide spread of land-ownership and the concentration of force, while justice in provinces and the overseas empire required the concentration of land-ownership and no local governmental powers. The largest colonial landholders must be the 'least admitted to the government abroad' because control of overseas territories necessitated denying self-government to local property holders; the alternative would allow them the separate independence of the state at home.[238] Harrington also emphasised the need for a similar imperial 'balance' between 'native' and 'foreign' territory holdings that ought to reflect domestic property division; avoiding provinces and colonies that are too 'vigorous' and unbalance the metropolis.[239] He noted the likelihood of eventual independence in the Indies through a maternal allegory: 'For the colonies in the Indies, they are yet babes that cannot live without sucking the breasts of their mother-cities, but Such as I

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236 Ibid 12.

237 Ibid 16.

238 Ibid.

239 Ibid 17–18.

mistake, if when they come of age they do not wean themselves; which causes me to wonder at princes that delight to be exhausted in that way.'[240]

This foreign and domestic division, and the opposition of force and property, are central to Harrington's wider aim of explaining the proper balance of aristocracy and democracy in the ideal, just and popular Commonwealth. The division of domestic and foreign empire provides the overlay for moving from force to legal authority. Concluding his points on the 'principles of power, whether national or provincial, domestic or foreign', Harrington noted that these principles are 'external, and founded in the goods of fortune'; the socio-economic conditions, and particularly the distribution of land ownership. The 'principles of authority', on the other hand, are 'internal and founded upon the goods of the mind'; the constitutional design of the Commonwealth.[241]

With this second division of external/fortune and internal/mind, Harrington framed the legislator's task as uniting external power with internal authority. Because reason and law restrain and organise power to make liberty possible, law becomes the virtue of the commonwealth: 'the government whose law is virtue, and whose virtue is law, is the same whose empire is authority, and whose authority is empire … if the liberty of a man consist in the empire of his reason … then the liberty of a commonwealth consists in the empire of her laws'.[242] Attaining this empire of laws is a matter of debating according to reason, and, in Harrington's system a deliberative senate that proposes laws, combined with a representative body which passes judgment on their reasoning by a simple 'yes' or 'no' vote to enact their proposals. The true meaning of commonwealth lies in this combination, which Harrington phrased in patriarchal and popular terms: the concurrence of the 'authority of the fathers and the power of the people'.[243] In

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240 Ibid 18.

241 Ibid. On Harrington's internal/external here, see Frank Lovett, 'Harrington's Empire of Law' (2012) 60 *Political Studies* 59, 66.

242 Harrington, *Oceana* (n 232) 19–20.

243 Ibid 23–5.

what follows, Harrington laid out the details of these fundamental laws that make this vision of commonwealth work, namely the redistribution of agrarian property, decisions by ballot, and the rotation of office-holding under universal adult male suffrage — a system of orders that he later succinctly saw in the metaphor of a tree: 'the agrarian by the balance of dominion preserving equality in the root, and the ballot by an equal rotation conveying it into the branch, or exercise of sovereign power'.[244]

Harrington's account of internal/external and reason/passion led him to explain the Commonwealth's international actions in terms of reason rather than law. The 'debate according to reason' is the foundation of the empire of laws, and corresponds to three kinds of rationality: private reason (individual interests); reason of state (the interest of a ruler); and the reason of mankind or the whole.[245] This tripartite taxonomy is of local, national, and international interests and rationalities. Relying on Grotius, Harrington articulated this final kind of reason as a 'common right, law of nature, or interest of the whole, which is more excellent, and so acknowledged to be by the agents themselves, than the right or interest of the parts only'.[246] This humanity-wide expression of 'right reason' is then linked back to domestic government: 'Now compute well, for if the interest of the popular government come the nearest unto the interest of mankind, then the reason of popular government must come the nearest unto right reason'.[247]

This link between local–national and humanity-wide interest, through an overlap of popular government and right reason, becomes clearer in Harrington's project, built throughout *Oceana*, of making the justice of Oceana's internal government the basis for the justice of its external actions. Early on, Harrington raised an innovative focus on equality as a means to domestic peace, in the balancing of people and senate, that is reflected in a taxonomy of different kinds of

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244 Ibid 100–101.

245 Ibid 21.

246 Ibid.

247 Ibid 22.

commonwealths. The first is a basic distinction between commonwealths of single nations (Israel, Athens) contrasted with those formed by 'leagues' or alliances of nations (the Achaeans, the Hollanders). The second is Machiavelli's distinction between commonwealths for preservation, including non-expansionist (Venice) and those 'for increase' or empire (Athens, Rome).[248] The third is what Harrington introduces as a new division around equality that fixes on 'domestic peace and tranquillity':

> The third division (unseen hitherto) is into equal and unequal, and this is the main point especially as to domestic peace and tranquillity; for to make a commonwealth unequal is to divide it into parties, which sets them at perpetual variance, the one party endeavouring to preserve their eminence and inequality, and the other to attain unto equality… but in an equal commonwealth, there can be no more strife than there can be overbalance in equal weights …[249]

Equality in the commonwealth erases internal strife. Taken with Harrington's idea of local, national and international reason and government, this third division is the basis for Harrington's concluding articulation of Oceana's imperial, religious mission.

Oceana has a providential role; a duty to expand its provinces and spread its system of government throughout the world.[250] Harrington's distinction between commonwealths for preservation and increase appears not only in the taxonomy above, but early in the introduction. The model commonwealth must go beyond mere preservation and must be 'for increase', aiming to form the 'mightiest foundation' that has yet been laid, and spreads its law across the seas: 'The sea giveth law unto the growth of Venice, but the growth of Oceana giveth law unto

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248 Ibid 32–3.

249 Ibid 33.

250 See ibid 232–4. On Harrington's imperialism, see further Mark Somos, 'Harrington's Project: The Balance of Money, a Republican Constitution for Europe, and England's Patronage of the World' in Bela Kapossy et al (eds), *Commerce and Peace in the Enlightenment* (CUP, 2017) 20.

the sea'.[251] Closing the work, Harrington returned to this theme of empire and the 'increase' of the Commonwealth. He noted the commonwealth has 'an open ear and a public concernment', not 'made for herself only' but instead is a 'magistrate of God unto mankind, for the vindication of common right and the law of nature'.[252] Noting Cicero's characterisation of the Romans as taking up the 'patronage' rather than empire of the world, Harrington insisted the Commonwealth, having attained its liberty, cannot 'sit still and fold your arms' or allow others to live under tyranny.[253] The model commonwealth is 'a minister of God upon earth, to the end that the world may be governed with righteousness', and in this pursuit 'the orders last rehearsed', that is, Oceana's constitution, are 'buds of empire [and] with the blessing of God, may spread the arms of your commonwealth like an holy asylum unto the distressed world'.[254]

Like Hobbes, Harrington fixed on leagues to explore the justice of empire, but here between empires and their provinces. Recapitulating Machiavelli's divisions of commonwealths that have spread by force through 'equal leagues' (the Swiss and Dutch; quasi-federal alliances), and by 'unequal leagues' (Rome; involving conquest, subjugation, and incorporation as part of peace), Harrington argued that the Roman example ought to be emulated now. Rather than planting colonies, Rome transformed former enemies into provinces by the spread of social and provincial leagues — the individual rights of citizenship, and collective rights of appeals to Rome to ensure just civil administration — but this eventually collapsed because of Rome's unjust land distribution.[255] Harrington's domestic scheme and its distribution of land, in contrast, would form the foundation for spreading

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[251] Harrington, *Oceana* (n 232) 7.

[252] Ibid 220–1.

[253] Ibid 221.

[254] Ibid.

[255] Ibid 221–4 (expansion) and 228 (collapse).

Oceana as a new patron of the world.[256] This is expressed in religious, millenarian terms:

> Now if you add unto the propagation of civil liberty, what is so natural unto this commonwealth that it cannot be omitted, the propagation of the liberty of conscience, this empire, this patronage of the world, is the kingdom of Christ. For as the kingdom of God the Father was a commonwealth, so shall be the kingdom of God the Son.[257]

This expansion, however, could only justly take place once Harrington's domestic system of government was implemented; an expansionary republic, creating new dependent provinces on the basis of a properly ordered agrarian distribution, and thus expanding in a balanced, equal manner.[258]

Harrington's legal theology of the domestic required that an eternal commonwealth, properly arranged, must spread its system throughout the world. This is not a question of agreeing laws between nations, helping nations recognise their commonalities by their shared civil laws or ideas of right reason or natural law, but rather as the announcement and spread of Harrington's form of domestic constitutional order, rational in its balance and equality. Its perfection demands that it be first established in Britain, and then spread throughout the world.

Harrington's empire of law rested on the division of foreign and domestic and the opposition between them around land ownership and political power. Whereas Zouche, Selden and Hobbes each used the more technical languages of civil law, natural law and the law of nations, Harrington employed more general terms of property, power, protection and reason and a wider concept of law that more readily moved from internal to external. That movement was central to Harrington's description of what is perhaps the clearest imperial content yet in an account of the domestic, in which Harrington looked not to connections through

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256 Ibid 231.

257 Ibid 231–2. On millenarianism in Harrington, see Davis's critical exploration of Pocock's reading: JC Davis, 'Pocock's Harrington: Grace, Nature and Art in the Classical Republicanism of James Harrington' (1981) 24 *Historical Journal* 683, 687ff.

258 Armitage, 'The Cromwellian Protectorate and the Languages of Empire' (n 147) 550.

the law of nations, shared civil law traditions or the universality of natural law, but instead a quasi-religious mission to spread just government.

F *The 'Force of the Public': John Locke's Federative Split*

Things, of course, turned out rather differently. Instead of being reformed around Harrington's domestic vision, let alone expanded to pursue his international one, the Protectorate collapsed, Charles II was restored and his successor James II would be ousted by the foreign intervention of Dutch Protestant William. The Glorious Revolution of 1688, often presented as the origin of Britain's 'modern' constitutional settlement, announced a clearer division of powers between the King and Parliament and ended the 'pre-history' of public law in the British Isles.[259] As chief ideologue of 1688, John Locke (1632–1704) epitomised the new 'radical conservatism' and sought to construct a political theory around the Revolution.[260] The centrepiece of that theory, the *Two Treatises*, were explicitly written in defence of William's claim to the throne and aimed externally: 'to justify to the world the people of England'.[261] With the institutional split of legislative and executive as one foundation of the new constitution, the competence over domestic law now fell clearly to Parliament alone, and external affairs to the monarch and ministers. It is in this context that Locke would articulate a clear 'federative' split between a revived 'municipal law' and the laws of nations. With this, the domestic has finally most clearly emerged, and its legal theology entrenched.

Amidst the well-known arguments of the Second Treatise, Locke drew a less-noticed series of divisions between internal and external laws that provide the clearest account of a split between domestic and international laws. Locke's careful treatment of 'municipal laws' placed them in opposition to patriarchal rule

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[259] See, eg, Thomas Poole, *Reason of State: Law, Prerogative and Empire* (CUP, 2015) 13.

[260] See, eg, Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton UP, 1986); Lois G Schwoerer, 'Locke, Lockean Ideas, and the Glorious Revolution' (1990) 51 *Journal of the History of Ideas* 531; Cromartie, *Constitutionalist Revolution* (n 118) 275ff.

[261] John Locke, *Two Treatises of Government*, ed Peter Laslett (CUP, 1988) 137.

to describe the origins of commonwealths and the laws of nature, tied together by the innovative centrality of property and especially private ownership. Whereas Selden's concern was the private dominion of the monarch, Locke's account of political power was in the combination of the right to make laws to regulate and preserve property, the enforcement of those laws, and a general power to defend the Commonwealth from 'Foreign injury', all of which can be done, as in Hobbes, 'only for the Public Good'.[262]

This apparently extensive general power is curtailed by jurisdiction and Locke's reading of the state of nature, which he used to limit jurisdiction to subjects alone. States cannot execute or punish 'any alien' because domestic laws 'reach not a Stranger': sovereigns, regardless of their 'civilisation', are 'to an Indian … men without authority', and hold no more power over foreign subjects as a person holds over another in the state of nature; that is, only their natural law powers.[263] Similarly, these municipal laws are based on and linked to natural law, regulated and interpreted through natural law precepts.[264] Any transgression of natural law, within or beyond a commonwealth, can be punished by all. Far from being subject to disagreement or uncertainty or incapable of adjudication (as in Selden or Hobbes) Locke saw natural law as even 'plainer' than the positive laws of commonwealths, because reason is easier to understand than the 'fancies and contrivances' that men might put into the words of positive law.[265]

Like Harrington, Locke's concept of municipal law is grounded in his account of property and its distribution. Unlike Harrington, but like Selden, Locke emphasised private rather than communal ownership. But unlike the jurists examined above, Locke now used labour as the basis for understanding private

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[262] Ibid 268.

[263] Ibid 273.

[264] Ibid 275 (emphasis original).

[265] Ibid.

property rights, within or after the state of nature,[266] as a form of positive agreement or league, which was central to Locke's account of the divisions and contacts between states, the different systems of law among them, and the compacts between them. 'Labour, in the Beginning, gave a Right of Property', and through labour and the increase of families, land became scarce and thus valuable, and this led to boundaries and then differences of laws between states that became territorial: 'the several *Communities* settled the Bounds of their distinct Territories, and by the Laws within themselves, regulated the Properties of the private Men of their Society, and so, *by Compact* and Agreement, *settled the Property* which Labour and Industry began'.[267] That settlement and consolidation of property within the state led to agreements between states to mutually agree to relinquish any natural law claim:

> the Leagues that have been made between several States and Kingdoms, either expressly or tacitly disowning all Claim and Right to the Land in the others Possession, have, by common Consent, given up their Pretences to their natural common Right, which originally they had to those Countries, and so have, *by positive agreement*, *settled a Property* amongst themselves, in distinct parts and parcels of the Earth …[268]

These positive agreements to solidify state property do not, however, apply to the '*great Tracts of Ground* to be found', where the 'Inhabitants' have not 'joined with the rest of Mankind' by similar ideas of labour, property or money, and thus still lie 'waste' and 'in common'.[269] Locke saw the accumulation of dominion over land as a form of common positive agreement or league between states to limit what would otherwise be claimable by natural law; to respect each other's property claims specifically tied to respect for the internal laws of other states, and to give up any dispute over them, in favour of instead seeking out more 'unoccupied' land.

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266 On Locke and property, see especially James Tully, *An Approach to Political Philosophy: Locke in Contexts* (CUP, 1993) chs 3–4.

267 Locke (n 261) 299 (emphasis original).

268 Ibid.

269 Ibid.

Locke thus connected a kind of comity of respecting different municipal laws to an international law of imperial colonial expansion, tied through natural law understandings of property rights commonly agreed by European states.

Locke turned to the 'domestic' as patriarchal family relations, to both build on this connection between municipal law and the law of nature and explore the origins of government. In the First Treatise, Locke had dismantled Robert Filmer's *Patriarcha*, which sought to trace England's kings back to Adam as the basis for their legitimate rule.[270] Locke contended that government was not a product of Adam's 'private dominion' or 'paternal jurisdiction' — a project also reminiscent of Selden's genealogising back to Noah — but instead a state of freedom and equality among equal men who might voluntarily elect and appoint a sovereign to rule them, then described in the Second.[271] Here Locke saw the family as a master with 'subordinate Relations of *Wife*, *Children*, *Servants* and *Slaves*' who are 'united under the Domestic Rule of a Family'.[272] While domestic rule resembled an ordered commonwealth, it was distinct in its 'Constitution, Power, and End': the patriarch holds powers that are distinct and differently limited than those of a king, namely only over family members.[273] Later, Locke offered an origins allegory, contending that families grew into Commonwealths, where the family formed a model of patriarchal government that might either lead to the unification of different families and a patriarch over them all, or the election of a monarch without any familial limits to power on the basis of trust in the monarch's honesty and prudence.[274] Locke's elective monarchy is a rejection of domestic government, but again, keeping with his refutation of Filmer, he also rejected

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270 See further Paul Monod, '*Patriarcha* and Other Writings' (1993) 17 *History of European Ideas* 366.

271 Locke, *Two Treatises* (n 261) 144–71.

272 Ibid 323. 'Servants' included agricultural or industrial workers under (temporary) domestic authority of a lord: see at 322 n 3.

273 Ibid 323.

274 Ibid 341–2 and 343–4.

paternal power as the basis of either dominion or government, and insisted that it is not divine because both origins pre-dated Christ.[275]

Locke's contrast of domestic family and state sovereignty led to an international problem about families that is in turn revealing of his concept of the community tie: issues of nationality and the treatment of foreign-born children and foreigners generally. Considering the nationality of a child born to English parents living in France, Locke insisted that the child can choose his subjecthood once he attains majority and is no longer under his father's rule, because the laws of nature trump municipal law: 'Since the Power that a Father has naturally over his Children is the same, wherever they are born; and the Ties of Natural Obligations, are not bounded by the positive Limits of Kingdoms and Commonwealths'.[276] Likewise, subjecthood is not simply a question of submission to positive laws, but rather the uniting of both one's self and one's possessions to a jurisdiction.[277] Submission to local laws is merely a natural law duty, a form of 'protection and homage', akin to submitting to the head of household in which a person stayed:

> But submitting to the Laws of any Country, living quietly, and enjoying Privileges and Protection under them, *makes not a Man a Member of that Society*: This is only a local Protection and Homage due to, and from all those, who, not being in a state of War, come within the Territories belonging to any Government, to all parts whereof the force of its Law extends. But this no more *makes a Man a Member of that Society*, a perpetual Subject of that Commonwealth, than it would make a Man a Subject to another in whose Family he found it convenient to abide for some time.[278]

In this thoroughly domestic analogy between visiting a household and equal protection of foreigners and subjects, Locke concluded that presence is not sufficient for membership of a society. What is needed is some further act of submission. The main end of submission to government is the preservation of

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[275] Ibid 343–4.

[276] Ibid 346–7.

[277] Ibid 348.

[278] Ibid 349 (emphasis original).

property.[279] Individuals give up the 'Empire' of freedom in the state of nature — their individual and personal 'equality, liberty and executive power' — to 'the Legislative power' of a society.[280] This legislative power cannot go beyond the common good, must be through established laws interpreted by impartial judges, and must only support force to execute those laws at home 'or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion', and each of these things guided by and directed only to the '*Peace*, *Safety*, and *public good* of the People'.[281] Obedience to these laws cannot be overridden by 'any Oaths to any Foreign Power whatsoever, or any Domestic Subordinate Power'.[282]

These linked ideas of divided states, the primacy of natural law over municipal, and concepts of property, family, the origins of government provide the basis for Locke's federative power and his clear statement of a division between domestic and international. Locke's domestic — municipal law-making through parliament — is entirely legal and the basis for making natural law principles real, while his international is prudential and quasi-legal; the navigation of leagues and compacts to pursue the 'force of the public'. After exploring various forms a commonwealth might take,[283] Locke offered a set of generalised, separate functions that are present in all forms of commonwealth. Legislative power is the right to direct the force of the commonwealth for preserving the community and its members (again, property), and executive power is the use of force to ensure compliance with those laws.[284] But a commonwealth also holds a wider 'natural power' that reflects the powers held by individuals in the state of nature. Most prominent is the natural law right of self-defence, held by all individuals in the state of nature, and after the formation of states, held by states as embodiments of their subjects. Locke

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[279] Ibid 350–1.

[280] Ibid 353.

[281] Ibid (emphasis original).

[282] Ibid 356.

[283] See ibid 355ff.

[284] Ibid 364–5.

articulated this in terms of 'controversies' and the possibility that injuries to individuals by foreigners might be relayed to the state as a whole: 'the Controversies that happen between any Man of the Society with those that are out of it, are managed by the public; and an injury done to a Member of their Body, engages the whole in reparation of it … the whole Community is one Body in the State of Nature, in respect of all other States or Persons out of its Community'.[285]

What follows is a longer list of the other powers within the general 'natural power', which Locke labelled the 'Federative': powers of war and peace, leagues and alliances, and of any 'transactions' with 'Persons and Communities without [beyond] the Commonwealth'.[286] The distinction between executive and federative power is between municipal and international laws:

> These two Powers, *Executive* and *Federative*, though they be really distinct in themselves, yet one comprehending the *Execution* of the Municipal Laws of the Society *within* its self, upon all that are parts of it; the other the management of the *security and interest of the public without*, with all those that it may receive benefit or damage from, yet they are always almost united.[287]

While the powers and the spheres of law to which they relate are nominally distinct, Locke insisted that they are practically unified. The executive power can be directed by clear positive laws, but the federative power must be left to the 'Prudence and Wisdom' of those exercising it, managing it for a general public good: laws between subjects within the Commonwealth precede them and can direct their actions, but in dealing with foreigners the executive must react to their actions and the 'variation' of foreign 'designs and interests', and thus is largely prudential and exercised by 'skill' for the advantage of the Commonwealth.[288] Finally, although these are distinct powers they are 'hardly to be separated' into the hands of different people: 'For both of them requiring the force of the Society

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285 Ibid 365.

286 Ibid.

287 Ibid (emphasis original).

288 Ibid 366.

for their exercise, it is almost impracticable to place the Force of the Commonwealth in distinct, and not subordinate hands', and to do otherwise would risk placing the 'force of the Public' under different commands, which would likely lead to conflict between those holders, and thus 'disorder and ruin'.[289] This marked the emergence of a division of internal and external executive power; an idea that both are exercised for the public good. The internal executive is realising the public good of enforcing municipal law, while the external federative is pursuing the good within compacts and leagues with other sovereigns. These things are often the same public good, but the former is achieved through enforcing positive law and the latter is best left to prudence.

Locke's institutional division of legislative/domestic and executive/international competency and power inaugurates the foundations of the 'modern' constitutional arrangements that are recognisably similar to the questions of the interaction of domestic and international law at issue today. Combined with Locke's other shifts — contrasting municipal laws away from patriarchal rule and towards the protection of private property, emphasising the connection of law to territory, and using patriarchal family relations as a contrast for both civil law implementations of natural laws and wider ideas of community membership — this new 'force of the public' in the federative split marked the clearest emergence of the domestic as linked to nation and territory. Locke presents the final point in these various legal theologies of the domestic; a rejection of biblical genealogical legitimacy, and the use of a range of Christian religious themes to tie property to law, to see civil laws as the enactment of laws of nature, and the commonwealth's natural duties to pursue its security and public interests with foreigners and foreign sovereigns alike.

G *Conclusion*

The otherwise disparate backgrounds and projects of the jurists examined in this part are linked together by a common aim of articulating a domestic sphere of law

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289 Ibid.

that is tied to nation, territory and empire, where the laws of the land might contest and control the intrusions of other rival legal orders. Three themes emerge from this general connection.

A first foundational theme is the use of the domestic image of the family as a model for legal authority inside and outside the state; as an analogy, contrast, or as origin story, some religious (Selden) and others mythical and secular (Zouche, Hobbes, Locke). Zouche used Roman patriarchal authority, enshrined in civil law, as an analogy for state. Selden used the biblical descendance of Noah as the genesis of private occupation rights and the basis for national divisions. For Hobbes, patriarchal authority was inevitably despotic, forming the contrasting model for the genuine, artificial commonwealth, but it also was the model for imperial spread and command. Locke's domestic images are the basis for submission and obedience, with the household guest forming an analogy for the treatment of foreigners. A second aspect of the emergence of the domestic is the introduction of positivism as an account of law-making that curtails and channels natural law. Consistently, these jurists saw a realm for changing civil law to channel natural law principles to render the latter unjudgeable: civil laws of different states may aim to implement the same natural laws, but do so in a range of ways that are tied to the climate, national character or history of a state, or simply the will of the sovereign representing the people. These thinkers fixed on articulating the human and artificial means of changing and reforming domestic law — treating it now as positive, changeable expressions of natural law ideas — which could be the basis for law-making between states that went well beyond their natural law rights and duties. In Zouche and Selden, this also formed the basis for a new understanding of the possibilities of laws between nations; the making of more complicated compacts and leagues to govern relations between states, that move well beyond the generalities of natural law principles. In contrast to the universal or pan-human senses of natural law in Gentili, the sectarian violence that motivated these works made doctrinal disagreements a stark reality and an urgent problem to be resolved by law. That necessitated carving out a stronger sense of national domestic law. A third and final theme is the connection of property and empire. Each of these jurists used analogies to property extensively, but it is with

Harrington and Locke that property was made central to their ordering of the state and its international aspects. As the next chapter will show, property and trade will be central to the emergence of the international.

IV CONCLUSION: THE DOMESTIC EMERGED

This Chapter demonstrated how the domestic emerged as a project of legal theology; a kind of secularisation of principles and themes in natural law thought which were then used to build the conceptual pre-history of international and domestic law that focused on sovereign and state. Through these tensions and attempts to understand and limit these political contests through law and legal ordering, to order a mass of jurisdictions, a domestic idea of law emerged. Some jurists (Gentili and Hobbes) saw an international in the conjoining of the law of nature with the law of nations. Others (Selden, Zouche, Locke) resisted convergence, but drew links and analogies between the law of nature, nations and civil law by connecting them to other ideas like universal laws, divine law, natural reason, or traditions specific to European states in the recently rediscovered Roman civil law, posed as the persistent links between divided nations. Still others (Zouche, Selden) also saw the laws between nations — inter-sovereign or inter-polity agreements — as forms of positive law not dictated by nature, or looked to law as power, prudence and institutions acting within and beyond the state (Harrington).

Gentili developed a thoroughly civil law-infused account of how the law of nations might develop through analogies and ordering, first following republican humanist restraints on sovereigns, and then absolute monarchical, imperial ideas of international action. With the tumults of mid-seventeenth century England, the domestic was articulated as a basis for a strongly nationalistic legal order that could be the basis for imperial claims to the sea (Selden), a system of international law (Zouche) or colonial expansion (Hobbes and Harrington) and — finally and most lastingly — as a division of legislative/domestic and executive/international competencies (Locke). Locke's division reflected the new institutional basis that will be the focus in chapters to come for incorporations, conflicts, and tensions between international and domestic law. The executive, acting prudentially, might

bind the state to treaties or compacts which require changes to internal laws, where that power lies solely with the legislature. This set up the spheres of domestic and international as the focal point for governing a commonwealth, and an empire, through law.

The next chapter shows how the quasi-religious aspects of this divide were finally and thoroughly secularised in Bentham's rejection of Blackstone's Lockean spheres of natural law, which formed the basis for his new term 'international' to counteract nationalism. Bentham's coinage fitted into a wider trend around sentiment and political economy seen in the works of Adam Smith. Its effects ran to responses to the French Revolution, the foundations of legal positivism, and the mid-nineteenth century accounts of nationalistic independence at the cusp of the re-emergence of Britain's empire in the Victorian era.

SENTIMENT AND REVOLUTION: POLITICAL ECONOMIES OF THE INTERNATIONAL, 1750–1850

I Introduction: Enlightenments

The European enlightenment story of the moves from religious to secular forms of law and authority is often told through the major works of continental legal theorists dealing with the encounters between legal systems. In his 1748 *Spirit of the Laws*, Montesquieu grounded constitutional analysis in the comparison of the functioning of different systems, arguing that these structures were contingent and open to improvement, rather than naturally emerging from or inherent in a people, and in doing so bridged the traditional and modern ideas of constitutional government.[1] A decade later the Swiss jurist Emer de Vattel's *Law of Nations* effected a similar bridge to the 'modern' law of nations, entrenching a view of the international legal system as built by and around the actions and arguments of independent sovereign states, the sole authors of international law, whose 'good housekeeping' of their internal orders by prudence would guarantee their enduring independence and stave off legitimate foreign interventions.[2] Prior to these shifts, a broader change took place. The old language of prudence and natural law was 'transformed' into secularised civic jurisprudence, most notably in the works of the late seventeenth and early eighteenth-century German jurists Samuel von Pufendorf and Christian Thomasius — both heavily influential upon Vattel — which laid the foundation for European sciences of political economy.[3]

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1 Baron de Montesquieu, *de l'Esprit de Loix* (Barrillot, 1748). On bridging in Montesquieu, see Judith N Shklar, *Montesquieu* (OUP, 1987) 111.

2 E de Vattel, *The Law of Nations*, tr Charles G Fenwick (Carnegie, 1916). On housekeeping in Vattel, see Béla Kapossy, 'Rival Histories of Emer de Vattel's Law of Nations' (2010) 31 *Grotiana* 5, 7.

3 Martti Koskenniemi, 'Transformations of Natural Law: Germany 1648-1815' in Anne Orford and Florian Hoffman (eds), *Oxford Handbook on the Theory of International Law* (OUP, 2016) 59; Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Europe* (CUP, 2006); Ian Hunter, *The Secularisation of the Confessional State: The Political Thought of Christian Thomasius* (CUP, 2007).

As the previous chapter showed, British jurists had been engaged in similar projects of rethinking natural law as part of a legal theology of the domestic, eventually leading to a 'modern' split of legislative/domestic and executive/international. This chapter shows how British jurists writing in the eighteenth and early nineteenth centuries turned, like their European contemporaries, towards sentiment, revolution and political economy, albeit spurred by different Enlightenment currents: utilitarian rational law reform, Scottish enlightenment cosmopolitanism, and British reactions to European revolutions. In these works, the international emerged by replacing quasi-natural law thought with rational reorganisation, ideas of national sentiment, and the new science of political economy, all of which provide the first strong links between internal and international laws, and projects for the reform of both.

Part One contends that Jeremy Bentham's term 'international' grew out of his polemical rejection of William Blackstone's Lockean hierarchy of legal spheres. This grounded Bentham's work on a system of morals and legislation that fixed on internal and international laws to distinguish the laws between states from those within them, as projects to counteract national prejudice and serve peace. Meanwhile, Adam Smith's work on sentiment and trade produced a parallel account of the international that grew out of domestic sentiment, which was then reoriented towards political economy, a science of new 'natural' laws that, like Bentham's, also urged the reorganisation of internal governments. Part Two turns to three legacies of Bentham and Smith's visions of the international, which, after the loss of the American colonies and the French Revolution, became fixated on internal constitutions. First, Edmund Burke's reactionary responses to the French Revolution argued that it violated the laws of nature, which he revived in a 'law of civil vicinage' based on ideas of property and neighbourhood to support interventions to contain revolutionary constitutionalism and its international, imperial ambitions. Second, Bentham's later works, which grew out of his critique of the Revolution, that, mirroring Burke's, argued that it was wrongly based on natural law, led him to turn away from international law to the reform and rationalisation of constitutional systems and culminated in his 1820s attempts to write a constitutional code that extended the duties of good government to all

nations. Third, whereas John Austin's centring of the domestic commanding sovereign grounded his influential account of international law as not strictly law so-called, it is in Travers Twiss's wide-ranging works that Benthamite and Smithian themes of political economy, sentiment and utility come together in the quintessential mid-nineteenth century account of an international and domestic built on nations and independence; a vision that laid the stage for the imperial expansions of the late nineteenth century.

II 'OH MY COUNTRYMEN!': THE INTERNATIONAL IN BENTHAM AND SMITH

A *Introduction*

Bentham's international grew out of his early oppositions to Blackstone's endorsement of Locke's approach, and gave rise to his later arguments that a simple division of internal and international laws would allow the unification and rationalisation of the relations between them, and with that the improvement of legal systems throughout the world. But Bentham's new term emerged amidst a wider change in theorising sentiment, subjectivity, cosmopolitanism and empire most evident in the works of Adam Smith. Smith's parallel project applied Hume's critiques of Locke to juridical ordering, leading to accounts of domesticity and ranking as constitutional ordering and an early idea of equality, in turn linked to his ideas of international trade and imperial federation; a project of cosmopolitan commerce and the reform of internal laws amidst the vast eighteenth century expansions of the British Empire.[4] What joins Bentham and Smith in their parallel approaches to the domestic and international is their use of sentiment and rational reform to pursue utility, maintain the habits of obedience, and avoid revolution. Bentham's exhortation in his essays on international law — 'Oh my Countrymen! purge your eyes from the film of prejudice' — is an anti-nationalist sentiment for internationality, just as Smith would base the duties of cosmopolitanism on a close

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4 See especially John Robertson (ed), *A Union for Empire: Political Thought and the British Union of 1707* (CUP, 1995); Istvan Hont, *Jealousy of Trade: International Competition and the Nation State in Historical Perspective* (Belknap, 2005); Istvan Hont and Michael Ignatieff (eds), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (CUP, 1985).

focus on domestic sentiments and laws.[5] Like the jurists of the previous chapter, both Bentham and Smith use the family and paternal authority to understand the relation of sovereign and subject,[6] but in the eighteenth century these allegories and analogies turned international.

B *Anti-Blackstone: Bentham on Sovereignty, Obedience and Natural Law*

Blackstone's *Commentaries* took up Locke's division of municipal and international laws, and made it still more juridical by examining recent cases and announcing what has been memorialised as the first clear account of the 'doctrine of incorporation', whereby the law of nations became part of the body of English law, automatically or by statute, albeit without Blackstone using the term 'incorporation':

> In arbitrary states this law [the law of nations], wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.[7]

Parliament clarifies and turns to statute what is already accepted within English law and the constitution. For Blackstone, this is not about conflicts between parliamentary or crown sovereignty and the principles of the law of nations, but rather the clarification of individual criminal offences; he turns to the violation of

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5 On sentiment as a frame for imperial history, see further Jane Lydon, *Imperial Emotions: The Politics of Empathy across the British Empire* (CUP, 2019).

6 On this point, see JH Burns, 'Bentham and the Scots' (2004) 7 *Journal of Bentham Studies* 1, 10.

7 William Blackstone, *Commentaries on the Laws of England*, ed Wilfrid Prest (OUP, 2016) vol 4, 44.

safe-conducts, infringements on ambassadorial rights, and crimes of piracy.[8] In each of these settings, different kinds of laws are hierarchically ordered, and their interactions or conflicts are limited.

The first foundations of Bentham's later international were laid in his decimation of Blackstone's neat ordering.[9] In his first major work, the 1776 *Fragment on Government*, Bentham focused on Blackstone's theoretical ordering of the law of nature and nations and municipal law as a basis for critiquing his broader account of sovereignty and the nature of the British Constitution. Against Blackstone, Bentham sought to distinguish real from 'imaginary' laws. Municipal laws were real laws; the laws of nature and nations were not.

Bentham began by describing Blackstone's ordering as involving law in general, the law of nature, revelation and nations, which Bentham called 'branches of that imaginary whole', in contrast to domestic laws, or, simply put, 'law':

> After treating of 'Law *in general*', of the 'Law of *Nature*', 'Law of *Revelation*', and 'Law of *Nations*', branches of that imaginary whole, our Author comes at length to what he calls 'Law *municipal*': that sort of Law, to which men in their ordinary discourse would give the name of Law without addition; the only sort perhaps of them all (unless it be that of Revelation) to which the name can, with strict propriety, be applied: in a word, that sort which we see made in each nation, to express the will of that body in it which governs. On this subject of Law *Municipal* he sets out, as a man ought, with a *definition* of the phrase itself; an important and fundamental phrase, which stood highly in need of a definition, and never so much as since our Author has defined it.[10]

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8 Ibid vol 4, 45–8.

9 On Blackstone and Bentham generally, see especially J H Burns, 'Bentham and Blackstone: A Lifetime's Dialectic' (1989) 1 *Utilitas* 22, and also Mark Weston Janis, *America and the Law of Nations 1776–1939* (OUP, 2010) ch 1 ('Blackstone and Bentham: The Law of Nations and International Law'), comparing them, though framed around their different receptions in American legal thought.

10 Jeremy Bentham, *A Fragment on Government; or, a Comment on the Commentaries* (Wilson, 2nd ed, 1823) 2 (emphasis original).

For Bentham, Blackstone confused these various meanings as equivalent, when they are different. Natural law and its branches are imaginary, speculative and refers to nothing existent in the world, whereas municipal law is real because it is effective and can be found in the world, most clearly in statutes. Bentham first articulated his account of sovereignty as obedience and subjection, which he later used to analyse the treaty-powers of the British Constitution and, at several points in the *Fragment*, the connection between internal and external/imperial government, and the issue of revolts and revolutions, which he then tied to an early idea of law as will and utility. In dealing with these themes, Bentham lays the foundations for his later international.

First, Bentham explained sovereignty as obedience and subjection through a disagreement with Blackstone on the state of nature and origins of government, which then formed the basis for understanding the connections of quasi-sovereignty between polities. Contra Blackstone's view that the social contract originated in the aggregations of families rather than the state of nature, Bentham argued that families lacked the genuine habit of obedience required of a true polity.[11] While Bentham thought the state of nature compact was probably fictional, it likely had an historical use in describing the rules of government in practice: a promise of general obedience from the people in exchange for the monarch's promise to govern in a manner subservient to the people's happiness, which left the people to determine if that promise was kept.[12]

This laid the way for Bentham's critique of Blackstone's political theology in his account of forms of government. Against Blackstone's view that sovereignty reflects the attributes of God — 'wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength or power, to carry this knowledge and intention into action' — Bentham insisted that the efficacy of power is the mark of sovereignty, proportionate to the

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11 Ibid 28–31.

12 Ibid 36–39.

real obedience of subjects, and an expression of the will of the polity.[13] Against Blackstone's insistence that regardless of governmental form, sovereignty must be supreme, irresistible and absolute, and thus requiring divine attributes of wisdom, goodness and power,[14] Bentham argued this ignores the complexities of real world states, abstracting them into generalities of careful planning and full, general assent, rather than the caprices, violence, accidents, prejudices and passions that explain their actual histories and forms. Bentham illustrated this by a set of parodies of conquests read in Blackstone's language of irresistible, absolute, uncontrolled authority: that the Mexicans were of the 'opinion' that Charles V had more goodness, wisdom and power than themselves, and so on.[15]

Bentham's later critique of Blackstone's account of the British Constitution returned to this idea of power, wisdom and goodness, here raised in dealing with a quintessential issue of the relationship of domestic and international law: the legislative, executive and judicial split in the context of problems around treaties and prerogative powers. Blackstone saw the British Constitution as the best balance of power, wisdom and goodness; respectively, in monarchy/King, aristocrats/Lords and democracy/Commons, with sovereignty acting as the balancer and distributor of supreme power, which is 'lodged throughout' the branches of the system.[16] Bentham contended that Blackstone introduced here a new distinction between executive and judicial power set apart from ordinary legislative power (which Blackstone had called simply 'sovereign power') that lacks clarity in itself or its application to various areas of government; the military, taxation, and so forth.[17] Bentham then explicitly queried the place within the executive of prerogative powers that touch on the law of nations: do executive powers 'include the right of substituting the laws of war to the laws of peace; and, *vice versa*, the laws of peace to the laws of war? Does it include the right of

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13 Ibid 54.

14 Ibid.

15 Ibid 56–8.

16 Ibid 71–3.

17 Ibid 74–5.

restraining the trade of subjects by treaties with foreign powers? Does it include the right of delivering over, by virtue of the like treaties, large bodies of subjects to foreign laws?'[18] Bentham insisted that Blackstone's efforts to distinguish legislative and executive powers must explain which branch these powers fall into,[19] forming the clearest statement yet of the constitutional technicalities of the interactions of international and domestic laws.

These critiques led to Bentham's own account of sovereignty as obedience and subjection as a wide spectrum lacking clear markers, which he applied to both subject–sovereign and imperial hierarchical relations. Obedience described both ordinary subjects under a governor, and 'governors' — or polities — in relations of obedience to each other: 'among governors some may be in a perfect state of nature with respect to each other', raising the example of France and Spain, emphasising the state of nature between equal, full sovereigns.[20] Beneath full sovereignty and a state of nature lay the relations of empire. Some governors may be in 'perfect subjection'; the vassalage of polities directly controlled by a higher sovereign. Others may be in 'imperfect subjection', of partial dependence, like the German states partly controlled by the Holy Roman Emperor. Still others lie somewhere between imperfect subjection and the state of nature between full sovereigns, with Bentham using the example of the King of Naples who partly depended on the Pope's ability to enforce succession rules.[21] With these distinctions in place, Bentham raised a domestic allegory. Obedience and subjection are changeable, as with infants gaining independence from their parents, and can be interrupted, as with the 'American Indians' who become dependent on a chief only during war and in peace return to independence. But Bentham lamented the difficulty of finding a 'note of distinction — a characteristic mark' that distinguishes societies with a 'habit' of obedience from those that do

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18 Ibid 75–6.

19 Ibid.

20 Ibid 20.

21 Ibid.

not. Marks of office or titles like King or Senator may be significant within a society or union, but do not themselves reveal real obedience.[22]

The only clear mark of obedience is revolution, raised throughout the *Fragment* as an internal (subjects–sovereign) and later external (sovereign–sovereign or sovereign–vassal) question. Dealing first with internal rebellions and writing of the fiction of the compact, Bentham saw subjects as weighing the utility of obedience against resistance, using the language of interest: 'why they should obey in short *so long as the probable mischiefs of obedience are less than the probable mischiefs of resistance:* why, in a word, taking the whole body together, it is their *duty* to obey, just so long as it is their *interest*, and no longer.'[23] Revolt shows the refusal of obedience and submission, a conscious disobedience against law and fact that is open and forcible rather than secret or fraudulent; but the particularities of when simple murder by revolutionaries becomes treason will depend on 'particular local jurisprudence': the laws of the states in question.[24] Contra Blackstone's Hobbesian account of supreme power as the union of private wills to a sovereign person or assembly, Bentham contended that this account of supreme authority is circular: law-making power indicates supreme authority, and supreme authority is the power of making laws; the combination of wills already assumes the reduction to one will that can claim the supreme power as combiner of wills. Instead, Blackstone's branches account simply makes the 'road' to revolutionary dissent and overthrow of this claimed supreme power longer: each subject under a sovereign simply weighs the 'internal persuasion' of that sovereign's claim to power on a balance of utility, and it is the utility of obedience over resistance that marks the real limits of proper government and legislative authority.[25]

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22 Ibid 20–23.

23 Ibid 42 (emphases in original).

24 Ibid 25–27.

25 Ibid 111–14. See also at 54 for Bentham's parody of Blackstone envisioning legal doctrine blocking revolutionary mobs.

These considerations of internal government and revolution are mirrored in Bentham's examination of sovereignty and secession at the external, imperial level. Just after articulating revolt as weighing obedience against mischief, Bentham noted that, at the inter-polity level, a smaller polity's break from a larger one means it is no longer in a political union with that larger state but instead a 'state of nature' relationship, though as with obedience, the 'characteristic mark' of this break remains difficult to clearly discern.[26]

In his closing analysis on leagues, Bentham returned to this issue of relational sovereignties and rebellions within empires. Using the ambiguous language of 'convention', Bentham raised an external/imperial meaning of convention and a more common domestic constitutional one. He noted that a supreme governor's authority was not infinite but rather 'unavoidably … *unless where limited by express convention … indefinite*'.[27] To explain the meaning of 'express convention', Bentham posited two situations. The first was an imperial arrangement, where one state 'upon *terms*' submits itself to government by another; a form of partial dependence under the constitution of another state, that reduces or removes the 'indefiniteness' of the formerly supreme, but now subordinate, governor's authority, 'defined by that arrangement of constitutions'.[28] The second was an international league formed through a constitutional instrument: 'where the governing bodies of a number of states agree to take direction in certain specified cases, from some *body* or other that is distinct from all of them: consisting of members, for instance, appointed out of each', such as an arbitral or judicial body that directs each member state.[29]

In these imperial and international arrangements, the express legal limits on authority are not as important as the habit of obedience of subordinate states to the imperial master. Any conventions or constitutions between them can be modified

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26 Ibid 24.

27 Ibid 112 (emphasis original).

28 Ibid 112 note [g] (emphasis original).

29 Ibid 122 (emphasis original).

or altered without departing from the spirit of the imperial constitution, and the imperial power can consent to it by either passing a law declaring the new relationship, or simply acquiescing to the subordinate's change.[30] Bentham then took up the example of Britain and linked it to sentiment. Any alteration of the Act of Union that would favour Scotland, as the minority nation, would likely need — for both 'expediency' and to preserve English 'public faith' and avoid 'irritating the body of the nation' — some method for making the new law 'depend upon their sentiments'.[31] Convention here is used to mean both the treaty–constitutional connection and laying the basis for an aggregation of nations into some kind of international government. These possibilities of conventions of imperial semi-sovereignty refuted Blackstone's claim that all governments must possess absolute authority.

Bentham's *Fragment* is usually placed as the whiggish, early germ of his later constitutional thought. It has been recently interpreted as a response to growing American revolutionary sentiment.[32] But it also dealt closely with problems analogous to those of domestic and international law. Bentham moved freely between internal and external constitutional relations, was primarily occupied by the broader questions of the legitimacy of revolution and the rejection of constitutional orders, and frequently returned to imperial constitutional relations of subjection, obedience and the formation of will. Rather than look to a state of nature or original aggregation of families, Bentham articulated the possibilities of obedience and revolution as markers of an enduring compact, in turn expressed through a principle of utility, which would come to guide his 'international'.

C *Prejudice, Publicity, Empire: Bentham's International*

Bentham's doubts in the *Fragment* about the law of nations' status as real law, his emphasis on will and obedience as the genuine marker of relations between

30 Ibid.

31 Ibid.

32 Paola Rudan, 'Securing the Future: Jeremy Bentham's *A Fragment on Government* and the American Revolution' (2013) 34 *History of Political Thought* 479.

subject–sovereign and sovereign–sovereign, and the use of revolution and the principle of utility as the marker of limits to sovereignty within or between states are all recognisably 'international' questions, without yet using that word. Whereas the *Fragment* was a polemical critique of Blackstone's inadequate definitions, Bentham's next major work, the *Introduction to the Principles of Morals and Legislation*, largely completed by 1780 and published in 1789, was a systematic treatise on the science of morality and jurisprudence which aimed to clarify and explore the branches of jurisprudence and offer precise definitions of its terms. Here, Bentham introduced the term 'international' to extend and solidify his analysis of the branches of domestic law, following the principle of utility. This new term was motivated not by developments in travel, commerce, diplomacy, culture, war or politics, but rather the laws that might and should exist between polities to regulate these things, and many other matters besides. Utility also formed the basis of his extended exploration of international and internal law in the *Principles of International Law*, written in several manuscripts from 1786–9, but only published posthumously in 1838 as fragments collated and arranged by Bowring. The decade of the 1780s and these texts form one major conception of the international that is largely fixed on avoiding further revolution by reforming the internal laws of legal orders across the world, joined by the principle of utility.[33] This part emphasises that Bentham's plan also sought to counter the domestic sentiments of nationalist self-interest that had also spread across the world.

The *Introduction* began with a statement of the principle of utility: '[n]ature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*', from which the interests of the community and ideas of morality must

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33 For an incisive and thorough reading of Bentham's global legisprudence that links it to his broader utilitarian system, see Gerald J Postema, 'Utilitarian International Order' in *Utility, Publicity, and Law* (OUP, 2019) 247. On Bentham and empire, see further, eg, Jennifer Pitts, 'Empire and Legal Universalisms in the Eighteenth Century' (2012) 117 *American Historical Review* 92.

be derived; to increase pleasure and decrease pain, in their various forms.[34] Bentham's overall purpose — promised in a retrospective 1823 preface but not entirely fulfilled by the time of his death in 1832 — was to first lay out the principles of morality and these building blocks of pleasure and pain, as well as action, consciousness, motive and intention, to provide a foundation for analysing legislation in general, to be then explored in specific branches of law.[35] In Bentham's detailed taxonomy, these branches were the 'principles of legislation' in matters of 'private distributive' (civil), penal, procedural (both criminal and civil), 'reward' (remedies), 'public distributive' (constitutional), 'political tactics' (legislative/institutional procedure), the 'principles of legislation in matters betwixt nation and nation, or to use a new though not inexpressive appellation, in matters of *international* law', finance, political economy, and finally a universal plan of law that would bring the branches together in general concepts: 'obligation, right, power, possession' and so forth.[36]

Bentham began the chapter that introduces international law with an idea of 'private ethics' as the art of self-government or action according to a person's own happiness, contrasting it with jurisprudence as the art or science of legislation, which 'teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is the most conducive to the happiness of the whole community, by means of motives to be applied by the legislator'.[37] The main branches of jurisprudence — those described in Bentham's prefatory plans — arose from five 'circumstances': the 'extent' of the laws in a dominion; the 'political quality' of the persons those laws seek to regulate; the time they are

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34 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon, 1907) 1.

35 Ibid viii.

36 Ibid viii–ix.

37 Ibid 323.

in force; how they are expressed; and their relation to punishment.[38] The first two are of most importance for Bentham's international.

The extent of laws is a geographical and regional-cultural idea about the links between internal laws and the idea of universal law. Bentham used it to refer either to the laws of a particular nation or group of nations, as 'local' jurisprudence, or to all nations as 'universal' jurisprudence. Nations, in their 'infinite variety', never agree entirely on the same internal laws in either substance or form, and at the least their linguistic differences would lead to further substantive differences between otherwise translatable legal terms.[39] Consequently, 'universal' works on jurisprudence can only be seen in 'very narrow limits'.[40] They cannot accurately describe the laws actually in force, though a work of modest comparative analysis that examined the laws and principles of 'a few of the nations with which [a jurist's] own is most connected' could be called 'universal jurisprudence'.[41] Bentham thought that the more properly universal treatise was one of censorial analysis, which described what ought to be the substantive law for all nations, marking out 'some leading points' around which 'the laws of all civilised nations might, without inconvenience, be the same'.[42] For Bentham, then, juristic writings that aim to draw commonalities or state close-to-universal principles existing between nations and within them, which might build from examining several jurisdictions, are aspects of examining the 'extent' of laws, but, contra the jurists of the last chapter, incapable of revealing any 'pretended' natural law.[43]

This general idea of extent lays the ground for Bentham's next focus on the '*political quality* of persons whose conduct is the object of the law', the basis for

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38 Ibid 324–5.

39 Ibid 325.

40 Ibid.

41 Ibid 326.

42 Ibid.

43 Ibid 329 n 1.

Bentham's distinction between international and internal jurisprudence.[44] The political quality of persons subject to internal law are members of the same state, while those subject to '*international* jurisprudence' are members of different states.[45] In a note explaining the term, Bentham wrote:

> 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 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 …[46]

While the 'law of nations' might literally mean some kind of comparative political theory, or the description of law within various nations, 'international' emphasises the laws existing between, or mutually penetrating, the legal systems of the nations of the world. Disputes between private foreigners, and between a citizen and a foreign sovereign are within internal law. The 'properly and exclusively' focused meaning of 'international law' is solely the 'mutual' transactions between sovereigns 'as such'.[47] Bentham illustrated this point with an example from Selden's *Table Talk*: when several English merchants won a case against Philip III of Spain in the English courts, Philip's ambassador paid the money, leading Bentham to conclude that '[t]his was internal jurisprudence: if the dispute had been betwixt Philip and James [I/VI] himself, it would have been international'.[48] Finally, he noted that any further clarity about whether the rules of sovereign conduct can be called 'laws' depends on the idea of a law being 'more particularly unfolded'; for the moment, he stated that both internal and international

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44 Ibid 326 (emphasis original).

45 Ibid (emphasis original).

46 Ibid 326 n 1 (emphasis original).

47 Ibid 327 and 327 n 1.

48 Ibid 327 and n 1.

jurisprudence and be expository or censorial (positive or normative), and authoritative or 'inauthoritative' (accurate or inaccurate).[49]

Bentham then turned to the nature of internal jurisprudence, stating that it might cover all members of a state, or just those in a district, noting his slight preference for the terms 'local' or 'particular' over the terms 'national' or 'provincial', and placing local/particular in opposition to the universal, and applicable when the universal 'is plainly out of the question'.[50] A note here returned to the point made at the outset of the *Fragment* on the language of the municipal: 'The term *municipal* seemed to answer the purpose very well, till it was taken by an English author of the first eminence', implying but not naming Blackstone, 'to signify internal law in general, in contradistinction to international law, and the imaginary law of nature. It might still be used in this sense, without scruple, in any other language'.[51] Bentham suggested here that Blackstone corrupted the meaning of municipal by pitting it against international law, and in doing so expanded municipal to mean national rather than local law.

The remainder of the *Introduction* turned to the problem of the nature of law itself, raised and deferred by Bentham, and not laid out in much detail until a series of points were appended in the 1789 manuscript. A deeper appreciation of Bentham's concept of international, and particularly its relation to constitutional law, lies in the *Principles of International Law*, arranged by Bowring in 1838 from a series of manuscript fragments written from 1786–9 that remained unfinished and unpublished in Bentham's lifetime.[52] When read with the *Fragment* and *Introduction*, some further clarity about Bentham's early views of internal and international law emerges. Neither 'domestic' nor 'municipal' appear in the *Principles*, but rather 'internal' law.

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49 Ibid 327.

50 Ibid 327–8.

51 Ibid 328 n 1 (emphasis original).

52 Jeremy Bentham, 'Principles of International Law (1786–9)' in John Bowring (ed), *The Works of Jeremy Bentham* (1843) vol 2, 535.

In the first essay, Bentham defends a concept of international law that centres the idea of common utility as the rational basis of government and stretches it over the boundaries that divide nations. Bentham begins by asking '[i]f a citizen of the world had to prepare an universal international code, what would he propose to himself as his object?'[53] While individual national legislators ought to act for the common utility of their nations, the 'line of common utility' between nations can be drawn by the linking of three 'lines of least resistance': that of individual citizens throughout the world, that of nations as collections of citizens, and that of the international community as a collection of nations.[54] For sovereigns and hypothetical international legislators alike, their interest is 'the most extended welfare of all the nations on the earth'.[55] That 'general end' is also the best adapted means to furthering the ends of any single nation.[56] Here, Bentham used an expanded principle of utility to cover the entirety of the world and each of its constituent polities. The 'problem', however, remained overcoming resistance to recognising this unity of utility. Bentham's suggestion is to articulate a general body of law that regulates the conduct of all nations to align their national interests, and proposes five 'objects' of utility that described this new system of international law: increasing the nation's well-being; doing the greatest good possible to other nations; avoiding harming other nations; gaining the greatest benefit from other nations; and, in war, producing the least evil consistent with the good for which the war is fought.

Bentham then directly addressed the internal–international analogy and its limits for the 'disinterested legislator upon international law'.[57] Forming the 'primitive principles' of international law would occur through analogies to internal laws. First is to 'prevent positive international offences', which involves national 'crimes' like seizing ports to harm another country, or closing seas and rivers ('the

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53 Ibid 537.

54 Ibid 535.

55 Ibid 538.

56 Ibid.

57 Ibid.

highways of our globe'), or preventing commerce by force.[58] Second to encourage 'positively useful actions', a set of international duties which were 'negative offences' of one nation refusing to help another, where the good of doing so would outweigh the loss.[59] Nations must also prefer international procedures over wars to vindicate their rights.[60]

But here Bentham turned to the limits of analogy. 'The thread of analogy is now spun; it will be easy to follow it. There are, however, certain differences', most importantly the limitation of the analogy between personhood and the nation:

> A nation has its property — its honour — and even its condition. It may be attacked in all these particulars, without the individuals who compose it being affected. Will it be said that it has its person? Let us guard against the employment of figures in matter [sic] of jurisprudence. Lawyers will borrow them and turn them into fictions, amidst which all light and common sense will disappear; then mists will rise, amidst the darkness of which they will reap a harvest of false and pernicious consequences.[61]

National subjects are not to blame for the injustices of their 'chiefs', and are but the 'innocent and unfortunate instruments' of the crimes of their leaders, and so nations can only do restitution for their wrongs, but cannot be properly punished, because that punishment would fall on subjects rather than leaders.[62] Bentham also stated there is little need to 'insist' on achieving the third and fourth objects of avoiding harm to other nations and gaining benefits from them, because 'men, sovereigns as well as individuals' follow their own interests.[63]

But Bentham then rejected a common distinction between individuals and sovereigns. Just as individuals 'swerve from the end which internal laws ought to

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58 Ibid.

59 Ibid.

60 Ibid 538–9.

61 Ibid 539.

62 Ibid.

63 Ibid.

propose to themselves', sovereigns may avoid the objects that international law ought to show them to follow.[64] Individuals and sovereigns have similar psychologies, neither always good nor bad, not possessed of unlimited intelligence, and that we should neither assume all sovereigns bad nor all individuals good.[65] Most importantly, like individuals, sovereigns may commit offences '*de bonne foi*' — 'in good faith': wars of succession; interventions in the '[i]ntestine troubles' of neighbours, such as constitutional disputes or civil wars; uncertainties over the limits of their rights; uncertainties about rights of discovery; jealousies; disputes or wars of whatever cause; and religious hatred.[66] To prevent these, and to articulate and achieve the five objects, Bentham looked to the clarification of both domestic and international laws. He proposed a program of codifying customary and unwritten laws — both internal and international — concluding new international conventions to cover points of potential confusion, disagreement or conflicts of interest among nations but, above all, '[p]erfecting the style of the laws of all kinds, whether internal or international'.[67] This clarification of laws is likely to prevent conflicts: 'How many wars have there been, which have had for their principal, or even their only cause, no more noble origin than the negligence or inability of a lawyer or a geometrician!'[68]

Bentham's final essay is a detailed plan for achieving this kind of 'universal and perpetual peace', but here through the internationalisation of sentiment along the lines of utility. Bentham focused first on decolonisation and disarmament, both of which posed major obstacles to the ideal of peace. Decolonisation is demanded by commercial and administrative arguments. With a broader 'end in view' of achieving 'three grand objects, — simplicity of government, national frugality, and peace', the subjugation of colonies is a needless complication to domestic

64 Ibid.

65 Ibid.

66 Ibid.

67 Ibid 540.

68 Ibid.

government.[69] Colonies do not profit the 'mother-country' any more than they would if trading as free nations. Bentham then linked this to demilitarisation. Most military force was maintained for the defence of colonies, and colonies from the primary targets in contemporary warfare.[70]

To replace colonial exploitation and warfare with arbitration and justice, Bentham weaved together national honour, morality, force and reason. He began with a link between national morality and injustice in strength based on force alone, addressing his exhortation not to the British state or sovereign, but rather its constituent men, and seeing national sentiment or prejudice as a possible lever for eventual peace:

> The moral feelings of men in matters of national morality are still so far short of perfection, that in the scale of estimation, justice has not yet gained the ascendancy over force. Yet this prejudice may, in a certain point of view, by accident, be rather favourable to this proposal than otherwise. Truth, and the object of this essay, bid me to say to my countrymen, it is for you to begin the reformation — it is you that have been the greatest sinners. But the same considerations also lead me to say to them, you are the strongest among nations: though justice be not on your side, force is; and it is your force that has been the main cause of your injustice.[71]

One means of achieving this 'pacification' is establishing a 'common court of judicature' to decide differences between nations, even without coercive powers, which would remove the inevitability of wars that follow from differences of opinion, and would save the 'credit' and 'honour' of each nation.[72] Here Bentham drew examples of these mechanisms from federal states: the 'American confederation', 'German diet' and 'Swiss league'.[73] But reducing the prejudices of the people would begin by a concerted reduction 'in the contributions' —

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69 Ibid 546.

70 Ibid.

71 Ibid 552.

72 Ibid.

73 Ibid.

taxation — 'of the people' in every nation, by each preparing domestic laws to be 'presented to every other' nation, 'ready to be enacted'.[74] This would be the first step in removing the prejudices and suspicions against foreign peoples and states, leading to Bentham's exhortation:

> Oh my countrymen! purge your eyes from the film of prejudice — extirpate from your hearts the *black specks* of excessive jealousy, false ambition, selfishness, and insolence. The operations may be painful; but the rewards are glorious indeed! As the main difficulty, so will the main honour be with you.[75]

Bentham's plan, then, aimed to achieve international peace through the rearrangement of nationalist pride.

In the remainder of the plan, Bentham presented a detailed consideration of the major mechanism for achieving this peace: removing suspicion through the transparency and wide publicity of all negotiations and decision-making, both at the international level of a proposed 'World Congress' and at the domestic level of cabinet decision-making processes in all states.[76] Bentham announced this at the outset of the essay: 'The globe is the field of dominion to which the author aspires, — the press the engine, and the only one he employs, — the cabinet of mankind the theatre of his intrigue.'[77] Press here holds the double meaning of the printing and distribution of the plan itself to all mankind ('What can be better suited to the preparing of men's minds for the reception of such a proposal than the proposal itself?') as well as the distribution of the debates and 'opinions' of the World Congress through its national delegates and throughout the 'dominions of each state', but also the spreading of a 'liberty of the press' throughout all states, as the least burdensome means of distributing the workings and opinions of the Congress.[78] Bentham added to this general transparency of government, internally

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74 Ibid 553.

75 Ibid 553 (emphasis original).

76 Ibid 554ff.

77 Ibid 546.

78 Ibid 554.

at the cabinet level, and externally in diplomatic conferences ('the cabinet of mankind') on the basis that secrecy, especially in the English foreign office, is 'altogether useless, and equally repugnant to the interests of liberty and peace'.[79] A nation's will, on display, can lead its citizens or the citizens of other countries to hold it up, critique it, and argue for or against it, depending on its conformity to the principle of utility.

As the means of achieving the perfection of internal and international law suggested in the first essay, Bentham's plan rested on the use of public opinion and transparency to realise greater utility within and between nations. International law here is far from a branch of the 'imaginary whole' of natural law expressed in the *Fragment*. Bentham now saw it as capable of being put into action in the same way as any other set of laws: by clarification and exposition, and, with the recognition of its logical force and congruency with the principle of utility, its enactment by national parliaments and their adherence through transparency and the force of international shame; making publicness essential to international law.[80]

Bowring's arrangement of Bentham's *Essay on International Law* was notoriously poor and illogical. One later editor of Bentham's papers noted that Bowring and his staff had bundled the papers designated 'Colonies' and 'Navy' separately, with the first dealing with political economy and the second with international law, and dated them arbitrarily: 'Yet these are two aspects' — political economy and international law — 'that, for Bentham, always formed one'.[81] Nonetheless, these were the arguments in public circulation from the 1840s onwards, and, read with Bentham's published works in the *Fragment* and *Introduction*, it becomes clear

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79 Ibid.

80 On the centrality of publicity for understanding Bentham's general and international legal thought, see further Postema's concluding chapter: Gerald J Postema, 'Bentham: Theorist of Publicity' in *Utility, Publicity, and Law* (n 33) 283.

81 Gunhild Hoogensen, 'Bentham's International Manuscripts versus the Published "Works"' (2001) 4 *Journal of Bentham Studies* 1, 2, quoting W Stark (ed), *Jeremy Bentham's Economic Writings* (1954) 46.

that at that point empire, national ideals, and publicity were all central to Bentham's international, linked by a particular focus on utility and revolution. The next section expands on this suggestion of political economy, not directly in Bentham (though it reappears in his legacies examined in the next Part), but rather in the parallel vision of the international in the works of Adam Smith.

D *Sentiment, Monopoly, Empire: Smith's International*

Bentham's reaction to Blackstone was not the only transformative rejection of natural law from British legal thought that underpinned a new international, and Bentham's neologism cannot be understood without appreciating another rethinking of the international that occurred around the same time in the juristic works emerging from the Scottish Enlightenment. This section contends that Adam Smith's works just prior to Bentham developed a parallel rejection of old-style natural law exemplified in Locke and Blackstone to ground another idea of the domestic and international. The parallels and incorporation of 'Smithian themes' into Bentham's international have been noted and are considerable.[82] But the distinctions are important too: unlike Bentham, Smith strongly rejected the command theory of law and approached 'utility' as government achieving justice at a local level, and not as happiness or interests in any ideal abstracted plan.[83] Smith's account rested on a more developed idea of sentiment and public opinion as the basis of community and law through family allegories and stadial history. From this Smith developed his theory of political economy, motivated by problems of nationalism, monopoly, and empire to account for the laws within and between nations.[84]

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82 Benjamin Straumann and Benedict Kingsbury, 'The State of Nature and Commercial Sociability in Early Modern International Legal Thought' (2010) 31 *Grotiana* 22, 41. On Smith as an international law writer, see Bastian Ronge, 'Towards a System of Sympathetic Law: Envisioning Adam Smith's Theory of Jurisprudence' in Stefan Kadelbach et al (eds), *System, Order, and International Law* (OUP, 2017) 283.

83 Knud Haakonssen, *The Science of a Legislator* (CUP, 1981) 132 and 148–9 (on the command theory).

84 On Smith's use of stadial history, see especially Istvan Hont, 'Adam Smith's History of Law and Government as Political Theory' in Richard Bourke and Raymond Geuss (eds), *Political Judgement: Essays for John Dunn* (CUP, 2009) 131.

Smith's understanding of sentiment and its relation to law within and between states appeared in his first major work, the 1759 *Theory of Moral Sentiments*. Using a combination of stadial history and moral philosophising, Smith took communication as the foundation of understanding justice. Justice was the basis of 'natural jurisprudence', while prudence was the basis of political economy. Smith saw morality not as a universal ideal system but rather humanity's adaptations and responses to the conditions in which it finds itself.[85] Utility was not an abstract guide like happiness or some other outcome but a functional means to an end, which could change depending on local conditions.[86] With this focus on conditions and adaptation, Smith's moral and legal thought was spatial, with recurring analogies to locality and distance. Distance and intimacy are the metaphors for Smith's 'impartial spectator', the judge we each imagine and internalise to guide our conduct, which Smith used to complicate and replace ideas of eternal natural laws:

> It is not the soft power of humanity, it is not that feeble spark of benevolence which Nature has lighted up in the human heart, that is thus capable of counteracting the strongest impulses of self-love. It is a stronger power, a more forcible motive, which exerts itself upon such occasions. It is reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct.[87]

Humanity clarifies a set of counterforces as the real balance to self-interest in the reasoned, principled conscience personified in the impartial spectator. For Smith, the reactions of others to our own actions provided both real and imagined judges, and morality emerges in encounters with others by internalising the observed, external effects of our actions; a 'sympathetic' imagining of what the impartial spectator would demand of us.

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85 Knud Haakonssen, 'Introduction' in *The Theory of Moral Sentiments* (CUP, 2002) vii–xxviii, xii.

86 Ibid xix.

87 Adam Smith, *The Theory of Moral Sentiments*, ed Knud Haakonssen (CUP, 2002) 158. On the spectator, see further DD Raphael, *The Impartial Spectator: Adam Smith's Moral Philosophy* (OUP, 2007).

In contrasting this idea of spectator and individual morality with questions of states and their internal and international conflicts, Smith laid out a rough first account of his approach to the domestic and international. The sympathetic imagination leads to difficulties when the subjects are nations rather than individuals. The distance of neutral nations both gives them a position of impartiality, but also prevents them from fully understanding the dispute.[88] Likewise, at the domestic level, the distance between subjects and sovereigns, and between national sentiments, also causes problems, rendering individuals unable to understand the sentiments of outsiders towards one's own nation.[89] Civil and international disputes and wars alike provide serious problems for the impartial spectator.[90] In the next chapters, Smith proposed the 'general rules' of morality as the sentiments of mankind; general standards of human conduct that are fixed by self-reflection, and which are seen the means of recognising real natural laws.[91]

Smith ended the first edition with a promise that a later work would examine the general principles of law and government, their development, and questions of justice, police, revenue, arms and 'whatever else is the object of law'; to return to questions of sentiment and law within and beyond the state.[92] The final, heavily revised edition of the *TMS*, published in 1790, retained this concluding promise though noting at the outset that it would never be completed.[93] But the 1790 text also included a considerable expansion of Smith's thoughts on sentiment, the law of nature and nations, and constitutional ordering in a new section on a practical system of morality, and further thoughts on ideal plans in a reorganised final section on a theoretical system of morality. That plan is based on domestic sentiment, which forms the basis for sentiments between nations.

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88 Ibid 179.

89 Ibid.

90 Ibid 180–1.

91 Ibid 186–90.

92 Ibid 404.

93 Ibid 3–4 ('Advertisement' to the Sixth Edition).

Smith's plan built on his revision of the earlier image of the judgments of mankind and the impartial spectator, which is newly rendered as a judicial, procedural metaphor. The divine creator made man the 'immediate judge' of mankind, but the 'appeal to a higher tribunal' is not to natural law, but the internalised impartial spectator in his own conscience.[94] This is explicitly not to the imagined judgments of a divine being, or to a deferred idealised afterlife where justice is done, but a human evaluation of what justice demands that led Smith to reject the same link in sovereigns: 'But what is considered as the greatest reproach even to the weakness of earthly sovereigns, has been ascribed, as an act of justice, to divine perfection';[95] for individuals and sovereigns alike, no such link can be made.

With this rejection of divine natural law in place, Smith then offered, in the new sixth book, a practical system of morality built from prudence, to sentiment, to the development of nations. The family and household is the basis of sentiment and duty in this system. After regard for one's self, the 'objects' of a person's 'warmest affections' are 'naturally' their parents, children and siblings.[96] These families grew into tribes then nations, with their links growing by their close proximity, connection to and mutual reliance on each other.[97] Family sentiments lead to a clarification of virtues we see in other individuals, particularly office-holders, and from there we take this ordering of individuals to think about the ordering of society.[98] Progress, however, can undermine sentiment. In 'commercial countries' the family sentiment is quickly dispersed: people rely not on family but on law to protect their interests, and this dispersal increases with the progress of 'civilization'.[99]

94 Ibid 149–51.

95 Ibid 154 (note this passage inserted in the 1761 2nd edition).

96 Ibid 257.

97 Ibid 262.

98 Ibid 265–7.

99 Ibid.

Smith turned to link national and international sentiment through this family allegory. Just as we prefer our own family, we and our family and friends tend to see our own state as the one 'most strongly recommended to us', and we think of our personal honour as connected with that of the state.[100] Smith offered a subtle critique of patriotism and nationalism, similar to Bentham's, that connected individual, national and international sentiments in the language of the law of nations, reminiscent (and critical) of Hobbes:

> The love of our own nation often disposes us to view, with the most malignant jealousy and envy, the prosperity and aggrandisement of any other neighbouring nation. Independent and neighbouring nations, having no common superior to decide their disputes, all live in continual dread and suspicion of one another. Each sovereign, expecting little justice from his neighbours, is disposed to treat them with as little as he expects from them. The regard for the laws of nations, or for those rules which independent states profess or pretend to think themselves bound to observe in their dealings with one another, is often very little more than mere pretence and profession. From the smallest interest, upon the slightest provocation, we see those rules every day, either evaded or directly violated without shame or remorse. Each nation foresees, or imagines it foresees, its own subjugation in the increasing power and aggrandisement of any of its neighbours; and the mean principle of national prejudice is often founded upon the noble one of the love of our own country.[101]

Nationalist love did not reflect any 'love of mankind' but rather the prejudices towards neighbours.[102] The British fear the French and call them their 'natural enemies', and vice versa, but bear no animosity towards the 'prosperity of China or Japan'.[103] Similarly, goodwill is usually only local, and any plans for alliances

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100 Ibid 268.

101 Ibid 269.

102 Ibid 270.

103 Ibid.

for defence or peace are most often motivated by the national self-interest of each neighbouring state.[104]

Smith then returned to the link between national sentiment and constitutional order, as the means of guiding respect, obedience and mutual welfare, and as a check on the ideal systematising plans of individuals and sovereigns alike. Smith framed the constitution itself in terms of competing 'orders and societies', akin to classes. All states are divided 'into many different orders and societies', which each hold their 'particular powers, privileges, and immunities'.[105] As with families, each person is 'naturally more attached' to their own order, with the interests and vanities of everyone and their close companions connected to that order, meaning each aims to extend its powers and defend it against the 'encroachments' of all other orders.[106] But idealist plans, by citizens or sovereigns alike, to overthrow or impose ideal schemes on the polity, while often motivated by the 'love of humanity', are unlikely to succeed, because the constitution's ordering is built from a long history of customs and sentiments; it is these that reformers ought to gradually change.[107]

These reservations about idealistic constitutional revolutions are important because Smith expands them to a wider critique of the limitations of positive law in its domestic and international forms to conclude the 1790 text. All systems of positive law are 'more or less imperfect attempts' to enact the principles of natural jurisprudence. In some instances, the government or a particular order of men who control it will 'warp' positive laws away from natural justice and to their own interest.[108] In others, the 'rudeness and barbarism of the people hinder the natural sentiments of justice' from reaching the precision of civilised nations: 'Their laws

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[104] Ibid 270–1.

[105] Ibid 271. For an important extension of this thinking by one of Smith's major followers, see John Millar, *The Origin of the Distinction of Ranks* (Liberty Fund, 2006 [1771]).

[106] Smith, *TMS* (n 87).

[107] Ibid 272–6.

[108] Ibid 403.

are, like their manners, gross and rude and undistinguishing'.[109] But even absent these more serious problems, positive laws always fall short of natural justice, and never 'coincide exactly, in every case' with them.[110] While systems of positive law 'deserve the greatest authority' in their states, they are merely 'the records of the sentiments of mankind in different ages and nations' and cannot ever be seen as accurate systems of the 'rules of natural justice'.[111] Nor can comparative examinations lead to a perfect system of laws or an image of the ideal laws of all nations. In a significant concluding passage, Smith discussed the connection between comparative jurisprudence and a general aim of reforming positive laws to mimic natural justice, raising a series of doubts about the possibility of this endeavour, illustrated by laws within and between nations:

> It might have been expected that the reasonings of lawyers, upon the different imperfections and improvements of the laws of different countries, should have given occasion to an inquiry into what were the natural rules of justice independent of all positive institution. It might have been expected that these reasonings should have led them to aim at establishing a system of what might properly be called natural jurisprudence, or a theory of the general principles which ought to run through and be the foundation of the laws of all nations.
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> But though the reasonings of lawyers did produce something of this kind, and though no man has treated systematically of the laws of any particular country, without intermixing in his work many observations of this sort; it was very late in the world before any such general system was thought of, or before the philosophy of law was treated of by itself, and without regard to the particular institutions of any one nation.[112]

Linking internal laws and the laws of nations with the system of natural jurisprudence that Smith thought was the incarnation of justice remained the great

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109 Ibid.

110 Ibid.

111 Ibid.

112 Ibid 403–4.

project that Smith saw as unfinished by himself, and only imperfectly attempted by Grotius.[113] In 1790, Smith reprinted his 1759 promise to attempt such a general account of the principles of law and government, ending the book knowing it would never be completely fulfilled.

That project had, however, been partly attempted in Smith's *Wealth of Nations*, published between the first and final *TMS* editions, where Smith articulated a system of internal laws linked to the law of nations in the new language of political economy and prudence. *WN* developed and made practical the more abstract sentimental account of motivation and human and social behaviour in the *TMS*.[114] It offered several practical implementations of Smith's theoretical investigations into the interactions of domestic and international law, and placed both in service of the wider principles of political economy.

The same preoccupation with space and distance that laid the foundation for the *TMS* are used to understand the development of economic activity, laws and restraints on trade, which Smith then linked to national sentiment. In Book III, 'Of the Different Progress of Opulence in Different Nations', Smith presented a stadial history of the natural progression of government, beginning with economic activity being directed first to domestic agriculture, then to domestic manufacturing, and only then to foreign trade, which coincided with the centralisation of legal power from aristocratic landowners to a national sovereign exercising effective power throughout the whole territory.[115]

On the back of this stadial account, Smith turned to the problems of restraints on trade, arguing that internal laws ought to promote free trade. Political economy, as

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113 Ibid 404.

114 The supposed mismatch between the sentimentalism of the *TMS* and the self-interest of *WN*, known as the 'Adam Smith Problem', is now largely accepted as based on a mistaken or overly simplistic reading of both works. Consequently I read both as offering a complementary account of Smith's thinking on the international and domestic. See further Keith Tribe, '"Das Adam Smith Problem" and the Origins of Modern Smith Scholarship' (2008) 34 *History of European Ideas* 514.

115 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations, Volume 1*, ed RH Campbell and AS Skinner (1982) 379–80.

the science of the legislator, aims to provide revenue for the people's subsistence and for public services, to 'enrich both the people and the sovereign'.[116] Smith analysed this through a division of domestic and foreign industry and trade. Restraints on foreign imports encourage domestic industries, but they do not increase the general industry of society to its highest natural level.[117] Workers and merchants seek their own advantage, try to work as close to home as possible, and try to maximise the value of that industry, and in doing so their combined private interests produce the greatest value and thus the largest public good, led by Smith's 'invisible hand'.[118] Smith then linked this to law and locality: the precise domestic industry that is likely to be of greatest value is to be judged by every individual, who 'in his local situation' can 'judge much better than any statesman or lawgiver can do for him'.[119] Statesmen and lawmakers who direct private interests by law arrogate this power for themselves.[120] All monopolies that appear to protect domestic industry actually direct private people to how they should use their capital, which inevitably fails: if domestic produce is cheaper, the regulation is useless, and if the foreign import is cheaper, the regulation is harmful.[121] Smith ended this point with an analogy from the family to the state, to apply this principle to international trade: 'What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom', and if foreign imports are cheaper than domestic produce, then it is better to buy them with money made from areas in which domestic produce has an advantage over foreign.[122]

Smith's second major target was the other principle of mercantilism, 'national prejudice and animosity', prompted not just by national pride, as in Bentham, but

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116 Ibid 428.

117 Ibid 452–3.

118 Ibid 454–6.

119 Ibid 456.

120 Ibid.

121 Ibid.

122 Ibid 457.

also 'always by the private interest of particular traders'.[123] Smith rejected the mercantilist view that the balance of trade between nations is a zero-sum game; instead, trade in all cases is always advantageous, though it might benefit one nation more than the other.[124] National prejudice is a failure to appreciate the true interests of the nation, akin to individual bonds:

> By such maxims as these … nations have been taught that their interest consisted in beggaring all their neighbours. Each nation has been made to look with an invidious eye upon the prosperity of all the nations with which it trades, and to consider their gain as its own loss. Commerce, which ought naturally to be, among nations, as among individuals, a bond of union and friendship, has become the most fertile source of discord and animosity.[125]

Nationalism is a problem of monopoly, and the misguided preference for domestic trade over foreign.[126] While restrictions come from the jealousy caused by proximity to neighbouring countries, it ought to be channelled to competition and friendship, rather than animosity — 'Mercantile jealousy is excited, and both inflames, and is itself inflamed, by the violence of national animosity'.[127] But, Smith insisted, this is a misguided argument of merchants who, again, do not have the interest of the nation to mind, and instead seek rewards for foreign trade, which Smith examined in detail.[128] Likewise, Smith denounced treaties of commerce in general, as a kind of monopoly granted to foreign merchants in a domestic market; these treaties may advantage particular merchants, but they are always to the detriment of the interests of both nations.[129] And within this defence of the liberalisation of trade, Smith then likened friendship to an empire: 'Were all

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123 Ibid 474–5.

124 Ibid 488–9.

125 Ibid 493.

126 Ibid 494ff.

127 Ibid 496.

128 Ibid 499ff.

129 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations, Volume 2*, ed RH Campbell and Andrew S Skinner (Liberty Classics, 1981) 545.

nations to follow the liberal system of free exportation and free importation, the different states into which a great continent was divided would so far resemble the different provinces of a great empire'.[130]

Indeed, imperial government prompted the most thoroughgoing of Smith's critiques of monopoly in dealing with colonial trade and imperial-constitutional relations. While laws like trade restrictions and treaties had been examples in Smith's illustrations of domestic and foreign markets, here questions of domestic and international laws, in the context of trade and empire, become central.

Throughout this lengthy analysis, Smith frequently returned to analogies with Greek and Roman models of colonisation, which he distinguished around internal self-government using the language of households. The Greek colonies were called *apoikia*, meaning, in Smith's translation, 'a separation of dwelling, a departure from home, a going out of the house'.[131] As these expeditions ranged far away from Greece, they were independent states capable of changing their internal laws, and retaining a familial, maternal bond to the mother city:

> The mother city, though she considered the colony as a child, at all times entitled to great favour and assistance, and owing in return much gratitude and respect, yet considered it as an emancipated child, over whom she pretended to claim no direct authority or jurisdiction. The colony settled its own form of government, enacted its own laws, elected its own magistrates, and made peace or war with its neighbours as an independent state, which had no occasion to wait for the approbation or consent of the mother city. Nothing can be more plain and distinct than the interest which directed every such establishment.[132]

Roman colonialism, on the contrary, was prompted at first by property redistribution required by the Republic's agrarian law foundations, which divided public territory among the orders of free citizens, and which, as Rome's population

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130 Smith, *WN Vol 1* (n 115) 538.

131 Smith, *WN Vol 2* (n 129) 558.

132 Ibid 556.

grew, necessitated the sending of colonies, particularly into conquered territories to ensure their obedience.[133] Unlike Greece, Roman colonies remained part of the Republic, where lands were granted in conquered provinces which, 'being within the dominions of the republic … could never form any independent state'.[134] Instead, they could at most be a 'sort of corporation' that had powers to enact 'bye-laws for its own government' but remained always subject to 'the correction, jurisdiction, and legislative authority of the mother city'.[135] Later, Smith argued that the success and rapid growth of Greek colonies was largely due to their easy displacement of 'savage and barbarous nations' and their independence in internal law-making, whereas Roman colonies were established in conquered provinces that were 'fully inhabited before', and were not independent and thus not at liberty to adapt to local conditions and pursue local interests.[136]

Smith used this comparison of ancient centre–periphery independence to argue that contemporary British and European colonies succeeded according to their degrees of self-government. In contrast to Greek and Roman colonies, European colonies in the Americas and East and West Indies were not motivated by necessity but conquest and commerce (particularly the search for gold and silver), and thus their 'utility' had been great, but not necessarily clear or well understood.[137] Their government and imperial relations were similar to both Greece and Rome: like Roman colonies, they are dependent on their mother states and their distance made central control difficult.[138] But worse still than distance was the arbitrary and self-interested system of 'exclusive company government', where the colony is run solely by merchants who have neither the interest of the colony nor the mother country in view.[139] Instead, Smith argued, the English system has led to the most

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133 Ibid 557–8.

134 Ibid.

135 Ibid.

136 Ibid 567.

137 Ibid 558ff.

138 Ibid 567.

139 Ibid 570–1 and 575–7.

'rapid progress': 'plenty of good land', combined with the liberty to manage their own affairs their own way' (like Greek colonies) are the major explanations for this success, though Smith added that the ability to alienate colonised land, the modest rates of imperial taxation, the few costs of local government, and unrestricted local trade for English colonists — as opposed to European monopolisation that precluded trade with other colonies — all contributed to this progress.[140]

Smith then built a dual criticism of poor European style internal government combined with imperial monopolies, arguing that English liberties in the American colonies made them far superior.[141] While Smith noted they are not 'independent foreign countries', the thrust of his later arguments is that they effectively should be, in an empire modelled on the free trade system discussed earlier. But current British monopolies, combined with military expenditures to defend the colonies, made them a loss to Britain,[142] and while no nation would give up its dominions due to national pride, national interest and the principles of free trade dictate that Britain should do so.[143] Smith again put this argument in the language of self-government and family affection; parting as 'good friends' would 'revive' the 'natural affection of the colonies to the mother country', which, with trade and communication, might lead to a return to alliance and a 'sort of parental affection on the one side, and filial respect on the other', typical of British (and Greek) colonial relations.[144]

The only alternative to separation was imperial-constitutional reform, in which the colonies would become part of domestic constitutional arrangements, sending representatives to the House of Commons and being taxed by the Empire.[145] While

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140 Ibid 572–5.

141 Ibid 588 (government) and 593-601 (monopolies).

142 Ibid 616.

143 Ibid.

144 Ibid 617.

145 Ibid 619–23.

Smith raised concerns about distance for both colonists and British alike, this imperial union would perfect the constitution of the Empire: 'there is not the least probability that the British constitution would be hurt by the union of Great Britain with her colonies. That constitution, on the contrary, would be completed by it, and seems to be imperfect without it. The assembly which deliberates and decides concerning the affairs of every part of the empire, in order to be properly informed, ought certainly to have representatives from every part of it'.[146] While Smith noted the difficulties of this proposal, as he had raised earlier, the only alternative was the present 'empire of shopkeepers' who see only customers and not citizens; the merchants who maintain the demand for self-interest and monopolies of domestic and colonial trade.[147]

Finally, turning to the law of nations specifically, Smith noted the possibility that, like the American colonists, the 'native' populations might grow to self-government and a level of equal justice with European nations through force and communication. Noting that for 'the natives' the commercial benefits of colonialism have been 'sunk and lost in the dreadful misfortunes which they have occasioned', Smith contended that it was the superiority of European force that allowed them 'to commit with impunity every sort of injustice in those remote countries'.[148] Smith hoped here, instead, that 'the natives' might grow stronger than the Europeans, and arrive at equality by the 'courage and force' that inspires 'mutual fear' and which 'can alone overawe the injustice of independent nations into some sort of respect for the rights of one another'.[149] The path to that equality was mutual communication and unrestricted commerce.[150] Even for the colonised, free trade — the principles of national interest that demands the removal of internal

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146 Ibid 625.

147 Ibid 613–14.

148 Ibid 626.

149 Ibid 626–7.

150 Ibid 627.

and international laws of restrictions, tariffs, and monopolies — was Smith's fount of justice between nations, whatever their level of development.

E *Conclusion*

Bentham and Smith's ideas of the international were written at roughly similar times but not in direct conversation with each other. What Smith still yearned to do at the end of his life's work, Bentham would, in his own parallel way, pursue in his later works on constitutions. For Bentham and Smith different combinations of sentiment, political economy and stadial history that formed a bridge between thinking about constitution, state, and political authority and trying to understand systems of law beyond the state, especially around colonies and empire. This connection was made with new ways of thinking about human life, sociability, the basis of moral and legal obligation, and the ideas of will, opinion, interest, progress and utility. These theories, themselves heavy with law and legal theory, articulated new models of rational human individuality, and cast the state's essential duty as providing a dependable legal framework for economic affairs, which, domestic or international, formed a powerful and influential image of civic life. This also reoriented law towards its capacity for rational reform, emphasising the need for domestic and international laws to reflect as well as change moral sentiments, rather than leave them unchangeable, as in natural law thought. This moved the domestic and international away from nationalism and towards political economy in a capitalist mode: that the laws within and between nations ought to serve the individual interest, happiness and wealth. With that reordering came a new emphasis on spatiality and geography, where sympathy and preference took on domestic connotations that Bentham and Smith thought could be expanded through trade and law. This first narrowed version of the international is not yet globalised, but it lays the basis for further rethinking in the wake of the French Revolution, and a later expansion — and entwining with the domestic — in the resurgence of the British Empire in the Victorian era.

III REACTION AND REFORM: POST-REVOLUTIONARY INTERNATIONALS

A *Introduction*

Between the American and French Revolutions, the question of the interaction of domestic and international laws became still more intense.[151] This part examines the legacies of Bentham's and Smith's ideas of the domestic and international, exploring three points in the post-Revolutionary era. Part One explores Burke's revival of natural law to articulate reactionary connections between the domestic and international in a general law of 'civic vicinage' under which the states of Europe were bound to protect the law of nature and nations — and especially laws of property — against constitutions that threaten that order. Part Two examines how Bentham's later works turned away from plans for remaking the world through an international code in favour of rational reforms of domestic and constitutional laws, culminating in a single set of internal laws adaptable to each state that included, significantly, legal duties to other nations. Part Three then looks to two lasting legacies of Bentham and Smith's internationals: in Austin's influential account of the commanding domestic sovereign that rejected the lawfulness of the international, and in the works of Travers Twiss, in which the first modern expression of a strong account of national independence as central to international personality finds its expression, that set up — more so than Austin — the complexities of the domestic and international that came with the Victorian Empire.

B *Resurgent Laws of Nature: Burke's Civil Vicinage*

If Smith developed an account of the international in parallel to Bentham's project, Edmund Burke (1729–97) provided an important counterweight to it in his reactionary ideas about natural law's primacy over positive laws within and between nations, raised by the upheavals of the French Revolution and enduring

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[151] On American and French connections of domestic and international law in the revolutionary period, see further Daniel Hulsebosch, 'Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation' (2018) 59 *William and Mary Law Review* 1239; Edward James Kolla, *Sovereignty, International Law, and the French Revolution* (CUP, 2017).

problems of imperial rule and commerce.[152] Writing soon after Bentham's coinage, Burke does not use the term 'international'. This is probably due to its novelty and limited early circulation. But even if Burke had heard it, he almost certainly would have preferred the 'law of nations': Burke retained a central place for divine natural law in his juridical thought and saw it as a limit to positive law, and would thus have rejected any suggestion that the international community could agree on any laws between them whatsoever, as they remain always bound by natural law. Indeed, this is the thrust of his thinking on the French Revolution. Burke does, however, use the 'domestic' extensively. His writings touching on the law of nations are almost entirely fixed on internal government. Burke provides perhaps the strongest defence of the continuing relevance of natural law, and a response to the limits of what would become the Benthamite rational reformist agenda, but in a subtle way that emphasises the continuing endurance of political structures that still recognises utility and, innovatively, equity, as the guide to reforming domestic law. In Burke's writings on the French Revolution, domesticity plays several roles: as sentiments binding a nation, as a shared history, and — most importantly — as the kinds of foreign governmental forms that can be justifiably intervened in and changed. Domestic law is the basis for an idea of 'civic vicinage', in which states might check the revolutionary, expansionist and absolutist designs set by the internal constitution of their neighbours. This is a new law of nature and nations for the post-Revolutionary era. Burke still frequently uses ideas of sentiment, nationalism and the binds of domestic ties; but whereas Bentham and Smith saw those ties in North American colonies, Burke extended them to Europe outside France in a plea for containing radicalism through a renewed international order.

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[152] On Burke and empire, see especially Onur Ulas Ince, 'Not a Partnership in Pepper, Coffee, Calico, or Tobacco: Edmund Burke and the Vicissitudes of Imperial Commerce' in *Colonial Capitalism and the Dilemmas of Liberalism* (OUP, 2018) 74 and Daniel I O'Neill, *Edmund Burke and the Conservative Logic of Empire* (University of California Press, 2016). For an incisive biography covering the same thematic emphases as here, see Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Princeton UP, 2015).

In his 1790 *Reflections on the Revolution in France*, Burke saw revolutionary sentiment and radical change as departures from the stability and proof of older legal institutions, framed in the language of his own national tastes and 'domestic laws':

> The dislike I feel to revolutions, the signals for which have so often been given from pulpits; the spirit of change that is gone abroad; the total contempt which prevails with you, and may come to prevail with us, of all ancient institutions, when set in opposition to a present sense of convenience, or to the bent of a present inclination: all these considerations make it not unadvisable, in my opinion, to call back our attention to the true principles of our own domestic laws; that you, my French friend, should begin to know, and that we should continue to cherish them.[153]

English resistance to French revolutionary projects should flow from a renewed appreciation of the 'true principles' of English domestic laws and constitution. With a mix of trade, growth and corruption metaphors, Burke insisted the English ought to be wary of the 'counterfeit wares' of British legal principles exported as 'raw commodities' to France, then placed in a 'wholly alien' soil, and then 'smuggle[d] back' into Britain with the 'newest Paris fashion of an improved liberty' attached.[154] Instead, the 'people of England' will resist these French corruptions and continue to see the Crown as beneficial for their security, liberty and stability.[155]

Burke's wider project in *Reflections* is to link domestic arrangements with international ones. The Revolution's constitutional changes threw the conservative European balance of power system into chaos. The British constitution, on the other hand, remained in 'just correspondence and symmetry with the order of the world', and supported and mirrored both the European order and the natural order itself. Burke's explanation of this is through an allegory of family and nation,

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[153] Edmund Burke, *Reflections on the Revolution in France* (Liberty Fund, 1999) 113. On Burke's themes of European commonwealth and interventionism, see especially Jennifer M Welsh, *Edmund Burke and International Relations* (MacMillan, 1995) chs 3 and 5.

[154] Burke, *Reflections* (n 153) 113.

[155] Ibid.

arguing that the endurance of constitutions — and by extension the European and natural orders — lies in linking past and present families together, as a binding of 'our dearest domestic ties'.[156] The constantly renewed body of the state and human race alike reflected the 'method of nature', where adhering to the 'principles of our forefathers' was not motivated by superstition but instead 'the spirit of philosophic analogy': 'In this choice of inheritance we have given to our frame of polity the image of a relation in blood; binding up the constitution of our country with our dearest domestic ties; adopting our fundamental laws into the bosom of our family affections; keeping inseparable, and cherishing with the warmth of all their combined and mutually reflected charities, our state, our hearths, our sepulchres, and our altars.'[157]

This image of domestic tie that linked family and nation formed the basis of Burke's querying of the international and domestic political reality of France itself. Shifting to the language of municipality and the combination of will into a state, Burke asked whether the 'territory of France', split into 83 'independent municipalities', could 'ever be governed as one body, or can ever be set in motion by the impulse of one mind?'.[158] This mass of independent municipalities contravened and dissolved the real order of the state as a structured hierarchy of subordination, a set of contracts that create a partnership 'in every virtue, and in all perfection' that binds citizens living, dead and to be born:[159]

> This law is not subject to the will of those, who by an obligation above them, and infinitely superior, are bound to submit their will to that law. The municipal corporations of that universal kingdom are not morally at liberty at their pleasure, and on their speculations of a contingent improvement, wholly to separate and tear asunder

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156 Ibid 122.

157 Ibid 122.

158 Ibid 143.

159 Ibid 193.

> the bands of their subordinate community, and to dissolve it into an unsocial, uncivil, unconnected chaos of elementary principles.[160]

Burke later linked this breakdown of order and national sentiment to the municipalities' claimed 'arbitrary pleasure' of determining whose property will be protected.[161] There is no national 'principle by which [the] municipalities can be bound to obedience; or even conscientiously obliged not to separate from the whole, to become independent, or to connect itself with some other state'.[162] But Burke's other direction for the link between family, religion and state was to create international limits for domestic law. Burke argued that the French National Assembly's confiscation of religious estates was an unjust disregard of the rights of property, and a derogation from the 'common concerns of mankind'.[163] Burke concluded by arguing that no parliament, whatever the extent of its legislative authority, could contravene this fundamental law of nations by violating property rights or overruling prescription, or, in general terms, 'to force a currency of their own fiction in the place of that which is real, and recognized by the law of nations', where such absolutism would lead, inevitably, to despotism.[164]

Burke's final work, the 1796–7 *Letters on a Regicide Peace*, built on the ideas of natural law and the restrictions on the law-making powers of states raised in the *Reflections*. Here, however, the connection of domestic and international law was used for the much grander project of criticising the legitimacy of the French Empire. France's internal laws are not just the concern of all nations, but justify an intervention to change them under Burke's innovative use of old Roman concepts around the 'law of the neighbourhood' and 'civil vicinage'; an analogy between nuisance and the law of nations that formed an integral part, Burke argued, of the public law of Europe.

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160 Ibid.

161 Ibid 339.

162 Ibid.

163 Ibid 255–6.

164 Ibid 256.

Burke began by emphasising Britain's sympathetic links with humanity, arguing that France had repudiated the law of nations by severing those same links, and then explaining France's ambition to spread its domestic law throughout the world by force. Early in the First Letter, 'On the Overtures of Peace', Burke considered Britain's place in the world, critiquing apparent autarchy and the separation of any state from its neighbours, using the language of the domestic: 'IF WE LOOK TO NOTHING but our domestic condition, the state of the nation is full even to plethory; but if we imagine that this country can long maintain its blood and its food, as disjoined from the community of mankind, such an opinion does not deserve refutation as absurd, but pity as insane'.[165] Burke urged England to see herself as part of Europe, resisting 'regicide' France in universal terms that drew on sympathy with all mankind: 'that sort of England, who, sympathetic with the adversity or the happiness of mankind, felt that nothing in human affairs was foreign to her'.[166] Burke saw the war as not with an 'ordinary community', but instead against a system 'which by its essence, is inimical to all other Governments'.[167]

Burke then demonstrated how regicide France's constitution had repudiated the system of international diplomacy. France's insistence on bilateral agreements, rather than 'treating conjointly' with the other powers sought to split their common cause: 'the Regicide power finding each of them insulated and unprotected, with great facility gives the law to them all.'[168] By 'gives the law to them all', Burke meant that France negotiates with an unjust insistence on the constraints of its domestic constitutional law. Burke ventriloquised French arguments that their constitution does not allow the executive government to alienate any Republican territory, and that occupied territories not yet 'united to France' must be negotiated with in a way 'compatible with the dignity of the Republic'.[169] He then heaped

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165 Edmund Burke, *Letters on a Regicide Peace* (Liberty Fund, 1999) 70–71.

166 Ibid 72.

167 Ibid 76.

168 Ibid 88.

169 Ibid 88–9.

scorn on this argument. The occupied territories were throughout Austria, the Netherlands, Italy and Switzerland, well beyond the 'integrant parts' of the original republic, and not to be negotiated over at the Congress.[170] For Burke, this lacked any legal basis. 'Why?', he asks, 'Because there is a law which prevents it. What law? The law of nations? The acknowledged public law of Europe? Treaties and conventions of parties? No!' — but rather, purportedly, French domestic law, which Burke contended would make France's will the law throughout Europe:[171]

> their will is the law, not only at home, but as to the concerns of every nation. … Thus they treat all their domestic laws and constitutions, and even what they had considered as a Law of Nature; but whatever they have put their seal on for the purposes of their ambition, and the ruin of their neighbours, this alone is invulnerable, impassible [sic], immortal.[172]

This passage expands Burke's suggestion in the *Reflections* that legislatures were bound by the law of nations. Here, there is a much wider restriction on the ability of legislatures to make positive laws that are said to restrict their international actions, and Burke fixes on the hypocrisy of claiming full sovereign powers, using them to abrogate natural laws, and then invoking both sets of law as a constraint on international action.

It is against this hypocritical use of domestic law to constrain the international that Burke invokes a new principle of European public law based on an analogy with Roman civil law: the law of 'civil vicinage'. This innovation rests on Burke's critique of the French constitution. Noting that France's condition and its 'very essential constitution' involves a 'state of hostility' with Britain and 'all civilized people',[173] Burke positioned that constitution as a government form that 'has never been hitherto seen, or even imagined, in Europe' because France's people live under 'positive, arbitrary and changeable institutions' that are based on neither

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170 Ibid 88–90.

171 Ibid 90.

172 Ibid 90–91.

173 Ibid 123.

morality nor general ideas of law.[174] Indeed, this constitution has abolished law as a 'science of methodized and artificial equity', and 'demolished the whole body of … jurisprudence which France had pretty nearly in common with other civilized countries'.[175] Part of that 'common civilized' body of law was 'the elements and principles of the law of nations, that great ligament of mankind'.[176] Not only had the French annulled their treaties, but they also renounced the law of nations entirely, specifically its Christian, monarchical basis, the 'great politic communion with the Christian world' on whose principles all other European nations are built, and which was replaced with regicide, Jacobinism and atheism.[177]

Having articulated this split and divergence, Burke moved to explain the juridical bases on which Europe can and must intervene to change France's internal legal order. Using the language of moral ties and distance, Burke argued that there is no 'right of men' to act 'according to their pleasure, without any moral tie', and that no people are ever in total independence of each other.[178] While '[d]istance of place' may make duties and rights difficult to exercise, it does not extinguish them, and it is by analogy to civil law that Burke proceeded: 'there are situations where this difficulty [of distance] does not occur; and in which, therefore, these duties are obligatory, and these rights are to be asserted. It has ever been the method of public jurists, to draw a great part of the analogies on which they form the law of nations from the principles of law which prevail in civil community.'[179] Burke's invocation of civil law here is not limited only to positive laws, but also ideas of universal equity.[180]

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174 Ibid.

175 Ibid 123–4.

176 Ibid 124.

177 Ibid.

178 Ibid 135.

179 Ibid.

180 Ibid.

Burke's next analogy was to the 'Law of the Neighbourhood', which limits the 'perfect master[y]' over property through the 'right of vicinage' that regulates and restrains ownership rights without destroying them.[181] Against the recurring problem of the lack of an international adjudicator superior to states, Burke simply insisted that the region itself is the judge: 'Now where there is no constituted judge, as between independent states there is not, the vicinage itself is the natural judge. It is, preventively, the assertor of its own rights; or remedially, their avenger'.[182] The vicinage gains this position because of the presumption that neighbours know each other's acts. That presumption 'is as true of nations as of individual men', and it 'has bestowed on the grand vicinage of Europe a duty to know, and a right to prevent, any capital innovation which may amount to the erection of a dangerous nuisance.'[183] While he acknowledged that this assessment, and the move to war that is the only real remedy, requires 'great deliberation' and an identification of clear plans by the offending nation to violate it,[184] Burke reiterated that the Republic's form violates not only the rights on which France was founded, but on which all communities are founded, namely property:

> The principles on which they proceed are general principles, and are as true in England as in any other country. They who (though with the purest intentions) recognize the authority of these Regicides and robbers upon principle, justify their acts, and establish them as precedents. It is a question not between France and England. It is a question between property and force. … The property of the nation is the nation. They who massacre, plunder, and expel the body of the proprietary, are murderers and robbers.[185]

Vicinage might raise difficult questions, but France's violation of natural rights of property was straightforward.

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[181] Ibid 135–6.

[182] Ibid 136–7.

[183] Ibid.

[184] Ibid 137.

[185] Ibid 138–9.

Burke then linked this legal violation to a wider destruction of both domestic and international society that threatened all nations. The Republic presents the 'destruction and decomposition of the whole society', which renounced and destroyed the true elements of France — monarchy, nobility, gentry, clergy, magistracy, and property: 'All these particular moleculae united, form the great mass of what is truly the body politick. They are so many deposits and receptacles of justice; because they can only exist by justice. Nation is a moral essence, not a geographical arrangement'.[186] The moral essence of neighbouring nations may be under threat by Jacobinism. Indeed, in the Third Letter, 'Proposals for Peace', Burke explicitly saw Jacobinism as a threat to British 'domestic government'. There 'may be made by any adventurers in speculation in a small given time and for any Country, all the ties, which, whether of reason or prejudice, attach mankind to their old, habitual, domestic Governments, are not a little loosened: all communion, which the similarity of the basis has produced between all the Governments that compose what we call the Christian World and the Republic of Europe, would be dissolved.'[187] The Republic's threat to these ties, and to all forms of government, led Burke to speculate on the possible insurrections of 'domestic violence' that, if unchecked, would likely spread and destroy both the British monarchy and Christian religion.[188]

A final set of domestic–international links emerges in Burke's considerations of rearranging the French Empire to prevent this expansionist threat to all domestic government, in his rejection of an internationalised scheme of colonial management. In the Fourth Letter, Burke reiterated his earlier points about France's extension of its domestic constitution into new territories, now calling this its 'Law of Empire', based not on 'principles of treaty, convention, possession, usage, habitude, the distinction of tribes, nations, or languages' but instead 'by

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186 Ibid 139.

187 Ibid 351–2.

188 Ibid 223 ('domestic violence') and 382–93 (on spread and destruction).

physical aptitudes'; a law of force.[189] Burke argued that France must be stripped of its West Indies colonies, but insisted that these should not be occupied by Britain. In the course of this argument, Burke considered and rejected a proposal by Lord Auckland for a conjoined system of domestic colonial administration, named 'Convention for Analogous Domestic Government':[190]

> for [this] desperate case, [Auckland] has an easy remedy; but surely, in his whole shop, there is nothing so extraordinary. It is, that we three, France, Spain, and England, (there are no other of any moment) should adopt some 'analogy in the interior systems' of Government in the several Islands, which we may respectively retain after the closing of the War. This plainly can be done only by a Convention between the Parties, and I believe it would be the first war ever made to terminate in an analogy of the interior Government of any country, or any parts of such countries. Such a partnership in domestic Government is, I think, carrying Fraternity as far as it will go.[191]

Burke's objections range from racist hierarchies — 'it immediately gives a right for the residence of a Consul (in all likelihood some Negro or Man of Colour) in every one of your Islands' — to colonial administration — that a 'Regicide Ambassador' would attend all merchant, plantation and colonial council meetings — to limits on government and parliamentary powers: that no Orders in Council or Acts of Parliament on the West India Colonies could be debated or made without protests and interference from the French.[192] Not only would the French become 'an integrant part of the Colonial Legislature' and, regarding colonial policy, of the British Parliament too, but, further, the interpenetration of imperial and domestic law and policy means this would be an effective 'co-partnership' in all domestic law: 'as all our domestic affairs are interlaced, more or less intimately, with our external, this intermeddling must everywhere insinuate itself into all other interior transactions, and produce a co-partnership in our domestic concerns of

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[189] Ibid 363, and see 362.
[190] Ibid 369.
[191] Ibid 370–1.
[192] Ibid 371.

every description.'[193] Any 'analogy' between colonial governments would, inevitably, spread to British 'interior Governments' proper, and they are a route through which Jacobin constitutional principles would inevitably flow into Britain and destroy it.[194] Burke saw this possibility as risking a 'total revolution in all the principles of reason, prudence, and moral feeling'.[195]

Burke's law of civil vicinage drew on the kinds of national and regional sentiments that motivated Bentham and Smith's discussions of the domestic and international. Unlike those earlier writings, however, Burke was motivated by an almost apocalyptic sense of the kinds of upheavals that France's constitutional changes might have in neighbouring countries. Seeing them as breaking and destroying the past juristic common heritage of Britain and Europe alike, Burke's new interventionist principles of the law of nations, prompted by changes in a European state's domestic law that violated natural laws, show how internally fixated international law could or should be. But in this and his rejection of any internationalised scheme of colonial management, it becomes clear that, for Burke, domestic ties as the basis of nation and constitution were also the building blocks of a just international order — as well as a useful polemical emphasis within an otherwise traditional juridical theory of the domestic and international.

C *Constitutionalising the International: Reform and Revolution in Later Bentham*

Despite their ideological differences, Burke and the post-Revolutionary Bentham were, on the question of the relationship of constitutional and international legal orders, closely aligned. Like Burke, Bentham's response to the French Revolution was hostile and focused on its natural law and universalising aspects. But whereas Burke saw the Republic as acting contrary to natural law and the public law of Europe, Bentham argued that revolutionary claims were faulty precisely because of their invocation of natural law and natural rights, which he famously dubbed

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[193] Ibid.

[194] Ibid 372–3.

[195] Ibid.

'nonsense on stilts'.[196] Bentham returned briefly to his manuscripts on international law just before his death as part of his colonial writings.[197] But Bentham's post-Revolution thinking on the connection of domestic and international law was developed primarily in his mature writings on constitutions, as part of his writings on France, and in his final project of a 'constitutional code', where constitutional and international law formed one significant part. This turn to constitutions began to clarify some of Bentham's earlier views on the interaction of domestic and international law. It lays the basis for Bentham's near-exclusive focus in the 1820s and 1830s on free trade and constitution-making. Instead of aligning internal legal orders through treaties and agreements, Bentham thought writing and reforming constitutions — acknowledging some local peculiarities, but generally guided by the universal principle of utility — was the way towards internal and external peace. Bentham's post-Revolution shift away from the international towards the domestic was, in a sense, constitutionalising his own earlier concept of the international: advancing the principles of international law not through schemes for perpetual peace or treaty agreements, but rather making them an increasingly important part of the constitutional orders of all states.[198]

This shift from the international to constitutional was evident from at least 1790, when Bentham began writing on the French Revolution and the French Empire. While the term 'international law' is absent from these writings, concepts of world government and constitutional powers around foreign affairs were central to them. Writing in response to France's 1789 'Articles de Constitution', Bentham's '*Projet* of a Constitutional Code for France' placed full sovereign powers in the National Assembly, and made the King's executive powers subject to legislative oversight: the powers of 'declaring war', 'making peace' or 'binding the Nation

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[196] See further Philip Schofield, 'Jeremy Bentham and the British Intellectual Response to the French Revolution' (2011) 13 *Journal of Bentham Studies* 1.

[197] This emphasis is pursued by Pitts: see Jennifer Pitts, *Boundaries of the International: Law and Empire* (HUP, 2018) 143–5.

[198] On Bentham's later years, see, eg, James E Crimmins, *Utilitarian Philosophy and Politics: Bentham's Later Years* (Continuum, 2011).

by treaties' required the Assembly's consent.[199] Bentham noted that this arrangement aimed to avoid the wide disagreements over whether treaty and war powers were part of executive power or not, arguing that, either way, these are the 'last of all powers that ought to be intrusted to the King' because of the temptation to abuse them in service of '[p]ride and caprice', and the wider despotic risks of coercive powers.[200] Further, declaring war had major effects on everyday laws, suspending various rights and powers of citizens, and also removing the ordinary protections given to citizens of the enemy nation.[201]

Bentham then conceived of general treaty-making powers as being essentially legislative, and unlimited, in that they might require any kind of change to internal laws. He also drew a connection between peace conditions and general treaties: 'peace can never be made as to any point besides the bare cessation of hostilities without producing equal changes in the effective result of the body of the laws. To cede a province is to demolish, to the extent of that province, the whole fabric of the laws.'[202] Likewise, treaties are an establishment of law within territory, and thus involved legislative power: 'The power of making treaties, if uncontrolled and unlimited, involves in it the whole of legislative power: since by inserting it as an article of a treaty no provision that can be imagined but [those which] might be made to pass into a law.'[203] Bentham's *Projet* thus saw a strong overlap between domestic legislative powers and treaty-making powers, emphasised the need for domestic implementation of treaty obligations, and recognised the importance of making these executive powers entirely subject to control by the legislature.

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199 Jeremy Bentham, '*Projet* of a Constitutional Code for France' in Philip Schofield et al (eds), *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution* (OUP, 2002) 227, 229 (s I, art 1) and 232–3 (s III, arts 5, 6, 9).

200 Ibid 253–4.

201 Ibid 255.

202 Ibid.

203 Ibid.

In the same vein, Bentham's anti-colonial writings of the 1790s criticised France's empire in terms of self-government and sentiments of humanity, rather than 'international law'. In *Emancipate Your Colonies!*, written and circulated in 1793 but not published until 1830, Bentham exhorted Revolutionary France to grant self-government to its colonial possessions, drawing on their own rhetoric: 'You choose your own government, why are not other people to choose theirs? Do you seriously mean to govern the world, and do you call that *liberty*? What is become of the rights of men? Are you the only men who have rights?'[204] Against the likely objections that the empire must be unified and governed as a whole, or that provincial deputies might eventually be able to change French laws,[205] Bentham argued for the wisdom of foreign advice in legislative assemblies as impartial observers: 'Would you see your justice shine with unrivalled lustre? Call in commissaries from some other nation, and add them to your own. … The cool and unbiassed sentiments of these strangers will be a guide to the judgement, and a check upon the affections, of your own delegates'.[206]

But most of Bentham's arguments focused on the economics of colonies in terms reminiscent of Smith's arguments for free trade. Colonies are not profitable under subjection, and would be profitable if they were freed and traded freely — but to this he added a general criticism that any profit to France would remain unjust because it is gained only by depriving the provincials of their property rights.[207] Finally, like Smith Bentham criticised the military power behind France's colonial trading system, again using the Revolution's own rhetoric: 'While you take what suits you, keeping what does not suit you, you aspire openly to universal domination: with fraternity in your lips, you declare war against mankind'.[208] Bentham made here a charge of hypocrisy between domestic constitutional

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[204] Jeremy Bentham, 'Emancipate Your Colonies!' in *Rights, Representation, and Reform* (n 199) 289, 292.

[205] Ibid.

[206] Ibid 296.

[207] Ibid 297–9.

[208] Ibid 308.

guarantees and their refusal throughout the French Empire, which, he suggested, was not only unjust, but threatened the French constitution itself.[209]

This domestic hypocrisy argument grew into the wider attack on the Declaration of the Rights of Man and Citizen and the concepts of natural rights on which the Revolution was based that would become Bentham's 1795 *Nonsense on Stilts*. In his notes on the motivations for writing it, Bentham stated that even if the Declaration were 'nonsense', it nonetheless demanded a response because 'it is nonsense with great pretensions … of governing the world'.[210] Throughout, Bentham argued that the French concept of natural rights either invalidates or is an affront to the legal arrangements within other states. The language of the Declaration is to 'people' everywhere, and it is a 'source and model of all laws' that takes as its 'professed object … this self-consecrated oracle of all Nations'.[211] But rather than dealing with specific questions of whether one provision or other should be the law in France, and the underlying question of the utility of that law, the Declaration proclaims all its provisions as 'fit to be made law for all men: for all Frenchmen, and for all Englishmen'.[212] Whereas British legislative proceduralism channels 'the selfish and hostile passions' into discussion and voting on particular legislative changes, the Declaration's abstraction inflames those passions, 'to say to the selfish passions, there — everywhere, is your prey; to the angry passions, there, everywhere, is your enemy'.[213]

Like Burke, Bentham saw the universalism of French domestic law as a serious problem, illustrated by many of the Declaration's provisions. Article 1's proclamation that all men are born equal in rights is tantamount to a duty to free them everywhere, requiring 'the total subjection of every other government to

209 Ibid 312.

210 'Editorial Introduction' in *Rights, Representation, and Reform* (n 199) i, xvii–lxviii, xlvii.

211 Jeremy Bentham, 'Nonsense Upon Stilts' in in *Rights, Representation, and Reform* (n 199) 317, 320.

212 Ibid.

213 Ibid 321.

French government', which is a 'fundamental principle in the law of universal independence, the French law'.[214] Article 3's announcement that sovereignty resides in the whole nation requires popular elections, not just of the French for their government, but for all European nations, and in the absence of universal suffrage, extending to women as well as children, all acts of all European governments must be void.[215]

Bentham then developed a wider critique around the Declaration's natural law commitments for their conflicts with civil and domestic laws. Article 5's provision of negative liberty, that '[w]hatever is not forbidden by the law cannot be hindered', eliminates all powers of command and obedience — 'domestic power, judicial power, power of the police, military power, power of superior officers in the line of civil administration over their subordinates' — because the great range of context-specific commands (in the domestic power instance, in Bentham's example, a father telling a son not to mount an unruly horse) cannot be found in the laws. These existing institutions are then 'fundamentally repugnant to the rights of man', and cannot fill the 'gap[s]' in the new code.[216] Finally, in dealing with the 1795 Declaration of Rights and Duties, Bentham noted a further clash of civil and domestic duties. Distinguishing these terms, Article 4's declaration that a good citizen must also be a good son, father, brother, friend, and husband creates a range of contradictions between civil and domestic duties: 'The word civil gives name to one class of duties; the word domestic to another. Is it impossible to violate one law without violating another? Is there no distinction between duties? Is there no distinction between laws? does a man by beating his wife defraud the revenue?'.[217] Declarations of natural rights and duties, for Bentham, created innumerable conflicts in everyday familial relationships, and problematically dissolved the legal boundaries between private and public life.

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214 Ibid 325.

215 Ibid 338.

216 Ibid 341–2.

217 Ibid 383.

Against Revolutionary attempts at codes and declarations, and in line with his earlier project in the *Introduction*, from around 1800 onwards Bentham began circulating his own codes and essays on codification, and in these works started to clarify how he thought domestic, civil and international law ought to interact. In his 1802 'View of a General Code of Laws', translated and published for a French audience, Bentham began to solidify the scheme of the *Introduction* for implementation in post-Revolutionary France. Among the parts of this general code was provisions on 'Domestic and Civil States'. This title delineated the 'classes of persons' who hold rights and duties by virtue of that class: 'masters, servants, guardians, wards, parents, children, proxies, etc'.[218] Bentham then distinguished these family members and workers from the powers of political officer holders and the duties of citizens; the classes founded on 'political conditions — that is, those which are founded upon some political power, or some duty subordinate to it', which is covered in the constitutional code.[219] Bentham stated that the 'domestic or civil state is only an ideal base about which are ranged rights and duties, and sometimes incapacities', and that these are the 'work of the law', founded on, but distinguishable from, the 'natural state'.[220] All rules of civil law follow from various states of family or work life, and this makes the complete civil code comprehensible to all people.[221]

Turning to the constitutional code, Bentham noted that the rights and powers of office holders 'will not much differ from domestic rights and powers', except for being usually divided into many different hands, which necessitated the concurrence of a range of wills to exercise those powers.[222] Noting the lack of a 'universal political grammar' — the difficulty of comparing different public powers or substantive offices in various nations — Bentham fixed on the aims,

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218 Jeremy Bentham, 'A General View of a Complete Code of Laws' in *The Works of Jeremy Bentham* (Tait, 1838) vol 3, 155, 192.

219 Ibid.

220 Ibid.

221 Ibid 193–5.

222 Ibid 196.

methods and functions of public powers, dividing them into powers over persons, property, public things, individuals, collectives, classes, and civic remuneration and reward.[223] Here Bentham introduced a strong connection between internal and external government. While the executive holds the powers of declaring war, making peace, and making treaties, those obligations bind the citizens and courts, thus turning international laws into internal ones, and making executive power really a 'power of legislation': 'when [a sovereign] promises to another sovereign, that his subjects shall not navigate a certain part of the sea, he prohibits his subjects from navigating there. It is thus that *conventions* between nations become *internal* laws.'[224]

This led Bentham to a delineation of codes along international and internal lines. The 'international code' would contain the duties and rights existing between sovereigns, divided into a 'universal' and 'particular' code. The universal code includes all duties and rights that a sovereign has 'with regard to all nations', which are 'properly only the rights and duties of morality' because states cannot or will not submit to adjudication.[225] The particular code exists within each nation, listing the express and reciprocal treaty rights and duties with specific states enacted in internal law: 'laws executed', which 'regard the two sovereignties in their character as legislators — when in virtue of their treaties they make conformable engagements in their collections of internal law. A certain sovereign engages to prevent his subjects from navigating a certain part of the sea; he ought then to make a change in his internal laws prohibiting this navigation.'[226] These domestic obligations include abstaining from making certain internal laws, exercising or abstaining from certain sovereign powers (like sending or not sending military aid), and norms of personal conduct of the sovereign (using proper forms of address).[227] The distribution and demarcations for internal laws should 'guide' the

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223 Ibid 196–7.

224 Ibid 199 (emphasis original).

225 Ibid 200.

226 Ibid.

227 Ibid.

arrangement of international laws. Treaty rights might be thought of as property rights, and war can be thought of literally as litigation, 'a writ by which execution is made upon a whole people. The attacking sovereign is the plaintiff; the sovereign attacked is the defendant'.[228]

Bentham's early 1802 general code formed an early sketch for his final views on the relation of internal and international law within his incomplete project for a universal 'Constitutional Code', which occupied him from the 1820s to his death. Addressed to 'all nations professing liberal opinions', the Code would operate as a universal guidance in the structure of government which, if followed, would reduce disputes between nations and orient them all towards justice in a utilitarian frame. Central to this was a radical change in the relationship of domestic and international law, which Bentham understood through the obligations of each legislator to act for citizens and foreigners alike. This began with a general concept of the service of legislator. Explaining a legislator's attendance requirements, Bentham drew a parable-like connection between domestic and legislative service: 'ART. 2. A domestic servant is a servant of one: a Legislator is a servant of all. No domestic servant absents himself at pleasure, and without leave. The masters of the Legislator give no such leave. From non-attendance of a domestic servant, the evil is upon a domestic scale: of a Legislator, on a national scale.'[229] This service to the nation is explained in the extensive legislator's 'inaugural declaration', which announced and entrenched government along utilitarian principles in a personal oath of office: 'I acknowledge, as and for the *specific* and *direct* ends of Government' the maximisation of 'subsistence, abundance, security against evil in every shape'.[230] This extended specifically to 'evils' sourced from both 'internal adversaries' and other rulers, who, 'unless by apt arrangements debarred from all hope of sinister success' will tend towards ill rule;[231] an

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228 Ibid 200–1.

229 Jeremy Bentham, *Constitutional Code: Volume 1*, ed F Rosen and JH Burns (OUP, 1983) 49.

230 Ibid 136 (emphasis original).

231 Ibid.

objective of curtailing bad government in other states by domestic or international laws.

But the most profound statement, cementing Bentham's earlier writings on the connections of foreign governments and their people to the good ends of domestic government, appeared in the legislator's pledge, 'In International Dealings, Justice and Beneficence Promised', which began by making this connection and equivalence explicit: 'On the occasion of the dealings of this our State with any other States,—sincerely and constantly shall my endeavours be directed to the observance of the same strict justice and impartiality, as on the occasion of the dealings of the Legislature with its Constituents, and other its fellow-countrymen, of this our State.'[232] Bentham's pledge removed the usual nationalist preference, reframing the legislators' duties as attempting to further the good of all states. Thus the legislator disclaims any attempt to add to the 'opulence or power of this our State' at the expense of the 'opulence or power' of another state, beyond what would be acceptable in fair competition between individuals.[233] Demolishing the individual–state differentiation, Bentham declared that profits by conquest are robberies, that wars are crimes, that the taking of dominion without compensation or protection is unjust, and that the honour and dignity of a state cannot be increased by any of these things.[234] Bentham's creed ended with an exhortation to self-improvement and asylum, a promise to the citizens of all states: 'Never, by force or intimidation, never by prohibition or obstruction, will I use any endeavour to prevent my fellow-countrymen, or any of them, from seeking to better their condition in any other part, inhabited or uninhabited, of this globe. In the territory of this State, I behold an asylum to all: a prison to none.'[235]

Bentham's late works turned from his early emphasis on utilitarian plans for laws between states to achieve international justice and peace to shaping their

[232] Ibid 142.

[233] Ibid.

[234] Ibid 142–3.

[235] Ibid 144.

constitutional laws towards the same end. The Revolution provided an early prompt for delving more deeply into codification that, by the 1820s, had turned to much more ambitious plans for complete constitutional codes that bound domestic legislators to also consider and serve the interests of foreigners as if they were their own constituents. By the time of his death, then, Bentham saw the domestic as the place where international obligations must be made real not by the threat of force but by the duties of lawmakers the world over to each other's citizens. Bentham's radical reshaping went well beyond the national fixation and acceptance of imperial territorial conquest and the rights of war in thinkers like Selden, Hobbes and Locke; it made the international central to constitutional thinking, furthering Bentham's wider commitments to utility, representation, equity and publicity.

D *Two Legacies of the International: Austin and Twiss*

The first forms of the international in Bentham and Smith's work took on two different directions from the 1830s onwards. The first was in John Austin's (1790–1859) work. Austin's now-famous rejection of international law as not 'real' law but instead only sentiment, opinion and at best international 'morality', served to distinguish it sharply from sovereign-commanded domestic law.[236] But Austin was deeply interested in international law. His chair at the University of London was not just in jurisprudence but also the law of nations. He read, discussed and admired Grotius and von Martens. Most importantly, his works paid careful attention to a range of problems of international law and the interaction of internal and external sovereign power and public law. While Austin is often seen as a more cogent successor to Bentham,[237] given the importance of sentiment and anti-nationalism in Bentham's international Austin's shift to a nation and sovereign-centric account of law moved away from the spirit of Bentham's original meaning and later works. If anything he is the inheritor of the early Bentham of the

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[236] On Austin, sovereignty and international law, drawing out his legacy in Kelsen's reactions, see Lars Vinx, 'Austin, Kelsen, and the Model of Sovereignty: Notes on the History of Modern Legal Positivism', in Michael Freeman and Patricia Mindus (eds), *The Legacy of John Austin's Jurisprudence* (Springer, 2013) 51.

[237] See, eg, Neil Duxbury, 'English Jurisprudence between Austin and Hart' (2005) 91 *Virginia Law Review* 1, 6, 19 and 39–41.

Fragment: his 'dismissal' of international law and later discussions of the nature of sovereignty rely on examining the distinctions between domestic and international political society, touching on themes of dependence and subordination, and using examples of revolution and empire. This is partly about distinguishing 'sentiment and opinion' from law, and partly about establishing which 'determinate' bodies can make laws.

While Bentham is remembered as a universalist legal theorist, contending that law might arrange public order on a global scale, most of his influential followers turned in the 1830s towards particularism, seeing the state and national societies as the only real location of legal authority, understood as sovereign command.[238] Austin's *The Province of Jurisprudence Determined* was one major text of this particularist move, and it contained perhaps the strongest use of the idea of 'analogy' between international and domestic law, albeit against Bentham's vision. The domestic analogy was Austin's means of denying the real lawfulness of international law, emphasising that it cannot truly bind sovereigns or national societies.[239] Austin did not use the language of 'municipal' or 'civil law' in *Province* to refer to legal systems, and 'domestic' appeared briefly in relation to internal political disputes, imperial-sovereign relations and policies of protecting domestic industry, and to describe those 'barbarous … domestic societies' of families that are not 'compacted' by habitual obedience to a chief.[240] 'International law', however, appears extensively, and analogies with internal laws are a major part of Austin's wider efforts to define law, sovereignty and authority.

Austin's project was to begin to distinguish positive law from the 'objects' that are 'allied or related' to it through 'resemblance or analogy'.[241] Sorting through

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238 David Armitage, 'Globalizing Jeremy Bentham' (2011) 32 *History of Political Thought* 63, 66–7.

239 On Austin and his complicated legacy, see especially Wilfrid E Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England* (Continuum, 2005).

240 John Austin, *The Province of Jurisprudence Determined*, ed Wilfrid E Rumble (CUP, 1995) 55 (internal disputes), 139 (imperial trade disputes) and 178 (tribe obedience).

241 Ibid 288.

the numerous 'ties' and points at which law 'touches' these objects would lay the ground for distinguishing morals and laws adequately, which was to be his major, unfinished next project.[242] One recurring and misleading analogy was between international and domestic law; or rather, in Austin's terms, between positive international morality and positive law. Rather than splitting these entirely, Austin argued that a rule set by general opinion was analogous to real law.[243] Austin defined positive law as 'set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society where its author is supreme'.[244] While jurisprudence examines positive laws without considering their moral goodness or badness, positive morality 'might be' part of 'a science closely analogous to jurisprudence'.[245] Austin explained that this 'might' was because one of its branches, the law of nations or international law, 'has been treated by writers in a scientific or systematic manner', specifically, by von Marten's positive or practical international law: 'Had [von Martens] named that department of the science "positive international morality", the name would have hit its import with perfect precision'.[246] Austin then divided ethics into the science of legislation, which relates to positive laws, and the science of positive morality, or simply morals.[247]

Expanding on morals, Austin introduced a lasting domestic–international allegory around the 'club or society of men'. The internal rules of a club are simply indications of the general opinions of the bulk of members, and not properly laws. As imperatives they may be styled as laws or rules, but they are really simply rules of positive morality.[248] Austin saw these kinds of rules as existing in all levels of society through general opinions of members, giving examples from professional

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242 Ibid 288–9.

243 Ibid 152.

244 Ibid 285.

245 Ibid 112.

246 Ibid.

247 Ibid 113.

248 Ibid 123.

clubs to towns to nations to the international community.[249] These are similar to 'rules of honour' among 'gentlemen' or laws of fashion or, indeed, laws among nations: 'there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled the law of nations or international law'.[250] Austin thus likened international law to the rules of a private members' club; the 'mere opinions of beliefs' that happen to be held by the bulk of recognised members. While elsewhere Austin used familiar examples of monarchs, counsellors and the state of nature as well, this image of the aristocratic or bourgeois social circle is new.

Austin rejected any real analogy between domestic positive law and international law. He admitted there are very close similarities, but the difference was that international laws are set or imposed by general opinion and sentiments, and are thus not real laws, but only 'styled a law or rule by an analogical extension of the term'.[251] Austin's problem with international law was not primarily about sanction or force but instead the lack of a clear, determinate body of authors of the relevant sentiments and opinions, and the lack of obedience and ability to command that underlies real lawfulness.[252] His illustration of this was the law of nations: 'The so called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called. But one supreme government may doubtless command another to forbear from a kind of conduct which the law of nations condemns. And, though it is fashioned on law which is law improperly so called, this command is a law in the proper signification of the term.'[253] What would be needed is a relationship of dependencies, illustrated by empire, colonisation, and international societies and families. These issues became

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249 Ibid.

250 Ibid.

251 Ibid.

252 Ibid 124.

253 Ibid 124–5.

Austin's material for more clearly defining society and sovereignty, leading to his ultimate inquiry into the defining characteristics of domestic sovereignty. Much of the difficulty of that definition comes from confederal or external interactions, and Austin went into extensive detail contrasting confederations in which members give up real internal power to a federal government by compact with simple alliances that could be broken at any point.[254]

Austin's emphasis on a set of clear delineations in a taxonomy of laws has strong Benthamite connections, and his ideas of the constitution and the international community as a set of classes or orders bears strong resemblances to Bentham's and Smith's accounts. But Austin's rejection of the lawfulness of international law and the supposedly problematic analogies to domestic law was, unsurprisingly, never endorsed by later British international law writers.[255] Indeed, one of Austin's first rejectors, Travers Twiss, offers a second legacy of the international in the tradition of Bentham and Smith, rooted in political economy, Twiss's area of expertise prior to international law, and focused on sentiment and opinion, albeit retaining a place for some forms of natural law reasoning.[256] Twiss's early works sought to create a juristic science of international law through a focus on independent political communities, and contended that sentiment and, especially, opinion, was the real absent judge of sovereigns. This entrenchment of sentiment and opinion sets the stage for the widespread debates over the domestic and international's multiple manifestations in law, society and empire in the late nineteenth century, explored in the next chapter.

Like Smith, of whom he was a critic and proponent, Twiss's early works were concerned with morality and political economy and approached laws as both

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254 Ibid 293.

255 On Austin's 'challenge' and later responses, with some discussion of the domestic and international, see Michael Lobban, 'English Approaches to International Law in the Nineteenth Century', in Matthew Craven et al (eds), *Time, History and International Law* (Nijhoff, 2007) 65, 78–88.

256 On Twiss's life and work, see further Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (CUP) 232–9 and ch 9.

universal and quasi-natural, like the 'laws' of population, but also changeable and aimed at certain valued ends. Twiss began his intellectual career as a writer and lecturer on political economy at Oxford. In his first lecture, after critiquing Thomas Malthus's terminology and theories around populations and the growth of nations, Twiss argued that statesmen and positive laws must aim at stimulating population growth — now the only major, common problem of European states in the 1840s, which replaced issues of slavery, revolution and the imperial wars of the 1790s — by remedying the true barriers to that growth.[257] Twiss also examined law's relation to domestic conditions, to explain his concept of the progress of civilisation. Law cannot be obeyed in wretchedness, and a people cannot develop their full capacities when their private home and public lives are marred by pollution, poor sanitation and harsh working conditions: 'The remedies for such evils as these, which are internal to dwelling-houses and workshops, come rather within the sphere perhaps of domestic than political economy, as they originate in defective *private* arrangements.'[258] Sanitation is a matter for the state because poor public arrangements lead to the 'moral and physical deterioration' of the population, which leads to disregard for laws, specifically peace and property.[259] These reflections give way to a general consideration of the progress of civilisation in the examples of the civilised/barbarian distinction, subsistence, utopias and emergencies, with which Twiss concluded his lectures, arguing that the progress of morality and civilisation is part of the sturdiness of a population and a state's ability to deal with emergencies.[260] This view of progress and population became a central organising theme in Twiss's thought, developed first through an extended critique of Smith in a series of 1847 lectures. Smith had ignored the distribution of wealth and thus did not recognise that population increase will not necessarily improve the wealth of a nation; consequently, his theory was unable to understand the impact of inequality, and its role in causing

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[257] Travers Twiss, *On Certain Tests of a Thriving Population* (Longman, 1845) 23–7.

[258] Ibid 79–80 (emphasis original).

[259] Ibid 81.

[260] Ibid 94.

events like the French Revolution, while a Malthusian focus on population could account for both.[261] For Twiss, ultimately, politics and law between nations now focused on questions of political economy, within and between states.

Even after Twiss moved to a chair in international law at King's College London in 1852, his international law writings still held a strong sense of this earlier political economy work, especially in his approach to nation building and his Malthusian ideas about civilisation, growth and progress. With these commitments and interests came frequent analogies between national and international legal concepts. In a tract dealing with the 'Oregon Question', the US–British dispute over territorial ownership of the Pacific Northwest, Twiss provided a detailed survey of the geography of the territories, the legal arguments and doctrines deployed by the parties to the dispute, before examining the concept of territorial acquisition and its relation to dominium and domain. Twiss endorsed Vattel's argument that possession of a country without a prior owner gives the 'empire or sovereignty' as well as the 'domain' over it.[262] The empire and sovereignty aspect was, thought Twiss, a part of nation-building. Sovereignty is 'a necessary consequence upon the establishment of a nation in a country', and that national establishment may occur by immigration, colonisation, or the settlement of 'vacant country'.[263] Here Twiss approvingly quoted Vattel's argument that the new nation 'though separated from the principal establishment or mother country, naturally becomes a part of the state, equally with its ancient possessions'.[264] The domain, on the other hand, is a relation of property, directly analogous to an individual's property rights, understood along the lines of the acquiring nation's internal laws: 'The right of *domain* in a nation corresponds to the right of *property* in an

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261 Travers Twiss, *View of the Progress of Political Economy in Europe since the Sixteenth Century* (Longman, 1847) 195-201 (critiquing Smith) and 203ff (on Malthus' usefulness).

262 Travers Twiss, *The Oregon Question Examined in Respect of Facts and the Law of Nations* (Longman, 1846) 150–1.

263 Ibid.

264 Ibid.

individual.'[265] When a nation occupies 'vacant country', it 'imports its sovereignty with it', giving it the power not only to dispose of all property within the territory, but also an 'exclusive right of command' wherever it has taken possession.[266] Here, nations differed from individuals. A private person can settle an occupied country and gain his own personal independent domain over it, but to gain the 'exclusive right' or the 'empire' over that country, he must represent a state.[267] Following that claim, the importation of municipal law was an 'accessory of the right of settlement': a coastal possession in the New World gives a nation 'exclusive jurisdiction over the adjoining seas to the extent of a marine league, as being necessary for the free execution of her own municipal laws'.[268]

Twiss's next work on international law dealt with another kind of international legal incursion that fixed directly on conflicts of municipal and international law and sovereign authority: Pope Pius XI's attempt to establish Catholic bishoprics within England. Twiss contended that the Pope's action was multiply unlawful, as a violation of English as well as European public law, and of the law of nations: 'a direct violation of the Statute Law of the land'; an intervention 'within the dominions of an independent Sovereign' without its consent; and a departure from long-established practice, 'which in such matters constitutes the law'.[269] Within this monograph of detailed argument, Twiss rejected the 'parallelism' raised by one of the Pope's defenders which linked the acts of an English subject to acts of the Pope. While 'the *municipal law of England*' does not prevent English Catholics from becoming bishops, 'it may be against the *public law of Europe*' for the Pope to establish a bishop's see without the consent of the English Crown, and although the Pope's action might not affect the Crown's supremacy in spiritual matters, it may still be an 'invasion of its *temporal superiority* within the realm of

[265] Ibid 151 (emphasis original).

[266] Ibid.

[267] Ibid.

[268] Ibid 175.

[269] Travers Twiss, *The Letters Apostolic of Pope Pius IX Considered with Reference to the Law of England and the Law of Europe* (Longman, 1851) iv and 1–2.

England'.[270] Later, Twiss argued that Pius XI's 'new Hierarchy' involving an 'organic bond of union' between national bishops and an Archbishop who can unite and direct their conduct conflicts with the 'genius of the constitution of the realm'.[271] No 'rival' legislature can exist within the British constitution or make decrees that would conflict with those of the Queen and Parliament: the 'sphere of what is held to be ecclesiastical action by the Roman Catholic Church embraces much which, by the law of the land, is considered to be within the precincts of the supreme legislature'.[272]

By 1856, Twiss had returned to Oxford to take up the Regius Professorship of Civil Law, delivering an inaugural address that began by joining political economy and international law, and questions of domestic and international laws. 'THE Science of International Law, like the science of Political Economy, is a fabric of comparatively modern structure'.[273] Twiss then drew a sharp distinction between contemporary meanings of international law and their ancient antecedents, arguing that the 'Law of Nations' in its received sense, was largely unknown in antiquity and should not be confused with the Roman '*jus gentium*'.[274] The *jus gentium* did not regulate the intercourse of nations, but rather 'was that portion of Natural Law to which all mankind does homage, the least as feeling its beneficence, the greatest as not exempt from its control', and as such 'has accordingly been incorporated into the domestic code of every nation'.[275] The formal definitions in Justinian's Institutes cohered with Cicero's view that the *jus gentium* was 'common to all mankind as rational beings', whereas the '*leges populorum*, or those rules of municipal jurisprudence which are special to each state' are equivalent to civil

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270 Ibid 6–7 (emphasis original).

271 Ibid 19.

272 Ibid.

273 Travers Twiss, *Two Introductory Lectures on the Science of International Law* (Longman, 1856) 1.

274 Ibid 2.

275 Ibid.

law.[276] Thus while the *jus gentium* bound all states and became part of their domestic laws, it did not directly regulate their relations with each other.

Twiss searched for the implications of this connection amidst the considerable expansion of international law in recent years. He argued that the term ‘international law’ was more extensive and significant than ‘the law of nations’. The latter was a subdivision of the former, and can be contrasted with treaty law, which formed a separate branch of positive law, that Twiss likened to the division of common and statute law in the ‘municipal law of Great Britain’.[277] Turning from British to German legal arrangements, Twiss endorsed the relatively new German nomenclature of ‘external Public Law as distinguished from the internal Public Law of states’, which indicated a ‘still wider application’ of international law to cover the laws governing the ‘private relations between the citizens of separate states’, recognised by ‘civilised nations’ and for the ‘common protection’ of those citizens.[278] This branch of ‘the conflict of laws, foreign and domestic’ fell within private international law and outlined the rules ‘by which the conflict between the municipal law of different nations is to be appeased’.[279] Nations ultimately still held the right of judging foreign laws on the basis of them being ‘contrary to the policy or prejudicial to the interests of another nation’ — that is, according to their own constitutional, political or moral standards — but a presumption of respecting and applying foreign laws still formed part of the voluntary law of nations.[280]

These detailed points on the interaction of internal and international law built towards Twiss’s general concept of international law and its relation to force and enforceability. Twiss disagreed with Austin strongly. While Austin ‘seems disposed to banish the term “international law”’ and replace it with international

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[276] Ibid 3.

[277] Ibid 54.

[278] Ibid.

[279] Ibid 55.

[280] Ibid 57.

morality, this approach misunderstands law as narrow superior command.[281] Twiss instead defined law as 'the external freedom of the moral person' that may gain its force from 'self-protection'.[282] The *jus gentium*, for example, comes from self-protection, founded on national self-submission to the laws common to all nations 'by which its international life' is regulated, and on the reciprocal wills of nations submitting to this law.[283] Twiss here invoked public opinion and the Benthamite formulation of the 'general happiness of mankind', which he combined with a more providential account of progress in the judgment of history:

> The Law of Nations, in fact, has neither lawgiver nor supreme judge, since independent states acknowledge no superior human authority. Its organ and regulator is public opinion. Its supreme tribunal is history, which forms at once the rampart of justice, and the Nemesis by which injustice is avenged. Its sanction, or the obligation of all nations to respect it, results from the moral order of the universe, which will not suffer nations or individuals to be isolated from one another, but constantly tends to unite the whole family of mankind in one great harmonious society. Its province is to supply a secure foundation for building up the universal fellowship of the human race by the intercourse of nations and states; and its strength and efficacy is such, that no individual nation can lawfully prejudice it by any particular law or ordinance of its own.[284]

In other words, the law of nations was not dissimilar to the rules of political economy; a foundation of principles to build universal sentiment, which cannot be affected or denigrated by the unjust internal laws of a state that seeks to act contrary to it.

Twiss then related this concept of international law to the Benthamite method of observing laws and promoting general happiness. While 'by observation and

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[281] Ibid.

[282] Ibid 58. Note that 'the external freedom of the moral person' is Heffter's definition of law, which Twiss quoted but does not clearly cite (though he discusses Heffter in the preceding pages on external and internal public law). See August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart* (Schroeder, 1844) s 2. The translation is identical to Henry Wheaton, *Elements of International Law* (Carey, 1836) 14–15.

[283] Twiss, *Inaugural* (n 273) 58.

[284] Ibid 59.

meditation we ascertain what rules of international conduct best promote the general happiness of mankind, by applying those rules as opportunities for carrying them out present themselves, we shall make progress towards that admirable order wherein God has disposed all laws'.[285] But unlike Bentham's fixation on legislators of the world, Twiss looked to the international lawyer to achieve this general happiness. The 'vocation' of the international jurist, on which Twiss ended his inaugural, was to act as the 'sentinel' of this system, defending weak states against powerful ones, condemning war and conquest that went beyond 'established doctrines of public law', and constraining the conduct of war in general.[286] Spreading the doctrines of international law will make them take deeper roots around the world, and ultimately prevent isolationism in nations and individuals alike, the note on which he ends the lecture: 'The apprehension of perfect isolation may in this way operate as a counterpoise to the suggestions of covetousness or the promptings of ambition, and the conscience of a nation, as of an individual, may ultimately become a LAW UNTO ITSELF.'[287]

The science promised in Twiss's inaugural took on a more systematic form in his 1861 treatise, which took its title and starting point from 'independent political communities', rather than states or nations.[288] While Austin had used similar language in examining 'independent political societies' and 'communities', Twiss's use of the phrase here was intended to react against Austin's meaning, which was beginning to gain influence in the 1860s. In the Preface, Twiss 'regretted' that, at a point of so much practical 'progress' in the project of 'establish[ing] the ascendancy of the Reason over the Will', 'certain eminent Writers, who have treated of General Jurisprudence' — that is, Austin, though he is unnamed here — had adopted what Twiss dubbed a 'primeval Notion of Law'

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285 Ibid 59–60.

286 Ibid 59–60.

287 Ibid 60.

288 Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, vol 1 (OUP, 1861).

which reduced law to the enactment of sovereign will alone.[289] This was historically inaccurate, and failed to explain the many legal relations between states in the contemporary world that Twiss's work would examine to detail.

Instead, Twiss made the nation central. Independence was the 'fundamental element' that made a state into a nation.[290] The nation was the 'political body' that could discharge the 'obligations of Natural Society' that it owed to other bodies, and work with them to regulate the 'mode of discharging those obligations' in their relations as communities or in the interactions of individuals among them.[291] Twiss emphasised that these national interactions are capacities that can operate 'without the consent of any political superior':[292] it is nations, not sovereigns, that are subjects of international law. Twiss went on to examine the 'national state-systems of Christendom' and the Ottoman Empire, as the basis of the more abstract doctrines of the rights of nations. In dealing specifically with internal and international law, Twiss laid an extremely strong account of nationalist independence, termed the 'Right of Empire':

> THE Empire of a Nation Within its own territory is of Natural Right exclusive and absolute: it is susceptible of no limitation not imposed by the Nation itself, for any restriction imposed upon its exercise, deriving force from an external authority, would imply an impairment of a Nation's Independence to the extent of that restriction, and an investment of Sovereignty to the same extent in that Power which had imposed such restriction. All exceptions, therefore, to the free exercise of the Right of Empire by a Nation within its own territory must be derived from the consent of the Nation itself.[293]

What followed from this territorial focus was that the civil law of a state operated only within its borders. Rights over natural born subjects emerge from the personal obligations of subjects towards their sovereign, while the general control over all

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[289] Ibid Preface, v–vi. Twiss returns to Austin on this point, naming him, at 139ff.

[290] Ibid 9.

[291] Ibid.

[292] Ibid.

[293] Ibid 214.

persons and property within a sovereign's territory is a 'paramount right' of empire.[294] The discretion to enforce foreign laws, or extend a right over subjects into the territory of another, is a question of comity — what other states will reciprocally accept — rather than clear rules or rights.[295]

E *Conclusion*

This Part explored three early currents of reaction to the emergence of the international. Burke's reactions to the French Revolution used a 'law of civil vicinage' to support interventions to contain the revolutionary–imperial project and its corruption of natural laws. Bentham's later works similarly critiqued the natural law arguments of the revolution, but prompted his turn away from international law to the reform and rationalisation of constitutional systems that culminated in his 1820s attempts in the constitutional code to extend duties of good government to all nations. Austin's account of international law not strictly being 'law' rested on centring the domestic commanding sovereign proved pivotal. But it is in the works of Twiss that the Benthamite and Smithian themes of political economy, sentiment and utility returned strongly. The evolution of Twiss's early thought from political economy, to problems of territorial acquisition and papal intrusion into England, to a science of public opinion, to, finally, an anti-Austinian yet strongly nation-centric account of international law, shows an entrenchment of the main tenets of Bentham's approach to law in its internal and international forms: that the examination of positive laws in each nation would be the basis for understanding their relations with each other; that law bore a strong relation to consent in a national frame; and that it was the task of jurists to clearly articulate and spread the correct doctrines of the law of nations to aim at peace between them. Yet Twiss broke with Bentham's universalism and sentimental connections of humanity encapsulated in the latter's early exhortation of 'Oh My Countrymen!' and the legislator's oath to give credence to the happiness of other nations. Instead, for Twiss, the nation's internal laws owe

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294 Ibid 217.

295 Ibid 217–19.

nothing to foreigners, and any restriction by foreign or international law without its consent would be a breach of its independence. The question of the relationship of internal to international law was a constant topic of Twiss's works. This shows the point at which, with the great expansion of treaties and the beginning of statutes as a major tool of reform, conflicts between domestic and international laws would soon become a central theoretical and practical dilemma for British jurists. Twiss's final points on the rights of empire that took internal law as absolute sovereignty and national consent foreshadow the direction these debates would take.

IV Conclusion: Nationalism, Independence and the International

This Chapter examined the emergence of the international out of attempts to replace natural law thought with new natural laws of utility and political economy. Bentham's excoriation of Blackstone's Lockean taxonomy of the spheres of laws of nature, nations, and municipal law allowed Bentham to articulate a strong account of sovereignty as obedience and command that always had external and imperial dimensions. This laid the ground for his new word 'international' to describe the laws between states, which ought to be guided by principles of utility that should rationally reveal their shared interests to reject sovereign competition and national jealousies. But a rival international along similar lines appeared in Smith's contemporaneous works, which used sentiment within families and nations as an alternative basis for understanding the common links and interests between them which, for Smith, undermined imperial projects of colonial preference and urged all nations to adopt domestic laws of free trade. In the aftermath of the American and French Revolutions, the domestic and international were put to a range of other uses. Burke seized on domestic ties to ground a law of civil vicinage that denied the international claims of French Revolutionary constitutions as contrary to the revived natural universal laws of property. Reacting in a different way, the later works of Bentham critiqued the Revolution's revival of natural law ideas which gave way to projects of constitutional codes that developed Bentham's account of the international as primarily an internal check on legislative power, culminating in the arguments of the unfinished constitutional code that legislators must approach domestic laws as owing duties to other states

and peoples too. In the wake of Bentham's death, two divergent projects for Benthamite international law appeared: John Austin's influential rejection of the international as law, and Travers Twiss's continuation of the international as a project of political economy, emphasising and entrenching national independence.

The next Chapter examines how the domestic and international became further entwined along these lines, spurred by the expansion of the Empire in the late nineteenth century, as part of projects of independence and interdependence. Independence is primarily associated with absolute parliamentary sovereignty, which made Parliament the centre of domestic implementation of new international rules and treaties, the focus and model for empire and the local parliaments in the colonies, and led to new uses of private and public law analogies to spread imperial government structures through the development of new rules of international law. Interdependence, on the other hand, became a focus for a range of new political projects, from racialised world order views that relied heavily on continuities of domestic and international law, to liberal progressive projects that emphasised domestic and international government as collections of represented men, to socialist revolutionary programs for uniting domestic working classes into 'the International', to First World War plans to coordinate domestic governments for international peace. In all of these areas, the domestic and international, newly entwined, became central to projects of law, government and empire.

INDEPENDENCE AND INTERDEPENDENCE: ENTWINING, 1880–1920

I Introduction: 'Independence is Rivalled by Interdependence'

The engrained 'origin point' of modern theories of the relationship between the domestic and international is Germany, 1899,[1] with the publication of Heinrich Triepel's *Völkerrecht und Landesrecht* (*International Law and State Law*) often remembered as the first treatise built from the division of international and domestic law, and the foundation of contemporary dualist theories.[2] For Triepel, the rules of international law occupied a separate field of application, distinct from the rules of internal or municipal laws, with different sources and subjects. International law was restricted to state–state interactions, finding its source in the express consent of states. Domestic law governed individual–state (public) and individual–individual (private) relations, but either way found its source in the state alone. This deeply positivist, state-centric view ignored the possibility of customary laws and practices of internal government or state-interactions, or of general principles of law evinced by the practices of 'civilised' nations, both of which were central to other juristic attempts to understand the relation of domestic and international.[3] Like much German legal theory of the time, Triepel's account was closely connected to the constitutional architecture of Germany's unification in 1871, its vision of constitutions made not by writing but gradual unification of national will, the endurance of the Holy Roman Empire's inter-polity imperial law, and Germany's present imperial ambitions.[4]

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1 See, eg, Janne E Nijman and André Nollkaemper, 'Introduction' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP, 2007) 2.

2 Heinrich Triepel, *Völkerrecht und Landesrecht* (Hirschfeld, 1899).

3 Jochen von Bernstorff, 'German Intellectual Historical Origins of International Legal Positivism' in Jörg Kammerhofer and Jean D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP, 2014) 50, 50–1.

4 See Michael Stolleis, *Public Law in Germany, 1800-1914* (Berghahn, 2001); Nijman and Nollkaemper (n 1) 7–8.

British legal theorising on the domestic and international around the same time was motivated by a parallel set of changes in imperial-constitutional law and international institutions. Thomas Baty's 1909 textbook began with a pithy statement reflecting this. 'Since the Hague Conference of 1907', Baty wrote, 'it has become increasingly evident that the nineteenth-century conceptions of International Law must be revised. Independence is rivalled by Interdependence'.[5] This rivalry lay between old sovereign power and the new, tentative system of voluntary arbitration and the codification of various rules of international law on debts, warfare, and neutrality, among other things, announced at the Hague. Among Baty's conclusions was the stern view that despite the new interdependence, territorial independence — 'the absolute sacredness of a nation's land' — still formed the real basis of the law of nations; at least 'until we have something better to put in its place'.[6] The ability for nations to determine law within their own borders was central to that sacredness. But Baty strictly curtailed sovereign exercises of power beyond those borders, in terms reminiscent of Bentham's critiques of colonialism, taking the public as the world tribunal of international law:

> When we see Britain occupying a custom-house in Nicaragua, and dispossessing the national troops by a show of force; when we see the United States landing marines at Colon or Amelia Island; when we see France coolly laying hands on Mitylene or Chantabin, — we are witnesses of flagrant illegality which is in its essence destructive of the independence of Britain, France and the States. We see them bartering away principle and security for the satisfaction of extorting a few thousand piastres, or salving a few warehouses. The fabric of society is territorial: if it is once admitted that one state can, without war, carry out its will by force in the realm of another, there is an end of all law and order. The national law is converted from an axiom into an hypothesis.[7]

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5 Thomas Baty, *International Law* (Murray, 1909) 1.

6 Ibid 245.

7 Ibid 251.

International actions and imperial ambitions on the grounds of 'independence' could imperil national law and the fledgling international system. Actions backed by force beyond the confines of a sovereign's territory were not just unsupported by law, but also destructive of independence. Unlawful uses of force, claims of territory, acquisitions of property all undermined both international and domestic law, throughout the world.

Chapter Two ended with Twiss's 1861 articulation of an almost mirror image of this problem. Twiss's nation and independence-focused account of the interaction of domestic and international law ended with the 'Right of Empire'; the need for national consent to any and all international laws, and otherwise absolute jurisdiction over people and property within a territory. Baty, writing almost fifty years later, pointed to how external rights of empire could threaten all forms of law. But the problems were not so distinct. This Chapter shows how the height of the Victorian empire prompted a turn to imperial law as a British-specific form of universal and universalising legal authority that began to entwine the domestic and international, seen in a variety of doctrinal projects tied to independence and interdependence. While empire has been an important connective theme in previous chapters, it is in the nineteenth century that it becomes central to British constitutional and international legal thought.[8] Part One begins with empire and independence. With imperial expansion came new doctrines around the absolute sovereignty of parliament, emerging alongside a connected and expanded absolute executive power exercised well beyond the British Isles. This absolutist concept, reminiscent of the kinds of universal, natural and papal jurisdictions discussed by previous authors, is a form of internationalised law made stronger still; supporting the unlimited powers of the UK parliament within the British Isles and throughout the Empire to reject international limits on domestic power. Meanwhile,

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8 See, eg, Jennifer Pitts, 'Boundaries of Victorian International Law' in Duncan Bell (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (CUP, 2007) 67; Thomas Poole, *Reason of State: Law, Prerogative and Empire* (CUP, 2015); Dylan Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 *OJLS* 751; Dylan Lino, 'The Rule of Law and the Rule of Empire: AV Dicey in Imperial Context' (2018) 81 *MLR* 739

international lawyers used a range of domestic law concepts as analogies to expand and build the claims of international law as the juridical face of imperial power. Part Two then turns to 'interdependence', arguing that the international and domestic were central to a range of political projects, and exploring their use in four portraits of rival theories of law and society that proliferated in the late nineteenth and early twentieth century: racial hierarchies, liberal progressivism and representation, socialist internationals and peace plans.

II INDEPENDENCE: IMPERIAL PARLIAMENTS

A *Introduction*

This Part examines ideas of 'independence' tied to Parliament's position as the focus of imperial and international law enactment, and its lasting image as an analogy for government and territorial control in international law writings. It first argues that the turn to Parliament as the institution for clarifying international law's rules and doctrines gave way to a range of theories of parliamentary sovereignty that, far from insular in their absolutism, responded to international forms of law. It then shows how wider debates over the juridical nature of the empire and its colonies turned frequently to ideas of local self-government and imperial restrictions on international personality. Finally, it examines how international lawyers used domestic law concepts to create new analogies to spur the development of international law to support imperial claims in the 1890s: justifying territorial acquisitions, claims of protectorate government, and excluding a variety of non-European domestic legal systems.

B *Parliaments for Empire*

The late 1870s saw the British Parliament engage with international law in an unprecedented way. With the sinking of the *Franconia* and the landmark 1876 decision that followed,[9] Parliament began to pass statutes to replace the vague rules of international law with clearer principles and standards for the courts, which had to adjudicate questions of international law more frequently and of

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9 *R v Keyn* (1876) 2 Ex D 63.

increasing complexity. The next year, *Parlement Belge* cemented the requirement that rights derived from treaties needed enabling legislation to be clarified and made real in English law.[10] These cases form one starting point for the theories examined here about the nature of the UK parliament; as a legislature for the British Isles, as well as an imperial legislature of global scope. With this shift, the domestic and international became increasingly entwined, reflected in a proliferation of new juristic work.

In 1893, T E Holland gave a public lecture appraising this new statutory fascination with international law. Holland began by declaring that '[t]he whole question of the relation of National to International Law has been much misunderstood, and is indeed not free from difficulty'.[11] Putting to one side issues of common law and customary international law, Holland fixed on the 'points of contact' between statutes and international law, dealing first with statutes that 'assert' national rights — aliens, allegiance, territories — and then with those that 'perform' international duties — enactments of custom or treaty obligations. According to Holland, these statutes 'must be vigilantly watched' in case they over-assert international rights or fail to fulfil international duties, either of which might justify another state going to war against Britain to vindicate them.[12] In Holland's detailed survey, a messy relationship between statute and international law emerged, leading him to conclude that statutes cannot 'be taken as precisely measuring the international rights or duties' of Britain; they rarely expressly use the terms 'law of nations' or 'international law'; and judges presented with a conflict between a British law and a rule of international law would do their best to interpret the conflict away.[13] Ultimately this relationship is fragmentary: 'We may notice next, what has no doubt already become obvious, the fragmentary character of our legislation upon points of international interest. We have statutory

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10 *Parlement Belge* (1880) LR 5 PD 197.

11 TE Holland, 'International Law and Acts of Parliament' (1893) 9 *Law Quarterly Review* 136, 136.

12 Ibid.

13 Ibid 147–52.

enactments only upon points which have happened to call to them the attention of Parliament; while points of equal importance, but which have not attained this accidental prominence, have been left to the operation of the Common Law.'[14] Holland concluded with the suggestion that his survey 'perhaps … suggest[s] the necessity of some study of the limits which are imposed upon national legislation by the principles of International Law'.[15]

Constitutional writers had been vigorously fighting against precisely this kind of limitation for at least the preceding decade. Holland's close friend A V Dicey (1835–1922) provided probably the most extreme — and influential — refutation of it in his 1885 *Lectures Introductory to the Law of the Constitution*.[16] Taking up Austin's characterisation, Dicey saw international law as mere morality, incapable of abrogating or limiting Parliament's absolute sovereignty, and leaving it as the only conduit for international law's incorporation into domestic law, which, at whim, Parliament could repeal and revoke. Yet while Dicey is usually remembered as antagonistic to or dismissive of international law, his treatment of its relationship with domestic law, and particularly the doctrine of absolute parliamentary sovereignty, reveals a more nuanced approach. Before he took up the Vinerian Chair in 1882 and turned to constitutional law, Dicey had already published on private international law and used that book as one basis for an application for a chair in international law in the late 1870s.[17] And although in the *Lectures* he endorsed Austin's account of international law as morality, Dicey raised similar doubts about constitutional law and jurisprudence in general. Dicey considered whether constitutional law was not law at all but rather a mix of history

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14 Ibid 148.

15 Ibid 152.

16 On Dicey's era and legacy in British public law, see, eg, Martin Loughlin, *Public Law and Political Theory* (Clarendon, 1992) chs 7 and 8.

17 A note in the frontpages of the Stanford Law Library's copy of AV Dicey, *The Law of Domicil as a Branch of the Law of England, Stated in the Form of Rules* (Steven and Sons, 1879) addresses the copy to his former tutor and lifelong friend Pattison, stating 'You have a special relation to [this book] as I was led to study the subject of Private International Law by your advice to stand for the International Law Chair ...' (though it is not clear to which chair Dicey is referring). Available at https://archive.org/details/lawdomicilasabr00dicegoog.

and custom, suggesting that it might best be studied by historians or legal experts familiar with custom, namely, a professor of jurisprudence, who deals with the 'oddities or the outlying portions of legal science', or of international law; 'because he being a teacher of law which is not law, and being accustomed to expound those rules of public ethics, which are miscalled international law, will find himself at home in expounding political ethics which, on the hypothesis under consideration, are miscalled constitutional law'.[18] Were Dicey to endorse it and Austin's view, his international would be the rules of public ethics applied throughout the nations of the world, just as constitutional law would be those rules of political ethics that are acknowledged and applied within the domestic sphere.

Instead, Dicey argued that constitutional law contained rules which 'directly or indirectly affect the distribution or the exercise of the sovereign power in the state': who holds power, how they exercise it, and the territory over which this sovereignty extends, where these 'rules' include both laws followed by courts and 'conventions, understandings, habits, or practices' that might be termed 'constitutional morality'.[19] Although Dicey does not return in this argument to international law or general jurisprudence, this capacious idea of constitutional law as sovereign power would include much of international law, and his idea of 'constitutional morality' as conventions, understandings, habits or practices could, equally, describe the international morality of relations between states, or rather between the ministers and sovereigns that represent them. These theoretical foundations in the *Lectures* suggest the international might be more important for Dicey's account of constitutional law than the apparent brash rejection.

The importance of the international to Dicey's articulation and defence of absolute parliamentary sovereignty becomes clear in his exposition of it, which proceeded by rejecting three alleged 'limits to it, each of which are illustrated by legal problems external to the state. The first asserted limit was that neither the

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18 AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan and Co, 1885) 23.

19 Ibid 24–5.

'principles of morality' nor the 'doctrines of international law' — as 'private or public morality' — could invalidate an Act of Parliament that opposed their strictures.[20] Rejecting this, Dicey first noted Blackstone's argument that the laws of nature are superior over any human laws, 'over all the globe, in all countries and at all times', and touched on a recent case in which the judges implied that '[c]ourts might refuse to enforce statutes going beyond the proper limits (internationally speaking) of Parliamentary authority'; namely, legislating for subjects or foreigners beyond its territorial jurisdiction.[21] Dicey instead insisted that this simply meant that in interpreting a statute, judges will presume that Parliament did not intend to violate the principles of morality or international law, and will, where possible, interpret a statute consistently with both.[22]

The second supposed limit was that Parliament could restrict the exercise of the prerogative. Dicey responded by turning to treaty-making. While prerogative rights like the right of making treaties lies with the Crown and is exercised by the government, these rights could still be regulated or abolished by Parliament, for example by legislating restrictions on the 'mode in which treaties are made' or making Parliament's assent to a treaty necessary to its conclusion.[23] Turning then to the third apparent limit, that Parliament cannot bind its successors, Dicey invoked the Act of Union and statues on the taxation of colonies. For Dicey, the domestic enactment of the international agreement between the nations of England and Scotland, fundamental though it is as the constitutional basis of the UK Parliament itself, could be repealed by that Parliament by ordinary majority at any point. Likewise, the *Taxation of Colonies Act 1778* announced Parliament's self-limitation of its right to impose duties and taxes on colonies. It seemed to Dicey impossible that it would be repealed or its spirit violated. While 'policy and prudence' would counsel against that, there is 'under our constitution no legal

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20 Ibid 58–9.

21 Ibid 59.

22 Ibid.

23 Ibid 60.

difficulty' in repealing or overriding it.[24] The current parliament remains just as sovereign as the earlier one to repeal or override laws, and these changes would be legally permissible, though certainly not without severe political and prudential consequences that make exercising that legal power practically unthinkable. 'Parliamentary sovereignty is therefore an undoubted legal fact' and no other constitutional power may rival or limit it.[25]

Dicey only returned to international law as a legal system towards the end of the *Introductory Lectures*, in his discussion of constitutional conventions. Stating that constitutional conventions derive their power solely from public approval, Dicey noted that this is 'very like' contending that international law's conventions are 'kept alive solely by moral force.'[26] He argued that '[e]very one, except a few dreamers' agreed that respect for 'international morality' was due largely not to its moral but physical force; the 'armies and navies, by which the commands of general opinion are in many cases supported'.[27] Dicey used this analogy to conclude that constitutional conventions derive their force not from direct public assent, but instead a kind of national morality. Dicey also briefly considered the question of treaties altering the law of the land, arguing that a treaty made by the Cabinet is valid without Parliament's authority or sanction. In light of *Parlement Belge*, which he had earlier noted as a case that touched on constitutional law but might go unnoticed, Dicey stated: 'it is even open to question whether the treaty-making power of the executive might not in some cases override the law of the land'.[28] Added to the three points above, these two points form the five mentions that the international received in the *Law of the Constitution* in both its 1885 and 1915 forms.

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24 Ibid 62–3.

25 Ibid 64.

26 Ibid 370.

27 Ibid.

28 Ibid 33 and 391.

Despite the brevity of these mentions, the international is significant for Dicey. In articulating his tenets of absolute domestic power, Dicey raised then dismissed limits that were external to Britain. While Dicey is seemingly dismissive of international law's status as law, it is nonetheless necessary to raise and then deny its encroachment on domestic parliamentary sovereignty. These arguments could have used other examples, or pursued different justifications that paid no attention to international law (or indeed the treaty undergirding Britain), or rested solely on logical or definitional arguments, or a range of other means. Contrast Dicey's choices with William Anson, whose influential 1886 treatise mentions neither the law of nations nor international law in its volume on parliament, but endorses Dicey's view, subject to an insistence that legislative omnipotence requires public opinion in support of it.[29]

But the most important point is the intensity of Dicey's resistance to the international. Dicey presents the strongest and most influential account of Parliament's status as the gatekeeper between treaty obligations or other general developments in international law, and the laws of the United Kingdom. But this is not simply internally-fixated or chauvinistic nationalism: Dicey was a keen observer and commentator on international events, and the *Law of the Constitution* is itself deeply steeped in the legal aspects of European diplomatic history. Instead, the international forms a kind of spectral legal language that other states and empires might likely appeal to in order to limit Britain's imperial ambitions. The strength and absolutism of Dicey's view of absolute domestic power, which then extends into empire, seems motivated by this possibility. That likelihood is further strengthened by his treatments of internal and external imperial action, and of public opinion, examined below.

Before turning to Dicey's treatment of the constitutional law of empire, it is important to note that Dicey was not alone in theorising Parliament as the focus

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29 See William R Anson, *The Law and Custom of the Constitution, Part I: Parliament* (Clarendon, 1886) 208–9. The second volume on the executive devotes a short chapter to the foreign relations powers of the Crown, examined below: William R Anson, *The Law and Custom of the Constitution, Part II: The Crown* (Clarendon, 1892) ch 6.

for international law in the nineteenth century, and the conduit between it and domestic law. In Henry Maine's last work, his 1887 Whewell lectures on international law, Maine likewise focused on the legislature and international law, but to put forward a kind of natural-historical monism that contrasts with Dicey's emphasis on domestic enactment that made his position akin to dualism.[30] Maine asserted international law's separateness from domestic ideas of law and criticised the recent focus on legislatures as the markers of international law's true authority. This formed part of Maine's wider rejection of Austinian thinking, which he found to be convincing enough in accounting for the general nature of contemporary law, but utterly incapable of grasping or illuminating the historical development or movement of law and legal ideas. International law might not be law in Austin's view, but this rested on a misconception about what the international was and how it worked.

In explaining this position, Maine took his characteristically historical approach to the issue of international law's spread, authority and sanction. He drew an analogy between the spread of Roman Law and the recent 'self-propagation' of international law to counter criticisms of international law's illegitimacy or less-than-lawlike character on the basis of it not being introduced or sanctioned by a domestic legislature.[31] Genuine legislatures were of 'very recent appearance' in Europe: most were councils to the sovereign, most laws had spread historically through the 'literate classes' of lawyers and clergy and community acceptance of their views, rather than positive enactment, and, most importantly, laws simply do not rely on these institutions for their spread or authority: 'When then we are asked by what legislative authority International Law came to be adopted so as to make it binding on particular communities, we should rejoin that the same question must first be put respecting the extension of Roman law and of every other system of

30 Henry Sumner Maine, *International Law: The Whewell Lectures* (Murray, 1890).

31 Ibid 19.

law which, before the era of legislatures, gave proof of possessing the same power of self-propagation.'[32]

The turning point for Maine's anti-legislature account of international law's development and relation to domestic law was the *Franconia* case. This 1876 decision formed a landmark in the development of 'modern' international law in Britain, examining whether the development of international law doctrines on the extent of territorial waters were automatically incorporated into the law of England, and leading to the passage of the *Territorial Waters Act 1878* to settle the extent of admiralty jurisdiction by statute.[33] For Maine, England 'very nearly' split from the views of the 'civilised world', specifically those taken up by American jurists and the US constitutional system. Maine railed against Cockburn CJ's view for the majority that assent to international law required 'a public action which its Constitution recognises as legally qualified to adopt a new law or a new legal doctrine; that is, in Great Britain by an Act of Parliament or by the formal declaration of a Court of Justice'.[34] Instead, the 'historical method' tells against this supposed need to legislate, or to look to the legislature as the font of all real binding law. Maine reiterated that systems of law have historically spread without legislation, again citing his earlier example of Roman civil law, and then drawing a further analogy with the 'improvement' of morality in 'the East' as occurring not through the imposition of legislation, but by organic development. International law was a code in precisely the same way as this progress of civilisation. It was founded on 'new morality', discovered within the 'supposed Law of Nature'.[35] International law was characterised not by incorporation, but by its universality; its slow, almost autochthonous spread, that is not declared or changed at whim by

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32 Ibid.

33 See further AWB Simpson, 'The Ideal of the Rule of Law: *Regina v Keyn* (1876)' in *Leading Cases in the Common Law* (OUP, 1996) 227.

34 Maine, *Inaugural* (n 30) 40 and 43–44.

35 Ibid 46.

legislatures, but instead represents genuine moral change in the nations and peoples of the world.

Other jurists steadfastly rejected the idea that there was much morality or progress spread by international law, and certainly not in its impact on domestic sovereignty. Regius Professor of Civil Law James Bryce's treatment of sovereignty emphasised its popular basis and its only real domestic limitation in the opinions of its leading thinkers. Ending an article on the nature of sovereignty, Bryce concluded that contemporary states had returned to the Roman conception that sovereignty resides in the people: '[I]n the internal affairs of a State, power legally sovereign — even if the Constitution subjects it to no limitation — ought to be exercised under those moral restraints which are expected from the enlightened opinion of its best citizens, and which earlier thinkers recognized under the name of Natural Law.'[36] The problem, for Bryce, was that morality had made very little progress in the relations of states: 'The sphere in which no Sovereignty *de iure* exists, that of international relations, where all power is *de facto* only, is also the sphere in which morality has made least progress, and in which justice and honour are least regarded.'[37] Bryce thus saw sovereignty, whether domestic or international, as legally unlimited. The difference between the 'spheres' lay in a lack of an 'enlightened' international opinion comparable to that within a state that might lead to moral progress or constrain power prudentially. Contrary to thinkers like Bentham or Twiss, Bryce implicitly denies that opinions about morality might move beyond borders to form a basis for condemning international wrongs or vindicating international rights.

In this way, Bryce shared the vague autochthonic and internal-fixation of Maine and Dicey's view of the constitution. Bryce's innovation was to frame this in the language of flexibility and rigidity that reinforced the domestic basis of all constitutions. Britain's constitution was built from British traditions, customs,

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36 James Bryce, 'The Nature of Sovereignty' in *Studies in History and Jurisprudence* (OUP, 1901) vol 2, 554.

37 Ibid.

understandings and beliefs partly codified into statutes as 'flexible' — 'they can be bent and altered in form while retaining their main features' — whereas those constitutions that were 'works of conscious art' were rigid, 'because their lines are hard and fixed' and thus were incapable of responding deftly to national opinion as it evolves.[38] These laws and customs 'through and under which the public of a State goes on' is its Constitution, and any sense of spirit or principles from them 'gives to this mass a character different from that of the Constitution of any other State; just as each great nation has what we call a National Character'.[39] For Bryce the true constitution was confined to the British Isles, with its several nations represented by their parliamentary seats.

But Bryce's constitution was nonetheless built for international action. Dealing with a constitution's 'capacity' for 'territorial expansion', Bryce emphasised that flexible constitutions were best suited for 'taking in other communities' by conquest or treaty, particularly those nations 'passing through periods of change, whether internal or external'.[40] Within the British Isles that expansion involved altering and admitting members to the Parliament and suppressing certain offices in Scotland and Ireland, but '[h]ere, however, England has stopped': 'The vast dominions which she possesses beyond the oceans, while legally subject to her Crown and Parliament, have not been brought into the constitutional scheme of the motherland. Indeed they could hardly be brought in without a reconstruction of the present frame of government, which would probably have to be effected by the establishment of a Rigid Constitution.'[41] On this basis, Bryce's view of the constitution did not provide any limits to colonial and imperial interactions, or the Imperial Parliament's dealings with colonial legislatures. What remained fundamental was that the constitution be thought of as the laws and customs that

38 James Bryce, 'Flexible and Rigid Constitutions (1884)' in *Studies* (n 36) vol 1, 127–32.

39 Ibid 136.

40 Ibid 164–5.

41 Ibid 165.

undergird and make possible the public life of a state, and that this be expressive of its 'national character'.[42]

C *Domestic Empire*

These more theoretical expressions of the interaction of domestic and international that centred on the status and powers of the Parliament in its ordinary and imperial forms had wide effects in the many theoretical debates about law and empire. This section examines the ideas of domestic and international within Britain's 'domestic empire' — those settler colonies that remained linked by race and religion (or, in Ireland, conquest and geographical proximity) to the 'motherland' — and their use in visions of imperial legislative connections to 'home': the executive structure of empire, debates over Home Rule, the ideas of union, submission, imperial federation, and powers of self-government.

Ireland presented the most limited powers of self-government among Britain's settler colonies, and provoked the most extensive constitutional debate of the late nineteenth century. Quite literally framed in the language of domestic control, Home Rule was ardently opposed by the major constitutional jurists of the day: Dicey, Anson and Bryce were among its most prominent intellectual opponents, couching their objections in constitutional analysis.[43] Dicey, for example, published a long series of articles and books that argued that various forms of Home Rule risked 'dangerous if not fatal innovations' to the British Constitution.[44] But Home Rule also formed the basis for wider debates about the nature of the UK's constitutional-imperial-international personality, namely, whether it was a unitary or federal state, and whether that nature changed beyond the British Isles.

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42 Ibid 136.

43 Christopher Harvie, 'Ideology and Home Rule: James Bryce, AV Dicey and Ireland, 1880-1887' (1976) 91 *English Historical Review* 298; Iain McLean, 'Constitutionalism since Dicey' in Christopher Hood et al (eds), *Forging a Discipline* (OUP, 2014) 144.

44 AV Dicey, *England's Case against Home Rule* (Murray, 1886) iv.

In his 1890 lecture on 'Home Rule and Imperial Sovereignty', the Corpus Jurisprudence Professor Frederick Pollock sought to show that home rule was 'not an ordinary question of domestic policy, nor even a domestic question of constitutional policy' but instead involved wider issues and consequences: it would announce a new constitution for Ireland and also the British Empire, and would constitute 'a revolution' in the relations of colonies and possessions to the Imperial Parliament.[45]

After noting that imperial rule often involved the importation of English law, or the partial sufferance of local law, Pollock rejected the idea that Ireland had any 'native form of government or political institutions' or a kind of civilisation distinct from British government and institutions which might be restored.[46] While the machinery of Gladstone's 1886 Home Rule plan approximated that of a self-governing colony by allowing for local legislative power combined with general imperial policy of non-interference, Pollock drew a sharp distinction between self-governing colonies like Victoria or New Zealand and Ireland that made a relationship of habitual non-intervention impossible for the latter.[47] A relation of colonial dependence that was 'permanently compatible' with non-intervention rested on the dependent community first, 'frankly accept[ing] self-government with all its consequences' and, secondly, being not only content to preserve its connection with the Empire but also show an 'active willingness' to 'suffer some particular inconvenience on some occasions for the sake of maintaining the connection'.[48] Without any 'positive value' to the 'Imperial connection' or a fear of revolution or foreign conquest, colonies would simply work towards formal independence.[49]

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45 Frederick Pollock, 'Home Rule and Imperial Sovereignty (1888)' in *Oxford Lectures* (Macmillan, 1890) 187, 187.

46 Ibid 190–4 and 205ff (contending that Ireland has 'neither a stock of ancient institutions nor such internal unity as will suffice for the peaceful development of new ones').

47 Ibid 196–8.

48 Ibid 198–9.

49 Ibid 199.

While these conditions were fulfilled in the colonies from convenience and security, and, Pollock thought, 'in no small part … a matter of sentiment', they were absent in Ireland. Pollock saw the only possibility for a plan of Home Rule would be to make the new 'Anglo-Irish constitution as difficult to alter as the federal constitution of the United States or of Switzerland', which would introduce a statute holding supremacy over the rest of the ordinary legislation that governs the rest of the Empire.[50] This would 'destroy the supremacy of the Imperial Parliament' and turn the imperial English state into a federation.[51] While Pollock admitted this might be appropriate in the future, at present it was a 'fool's paradise'; an abdication of the UK's 'sovereign power and responsibility in these realms' not out of hopes for the 'good to come, but in sheer weariness and despair'.[52] Seeing sentiment as the 'moving force of human action',[53] Pollock thought that the sentiments around Home Rule risked destroying Britain's constitutional arrangements.

The juridical nature of the Union formed another prominent thematic problem of the international and domestic in the wider empire. William Anson saw the Acts of Union joining Scotland and Ireland to the United Kingdom as treaties that absorbed two independent Parliaments into the third, guaranteeing 'certain terms' of representation, and that instead that these terms must be studied by the constitutional lawyer by linking them to the wider empire: 'Our work is not done until we have made out the nature of the bonds which connect England with Scotland and Ireland, and the United Kingdom with the various parts of the Empire which lie scattered over the habitable surface of the earth'.[54] For Anson, those bonds tied dominions and dependencies to the field of constitutional law, but, contra Dicey, he examined their unity not through the imperial parliament but rather the Crown. His analysis began with local offices and authorities within the

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50 Ibid 211–12.

51 Ibid 212.

52 Ibid 212–14.

53 Ibid 194.

54 Anson, *Constitution: Parliament* (n 29) 30.

United Kingdom — the Home Secretary, and municipal corporations — through to executive controlled adjacent islands, then the colonies, then India, and finally protectorates, dependent states and spheres of influence, 'where we trench on the subject of foreign relations'.[55] Anson's categorisation showed a continuity of these aspects of the Crown, emanating from Britain outwards, and moving from the domestic crown to its external operations.

While much of the debate about imperial and colonial laws fixed on legislative capacities, some influential accounts saw many overlapping functions of internal and external law enforcement in new executive departments that came with the late nineteenth century expansion of cabinet government. Indeed, Anson's work illuminated another connection of domestic and international in its treatment of these new offices under the Crown. His *Law and Custom of the Constitution*, published from the late 1880s to early 1890s, almost entirely ignored Parliament's imperial-international roles and instead focused on the executive's functions in these spheres.

Detailing the rise of the Home Office and Colonial Office, Anson explored the legal powers of regulation, enforcement and notification that characterised this new bureaucracy. The Home Secretary's responsibilities spread across domestic and international legal events: communicating between crown offices, notifying local officials on 'State intelligence' matters like declarations of war or treaties of peace, admitting people to citizenship, preserving the 'amicable relations' between British and foreign subjects, and overseeing extraditions, territorial waters complaints against foreigners, and the *Foreign Jurisdiction Act 1890*.[56] Anson also emphasised the Home Secretary's general responsibility for the 'internal well being' of the nation, and especially the relations between the central and local governments, and social welfare legislation.[57] In parallel ways, the Colonial Secretary's responsibilities for internal and external colonial legal relations led

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55 Anson, *Constitution: Crown* (n 29) 206ff.

56 Anson, *Constitution: Crown* (n 29) 219–24.

57 Ibid 230ff.

Anson to insist that 'colony' was a 'geographical' rather than 'political term' that did not imply any particular form of government.[58] Rather, the forms of colonial government depended on the relations between legislature and executive, but remained at all times subject to general control by the Crown through its powers to legislate for colonies, veto local colonial laws, control the composition of the executive in each colony, and its status as their representative figurehead.[59] Anson proposed a taxonomy of these forms of self-government, with gradating powers of independence from the central imperial government.[60]

Beyond the British Isles, this new imperial–international law formed the model for understanding the gradual spread of self-government in Britain's settler colonies. J A Froude began his influential 1886 survey of the extent of empire, *Oceana*, with what he called Harrington's 'dream' — a single commonwealth united by popular government — which Froude thought was impossible precisely because of this form of government: 'One free people cannot govern another free people … [the colonist] cannot submit to an inferior position, and the alternative arises whether the mother country shall part with its empire or part with its own liberties'.[61] But where Froude saw impossibility, most other jurists recognised the possibility of balancing empire and liberty by degrees and through gradual change. For Dicey, the empire formed a sub-set of the world approximating the international community. Reflecting on the changes in the meaning of 'imperialism' in 1905, Dicey took up Bryce's point that while in 1865 'imperialism' meant autocratic rather than constitutional government, exemplified in Louis Napoleon and always unfavourable, by 1905 it had come to a 'positive' meaning: 'the wish to maintain the unity and increase the strength of an empire which contains within its limits various more or less independent States', and which described US citizens and

58 Ibid 250.

59 Ibid 250–1.

60 Ibid 250ff.

61 James Anthony Froude, *Oceana, or England and Her Colonies* (Longmans, 1886) 1–3.

British subjects alike.[62] A set of 'more or less independent' states at that point described most of the world, largely owing to the spread of empires.

Within the British Empire, these greater or lesser degrees of independence were questions about the freedoms of the executives and legislatures in each colony relative to their imperial master. Dicey's view of the imperial treaty-making power formed the mirror image to colonial legislative freedoms. Whereas successive editions of *Law of the Constitution* did not expand much on Dicey's 1885 points on international law generally, laws beyond Britain in their many forms — treaties, colonial and imperial (federal) arrangements, conquests, foreign policy — received much more in-depth treatments and an increasingly important position for his views on constitutional law, and a much more complicated view of his uses of the domestic and international.

Colonial–imperial legislative relations provided conceptual finesse to Dicey's ideas of 'sovereign' and 'non-sovereign' parliaments. Constitutional arrangements had a close relation to international personality. As part of his lengthy discussions of colonial–imperial legislature relations, Dicey drew a distinction between sovereign and non-sovereign legislative assemblies around whether they were 'constituent bodies'. Dominion parliaments 'are not in reality sovereign legislatures' because the Parliament of Great Britain, 'which legislates for the whole British Empire, is visible in the background', and because colonies lack the constitutional power to conduct their own foreign affairs: they 'do not act as independent powers in relation to foreign states', reflecting their degrees of independence within the empire.[63] But Dicey also provided examples of seemingly sovereign legislatures, apparently representative of their states that, he contended, lacked this constituent nature.[64] Using Bryce's distinction, Dicey

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62 AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (MacMillan, 2nd ed, 1919) 450 n 1.

63 Dicey, *LOTC (1st Ed)* (n 18) 109.

64 Ibid 109–110.

argued that France's rigid constitution meant its assembly was not truly sovereign, while the British Parliament's flexible ability to alter all laws meant it was.[65]

While the imperial-constitutional links between the Empire and its colonies might be flexible and capable of change over time, for the moment they presented an international restriction on the domestic powers of colonies. Dicey analysed this connection through the mix of treaty-powers, colonial executive law-making, imperial statutes, general constitutional principles, and a flexible evolutive view of self-government. Recognising the Imperial Parliament's supremacy made it unnecessary to carefully limit colonial legislative powers: 'the home government, who in effect represent [the imperial] Parliament, retain by the use of the Crown's veto the power of preventing the occurrence of conflicts between colonial and imperial laws'.[66] Treaties bind the colonies, ultimate treaty making power resides in the Crown, and thus in accordance with Parliament's restrictions on that power the colonies could only have authority to make their own treaties if an Act authorised them to do so.[67]

But Dicey allowed colonies a large measure of discretion in treaty implementation, with each legislature 'free to determine whether or not to pass laws necessary for giving effect to a treaty entered into between the imperial government and a foreign power', relating this to the differences in 'sentiment' and local opinion: 'there might in practice be great difficulty in enforcing within the limits of a colony the terms of a treaty … to which colonial sentiment was opposed.'[68] While Dicey held on to the direct effect of imperial laws within colonies, he also noted that practically this has receded in recent years. 'The tendency … of the imperial government is as a matter of policy to interfere less and less with the action of the colonies', except, Dicey noted, 'in the case of political treaties, such as the Hague

65 Ibid 109–110.

66 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, vol 1 (MacMillan, 8th ed, 1915) 114–15.

67 Ibid 115.

68 Ibid.

Conventions' where the Imperial Parliament would not bind colonies directly but rather include treaty clauses that allowed them to adhere to the agreement if they wished.[69] International law and federal language had other uses for describing semi-independence. In articulating the principle that colonial laws were invalid if they are repugnant to an Act of Parliament applying to the colony, Dicey called this a policy of 'non-intervention in the local affairs of British dependencies' that rested on a practical demarcation of competencies — the Imperial Parliament attempted to avoid encroaching 'on the sphere of colonial legislation' and the colonial parliaments avoided 'the domain of imperial legislation', rendering conflicts rare.[70] Finally, the term 'constituent bodies' gives way to looking for the 'marks of subordination' in a legislature: flexible systems bear no marks and always retain the power to change the meaning of constitutional law itself. Rigid constitutions — those with entrenchment, or subordination — cannot. Here, then, powers of foreign affairs and treaty-making were the theoretical linchpin of Dicey's view of the imperial constitution and sovereignty itself.

These marks of subordination matched the kinds of ideas international lawyers had looked to in marking out semi- or quasi-sovereignty that sought strong connections between domestic constitutions and international personality as primarily about independence. To develop his concept of sovereignty in his major 1894 textbook, the Cambridge Whewell Professor of International Law John Westlake, a close associate of Dicey's, turned to independence defined through constitutional links, with the British Empire forming the main examples Westlake explored. Westlake rejected the possibility of independence existing in degrees, and conceptualised international independence as a lack of constitutionally-entrenched 'dependence': 'Independence, like every negative, does not admit of degrees. A group of men dependent in any degree on another group is not independent, but has relations with that other group which as between the two are constitutional relations.

69 Ibid.

70 Ibid 115–16.

Sovereignty is partible.'[71] Full sovereignty in a 'group of men' means it has 'no constitutional relations making it in any degree dependent on any other group', but if it has any kind of constitutional relations, they determine the 'kind or degree' of 'semi-sovereignty', and Westlake noted the constitution might 'not call it by that name'.[72] Calling semi-sovereignty 'partial independence', however, would be 'an abuse of language'.[73] Independence from other polities, enshrined in a constitution, is the requirement of proper sovereignty and international personality. Because many polities were not independent, Westlake turned to examine these kinds and of dependency, and considered the effects that these different sorts of constitutional links between polities have on international personality.

Like Dicey, Westlake's clearest marker of independence is freedom in foreign affairs. Constitutional structures between a state and its dependencies may exclude the dependent from 'any public intercourse with foreign states' or any independent foreign policy or diplomatic connections, or it may severely restrict them, as the Holy Roman Empire had. Westlake put these arrangements in conjoined terms of constitutional and international sovereignty. States like France and Britain are 'sovereign and independent constitutionally as well as internationally', while states 'nominally hampered by a weak constitutional tie' are merely treated by others as though they were sovereign and independent.[74] Writing of the Transvaal in 1899, Westlake noted that all dominions, regardless of their freedom in internal affairs, cannot hold foreign relations distinct from those of the UK. Breaking away from this involves a move from constitutional relations to international ones:

> Thus they became separate, or what in recent controversies has been called international, states, and not only that but sovereign international states, because the foreign relations allowed them were uncontrolled; they were at their sole option. There

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71 John Westlake, *Chapters on the Principles of International Law* (CUP, 1894) 87.

72 Ibid.

73 Ibid.

74 Ibid 88.

> were in the conventions which recognized them certain stipulations as to their conduct towards the natives, but these were only treaty matters. The stipulations were such as we might have in a treaty with any other power; they were no vestiges of supremacy.[75]

Moving to full independence was, however, all a question of practice, convention and the opinion of full sovereigns. In *Chapters*, Westlake illustrated this point by an analogy to the British Constitution, likening the authority of the fully independent Great Powers to that of the House of Commons: 'how much of real independence is implied by the concurrence of the crown and the house of lords [sic] can only be known from the history of earlier struggles: machinery is apt to work smoothly when the power of its different parts to resist has been tested and is known.'[76] Westlake's engineering metaphor — struggle and resistance as smoothing and clarifying real power — is striking, reflecting the broader issue of the operation of laws and domestic analogies in the wider, non-self governing Empire, where the domestic and international functioned as technologies of control and development.

D *Analogies for Empire*

Whereas the British Isles and self-governing colonies evoked close connections between constitutional and international legal ideas, the interaction of domestic and international played a still more diverse role in attempts to understand, theorise, justify and create the wider empire and its laws. The relationship appears in many facets of imperial juridical thinking. This section focuses on three. First, the combining of public and international law to constitute imperial relations in areas controlled by the Crown without self-government; most prominently India. Secondly, the use of analogies with domestic law, specifically property and government, to explain and justify a new international law of territorial acquisition. Thirdly, the wide interest in a kind of quasi-'law and development' agenda that aimed to reform the internal laws of states under British control (India and the African colonies) or those not under direct imperial control, but which

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75 John Westlake, *The Transvaal War* (CUP, 2nd ed, 1899) 9–10.

76 Westlake, *Chapters* (n 71) 98–9.

sought 'admission' to the European system of public law: the Ottoman Empire, China, Siam, and Japan. This expansion was linked to the considerable interest and activities of multilateral treaty making that used the 'conference' to solve 'questions' of importance for Europe: the 1856 Paris Conference that 'admitted' the Ottoman Empire into the public law of Europe, the 1877 Berlin Conference to deal with the 'Eastern Question' of the Ottoman and Russian Empires, the 1885 Berlin Conference that planned European colonial expansion into Africa, and the 1899 and 1907 Hague Conferences to codify the rules of international law.[77] These international events reflected a need not just to codify, declare and spread international law, but also to agree on the modes and ways in which that spread would take place. In all these cases, the international was a conduit for demanding and coordinating changes to the domestic laws of other states to support imperial designs.

The first sustained examination of the interaction of international law and constitutional law as joined spheres of principles explaining political rule emerged in Westlake's work, which built on his account of semi-sovereignty examined above. Westlake sought to theorise the position of India — both as a part of the constitutional empire, and holding some kind of international legal personality — as a pressing example of the overlap and affinities between the constitution and the international. Contrary to the experience of self-governing colonies, the Indian states underwent a reversal of constitutional development: gradually losing rather than gaining the ability to manage their own foreign affairs and thus claim genuine statehood. Jamaica underwent the same — albeit more rapid — shift following the 1865 Morant Bay rebellion, moving back to Crown colony status and losing its self-government powers.[78]

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77 See Holly Case, *The Age of Questions* (Princeton UP, 2018); Maartje Abbenhuis, *The Hague Conferences and International Politics, 1898-1915* (Bloomsbury, 2018).

78 See further Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton UP, 2010) 5ff; David Dyzenhaus, 'The Puzzle of Martial Law' (2009) 59 *University of Toronto Law Journal* 1 (on Dicey's response to Morant Bay).

India's longer history of political and legal arrangements formed, for Westlake, a 'remarkable example' of the way in which 'international relations' through law may 'shift in substance while remaining unchanged in form'.[79] Reading the Crown's assumption of direct rule from the East India Company following the 1857 Rebellion as really a part of constitutional rather than international history, Westlake likened Britain's relations to the Indian principalities as similar to those between the states constituting the Holy Roman Empire. He insisted that the 'native states' lost their independence 'not through any epoch-making declaration of British sovereignty', but gradually, as they ceded their foreign affairs powers to the Crown.[80] This shifted 'the affairs of India from an international to an imperial basis, although that course neither began with it nor was completed by it'.[81] It removed a formerly international society and replaced it with an imperial one: 'The isolation of the native states was the negation of an international society, and subordinate cooperation in maintaining the pax Britannica implied that the peace to be maintained was the peace of the imperial state to which the cooperation was subordinate.'[82]

Westlake endorsed a doctrine whereby the terms of these various treaties can be overridden by the 'paramount power' of the Crown whenever the 'interests of the Indian people or the safety of … British power are at stake'.[83] This power was based on same indefiniteness and limitlessness that the British parliament holds, which Westlake noted is 'defined by being, wisely or not, left undefined. That to which no limits are set is unlimited. It is a power in India like that of the parliament in the United Kingdom, restrained in exercise by considerations of morality and expediency, but not bounded by another political power meeting it at any frontier line, whether of territories or of affairs.'[84] With this retained, ever-present

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79 Westlake, *Chapters* (n 71) 190–91.

80 Ibid 193–203.

81 Ibid 205.

82 Ibid.

83 Ibid 207.

84 Ibid.

paramount power, drawn from the domestic British constitution, Westlake ultimately saw British Rule in India as replacing the semi-independent international status of the Native States with an imperial-constitutional relationship.[85]

But the connection went beyond control to an analogy with the English experience of the endurance of its constitution, combined with an analogy of imperial and domestic missions of good government, which, for Westlake, became in India a question of precedent and 'constitutional tact':

> The sense in which England understands the task which has been set to her in India is at least as fixed as that in which she understands the duty of the state in her own islands, a practice now of many years' standing has settled with much certainty the restrictions which that task places on written terms, and subject to those restrictions the treaties and grants are sacred. If such a situation leaves much to precedent and constitutional tact, the princes and people of the native Indian states may reflect that England relies on precedent and constitutional tact for her own liberty and good government.[86]

The system of 'treaties and grants' in India could be understood analogously to the settlement of the British Isles themselves, likewise by treaty and an amorphous sacred guarantee to rule for liberty and good government. This arrangement, Westlake insisted, was more 'safe under a constitutional system than under an international one' because the constitutional connection precluded internal wars and foreign interference, and promoted the 'guardianship of fellow feeling' that unites subjects of the Queen.[87] India thus formed the specific illustration of Westlake's earlier definition of independence as the absence of constitutional restrictions on the conduct of foreign relations through law. Constitutional relations, then, could eclipse international personality entirely.

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85 Benton makes a similar argument with reference to Westlake and other examples: Lauren Benton, 'From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900' (2008) 26 *Law and History Review* 595.

86 Westlake, *Chapters* (n 71) 230–31.

87 Ibid 230.

While domestic law analogies were important for reconceiving the post-1858 international-constitutional position of the British in India, they also became fundamental to understanding the 1880s expansion of empire, in new uses of ideas of property, territorial control, the government of 'uncivilised peoples' by European powers, and the interaction of colony and metropole. In *Chapters*, Westlake saw the link between territory and property as a 'special point of contact' between international and national law, and one worthy of close attention. That contact was an analogy and a 'borrowing', with Westlake noting that 'certain international rules dealing exclusively with public interests have been borrowed from private law'.[88] Territorial states and the idea of property shared close connections that became engrained in Westlake's development of international law doctrines. For Westlake, a state's rights within its territory bore a 'great resemblance' to property rights, and this connection was even clearer during international law's formation in the sixteenth and seventeenth centuries, the feudal 'confusion' between government and property, the state and its sovereign, as well as the influence of state of nature theories around the same time.[89] With the state analogised to an individual without a common superior, and then further analogised to men in the state of nature, the 'door was opened for the introduction into international law, under the name of the law of nature, of no small part of the private law of Rome on obligation as well as on property'.[90]

Westlake fleshed out this special point of contact in the longest chapter of his book, which examined territorial sovereignty and the acquisition of 'uncivilised regions', and based its analysis on a thorough analogy from domestic property and constitutional ideas of protection and progress to international rights. Title to property in the 'old civilised world' of Europe and the Asiatic states of 'different' civilisation cannot be properly understood except as an 'irreducible situation of

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88 Ibid 10.

89 Ibid 10–11.

90 Ibid 11.

fact'; the accretion of conquest, cession, and conveyance reached too far back in time to be relevant to either international or national law:

> You may discuss the origin of either [civilisation] by way of philosophical or prehistorical speculation, but with no relevancy to international or to national law. You may discuss the motives for maintaining either, with some relevancy to international or national legislation, but with no other relevancy to law. Thus, the title to territorial sovereignty in old countries not being capable of discussion apart from the several dealings, as cession or conquest, which transfer it, we must turn to new countries.[91]

These newly established colonies, in contrast, resulted from the territorial sovereignty and claim of the imperial state, and the treatment of any 'uncivilised natives' was not a question for international law but instead was 'left to the conscience' of the acquiring state.[92]

Westlake considered native tribes to lack any form of government or sovereign power recognisable or communicable to European powers, focusing his justification on the colonisers' supposed inability to understand the internal laws and legal principles of that tribe: 'Is any territorial cession permitted by the ideas of the tribe? What is the authority — chief, elders, body of fighting men — if there is one, which those ideas point out as empowered to make the cession? With what formalities do they require it to be made, if they allow it to be made at all?'.[93] Absent clear answers to these questions, Westlake concluded that tribes lacked any real domestic laws and were simply incorporated into the acquiring power as subjects, though, he insisted, with a stronger claim on their new governors than the 'common claim' of ordinary British subjects: 'they have the claim of the ignorant and helpless on the enlightened and strong; and that claim is the more

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91 Ibid 134.

92 Ibid 139–40.

93 Ibid 135–6.

likely to receive justice, the freer is the position of the governors from insecurity and vexation'.[94]

Moving from property acquisition to a denial of recognition, Westlake contended that government is the 'international test of civilisation', meaning not 'mental or moral characters' or 'domestic and social habits' but rather a standard of protective government that can support the 'complex life' of Europeans, or, at least, one that can 'protect the natives in the enjoyment of a security and well-being at least not less than they enjoyed before the arrival of the strangers'.[95] These principles were clearly aimed at Westlake's central target: a discussion of the incompetence of particular tribes to understand or sign treaties, directed against Portuguese claims to acquisitions, reinforced by his contention that civilising influence still must be within a zone of occupation, under the direct control of 'a civilised government … in operation under the direct authority of individuals of European race'.[96] Property and government must go hand in hand with European rule for legitimate claims to extend an empire.

Westlake's third extension of international law through domestic analogies was the use of the concept of protection, akin to self-government in settler colonies, but here applied to 'uncivilised regions' and spheres of influence. Protectorates within Europe involved a state giving up its independence and, specifically, the management of its foreign affairs in return for defence, and retaining some form of international existence, albeit at most semi-sovereignty. As with India, this was a 'constitutional relation', where the protector state gains 'authority … over the foreign affairs' of the protectorate, and also determines what 'may be allowed … in [its] internal affairs'.[97] Protector and protectorate together 'constitute a single system, possessing and exercising all the powers which belong to civilised

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94 Ibid 140.

95 Ibid 141.

96 Ibid 174–7.

97 Ibid 178.

government, and not subject to the interference of any third state as to the distribution of those powers but regulating that distribution for themselves'.[98]

Beyond Europe and in 'uncivilised regions', however, Westlake denied that these relationships involved two states, but rather merely claims by imperial powers to 'assume and exercise certain rights in more or less well defined districts', which are called protectorates only by analogy.[99] These assumed rights were held by the imperial power itself, and excluded all other states from exercising their authority within the area, meaning that the imperial state 'represents and protects the district and its population, native or civilised, in everything which relates to other powers'.[100] Effectively, the uncivilised 'protectorate' held the same status as the state's own territory. This concept of protectorate, based on the Berlin Conference agreement, made the right to exclude other powers contingent on the imperial protector fulfilling the 'duties' that attached to the right of protection, namely the civilising mission, the pursuit of which granted full powers of sovereignty over the area. Exclusionary property rights and territorial sovereignty were not the only analogies here. Westlake ended by linking these civilising duties with a new 'exception' based on a different domestic law analogy: that a protectorate was 'comparable to the personal relation of guardianship', and thus 'may not be alienable by cession as territorial sovereignty is'.[101] The 'uncivilised protectorate' was thus held still more closely than any other territory, a limitation by analogy to guardianship and trustee status, limiting the usual rights to dispose of property at will.

Doctrinally, protectorates raised difficult questions about the nature of domestic, imperial, international and foreign jurisdiction, which reflected the complex problems of theorising British control and the amorphousness of the Crown. When Westlake turned to British jurisdiction within protectorates, and questions about

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98 Ibid.

99 Ibid 178–9.

100 Ibid 179.

101 Ibid 183.

the extent to which the *Foreign Jurisdiction Act 1890* gave the Crown jurisdiction over foreign subjects within protectorates, he argued that this jurisdiction was 'necessary' to performing the international duties that attached to (and justified) Britain holding those protectorates. This was not a question of international but rather constitutional law, specifically, the Crown's power to make legislation by orders in council.[102] The *Foreign Jurisdiction Act* provided that the Queen may exercise the jurisdiction she had in 1890, or any time after, that she might gain in a foreign country. Westlake argued this should include protectorates: they are foreign countries, rights in them are distinct from rights of territorial sovereignty 'by however thin a line', and thus Britain held jurisdiction over all persons, of whatever nationality, within them, for the purpose of 'maintaining order and enforcing rights'.[103] This acquisition of jurisdiction involved the connection of constitutional and international law, which Westlake read through the analogy of conquest: 'The power which the crown has in a conquered country is that which is conferred on the state by international law, and which is deposited in the crown because the constitution of the United Kingdom has made no provision for its being deposited elsewhere. In the same way the power which international law confers on the state in the case of a protectorate is deposited in the crown till parliament may provide for its being deposited elsewhere.'[104]

Distinguishing this instance from the *Franconia*, Westlake argued that gaining authority over a protectorate under a newly developed international doctrine on control over them was a question distinct from whether English internal jurisdiction could be enlarged by changes in international law. New ideas about protectorates do 'not affect the jurisdiction of an English court or anything else internal to the realm of England'.[105] Westlake then endorsed arguments that the crown had actually asserted jurisdiction in protectorates, which meant it had

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102 Ibid 184.

103 Ibid 185.

104 Ibid 186.

105 Ibid 186–7.

denied other states the ability to establish their own 'foreign extraterritorial jurisdiction' and, in the more closely-held protectorates, additional powers over internal order: 'in the protectorates where [Great Britain] has invested herself with fuller powers, while refraining from any undue invasion of internal sovereignty, she has secured to herself sufficient authority to meet all contingencies'.[106] Questions of excluding other states and gaining internal authority were separate, but connected by assertions of jurisdiction.

A final area of analogies between domestic and international law occurred in the examination and 'improvement' of domestic legal systems within the Empire and beyond it. For European jurists generally, the gradual acceptance of non-European states into European international law was predicated on internal legal reforms that evidenced 'civilisation', and for British jurists specifically, this ought to take place following the British example. In dealing with this theme, British jurists articulated an idea of the progressive development of legal systems that reflected the historicization of both domestic and international law, through the evaluation and criticism of the deficient legal histories of non-European polities.

This tendency began with British efforts to reform internal legal systems within the Empire. The historicization and progressive development of legal systems was a central fixture of late nineteenth century British thought. For Maine, the central figure in this movement, understanding the spread of international law and understanding the progressive development of domestic laws formed connected concerns. Extending his analysis of the parliament's relation to international law and relating it to the influential themes of his earlier works on the development of law in village communities,[107] and as noted above Maine drew a connection

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106 Ibid 187, quoting WE Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Clarendon, 1894) 220.

107 Henry Sumner Maine, *Ancient Law* (Murray, 1906); Henry Sumner Maine, *Lectures on the Early History of Institutions* (Murray, 6th ed, 1893); Henry Sumner Maine, *Dissertations on Early Law and Custom* (Murray, 1883) (note Maine does not expressly cite these works; the lectures are light on citations.).

between 'improving' the morals and laws of the East and the spread of international law:

> In the East a body of new moral ideas is sure in time to produce a string of legal rules; and it is said by those who know India and its natives well that the production of what for want of a better name we must call a Code is a favourite occupation with learned and active minds, though of course in a country which nowadays follows to a great extent the morality (though not the faith) of Christian Europe, and receives new laws from a regularly constituted Legislature, the enthusiasm for new moral doctrines is ever growing feebler and the demand for legal rules accommodated to them is becoming less.[108]

As noted above, Maine argued that international law was a code in precisely the same sense: founded on 'new morality', discovered within the 'supposed Law of Nature'.[109] This pointed to a wider importance for ideas of progress and development in imperial attempts to understand the East.

Colonial possessions had long formed 'laboratories' for experiments in law and administration, and by the close of the nineteenth century, even these experiments came to be described in explicitly imperial terms. In two connected essays, Bryce drew lengthy comparisons between the Roman and British imperial attempts to 'incorporate' and 'improve' absorbed or conquered races, arguing that the entrenchment of domestic law was proof of both civilizational progress for conquered peoples and the superiority and excellence of that law.[110] Rome's reform of the laws of its conquered races evidenced its superiority, just as England's extension of both the common law and (limited) legislative government evidenced the superiority of the British empire. India was Bryce's central example, where the 'reciprocal action' of English and Native law revealed the progress of

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108 Maine, *Inaugural* (n 30) 46.

109 Ibid.

110 James Bryce, 'The Roman Empire and the British Empire in India' in *Studies* (n 36) vol 1, 1; James Bryce, 'The Extension of Roman and English Law throughout the World' in *Studies* (n 36) vol 1, 72.

gradual adaptation to local customs, gentle instructions, and the rationalising of superstition.

Beyond imperial internal law reform, British jurists frequently appraised the internal laws of non-European states, beginning with a focus on the Ottoman Empire. The 1856 Paris Peace Treaty, which 'admitted' the Ottoman Empire to the 'privileges' of European public law, marked one beginning of British juristic interest in schemes to reform the internal political and legal organisation of a range of difficult 'Eastern questions'. Introducing his collection of major treaties and documents on these questions, Holland announced that the 'condition' of the Ottoman Empire was of concern to all of Europe, that Europeans 'extend[ed] their sympathy to the subject races' of the Ottomans, and recent treaties were the 'title deeds' by which those dependencies had been 'wholly or partially freed by the European concert from the sovereignty of the Porte'.[111] The 1884 edition of Twiss's treatise noted that the terms of the 1878 peace between the Ottoman and Russian empires evinced an Ottoman willingness to 'adjust its civil institutions to the general European standard',[112] which complemented his extensive examination of the constitutional, imperial and international legal connections between the Ottomans and their Balkan Christian dependencies (some now independent).[113]

By the start of the twentieth century, this general civilizational superiority argument extended beyond the Empire, to other Eastern states more generally. In 1899, Dicey argued that the British constitutional form had spread throughout Europe, adopted by all nations except Russia and the Ottomans, and had even 'invaded' Japan.[114] There, Dicey, concluded 'the adoption of the forms of

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[111] Thomas Erskine Holland, *The European Concert in the Eastern Question* (Clarendon, 1885) 1–2.

[112] Travers Twiss, *The Law of Nations Considered as Independent Political Communities* (Clarendon, 3rd ed, 1884) ix.

[113] Ibid chs 4 and 5.

[114] AV Dicey, 'Will the Form of Parliamentary Government Be Permanent?' (1899) 13 *Harvard Law Review* 67, 69.

constitutionalism by an Eastern race utterly devoid of Parliamentary traditions' was 'conclusive evidence that to the men of to-day representative government appears to be an essential characteristic of a civilized or progressive state.'[115] By the end of the nineteenth century, the domestic constitutional form of the British Parliament — its representation, sovereignty and independence — was the international standard to which British jurists thought all nations should aspire.

E *Conclusion*

This Part showed a first phase in the entwining of the domestic and international around parliaments, empire and new domestic law analogies. From the 1870s onwards, Parliament's imperial and international law-implement roles made it a focal point for ideas of absolute sovereignty. Constitutional and international lawyers alike then used these theories of parliamentary power to understand a variety of imperial–international questions raised by local self-government in colonial possessions. The clearest use of domestic law concepts was in the extensive analogies for articulating international law doctrines around imperial control of India, and territorial acquisition and governmental control in new 'uncivilised' territories. Together these formed the main uses of the domestic and international as expressions of independence and absolute sovereignty.

III Interdependence: New Visions of Society through Law

A *Introduction*

At around the same time, 'interdependence' emerged as a counter to independence, albeit one that frequently served empire too, as a parallel conviction, reminiscent of Bentham's work, that examining the many internal laws that now had international effects, and reforming them in each of the world's nations must be the focus of international law's development. This vision acknowledged that insisting on absolute internal sovereignty in the way Dicey had left little to no room for genuine international action or cooperation, because that had to take place through changes to domestic laws. The previous Part examined the absolute

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[115] Ibid 69–70.

imperial sides of the international and domestic in the late nineteenth century. This Part turns to a more divergent set of uses for the relationship. It examines four rival juridical trends that re-thought domestic and international society along the lines of interdependence that emerged in the 1880s and carried through to the aftermath of the First World War. First, scientific racist visions of constitutions and international law used allegories and analogies to taxonomise social interactions as built from the hierarchies of 'achievement' in the legal ordering of different races.[116] Second, British liberal progressivism and ideas of representation and public opinion at the domestic level spread quickly to their visions of international society. Third, socialist accounts of the international connections of classes within states heralded a radically different idea of the domestic and international as strongly connected, particularly in political movements aimed at taking over each capitalist state. Fourth, peace plans used the categories of domestic and international in a variety of configurations to attempt to prevent future wars. In each of these accounts, jurists used the interactions of domestic and international in service of different visions of law, society and politics, made possible by the tensions between the two spheres.

B *Racial Hierarchies*

While imperial constitutional and international laws used a range of analogies to explain and justify empire, a longer associated current of scientific racism underlay a set of orderings in detailed legal theories of national unity and international hierarchies based on racial groupings, which in turn grounded expansive visions of the relationship of domestic and international laws. The most significant jurist in this trend was James Lorimer, Regius Professor of Public Law and the Law of Nature and Nations at Edinburgh — a chair founded by Queen Anne in 1707 to mark the Union — from 1862 until his death in 1890. Basing his account of law on the science of 'ethnology', Lorimer claimed to be the first jurist begin his general approach to law from the standpoint of 'interdependence' over

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116 See Duncan Bell and Casper Sylvest, 'International Society in Victorian Political Thought' (2006) 3 *Modern Intellectual History* 207.

independence, raised specifically against Twiss.[117] With this combination, Lorimer made both race and interdependence central to his account of domestic and international law.

The domestic had long been a feature of Lorimer's work. In his 1863 inaugural address, Lorimer argued that the 'minutest' municipal laws were based on the same 'great principles' and aimed at the same ends as the law of nations — well-being and progress in the physical, moral, intellectual senses — and were sought by the same general means: the 'vindication … of the correlative principles of liberty and order'.[118] Lorimer sought to demonstrate that domestic and international law were linked by these correlative principles that reflected natural law: 'there is no obstacle to our reading the book of natural law in municipal as well as in international regulations'.[119] But because the stakes were higher in interstate disputes than municipal ones, it seemed, to Lorimer, their principles must differ somehow. Conceiving of public law as having both municipal and international 'departments', Lorimer argued that where public law dealt with the relations of independent states ('in which it may be said to be twice-public') it encountered higher principles than municipal law.[120] Public law in its international form 'is occupied with interests so vast as to lend altogether a novel and even startling aspect to principles which are so familiar as to pass almost unheeded when their action is exhibited in the other departments of jurisprudence'.[121]

This had a strongly sentimental, even sublime, aspect for Lorimer that could never be reached in municipal law disputes. With international disputes 'our imagination is taken captive, and our attention is arrested, by the deep and terrible significance of principles which in municipal law would have led at most to a protracted

117 James Lorimer, 'Centralisation and Decentralisation' in *Studies National and International* (Green, 1890) 192, 206.

118 James Lorimer, *An Inaugural Lecture on the Law of Nature and Nations* (Clark, 1863) 8–9.

119 Ibid 9.

120 Ibid 9–10.

121 Ibid.

litigation, or the disruption of a mercantile contract, when fleets are manned and armies march forth for their vindication, or when states are torn asunder in consequence of their neglect.'[122] Lorimer moved from this sublimity and terror to the excitement of public interest and the need for public discussions as the basis of the law of nations. That international disputes led to this excitement and public interest, and that they were not resolved technically and by courts, was actually valuable for developing wider understandings of international law compared to municipal law: 'Being surrounded by fewer technicalities, and encumbered by less traditional machinery than most of the branches of municipal law, the law of nations is regarded as the only department of jurisprudence which is altogether on a level with the popular understanding.'[123] Because its regulations form only a 'thinner coating', the 'vital principles' of the law of nations are brought up much more quickly than in domestic law, complicating it for public discussion.[124]

Lorimer insisted this discussion must take place throughout the world and was central to the development of the law of nations. It derived its authority as a 'system of positive consuetudinary law, from the general conscience of civilised mankind … a characteristic which is common to it with municipal laws within the narrower sphere of operation'.[125] The law of nations must be contrasted with municipal laws because it 'continues, at every moment of its existence, to be dependent on public sentiment for its binding force', specifically because of the lack of a 'cosmopolitan tribunal' to judge disputes or an executive to enforce its decrees.[126] Instead, all of 'civilised and intelligent mankind' are the judges of the law of nations, who provide the only principles on which states can 'proceed with confidence to enforce its provisions'.[127] For Lorimer, the basis of the law of

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122 Ibid.

123 Ibid 10.

124 Ibid.

125 Ibid 11.

126 Ibid.

127 Ibid.

nations was public conscience,[128] and while prior to the French Revolution that conscience could only be expressed by ‘Princes, and Cabinets, and Ministers of State’, by the 1860s it was that of the ‘guided and enlightened’ and ‘educated and cultivated portions of society’ in Britain and Europe; a slightly larger public than just state leaders, but nonetheless still those who Lorimer regarded as society’s betters.[129] Lorimer then turned to the incident that had excited so much of this public discussion; the US Civil War.

By the 1880s, Lorimer’s ‘basis’ for the law of nations had shifted from public conscience to recognition, which formed a new kind of national juridical consciousness. His 1884 *Institutes of the Law of Nations*, subtitled ‘A Treatise of the Jural Relations of Separate Political Communities’ began with his promise that the volume would ‘determine the characteristics of national existence on which the right to international recognition’ — membership of the international community — ‘depends…’, and substituted the ‘interdependence’ of states over their independence as a second central concept.[130] What followed was a baroque taxonomy of the kinds of internal legal orders that could support the right of international recognition based on ‘ethnology’, the science of racial groups. Lorimer thought race science explained the different forms of internal government throughout the world that formed the basis of jural relations, which in turn pointed to which communities were capable of recognising other nations and being recognised by them.[131] This undermined the individual–state analogy; legal theory ought to only deal with ‘ethnical groups’ that have ‘crystallised into political

[128] Ibid 10, and see at 18 (returning to public conscience as the basis of international law).

[129] Ibid 11–12.

[130] James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, vol 1 (Blackwood, 1883) vii. On Lorimer and his *Institutes*, see especially Gerry Simpson, ‘James Lorimer and the Character of Sovereigns’ (2016) 27 *EJIL* 431 and Karen Knop, ‘Lorimer’s Private Citizens of the World’ (2016) 27 *EJIL* 447.

[131] Lorimer, *Institutes* (n 129) 93ff.

bodies'; that is, with sufficient domestic legal ordering to found their international personality.[132]

Lorimer's ultimate purpose was to relativise the rights and duties of international law on the basis of internal laws, which, in turn, were based on his taxonomy of ethnic groupings. In two chapters examining the reciprocal recognition of 'public municipal law' and 'private municipal law' by separate states, Lorimer emphasised that a state's ability to form and announce the will of its people emerged through the legislature. Recognition of a state 'implies acceptance of the form of government established in the State as adequate to express its rational and normal will', and that will is ultimately about legislative capacity, which shows its national laws are sufficient for international personality.[133] This account stemmed from Lorimer's earlier, lengthy argument that recognition could be divided into grades that reflected this capacity. Full recognition was held by civilised nations — including all European states and their European-peopled colonial dependencies, and the States of North and South America that were former European colonies — on the basis of their ability to completely express the will and power needed to recognise other full states.[134] 'Barbarous' humanity — non-European political groups with problematic internal laws: Turkey, Persia, China, Siam, Japan — sat below this with only 'partial political' recognition.[135] 'Savage' humanity or the 'residue of mankind' — non-European peoples that had not formed into political groups with internal laws — was owed merely 'natural, or mere human recognition' and Europeans need not apply the positive law of nations to them.[136]

Lorimer's system of recognition depended on constitutional ordering, which he investigated through a somewhat arcane process of valuing and ranking different

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132 Ibid 101.

133 Ibid 325–6.

134 Ibid 101–2.

135 Ibid 102.

136 Ibid.

kinds of internal orders. First, a range of government systems were incompatible with real recognition — intolerant theocracies, aggressive tyrannical monarchies, 'intolerant republics' like the expansionist French Republic, and expansionist 'anarchic' communist states — because they could not accept coexistence with other states.[137] Instead, a polity must be free from external control by another state, and, most importantly, possess 'internal freedom' in that they are self-ruling and self-directing.[138] Communities that lacked any rational will could not be self-ruling or directing, and Lorimer drew long analogies with legal treatment of people who were not *sui juris* in the domestic sphere. The 'undeveloped races' were more like the elderly, children, imbeciles or criminals in municipal law. This turned to a wider family allegory. While 'barbarous communities' might be as old as the most civilised ones, there is no such thing as 'political nonage'.[139] The more 'capable races' are the 'children of the great human family' and while this 'childishness cuts them off from international rights', that exclusion is analogous to the restriction of a child's status in domestic law: 'it cuts them off as effectually as the childishness of a promising child cuts it off from municipal or political rights'.[140]

In all of Lorimer's cases, the extent of self-rule and self-direction depended on internal ordering. The state forms Lorimer thought most valuable were 'simple' states of a single body that claimed to represent one nation internally and externally, above 'composite' (federal) states whose internal government was divided between different political organisations and united only in its external dealings. Lorimer's concern here was that these internal bodies would always strive towards their own statehood: 'It is wonderful to how great an extent municipal relations affect international relations, particularly in free States. So long as the component parts retain a separate internal life, anything approaching

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137 Ibid 113–33.

138 Ibid 155.

139 Ibid 157.

140 Ibid.

to a political nationality, they will always, from time to time, exhibit a tendency to vindicate for themselves some approach to international recognition.'[141]

Equally, 'progress' through the spheres of recognition by those lesser 'quality' non-European states that held mere 'partial recognition' was largely a question of reforming internal laws and, more amorphously, developing the rational consciousness of the nation's subjects. For Lorimer, states always retained differences in the values expressed in their internal laws. Even among states within the sphere of full recognition, not all the 'definitions of legal relations' in foreign internal laws are accepted entirely or without qualification.[142] Emphatically, this was a question of morality and public policy, and recognising states need not accept morals and policies in the domestic laws of other states that were 'at variance' with their own.[143] But it was also a question of the national separation of values and judgments, which made full recognition in an absolute sense impossible: 'No free State puts either its conscience or its judgment wholly into the keeping of any other, and there is thus no such thing as plenary recognition in the absolute sense.'[144] While between 'civilised' states different internal laws were largely acceptable, between civilised and 'semi-barbarous' states it was imperative that the civilised state not allow its own citizens be subjected to local laws.[145] Advancement might come in the form of courts which 'mixed' foreign and local laws, as a 'partial recognition of municipal law' which Lorimer saw as the 'only form in which the principle of relativity has as yet been accepted in international organisation'.[146] With this complicated account of recognition's spheres, based ultimately on internal order, Lorimer turned to the substance of the rights and duties of these various kinds of nations relative to each other.

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141 Ibid 196.

142 Ibid 216.

143 Ibid.

144 Ibid.

145 Ibid 217ff.

146 Ibid 218.

More fundamentally than even internal ordering being the basis of recognition, Lorimer regarded the domestic–international link to be, as he put it, the 'ultimate problem of jurisprudence', meaning the task of finding international equivalents for the national law ideas of legislation, jurisdiction and execution, which he examined to close the second volume of *Institutes*.[147] After considering a range of solutions in arbitration schemes, legalised economic 'interdependence', utopian schemes from Henry IV through Bentham, and the problems of the Great Powers, Lorimer outlined an organisation of international government based closely on a modern territorial state, with a senate, legislature, 'bureau or ministry', judicial, executive and financial departments, detailed down to its procedural rules, meeting times, and salaries for officials. He concluded with reflections on how to accommodate the expansion in the number of states. Turning from Europe to the British Empire and the inevitable 'ripening' of colonies into self-governing states,[148] and asking whether the racial and 'ethnical' bond might be strengthened between Britain and the United States, Lorimer saw this as a 'colonial and municipal' rather than 'international question' that involved an inevitable and desirable 'gradual substitution of ethnical for political bonds of union, both between these new communities themselves and between them and the mother-country'.[149]

With its racist, reactionary and heavily natural law foundations that ran against the liberal progressivism of most juristic writings of the era, Lorimer's work shows an extremely strong meshing of questions of domestic and international law, reflected in the frequent analogies and connections drawn between private and public law in their municipal and international forms. Lorimer's approach to law as interdependence perhaps explains this: that the branches of law, like the people or states that made them, should necessarily be in a system of interdependence with other sets of principles. What might seem to be Lorimer's more esoteric positions

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147 James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, vol 2 (Blackwood, 1884) 182ff.

148 Ibid 288–92.

149 Ibid 294.

were not entirely unique to him. Lorimer's proposal for an Anglo-Saxon juristic union that would link the British and American national legal systems through a scheme of common citizenship would be proposed in a similar form fifteen years hence by Dicey.[150] More importantly, as the next section shows, Westlake also used the language of jural relations and national opinions as the basis of liberal progressive international law. While Lorimer's racialised world order and peculiar form of naturalism has led some to regard him as somewhat aberrant,[151] he was a significant figure who remains revealing of the place of the domestic and international in late nineteenth century juridical world ordering. Indeed his significance cannot be left in the nineteenth century: as the next chapter shows, Hersch Lauterpacht regarded him as the British jurist who cast the most light on the relationship between national and international law, and indeed formed one guiding light for both Lauterpacht's naturalism and his far more well-known theoretical contributions on the domestic and international.[152]

C *Liberalism, Progress, Representation*

Like Lorimer, liberal progressive jurists also fixed on new ideas of the public. Their use of ideas of citizenship, political life and representation spurred reconceptualisations of the basis of the constitution, international personality, and a focus on the opinion and will of a widened constituent 'people', and with this the question of who formed part of the nation and empire. This section delves into that link between subjecthood and state, most clearly illustrated by new liberal ideas about law's role in ordering domestic and international social life.

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150 AV Dicey, 'A Common Citizenship for the English Race' (1897) 71 *Contemporary Review* 457. See further Duncan Bell, 'Beyond the Sovereign State: Isopolitan Citizenship, Race and Anglo-American Union' (2014) 62 *Political Studies* 418.

151 See Martti Koskenniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27 *EJIL* 415, cf Simpson (n 130).

152 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, 1927) 28–9 and 309 (emphasising Lorimer's contribution to debates on the domestic and international and his 'independence of judgment'), and see 86–7 (endorsing Lorimer's view on analogies, and adding that Lorimer's naturalistic philosophy of law was 'corroborated' by a positivist examination of the practice of governments).

A first new vision of law's role in domestic life appears in treatments of the changing nature of legislation and representation. Within his influential account of parliamentary sovereignty and national independence, Dicey ultimately saw sovereignty as resting on popular opinion and representation. After outlining his doctrine of absolute parliamentary sovereignty in *Law of the Constitution* and raising some doubts about Austinian conceptions of sovereignty, Dicey discussed the 'external' and 'internal' limits to parliamentary sovereignty's theoretical and legal absoluteness. The 'external' limit is the possibility that subjects will disobey or resist the laws, while the 'internal' limit comes from the nature of sovereign power itself, that a sovereign acts in accordance with their own character and in the circumstances and social conditions in which they live.[153] These limits are neither 'definitely marked' nor necessarily coincident, but representative government provides one means of trying to bridge the gap between them.[154]

Dicey's other works offered more refined accounts of the functions of parliament, legislation and representation, and used them to critique 'collectivism'. The connection of these things to social life had, in Dicey's view, changed dramatically with the turn of the century. Despite his theoretical endorsement of popular representation as the basis of parliamentary sovereignty, Dicey consistently made reactionary arguments against social reform legislation that had grown with expansions of the franchise. In 1884, Dicey wrote a series of articles in *The Nation* against the infiltration of 'sentiment' into social policy.[155] In 1899, he argued that wide social reforms were work for which parliamentary assemblies were 'by [their] nature unfit', and that attempts for 'constructive legislation' to supposedly meet the country's needs and 'render happier the life of the masses' constituted a shift from *laissez faire* individualism to 'collectivism'.[156] Collectivism had imposed a 'new form of faith' on Parliament that a large representative assembly

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[153] Dicey, *LOTC (1st Ed)* (n 18) 70–6.

[154] Ibid 76ff.

[155] Harvie (n 43) 305.

[156] Dicey, 'Form of Parliamentary Government' (n 115) 78.

is simply 'not well fitted to perform'.[157] While a representative parliament was 'more or less recently invented', it had already become essential to English institutions and had 'thoroughly imbued' the 'whole English people' with parliamentary ideas and traditions.[158] The risk remained that in their new role as the 'external' limit of representativeness, the people would fail to understand parliament's own internal limits to the possibilities of what it could reform.

By the early twentieth century, Dicey saw the 'collectivist' turn as a problem of interdependence that was reshaping the concept of domestic law as primarily legislative. In *Law and Public Opinion*, published in 1905 and revised and updated in 1914, Dicey reflected on the impact of the new tie between law-making and public opinion from 1860 to the cusp of the war, arguing that collectivist legislation reflected the 'interdependence' of public and private interest in contemporary life.[159] Likening his use of 'interdependence' to the 'technical expression "solidarity" … an almost sacramental term' used by French sociological jurist Leon Duguit, whom Dicey admired and used extensively in *Law of the Constitution*, Dicey argued that the usual individual–state connection has been thoroughly disrupted in the modern world.[160] Mill's cardinal 'simple principle' that laws should only limit harms to others was now impossible to apply easily, because individual actions now almost always affected some or all of the general public.[161] Companies exercising public functions like the management of railways and unions calling for industrial action were clear illustrations, and Dicey also raised public health and defence as examples that both increased the sense of interdependence within society and suggested that, on this reasoning, 'individual liberty must be curtailed when opposed to the interest of the public.'[162]

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157 Ibid.

158 Ibid 72 and 70.

159 Dicey, *Law and Public Opinion* (n 62) liii–lvi (note that while the work was published in 1919, Dicey wrote this preface in 1914 to update the 1905 edition).

160 Ibid liii n 2.

161 Ibid liv.

162 Ibid lv–lvi.

While Dicey remained fixed on the interdependence within states, international lawyers were meanwhile replacing the same inadequate 'state as individual' analogy with an approach to states as aggregates of their national populations and representatives of their peoples, rather than mere sovereigns able to act at will. The first moves towards this replacement looked to the state as a unifying corporate entity. In the 1875 edition of his 1861 treatise, Twiss now turned to the nation's ability present a 'Unity of Will' as the means to avoid the domestic analogy generally. Noting that the 'external relations or conditions of nations, as of individuals, are continually undergoing changes' that might not be covered by present laws, Twiss rejected the 'narrow definition of Law' favoured by 'many writers on Municipal Institutes' that limited to law to only one of its forms; the imposition of the will of a common superior.[163] Twiss insisted on thinking of law 'in the highest sense of the term': it 'designate[s] the rules which guide the conduct of intelligent beings' and is 'the expression of their Unity of Will (Einheit des Willens)'.[164] Twiss then drew a strong link between the domestic and international forms of this meaning of law as common conviction: 'as the Law of any one people is the expression of its common conviction, so the Law of Nations is the expression of the common conviction of Nations'.[165] The practices and treaties of nations are the evidence of this common conviction, just as customs, judicial decisions and statutes are the evidence of the laws of a people.[166] While ascertaining international practice is somewhat more difficult than examining domestic sources, the principle and the resulting 'unity of will' between nations remained essentially similar.[167]

Later expressions of unity of will thinking were phrased in the language of liberal, evolutionary, and progressive visions of law and society that were applied to

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163 Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, vol 1 (OUP, 2nd ed, 1875) xxxvi–xxxvii.

164 Ibid xxxvii.

165 Ibid.

166 Ibid.

167 Ibid xxxvi–xxxvii.

domestic and international law alike. Westlake presented the most influential account of this kind of thinking. He infused national aggregation with progressive, evolutionary and sentimentalist ideas that described and urged the development of international society through law along the same lines by which law joined together domestic society. Most significantly, Westlake introduced an emphasis on states as aggregates of their male citizens, seeing those individuals as forming the real subjects of international law, with states only as their nominal representatives.

This began as a general evolutionary, social bonds account, first articulated in Westlake's inaugural lecture in 1888. There he sought to ground international legal principles along the lines of the system of English law, and to analogise domestic and international society as based on roughly similar legal ties. Westlake defined the international widely, as dealing with any 'human action not internal to a political body', phrasing it like a set of hypotheses for a geometrical equation appropriate to a scientific approach to expanding the field: 'Let it be the mutual action of political bodies, let it be action between one political body and one or more members of another, or let it be the action of a political body towards barbarians or savages not grouped in any such body — wherever such action can give rise to any general statement or judgment, there we have matter for International Law'.[168]

Far wider than the exclusively state–state conception promoted by jurists like Holland,[169] for Westlake international law encompassed state–state and state–alien interactions, as well as any imperial encounter with political and social groups that are less than states. Underpinning this approach was Westlake's focus on social organisation as a basis for any form of law. These 'social bonds' were not constructed or modified 'aforethought' according to ideal plans but rather through life. In a passage reminiscent of Smith, Westlake wrote that '[m]en did

168 John Westlake, *International Law: An Introductory Lecture* (CUP, 1888) 1.

169 TE Holland, *The Elements of Jurisprudence* (Clarendon, 4th ed, 1888) 322.

not construct society, nor do they now modify it, with a preconceived idea of the rights they shall have under it', but rather society and its legal order results from 'an inconceivable number of individual actions, performed in obedience to individual impulses'.[170] Legal principles emerge, inevitably, from thinking about this mass of action, and against this sum of individual actions, human reflections on the ideas towards which they were 'blindly struggling' lead to some formulation of 'jural right'.[171] Whereas moral rights are felt but not enforced, and are part of social cohesion, jural rights are those sentiments that 'men will enforce'.[172]

The different strengths of sentiments and social bonds at the domestic and international levels correspond to a difference of strength in jural rights in each sphere. Westlake explained this by a close analogy of internal and international society and law:

> Comparing international with internal relations, there is an obvious reason why in the former the jural sentiment should be weaker than in the latter, and its embodiment in jural principle much less clearly apprehended, even with reference to the degree of advancement already realized in international society. Through all the gradations of the family, the municipality and the state, the social feeling is developed and strengthened by the habit of action in common for common ends. As soon as the boundaries of the state are passed, common action ceases, or is limited to rare occasions, like those of active alliances, or to matters conducted by officials, like international posts and telegraphs.[173]

Practically the actions, duties and responsibilities of international lawyers are to strengthen these bonds in all areas of human action beyond the state.[174] Scientifically and theoretically, their task as jurists is to present international law

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170 Westlake, *Inaugural Lecture* (n 168) 12.

171 Ibid 12–13.

172 Ibid 12.

173 Ibid 13.

174 Ibid 14–15.

as the other side of internal legal ordering, to create a 'real unity' between external state actions and the ordinary jurisprudence of national laws and their reform.[175]

In the 1890s, Westlake developed this social bonds account into the foundations of his understanding of national and international society. Westlake began his 1894 text with a comparison between national and international society. National society exists through a 'state tie' that binds citizens to their sovereign and a social life of 'general subjection'.[176] The most striking difference between international and national society is the 'collective character and overwhelming strength' of the state sovereign, 'and the great variety of topics' of its legal rules.[177] In contrast, and in the absence of an international sovereign, the 'life' of each member of international society 'is touched by international law only at a few points'.[178] National laws, on the other hand, cover much of (national) social life, leading Westlake to fix on the points of contact between the national and international visions of law and life.

While, as examined above, these points of contact served imperial expansions of international law, they also led Westlake to a comparative account of ideas of law and right that explained the different approaches to both national and international laws in English and European systems. Westlake contrasted the English emphasis on 'law' as common law and practice solidified into general principles against the European focus on 'jus' or 'right' as duties and inherent capacities, which he contended led to different images of what international law requires and where it comes from.[179] For English jurists, it emerges from the practice of nations and custom, while for Europeans it proceeds from the nature of the state and its rights and duties. Emphasising the English view, Westlake saw international law's lawfulness as not a question of enforcement, organisation or authority but rather,

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[175] Ibid 15–16.

[176] Westlake, *Chapters* (n 71) 7.

[177] Ibid.

[178] Ibid.

[179] Ibid 16 and xi–xiii.

ultimately, of opinion. Few rights and duties of international society are laid down in clear instruments or conventions, and thus international lawyers must look to the practice of states, which must be connected to the 'study of opinion', especially where practice is absent or has become superseded by new opinions.[180]

This foundational emphasis on opinion was then built into Westlake's first and second principles of international law, which made it essentially a question not merely of the opinion of states, but of the 'men' that ultimately make up those states. Westlake's first axiom is that: '1. THE society of states, having European civilisation, or the international society, is the most comprehensive form of society among men, but it is among men that it exists. States are its immediate, men its ultimate members. The duties and rights of states are only the duties and rights of the men who compose them.'[181] Domestic populations are the true foundation of international society. Westlake extended this requirement to ideas of consent among states, which he argued was really the 'consent of the men who are the ultimate members of [international] society'.[182] With a final point on international and internal opinions, Westlake connected them to the 'state tie': where the 'general consensus of opinion within the limits of European civilisation is in favour of [a] rule', that rule will bind the 'consciences of men in matters arising within the society and transcending the state tie', but where there is no general European consensus on a rule, then the 'state law is normally binding on the conscience within that tie'.[183] International opinions might override state laws, but the lack of a clear consensus makes the law reflecting national conscience the binding one.

With the beginning of the twentieth century, public opinion in its national and international forms gained a still more prominent role in theorising the relationship of domestic and international laws. This was most clearly solidified in the

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180 Ibid Preface x.

181 Ibid 78.

182 Ibid.

183 Ibid.

influential work of Lassa Oppenheim. Oppenheim was a German jurist who arrived in Britain in 1895, taught at the LSE, became close with Westlake, and eventually succeeded him at Cambridge in 1908 on Westlake's recommendation and on the strength of his influential 1905 treatise on international law.[184] That work, however, promoted a dualist account of the relations of municipal and international law that owed more to Triepel than Oppenheim's new British colleagues. Nonetheless, Oppenheim maintained a similar focus on public opinion as the conduit between international and domestic law, drawing this not from English jurisprudence or parliamentary traditions, but an emphasis on the need for common consent among nations that derived ultimately from Triepel.[185] Oppenheim's *International Law* made dozens of comparisons and analogies between international and municipal law in service not of connections, but rather to show the sharp distinctions between these spheres and the specific situations in which they overlapped or came into contact.

Oppenheim began with a wide definition of 'law', insisting that if law is found in every community, then it cannot be identical to 'the law of States, the so-called Municipal Law', and equally, the idea of 'State' is not identical to the idea of 'community'.[186] Instead, the concept of 'community' was wider than that of state, and while every state was a community, not every community was a state.[187] Oppenheim then analogised this point to different forms of law, using the domestic: 'Likewise the conception of law pure and simple is a wider one than that of Municipal Law. Municipal Law is law, but not every law is Municipal Law, as, for instance, the Canon Law is not.'[188] Municipal law was but one, narrower

184 On Oppenheim, see further Mónica Garcia-Salmones Rovira, *The Project of Positivism in International Law* (OUP, 2013); Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 *EJIL* 401.

185 Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP, 2010) 42.

186 Lassa Oppenheim, *International Law: Peace*, vol 1 (Longmans, 1905) 9.

187 Ibid.

188 Ibid.

conception of the broader concept of law, into which international law may fit as well. Oppenheim acknowledged that in terms of strength, treated as the number of 'guarantees' that a law 'can and will be enforced', international law will always remain weaker than municipal law because there 'is not and cannot be' an international government that operates to enforce international law as a national one enforces domestic law.[189] But he also insisted that a weak law 'is nevertheless still law, and the Law of Nations is by no means so weak a law as it sometimes seems to be'.[190] Despite this supposed weakness, international law is still 'constantly recognised' as law, and this occurs through the connection of official and public opinion at the international and national levels: 'Governments and Parliaments are of the opinion that they are legally, not morally only, bound by the Law of Nations. Likewise, the public opinion of all civilised States considers every State legally bound to comply with the rules of the Law of Nations', and both sets of opinion thus reject any suggestion that international law is not law.[191]

Oppenheim emphasised that the mode of this acceptance of international law's genuineness is in municipal law. In addition to the daily affirmations by states that treaties announce the laws between them, their domestic laws affirm it too: states 'recognise [international law] by their Municipal Laws ordering their officials, their civil and criminal courts, and their subjects to take up such an attitude as is in conformity with the duties imposed upon their Sovereign by the Law of Nations'.[192] In this vision, international law filters through into the everyday operations of minor officials, reflecting an increase in the importance of bureaucracy, as well as the range of international law rules that might affect their work and decisions. Oppenheim then proceeded to carefully delineate the precise spheres of international and municipal law. Ideas of nationality, citizenship and subjecthood were essentially equivalent, but the question of who formed part of

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189 Ibid 13.

190 Ibid.

191 Ibid 13–14.

192 Ibid.

the community, and what rights membership gives that person, was a question of municipal law onto which international law cannot intrude.

Despite Oppenheim's influential insistence that states were the only subjects of international law, like Westlake he saw nationality as providing a link between individuals and the 'benefits' of international law.[193] Any rights and duties of individuals — including those that a state can or must grant by some obligation under international law — are always products of municipal law, and no individual human being is ever a direct subject of international law; it is through municipal law that those benefits are given to subjects.[194] While officials were likewise not direct subjects of international law, their powers are derived from the sovereign and must therefore be exercised in conformity with the sovereign's own promises and duties. Finally, Oppenheim contended that the progressive development of municipal and international legal systems would inevitably take place for the same reasons with a new emphasis on moral as well as economic development: 'looked upon from a certain standpoint, International Law is, just like Municipal Law, a product of moral and of economic factors, and at the same time the basis for a favourable development of moral and economic interests … immeasurable progress is guaranteed to International Law, since there are eternal moral and economic factors working in its favour.'[195] With this, Oppenheim gestured to the material conditions of international economic integration and the spreading of moral sentiments beyond nations as a growing trend.

D *The Socialist International*

Radically divergent views of international economics and sentiments provided the basis for the major challenge to liberalism and its focus on public opinion as the basis of law, giving impetus to another important conceptual innovation that linked domestic and international law. The coining of '*the* International' made this definite version of 'international' synonymous with both the First International

[193] Ibid 349.

[194] Ibid 19.

[195] Ibid 75–6.

Workingmen's Association's founding in 1864 and the socialist legal-political theorising around worker resistance to transnational capitalism that underpinned it. This new international was built largely on the writings of Karl Marx and Friedrich Engels, who wrote and agitated in Britain from the early 1850s until their deaths in 1883 and 1895 respectively. In a series of significant points at which Marx and Engels' extensive writings touched on domestic and international law, they presented a strong challenge to the liberal internationalist progressivism that dominated mainstream juristic writings.[196]

The socialist international premised the realisation of international peace on a destruction of the domestic entirely; flattening and transforming the nation-state, the family, and capitalist social reproduction, to form an international cooperative union of the proletariat. Marx's thought in particular was built on his critical reactions to Adam Smith's works, as well as the late eighteenth and early nineteenth century anarchist-utopians, including the British anarchist William Godwin, who offered radical rejections of state law and authority as majoritarian coercion.[197] This strand rejected the kinds of claims to representativeness and national unity that had characterised the work of jurists like Twiss in the 1860s and Westlake and Oppenheim in the late nineteenth century.[198] With Marx and Engels' extension of this critique of law, the flattening of the domestic state and its external policies came to be articulated as an international socialist program.

Workers, domestic servants and constitutions as class orderings emerged in the work of previous jurists, most notably Bentham and Smith. But it was with Marx's inaugural speech in London to the First International that the cooperative

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196 On which, see, eg, Bell and Sylvest (n 116).

197 See, eg, Ronald L Meek, *Smith, Marx, and After* (Springer, 1977); Alice Erh-Soon Tay and Eugene Kamenka, 'Marxism, Socialism and the Theory of Law' (1984) 23 *Columbia Journal of Transnational Law* 217. On Marxist international law, see especially Robert Knox, 'Marxist Theories of International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of International Legal Theory* (OUP, 2016) 306.

198 William Godwin, *An Enquiry Concerning Political Justice* (Robinson, 1793). Note Twiss had discussed and critiqued Godwin's approach to inequality and law's ability to remedy it: see Travers Twiss, *View of the Progress of Political Economy in Europe since the Sixteenth Century* (Longman, 1847) 200–4.

connections of working classes across national boundaries and against imperialism and nationalist aggression became central to a radically alternative vision of the domestic and international. Marx's conclusion to that famous address built from a need to deal with internal laws and foreign policies within all industrialised nations as the means to international peace. Part of achieving the 'fraternal concurrence' of the working classes involved counteracting foreign policies that pursue 'criminal designs, playing upon national prejudices, and squandering in piratical wars the people's blood and treasure'.[199] This Address — often taken as a statement of the charter and agenda of the socialist labour movement — ended with an objective of restraining external national action:

> The shameless approval, mock sympathy, or idiotic indifference, [of] the upper classes of Europe … have taught the working classes the duty to master themselves the mysteries of international politics; to watch the diplomatic acts of their respective Governments; to counteract them, if necessary, by all the means in their power; when unable to prevent, to combine in simultaneous denunciations, and to vindicate the simple laws of morals and justice, which ought to govern the relations of private individuals, as the rules paramount of the intercourse of nations.
>
> The fight for such a foreign policy forms part of the general struggle for the emancipation of the working classes.
>
> Proletarians of all countries, Unite![200]

Marx's 1864 Address thus ended with a different articulation of the problem of domestic and international laws: an appeal to the 'simple laws of morals and justice' that governed personal and national and international state conduct alike, which formed the basis of a command to the working classes of all nations to unite and take control of their states.

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199 Karl Marx, 'Inaugural Address of the Working Men's International Association' in Robert C Tucker (ed), *The Marx-Engels Reader* (WW Norton, 1978) 512, 519.

200 Ibid.

The 1864 view had longer roots. In an 1846 essay, Marx argued that the internal organisation of states and their foreign policy are each part of the same expression of the division of labour: 'Is the whole inner organisation of nations, are all their international relations anything else than the expression of a particular division of labour?'.[201] Most important, however, was the 1848 Communist Manifesto's conceptualisation of the proletariat's class struggle as, not in 'substance' but 'form', 'at first a national struggle', in which the 'proletariat of each country must, of course, first of all settle matters with its own bourgeoisie'.[202] The Manifesto saw the role of Communists and their party as forming a common link for individual national struggles: 'In the national struggles of the proletarians of the different countries, they point out and bring to the front the common interests of the entire proletariat, independently of all nationality', and in this way, Communists 'always and everywhere represent the interest of the movement as a whole'.[203] Marx and Engels also insisted that the theoretical program of Communism was not based on 'ideas or principles' that were 'invented, or discovered, by this or that would-be universal reformer' — reminiscent of Bentham, Burke or Smith — but instead sought to describe class struggle as it occurs in the world.[204]

This idea of internationality was based on the connections of classes and their national political struggles, and explicitly not on universalised principles. But it shared with earlier liberals like Smith and universalists like Bentham the idea of a constitution as a set of classes and orders arranged and in political and social competition or antagonism. Unlike Smith and Bentham, Marx and Engels used this to denounce nationalism and emphasised the need to destroy this ordering by taking control of it: 'The working men have no country … Since the proletariat must first of all acquire political supremacy, must rise to be the leading class of

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201 Karl Marx, 'Society and Economy in History' in *Marx-Engels Reader* (n 199) 136, 139.

202 Karl Marx and Friedrich Engels, 'Manifesto of the Communist Party' in *Marx-Engels Reader* (n 199) 469, 482.

203 Ibid 484.

204 Ibid.

the nation, must constitute itself the nation, it is, so far, itself, national, though not in the bourgeois sense of the word'.[205] While freedom of commerce has led to the daily diminishing of 'differences and antagonisms between peoples', that world market is based on the spread and uniformity of the bourgeois mode of production.[206] National control by the proletariat will cause these differences and antagonisms to 'vanish still faster', and here Marx and Engels framed this in the language of civilised nations destroying the hostility between them:

> United action, of the leading civilised countries at least, is one of the first conditions for the emancipation of the proletariat. In proportion as the exploitation of one individual by another is put an end to, the exploitation of one nation by another will also be put an end to. In proportion as the antagonism between classes within the nation vanishes, the hostility of one nation to another will come to an end.[207]

Marx's later works expanded this nation-focus of revolutionary socialism by exploring the seamless connection between national and international trade and economics. In the first volume of *Capital*, dealing with the historical tendencies of capitalist accumulation, Marx argued that the transformation of labourers into proletarians, their labour into capital, and the land and other means of production into private control began nationally and spread internationally, ending with the 'entanglement of all peoples in the net of the world-market'.[208] In the 1875 *Critique of the Gotha Program*, a polemic against a faction of the German Social Democrats, Marx emphasised that Germany's national trade is also international. The nation-state is 'economically "within the framework" of the world market, politically "within the framework" of the system of states. Every businessman knows that German trade is at the same time foreign trade, and the greatness of Herr Bismarck consists, to be sure, precisely in his pursuing a kind of international

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205 Ibid 488.

206 Ibid.

207 Ibid 488–9.

208 Karl Marx, *Capital, A Critique of Political Economy, Volume 1: The Process of Capitalist Production*, ed Frederick Engels, tr Samuel Moore and Edward Aveling (Kerr, 1906) 836.

policy'.[209] Marx strongly rejected the Social Democrats' endorsement of an aim of the 'international brotherhood of peoples', 'borrowed' Marx wrote, 'from the bourgeois League of Peace and Freedom', because it failed to sufficiently proclaim the international functions of all working classes, and was thus not equivalent to the movement's true aim, namely the 'international brotherhood of the working classes in the joint struggle against the ruling classes and their governments'.[210]

Crucially, however, this was not the anarchistic view that the state itself should be abolished — indeed, the anarchic communist view of political organisation that Lorimer thought was impermissible in international law — exemplified in Marx and Engels' debates with the collective anarchist Mikhail Bakunin. Engels' 1872 manuscript 'Versus the Anarchists', outlined the response to Bakunin, argued against his 'social liquidation' ideal in which all workers 'depose all the authorities, abolish the state, and replace it by the organisation of the International'.[211] Engels noted that the simplicity of this objective and its apparent radicality had helped Bakunin's view find quick favour with European 'lawyers, doctors and other doctrinaires', but it failed to accurately understand the national-centricity of the workers' immediate, domestic concerns, and the inescapability of engagement in national politics: 'But the mass of the workers will never allow itself to be persuaded that the public affairs of their countries are not also their own affairs, they are by nature political and whoever tries to make out to them that they should leave politics alone will in the end be left alone.'[212] Finally, Bakunin's approach equated the state with authority and both with an 'absolute evil', but that equation goes against the basic principle of majoritarian authority and the inescapability of authority in all forms of social life: 'Every individual and every community is autonomous; but as to how a society, even of only two people, is

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209 Karl Marx, 'Critique of the Gotha Program' in *Marx-Engels Reader* (n 199) 525, 533.

210 Ibid 533–4.

211 Friedrich Engels, 'Versus the Anarchists' in *Marx-Engels Reader* (n 199) 728, 729.

212 Ibid.

possible unless each gives up some of his autonomy, Bakunin again maintains silence'.[213]

Engels' 1884 masterwork, *The Origins of the Family, Private Property and the State*, furthered this project and attempted to radically re-evaluate the nature of domestic relations, albeit without much direct examination of juridical questions.[214] But in his final major work before his death, 'The Tactics of Social Democracy', an introduction for his translation of Marx's 1855 *The Class Struggles in France, 1848–1850*, Engels returned to these themes and the social democratic movement in Germany once more, linking them now to universalised laws. German social democrats and the unenfranchised workers behind them formed 'the decisive "shock force" of the international proletarian army', whose electoral power Engels conceived of as a turn to legal methods. 'The irony of World History turns everything upside down', Engels wrote, where 'We, the "revolutionists", the "overthrowers"— we are thriving far better on legal methods than on illegal methods and overthrow. The parties of Order, as they call themselves, are perishing under the legal conditions created by themselves'.[215] Against establishment tactics of attempting to force the social democrats into violence, Engels reminded them of the basis of constitutions in the language of contract: 'do not forget that the German empire, like all small states and generally all modern states, is a product of contract; of the contract, first, of the princes with one another and, second, of the princes with the people. If one side breaks the contract, the whole contract falls to the ground; the other side is then also no longer bound'.[216] Using or breaking this contract must be an international phenomenon. Engels ended with a parallel between Christian replacement of Roman universal law and contemporary socialism, calling both an international force: Christianity

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[213] Ibid.

[214] Friedrich Engels, *The Origin of the Family, Private Property and the State*, tr Alick West (International Publishers, 1942).

[215] Friedrich Engels, 'The Tactics of Social Democracy' in *Marx-Engels Reader* (n 199) 556, 571.

[216] Ibid 572.

'undermined religion and all the foundations of the state; it flatly denied that Caesar's will was the supreme law; it was without a fatherland, was international; it spread over all countries of the empire … and beyond [its] frontiers'.[217] Anti-Christian, like anti-socialist laws, failed to stop the complete takeover of the empire in a few short decades, and the same remained the promise for socialism.

While Marx and Engels' work touching on the connections of domestic and international are undoubtedly less doctrinal or detailed in their treatment of law and legal theory compared to the mainstream British juristic writings examined in this chapter, they illuminate an important and different strand in the relationship between the two. Against other juristic attempts to divide or align domestic and international laws, they insisted on a strong overlap in thinking about the economic, social and political problems that underly all domestic and international law. They provide strong theoretical contrasts to the presumption of the legitimacy of domestic law shared by the other jurists in this project, and yet resist other socialist strands that sought to abolish the domestic order entirely and replace it with a purely international class-based one. Finally, and most importantly, they show the far stronger social and political movements to which the vocabulary of 'the International' — as the more important connection for classes otherwise fixed on their domestic orders — moved, beyond law and legal discourse and into revolutionary programs.

E *Peace Plans*

International peace formed the impetus for the work of a final set of jurists who looked to the connections of international and domestic law to resolve disputes and prevent wars. Unlike late nineteenth century socialists, these writings dealt with the destruction of the First World War and the disillusionment in liberal ideals of civilizational progress and the imperial and capitalist projects that followed. Baty's 1909 claim that independence is rivalled by interdependence, his hopes for the Hague Conferences, and his critiques of empire and militarism, show,

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217 Ibid 572–3.

however, that peace plans were a frequent fixation for jurists writing on the domestic and international well before the War began.

Wartime and post-war plans began to look more closely to integration and interdependence, using municipal law as a cautious guide to where and how an international organisation might differ from internal state arrangements in its project of doing justice among nations. In a series of 1918 lectures examining plans for a League of Nations, Oppenheim emphasised that a League was not new, and the general idea of a league of nations dated back to early modern international law, which supported a foundational principle that 'any kind of an International Law and some kind or other of a League of Nations are interdependent and correlative', meaning international law must match international organisation, rather than the laws of its constituent nations.[218] That organisation should grow from the lessons of the Hague Conferences, which Oppenheim insisted was not futile, even in light of the War.

In contemporary proposals, this view of interdependence was reflected in the League's first object as the location of international legislation, which, Oppenheim emphasised, differed from the domestic meaning of legislation. 'International legislation' is legislation in a 'figurative sense only'.[219] Its everyday domestic meaning is the 'process of parliamentary activity by which Municipal Statutes are called into existence', which presupposes a sovereign power prescribing rules of conduct to subjects.[220] 'International Statutes', in contrast, can only contain rules of conduct that states have agreed between themselves, 'created by the so-called Law-making Treaties of the Powers'.[221] But, Oppenheim insisted, international

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218 L Oppenheim, *The League of Nations and Its Problems: Three Lectures* (Longmans, 1919) 6 (emphasis removed).

219 Ibid 41.

220 Ibid 41–2.

221 Ibid 42.

and municipal legislation resembled each other in that both intend to create law, making the comparison permissible.[222]

While past conferences and congresses — Vienna, the Hague — were instances of making and announcing these kinds of international legislative rules, Oppenheim envisaged a permanent legislative organ for international law-making that could transform the 'book law' of customary law recorded in textbooks into 'firm, clear, and authoritative statutory law'.[223] Oppenheim hoped that a number of difficulties — language, national interests, the number of endorsements needed, and a lack of general agreement on the interpretation and construction norms — might be avoided by each nation applying their own domestic rules of interpretation and construction.[224] Disputes would be solved by a system of international courts with multiple benches and appellate levels that would build a body of case law equivalent to municipal case law.[225] But just as the League cannot follow the model of state organisation, an international court cannot closely follow the model of municipal courts: its judges and procedures must be suited to dealing with the complexities of disputes between states, and must ensure each state has its 'general legal views' understood and represented.[226]

Oppenheim's pre-war views, written in 1911 but published posthumously in 1920 as *The Future of International Law*, had a somewhat more optimistic view of both international society and the use of legislation to achieve peace. While as in the later account he agreed that international society could not be modelled simply on single nation states, some analogies were useful and should be taken up. Although international 'quasi-legislation' could be drafted and agreed upon, and the methods adopted at the Hague formed a strong model to build on, Oppenheim insisted that this analogy was limited because repeal or amendment would require

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222 Ibid.

223 Ibid 43.

224 Ibid 43–5.

225 Ibid 63–4.

226 Ibid 65.

the unanimous resolution of the participant states, and, more problematically, cannot be easily repealed or amended: 'Municipal legislation can at any time be annulled or altered by the sovereign law-maker; but international legislation, for want of a sovereign over sovereign states, is not open to such treatment.'[227] Timed future withdrawals might be one 'way out' of this problem, but Oppenheim also insisted that international legislators needed to take even greater care than domestic ones in expressing 'their real meaning in rigid terms', which was achievable only by careful preparation and negotiations.[228]

The League took up some of these analogies and ignored others. Theoretical peace plans nonetheless show the varied attempts to acknowledge the limitations of the domestic while also extending the inspiration of national law to its breaking points. They are one place in which a truly different sphere of the international begins to be recognised as real and inevitable by British jurists. Certainly, the League's impact on the relationship of domestic and international would be much more far-reaching than establishing an international court, engaging in codification to inspire commonality between domestic systems, and claiming some mantle of (almost) global representation as the forum for the discussion of significant internal and international issues. More than this, it was the site for the next revolution in thinking about the domestic and international amidst the transformations of Empire, to which the next chapter turns.

F *Conclusion*

Part Two examined four different uses of the relationship of domestic and international law in projects pursuing different ideals of interdependence; reordering and coordinating the disparate systems of national law. Lorimer made interdependence the basis of his visions of racialised 'relative equality' that rested on a strong overlap of domestic and international, and looked to domestic law as the basis for international legal subjectivity. Liberal imperial jurists like Dicey and

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227 L Oppenheim, *The Future of International Law*, tr John Pawley Bate (Clarendon, 1921) 31–2.

228 Ibid 39.

Westlake looked to interdependence to rethink the concerns of domestic law and position states, domestically and internationally, as aggregates of their 'men', leading eventually to Oppenheim's formative account of the sharp distinction between domestic and international law's sources, personality and authority, along Triepel's lines. Marx and Engels' socialist reactions sought the interdependence of '*the* International' in focusing working classes of all nations on seizing and transforming the class orders of states to then reframe their domestic and foreign policies alike through solidarity. With the outbreak of the First World War the domestic and international became central to proposals for coordinating frameworks to establish peace and govern the world, a project that culminated in the League of Nations and the transformations of the Empire.

IV Conclusion: Problems of Empire

Imperial problems provided the impetus for new theorising, new connections, and new urgency for legitimating government actions at home and abroad. The 'improvement' of subject populations would take place through 'correct' laws; in a common law and parliamentary mould, fitted to the relative 'backwardness' of each nation, colony or possession, and forming the basis of a legal bond that made these diverse polities into a British Empire. The Victorian empire, rather than international diplomacy, was the main place in which modern concepts of the international and domestic began to flourish and entwine. Debates over these legal connections were always also about the degree of imperial control and intervention, measured by independence in internal and foreign affairs. For white settler-colonial polities, this involved the gradually gained constitutional power for each dependency to write its own internal laws and use international law according to its own will. For non-white polities, self-determination remained limited, ungranted, revocable, or impossible. Jurists used the international and domestic to understand the changing constitutional and international legal systems, and to further projects of empire.

The themes examined in Part Two presaged the major conflict areas for the international and domestic after the war: race and empire, liberal ideas of the rule of law, principles of collectivism and socialism, and the failed attempts to make

law ensure peace. The next and final chapter shows how some of these analogies and frameworks endured in the works of Ivor Jennings and Hersch Lauterpacht. It examines their elaboration of still more complicated juridical theories of the domestic and international, which they used to frame a range of projects: imperial transition, the expansion of international law, internal and international ideals of the rule of law, the compulsory adjudication of interstate disputes, and visions of post-war international order in commonwealths of the decolonised empire, and of humanity at large.

EMPIRE AND COMMONWEALTH: TRANSFORMATIONS, 1920–60

I INTRODUCTION: THE 'INSULARITY OF ENGLISHMEN'

The relationship of domestic and international law provoked constant discussions for European jurists working in the interwar years. In the 1920s, the Italian jurist Dionisio Anzilotti's new articulation of Heinrich Triepel's dualist theory — that international and domestic laws formed separate systems — was endorsed and developed further by many jurists throughout Western Europe.[1] Against this view the Austrians Hans Kelsen, Josef Kunz, and Alfred Verdross revived and rearticulated the theory of monism, arguing that international law and domestic legal systems were not distinct, but instead elements of a unified, universal legal system.[2] These debates have been read in various ways: as bolstering the normativity of law and emphasising its ability to restrain state power;[3] as an interwar legal project to reject the power of sovereign states by affirming the primacy of international law over them;[4] and as the centrepiece of a wider legal revolution that transformed national constitutions into global laws, turned state sovereignty into democratic sovereignty, and made rights a concern of and for all human beings as part of a global legal society.[5]

At the same time, British jurists seemed, at first glance, to be firmly and in a sense obviously dualist, with no real option for endorsing monism within their

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1 See Giorgio Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 *EJIL* 123.

2 See, eg, Jochen von Bernstorff, 'An "Objective" Architecture of International Law: Kelsen, Kunz and Verdross' in *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP, 2010). On Verdross, see especially Natasha Wheatley, 'Making Nations into Legal Persons between Imperial and International Law: Scenes from a Central European History of Group Rights' (2018) 28 *Duke Journal of Comparative and International Law* 481.

3 Alexander Orakhelashvili, 'Scelle, Schmitt, Kelsen, Lauterpacht and the Continuing Relevance of Their Inter-War Debate on Normativity' (2014) 83 *Nordic Journal of International Law* 1.

4 Peter Langford and Ian Bryan, 'Hans Kelsen's Theory of Legal Monism — A Critical Engagement with the Emerging Legal Order of the 1920s' (2012) 14 *JHIL* 51.

5 Hauke Brunkhorst, 'Critique of Dualism: Hans Kelsen and the Twentieth Century Revolution in International Law' (2011) 18 *Constellations* 496.

constitutional orthodoxy. A purportedly international system of laws or norms could hold no sway over the endlessly sovereign British parliament, and the executive's foreign actions of signing treaties could never alter the law of the land. What Europeans saw as a debate about the nature of law, state and international community, the British saw as, at most, a question of what English courts would decide to do with the possible 'rules' of international 'law'. John Fischer Williams, a prominent UK legal adviser at the League of Nations since the 1920s, wrote in 1939 that 'however much it may be thought to be important for the formation of a true theory of international law', the 'problem' of the relation of domestic and international law 'is not very likely to cause embarrassment to the practitioner or to a court or even an arbitrator', all of whom will know and agree on the law to be applied.[6] When Kunz addressed the Grotius Society in London on the theories of monism and dualism in 1924, the discussion began with the Chair giving thanks for a 'wonderful discourse' and expressing two regrets: the small audience, and the 'insularity of Englishmen' when it came to continental theories — the latter probably explaining the former.[7] British jurists seemed steadfastly and characteristically unengaged with the philosophical issues of state and law taking place as the League rose and fell.

Delving deeper than this first glance, this chapter argues that far from insular theoretical irrelevancies or being confined to debates on monism and dualism, the domestic and international were central to a variety of juristic attempts to make sense of the enormous legal transformations at the League, throughout the Empire, and within the inauguration of 'modern' British constitutional government in the 1920s.[8] This was most apparent in the work of two eminent writers on

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6 See, eg, John Fischer Williams, 'Relations of International and Municipal Law' in *Aspects of Modern International Law* (OUP, 1939) 81–2.

7 Josef Kunz, 'On the Theoretical Basis of the Law of Nations' (1924) 10 *Transactions of the Grotius Society* 115, 141.

8 See further Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (OUP, 2017); Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (OUP, 2015); Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton UP, 2009);

international and constitutional law, Hersch Lauterpacht and W Ivor Jennings, on which this chapter focuses. Writing and teaching at the LSE in the 1920s and early 1930s, Lauterpacht and Jennings were both disruptive figures in their fields, each arguing against the otherwise ascendant schools of positivism and advocating for functionalist and sociological accounts of legal doctrine that emphasised the ideological, material and normative elements of law and legal systems.[9] Lauterpacht, a student of Kelsen's and later Arnold McNair's at the LSE, exerted a lasting influence on British legal thought. Like Lassa Oppenheim, he brought German legal training, with its emphasis on doctrine and comfort with theorising, to bear on British practical, pragmatic and court-focused legal scholarship to counteract British positivism and work the international legal system into a form comprehensible and amenable to domestic-fixated lawyers.[10] Jennings, on the other hand, is usually remembered as a foundational and prolific constitutional law theorist who radically reshaped views of parliamentary, cabinet and local government and later served as an architect of decolonisation-era constitutions.[11] But his earliest works were fixed on questions of international and imperial constitutional law, and his later appraisals of the constitutional laws of the British Commonwealth and post-war plans for Europe dealt extensively with the interactions of domestic and international laws.

This chapter examines Jennings' and Lauterpacht's uses of the domestic and international in parallel in three parts. Part One shows how Jennings' earliest works dealt with the difficult mix of constitutional and international law in the rapidly changing British Empire, through arguments that imperial constitutional law was the proper, global limit to the international personality of Britain's dominions and protectorates, while Lauterpacht developed an account of the foundations of legal systems that explored the limits of analogies between

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9 On the LSE and especially the influence of Harold Laski's functionalism, see Martin Loughlin, *Public Law and Political Theory* (Clarendon, 1992) 169–76.

10 See further Martti Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' (1997) 8 *EJIL* 215; Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (CUP, 2010).

11 See further AW Bradley, 'Sir William Ivor Jennings: A Centennial Paper' (2004) 67 *MLR* 716; Adam Tomkins, '"Talking in Fictions": Jennings on Parliament' (2004) 67 *MLR* 772.

international and domestic law, ultimately building to the opposite of Jennings' positions: that international law bound Britain in its imperial-constitutional government. Part Two shows how these early interests in empire moved towards a parallel emphasis on the 'rule of law', as a systematic link between domestic and international. For Jennings, the British constitution provided a model for international and internal rules of law, while Lauterpacht revised his earlier works to articulate a more naturalist system of law that replaced the supposed division of domestic and international law with a 'rule of law' that insisted all disputes were capable of adjudication. Part Three examines the legacies of these theories in projects for building the commonwealths of the post-war world. Jennings' plans for a European federation modelled its inter-state system on the Empire, while his decolonisation-era juristic work urged newly independent states to cleave closely to British parliamentary traditions to resist international socialism. Lauterpacht's universal human rights projects, rested on the strong entrenchment of rights in national constitutions, presenting a new vision of humanity-wide commonwealth, presaging the tone for the interventionism in domestic legal systems that would be hallmarks of both blocs in the Cold War.

II DOMINION, MUNICIPALITY, MANDATE, 1920–33

A *Introduction*

The immediate outcome of the First World War was the collapse of the Russian, German, Austro-Hungarian and Ottoman Empires and their subsequent partitions into nation-states or new supervised colonial dependencies under the new Mandate system of the League. As the first international institution to harbour aspirations of global membership and influence, the League focused the attention of Western international lawyers and diplomats, and formed the institutional point of 'inclusion' for new nations, and the place to debate pressing questions around the protection of minorities, the administration of former empires, the international economic system, and the development of international law.[12] But the 1920s also

12 See Pedersen (n 8).

inaugurated the rapid legal transformation of the British Empire thorough gradual cessions of self-government to the dominions and the establishment of the Irish Free State on an equal footing with them, combined with repression and continued Crown 'guidance' in parts of India and Africa, and in the new acquisitions of Mandates taken from the empires of the defeated Central Powers in the Middle East, Africa and the Pacific. The questions about the vagaries of international personality and constitutional links between the polities of the British Empire that burned through the war were intensified by the establishment of the League. Which dominions could represent themselves at the League? Did they appear as part of the Empire or independently? Could they conduct independent foreign policy? These questions were gradually, partially resolved by successive imperial conferences in the 1920s and 1930s. This section explores how Jennings' and Lauterpacht's early examinations of the interaction of domestic and international dealt with these foundational questions of the wider transformations in empire, parliament, dominions and mandates.

B *The International Jennings*

The questions debated at the 1920s imperial conferences motivated Jennings' first academic works; a series of seemingly now-forgotten articles on international legal aspects of the British Empire and Commonwealth, based on London lectures, and translated for the major French international law journal *Revue Generale de Droit International et Legislation Comparée*. These pieces explored the international personality of the dominions, arguing that their status was, ultimately, a matter of imperial constitutional law and not international law, but basing that argument on a subtle account of the interaction of principles from both of these fields. Jennings sought to explain the varieties of international personality throughout the Empire as stemming from its complex, various constitutional orderings and degrees of self-government possessed by the entities which formed it, and the retention of executive control over non-white possessions. Jennings sought to convince others that the Empire's juridical relations overrode international law and, in some cases, created new categories of polity previously unknown to international law. In a sense, his argument reflected both an internationalising and localising of the British Constitution: making it relevant and

resistant to new international law concepts, and binding and shaping the constitutional and international development of the Empire's constituent members. In his turn in the early 1930s to local government, Jennings saw this imperial rule returning to influence government at home.

The idea of international law constraining or shaping the powers of the Crown was the subject of Jennings' first published work, which built on his essay as the Whewell Scholar in International Law at Cambridge. Examining the right of angary, which related to the interaction of statutory, prerogative and international law rights to seize foreign property, Jennings examined two major decisions in which English courts held that international law doctrines on angary formed part of the law of England, and thus corresponded to the prerogative right to requisition neutral goods for the defence of the realm.[13] Jennings endorsed Westlake's view that English courts enforce rights in international or domestic law where they fall within jurisdiction, subject to the sovereign's incapacity to, in Westlake's words, 'divest or modify private rights by treaty' and that courts cannot question acts of state.[14] Jennings noted, however, that '[t]he word "rights" is here used in rather a peculiar sense. Rights are given by International Law only to States, whereas Municipal Courts usually invoke International Law in suits by an individual. What is meant, therefore, is that Municipal Courts must recognise a right where a rule of International Law gives an individual a benefit; as, for example, where an ambassador claims a diplomatic immunity.'[15] Jennings read international law here in a language of private law, as a co-ordination of benefits and compensation. A state's international law right to seize the property of neutrals within its territory rests in the Crown and executive government, and a right of compensation rests with the owner.[16] Jennings thought that this should translate into English

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13 WI Jennings, 'The Right of Angary' (1927) 3 *Cambridge Law Journal* 49. See *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271; *West Rand Central Gold Mining Co Ltd v King* [1905] 2 KB 391.

14 John Westlake, *The Collected Papers of John Westlake on Public International Law*, ed Lassa Oppenheim (CUP, 1914) 518, quoted in Jennings, 'The Right of Angary' (n 13) 57.

15 Jennings, 'The Right of Angary' (n 13) 57.

16 Ibid.

constitutional law as international law shaping the prerogative: there 'ought therefore to be a prerogative right of the Crown to seize the property in accordance with the rules of International Law … there is nothing in the common law inconsistent with such a right, nor is there any statute to prevent such rights from taking effect'.[17] The Crown's prerogative rights, then, are constrained or moulded by the rules of international law, and might be further limited by parliament.

Jennings' next works delved much more deeply into the relationship of Crown, empire and international law. The first piece examined the international status of the dominions after the 1926 Imperial Conference, responding to articles by the influential Belgian jurist Henri Rolin and the more obscure Canadian political scientist C D Allin. Jennings rejected Rolin's argument that the dominions had no international personality, and went further than Allin's contention that they had some degree of international personality, but not to the extent of full sovereign states. Jennings contended instead that following the 1926 Conference the dominions held, under international law, the same international status as the United Kingdom, and that this status was 'limited by the superior law of the community of states conventionally called, erroneously, the British Empire'.[18]

Jennings' argument built on a disagreement with Rolin's view of the meaning of 'state'. Whereas Rolin saw states as juridically distinct, supreme organs that gain their powers by expressing the will of a people, rather than from delegation by another higher body, for Jennings this did not reflect the reality of state formation, and would make, for example, non-revolutionary emergences of states impossible: 'the *source* of the institution is immaterial. What is important is knowing whether the power is exercised by the institution for itself, yet on behalf of a third party'.[19] Rolin, Jennings argued, had fallen into an error common to jurists unfamiliar with British juridical thought by confounding a theory of law with the facts of reality

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17 Ibid.

18 W Ivor Jennings, 'Le Statut des Dominions et La Conference Imperiale de 1926' (1927) 8 *RDILC* 397, 398. (Translations of Jennings' French articles are my own).

19 Ibid 399 (emphasis original).

and the conventions of the British constitution. Put another way, Jennings placed the operation of the British imperial constitution over the concepts of international law.

Jennings' own view of the dominions' status moved between British imperial-constitutional law and international law. While the constitutional law of the British Empire was developed by judicial interpretations of law from an earlier era in which the King exercised governmental powers and the people were merely consulted, the contemporary reality was that cabinet and the prime minister — not legal categories and 'unknown to English law' — possess and exercise those powers. Likewise, the full sovereign status of the dominions rested on their ability and permission to exercise those powers, most crucially for international personality, the ability to conduct foreign relations, which was granted to them by imperial constitutional law. British constitutional law theoretically made the dominions 'complete dependents' under the English government, but they are practically never subjected to that control.[20]

Jennings emphasised that the international law analysis must not look to this 'theory of the Constitution' but instead to the 'real authority of the Dominion governments'.[21] If they lack the 'necessary authority to accomplish international acts', they cannot be recognised as having a personality distinct from Britain, but if they do have 'the capacity to maintain international relations' then the only element missing from their full international personality is recognition of that fact by other states.[22] Jennings thought that that recognition had been accorded to the dominions by most of the important states in Europe and America.[23] Moreover, this was the position of the Empire, evidenced by the report adopted by the 1926 Conference, which 'first established the general principle of independence' among the dominions, and 'then acknowledged that theories of law and forms of

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20 Ibid 400.

21 Ibid.

22 Ibid.

23 Ibid.

government (but not practice) do not conform to this principle' and 'finally suggest[ed] means of attenuating this divergence'.[24] Jennings' emphasis, then, was on the practical operation of domestic and imperial law, over the theory-fixation of other international law jurists.

The remainder of Jennings' argument explored those practical operations in detail, though with some examination of the conceptual changes announced by the Conference. While, in keeping with British tradition, the Conference refused to countenance a written constitution for the Empire, it did seek to define the relationship of the UK and the dominions by a general proposition: 'There are autonomous communities within the Empire, equal in their status, no one subordinate to another from the particular point of view of their internal affairs, although united by a common allegiance to the Crown, and freely associating as members of the British community of nations'.[25] Jennings saw no contradiction in independence and membership of the Empire, insisting that the empire was 'in fact' a society of free nations, linked by common places and shared history, and 'a loyalism towards a shared sovereign and a tradition of liberty and democratic government, transmitted from generation to generation'.[26]

While dominion parliaments remained theoretically subject to the laws of the British Parliament, in practice that was of little importance: contemporary British legislation did not apply generally to the dominions, and they made their own laws.[27] This independence followed into their international lives and was the basis of their juridical equality with Britain itself. After examining the international relations of the various dominions — their negotiation of treaties with foreign states outside the Empire, their modes of representation, their domestic ratifications, and their position in relation to wider conventions (as Jennings put it, those 'international acts between governments that generally do not necessitate

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24 Ibid 403.

25 Ibid 404, quoting and translating the Report.

26 Ibid 404.

27 Ibid 414.

legislative intervention, but have a purely political objective')[28] — Jennings concluded that the dominions and the UK held the same status in international law. But the particulars of that international status was still limited and shaped by the presence of imperial constitutional ties: 'the rights of different parts of the Empire are limited by the personality of the Empire, because from the point of view of questions of interest to a part of the empire, there is a unity'.[29] This unity meant treaties relevant to more than one part of the Empire bound the entirety, and that questions about the relations between parts of the Empire — 'conventions, disputes, etc' — 'are not regulated by international law, but by the constitutional laws and customs of the Empire'.[30]

In his 1928 piece 'International Personality in the British Empire', Jennings broadened his analysis to argue that the British arrangements had now reshaped international law, conceptualising Dominion–Imperial relations as a new upheaval and challenge to old outdated notions of international personality. Historically, all international legal persons were 'homogeneous States', and the nature of international personality was not a complicated question, with new states admitted not only by satisfying 'certain philosophical principles' but also because they appeared to be similar to current members.[31] When international organisation and the state form became more complex, fundamental ideas about the nature of states became relevant to international personality.

As applied to the British Empire, Jennings argued that it was 'an organisation of a character so complex that it is impossible to examine the personality of its different parts' without first establishing the principles of international personality.[32] Jennings now saw the British Empire as a formerly unitary state 'in transition',

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28 Ibid 429.

29 Ibid 433.

30 Ibid.

31 W Ivor Jennings, 'La Personnalité Internationale dans l'Empire Britannique' (1928) 9 *RDILC* 438, 438.

32 Ibid 438–9.

owing to the partial, somewhat unclear, international capacities of the dominions.[33] But the international implications of this transition was not a question of international law but imperial constitutional law: ‘We are now in a state of transition. But the principle is clear. No part of the Empire can be recognised as having an international capacity greater than that which it possesses constitutionally. To admit a British community to a power that it does not have constitutionally is to intervene in the internal government of the British Empire, and this is contrary to international law’.[34] Here Jennings raised the international law principle of non-intervention in internal affairs to place imperial constitutional law over the other ordinary principles of international law and give it an international and absolute effect. Jennings saw each dominion’s constitutional capacities as the ‘extreme limit’ on any possible recognition by other states. This mixed and went beyond international and constitutional ideas of personality: ‘The situation that has been examined here does not fit into the normal classifications of international law’ he noted, and concluded by stating ‘[t]he distribution of personality that is thus laid down does not fit within the classification seen so far in international law’.[35]

By the mid-1930s, following the passage of the Statute of Westminster, the kinds of restrictions that Jennings had theorised as following from Imperial conventions, the practical operations of the dominions, and the statements in the Imperial Reports, were solidified into clearer doctrines of imperial constitutional law. Jennings now theorised the legal structure of the British Empire as slowly disintegrating, moving from the 1914 foundation of a Parliament and Crown that could, in principle, legislate and govern in any part of the Empire, through a severe weakening in the 1920s that had, by the early 1930s, given way to a stark contrast between the Constitution within the British Isles, and that which barely bound what was now the Commonwealth. While the British Constitution was ‘a complex

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33 Ibid 440.

34 Ibid.

35 Ibid 493.

of institutions, laws, conventions and practices' that made it 'one of the most detailed and closely co-ordinated in the world', the 'Constitution of the British Commonwealth' had 'undergone a process of disintegration on the legal side which has not been met by any corresponding process of integration on the side of convention or practice. It does indeed exist, but its limbs are so weak that it seems that a breath would cause them to break.'[36] This weakness followed from the Statute of Westminster's removal of the presumption that any UK Act of Parliament would extend or be deemed to extend to a dominion as part of its law, unless expressly stated in the Act and at the dominion's request and with its consent.[37] Practically, Jennings thought, the connections and collaborations between Commonwealth nations were now questions of international cooperation akin to ordinary foreign affairs: 'neither an Imperial Federation nor a *Zollverein* [customs union] is practical politics. The question is now to secure collaboration among six or seven autonomous nations'.[38]

Beyond the Commonwealth, however, Jennings argued that British Crown powers over protectorates and mandates remained shaped and limited by imperial constitutional law alone, even though the claim to govern those mandates originated in international law doctrines and the League's mandatory grants. This approach shows the endurance of aspects of Jennings' late 1920s views on imperial control, even as the Empire had turned to Commonwealth. In the 1938 *Constitutional Laws of the Commonwealth*, which relied more heavily on the judicial decisions compiled by his co-author C M Young[39] than on William Anson and A B Keith's treatises used in the earlier articles, Jennings contended that the earlier doctrine of incorporation from *West Rand* and *Commercial and Estates Co of Egypt* was now expressed too widely, an error partly stemming from changes in

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36 W Ivor Jennings, 'The Constitution of the British Commonwealth' (1938) 9 *Political Quarterly* 465, 465.

37 Ibid.

38 Ibid 474.

39 See Ivor Jennings, *Constitutional Laws of the Commonwealth* (Clarendon, 3rd ed, 1957) Preface v.

the Empire since those cases were decided. While there is a presumption that international law and English law are not incompatible, the jurisdiction of English Courts to decide any dispute about which law applies flows from the jurisdiction of the Crown: 'The jurisdiction of the Crown, in which is included the jurisdiction of the Queen's Courts, has thus to be decided by English law. A jurisdiction may be lawful according to English law and yet unlawful according to international law'.[40] These recent decisions had confirmed that jurisdiction was ultimately up to the Crown, subject to any statutory limits on that power, and this extended to international status and the government of protectorates.[41]

This had effects for the status of mandate territories. Contra Hall and Jenkyns, who in the late nineteenth and early twentieth century saw protectorate government as a question of international law, Jennings insisted it was one of constitutional law. Whereas they had begun with international law doctrines on when a state might exercise its powers within the territory of another state, for the 'English lawyer', the starting question is 'to determine what powers the Crown possesses by English law outside British territory': this was solely about constitutional law, and the Crown 'is not bound even by the treaty by which the jurisdiction is first acquired in the international sense'.[42] Governance of mandates was the same as the position over protectorates. The Crown's acceptance of the League's mandate was a grant of jurisdiction, and while British obligations to the League were 'international obligations' and the Crown's Orders in Council provided that the terms of the mandate should not be broken, this only reflected the Crown being 'anxious' that Britain's international obligations be kept.[43] As a matter of constitutional law the mandate did not bind the Crown.

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40 Ivor Jennings and CM Young, *Constitutional Laws of the Commonwealth* (Clarendon, 1938) 16.

41 Ibid 16–17. See also W Ivor Jennings, 'Dominion Legislation and Treaties' (1937) 15 *Canadian Bar Review* 455.

42 Jennings and Young (n 40) 17, referring to WE Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Clarendon, 1894); Henry Jenkyns, *British Rule and Jurisdiction beyond the Seas* (Clarendon, 1902).

43 Jennings and Young (n 40) 17.

This supremacy of imperial constitutional law over international obligations followed, for Jennings, from the absolute nature of the Crown's powers. Jennings was quick to clarify that this did not allow the Crown or governor to act as an 'uncontrolled despot': administration by the Colonial Office still took place through law, according to the local constitution and legal system, subject to appeals to the Privy Council,[44] and the Crown remained 'a legal abstraction', with government was essentially 'that provided by the local constitution', though certainly still 'subject to the control of the Government of the United Kingdom'.[45] Imperial government was theoretically local, practically still subject to the control of Britain, and, either way, entirely freed of the international law that was the original basis of that claim to govern. In the parts of the world where it continued, British imperial government was legitimated by international law, but only constrained by British constitutional law.

C *Lauterpacht's Analogies*

Whereas Jennings saw the British Constitution and its interwar changes as both a guiding model for the development of international law doctrine and a legal order to whose 'facts' of control international legal concepts would need to bend, many British jurists saw international law's development in the 1920s as a process of its own fledgling constitutionalization that was most clearly evident in its connections, analogies and attempts to coordinate with municipal laws. The new realities they saw as driving this development were in the League itself, illustrated in the new system of international adjudication for legal disputes at the Permanent Court of International Justice, and the efforts to turn custom and general principles of law into clear, codified international instruments. Typical of these views was McNair's evaluation of the 1920s as a decade of building an 'international constitutional law' to govern the post-First World War society of states, which, for McNair, was an evolving constitution in a specifically English rather than European or American sense. McNair thought this process would eventually lead

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44 Ibid 18.

45 Ibid.

to a crystallised international constitution, and though progress might be hampered by war, the histories of individual nations suggested that great leaps could be made in constitutional development in the wake of civil strife or revolution, with English history as one example.[46]

As a doctoral pupil and collaborator of McNair and later his successor at Cambridge, Lauterpacht had long recognised that theories of the domestic state were the foundation of international lawyers' systems.[47] Lauterpacht also appreciated that this view cut against the prevailing English reluctance to think theoretically about the state, itself rooted in the image of the unwritten constitution emerging from politics and its everyday life, and not some ideal, schematic system of norms.[48] Lauterpacht spent much of his juristic career attempting to inject some basic principles about system, state, and law into British legal thought. Most important among these was his view that the state could not act without or beyond law. These apparently 'political' 'gaps' were simply indicators of hard cases, resolvable by the application of general principles, reasoning, and appeals to social purposes and ideas of community.[49]

Lauterpacht's project was primarily about drawing the domestic and international together; re-orienting the systems and principles of municipal and international law so that they interact and operate in concert, properly, and in service of the wider principles of justice and order; of anchoring the state and its power, in all cases, ultimately to the law. It involved reviving a form of natural law against the heresies of positivism, English and German alike, in a new set of general legal principles. Lauterpacht sourced these principles not in Burkean declarations of eternal laws of nature or the racial anthropology of Lorimer, but rather municipal legal orders, and the general principles they used to order the relations of

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46 Arnold D McNair, 'International Legislation' (1933) 19 *Iowa Law Review* 177, 183–4.

47 Hersch Lauterpacht, 'Spinoza and International Law' (1927) 8 *BYIL* 89.

48 Martti Koskenniemi, 'Introduction' in Hersch Lauterpacht, *The Function of Law in the International Community* (OUP, 2011) xxix, xxxv–xxxvi.

49 Martti Koskenniemi, 'The Function of Law in the International Community: 75 Years After' (2009) 79 *BYIL* 353, 359.

individuals to each other and to the state. Doing this involved urging municipal courts to use and interpret international law, and urging the international legal community to accept the justiciability of all disputes between them. This was a riposte to British international law orthodoxies which brought and adapted continental discussions over monism and dualism into a new, influential vision of international law. Whereas earlier readings of his works focused on systems[50] or individuals,[51] this part emphasises the importance of the domestic and international in connecting Lauterpacht's thought.

Lauterpacht's doctoral thesis and first monograph fixed on the issue of domestic–international analogy; specifically, between private law ideas found in the domestic systems of various states and their use by those states in international legal argument. The prevailing view in the 1920s, Lauterpacht suggested, was that while domestic analogies were 'perhaps … justified in the formative period of international law owing to the then prevalent patrimonial conception of State', they have now 'impeded the growth of international law, and ought to be discouraged'.[52] Recourse to analogies was mere imitation, ignored the 'special structure' of law in international affairs, and ultimately risked stifling any 'fruitful and creative scientific activity in the domain of international law'.[53]

Lauterpacht argued that private law had spurred the development of international law at all stages. Domestic analogies are constantly used, and without much concern for the possibility, newly *de rigeur*, that international law had some special character; indeed, what seemed like new and peculiarly international legal problems were usually given private law 'solutions'.[54] Most significant, though, was what Lauterpacht saw as the 'revolutionary' transformation in article 38(3) of

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50 Koskenniemi, 'Lauterpacht' (n 48).

51 Philippe Sands, 'Introduction' in Hersch Lauterpacht, *An International Bill of the Rights of Man* (OUP, 2013).

52 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, 1927) vii. Note that Lauterpacht does not use 'domestic' but rather 'municipal' throughout.

53 Ibid.

54 Ibid vii–viii.

the Statute of the Permanent Court of International Justice, which made the 'general principles of law recognised by civilised States' a binding source of law for the new system of international legal adjudication.[55] These general principles were gleaned from the bulk of similar municipal laws of Europe, Britain and the United States, and for Lauterpacht they were now a proper, legitimate source for filling gaps in current international law that would inevitably arise during international adjudication.

Lauterpacht saw the ideas of domestic and international as ultimately a problem about sovereignty and positivism. Modern positivism was the 'true offspring' of the doctrine of sovereignty, in that it insisted on all notions and principles being directly derived from state will.[56] This insistence on the 'eternal and inalienable interests protected by the State and of their public and absolute character' would always reject any turn to private law, because private law dealt with merely economic interests of a 'lower order' than those of the state.[57] But rather than rejecting this doctrine of sovereignty altogether, Lauterpacht instead sought to examine whether ideas of sovereignty fitted the practice of states and the 'rational system' of international law developed by jurists.[58] Sovereignty would not be 'shattered' by those who saw it as outdated or 'mischievous', but rather would only 'disappear' when its meanings were 'shown to be inconsistent both with the practice of States and with the science of international law'.[59]

Ultimately, however, Lauterpacht's investigation into the 'dangers of analogy' and the difference between the 'two spheres of law' still saw in domestic private law the 'principles of legal justice' and thus progress in international law through 'creative juristic activity'.[60] He sought to guide that development by charting

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55 Ibid viii.

56 Ibid ix.

57 Ibid.

58 Ibid.

59 Ibid x.

60 Ibid xi.

where and where not to use the domestic. Yet this project was circumscribed to focus purely on developing the public international law side. It was, Lauterpacht insisted, 'in no way connected' with questions of the 'relation between international and municipal law'.[61] Lauterpacht here was explicitly not concerned with the narrow doctrine of incorporation, but rather the more general question of the interactions and links between these spheres — namely, the drawing of analogies — in trying to theorise the problem of internal and world legal order, covering a wide range of places in which rules and wider principles of internal and international laws met and clashed.

Lauterpacht began that discussion with a history of juristic debates stretching back to Gentili, though he insisted the nature of their analogy problems was different. It was not whether different systems of law, with different subjects and objects, might permit of analogies between them, but rather whether 'the law of one ancient Empire may, by reason of its comprehensiveness and its universally recognised conformity with right and justice, be resorted to as a source of international law'.[62] The Roman Empire formed this single, unified internal jurisdiction from which so many jurists had drawn their training and inspiration; today's problem was a plurality of fractured, different systems of civil law. Lauterpacht first read Gentili as recognising this fractured set of separate jurisdictions, but argued that Gentili approached Roman law not as a question of imitation but of principle and scientific conviction, with the view that Roman law was not a particular law, but indeed the law of nations.[63] In Lauterpacht's reading, Grotius's use of 'civil law' was still more expansive, meaning all municipal laws, public or private, which aimed at the 'tranquillity of *one* community', which rendered them irrelevant for laws governing the intercourse between sovereigns.[64] Lauterpacht endorsed Textor's 1680 reading of Grotius that the law of nations 'embraces law common to all or

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61 Ibid.

62 Ibid 9.

63 Ibid 10–11.

64 Ibid 13–14 (emphasis original).

many nations, both public and private … and that it is not exclusively public law, although it is akin to public law and politics, "some of its special topics being matters of the prerogative, like war, peace, treaties"'.[65] These were early recognitions of the problems of defining the scope of which domestic laws would be models or analogies for their international counterparts.

Lauterpacht's main theoretical engagement with the domestic and international took place in refuting the argument that international law holds some 'special character', distinct from domestic law, because of the political aspects of sovereignty. Channelling Westlake, Lauterpacht contended that the acts of states are ultimately the actions of 'men', which 'for ordinary human purposes' are 'governed by standards of justice and morality accepted by States and their people within their territories'; namely, their internal understandings of morality, justice and law.[66] Characterising state interests as only different 'in degree' from the interests protected by other collectives, and the interests of individuals, Lauterpacht linked this to the similarities in laws governing individuals and those governing states, contending that both were just questions of degree: 'there is nothing in the interests protected by international law which is fundamentally different from those protected by municipal and private law'.[67]

This lack of difference between municipal and international held for a range of conceptions of 'interest'. In a nod to materiality, and contra Oppenheim, Lauterpacht rejected the suggestion that individual interests tended to be 'economic' while states had 'political interests', and even granting that terminology, the 'political interests' of states are 'primarily devoted to safeguarding collective economic interests, no matter under what disguise they happen to appear'.[68] This was simply the desire of states to try to avoid the kinds of strictures they impose on their citizens. The 'mysterious aspect of absolute

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65 Ibid 14 quoting JW Textor, *Synopsis Juris Gentium*, tr JP Bate (Carnegie, 1916).

66 Lauterpacht, *Analogies* (n 52) 72.

67 Ibid.

68 Ibid 73.

heterogeneity and supremacy' of state sovereignty rested on a deep conviction in some 'special sanctity' that meant 'those common standards of law and right which govern the relations of individuals under the sway of municipal law' could never apply to states.[69] Against this, Lauterpacht contended that the 'necessities of international intercourse' and public opinion should force governments to give up that independence and, in doing so, develop international law, alongside the conviction that individuals, groups and states are legally different in 'degree only'.[70] What Lauterpacht sought here was to reject any different standards of morality said to apply to collectives or individuals by insisting on all collectives being held to the standards of their constituent individuals: 'The moral responsibility of States is co-extensive with the moral responsibility of their citizens, or of those elected by them'.[71]

With this theory of 'degrees' rather than 'speciality' in place, Lauterpacht turned directly to the nature of this difference, seeing this as an aspect of incorporation. Fundamental difference came from the 'cherished dogma' of the positivists: 'The exceptional, one might say metaphysical, character of the persons of international law makes it plausible and natural that also their interests and rights are of a higher nature. The interests and rights are made to partake of the glory of their bearer, i.e. the State, the only subject of international law. It is this theory which is, to a considerable extent, the *fons et origo mali*'.[72] This view was an 'arbitrary dogma somehow connected with the doctrine of sovereignty' that failed to deal with present practice — 'What is, for instance, the position of insurgents recognised as belligerents, of pirates, of blockade-runners, of war criminals … of international unions, bureaus, and commissions, of the British Dominions, of the Holy See, of the League of Nations?' — and cannot make sense of the fact that some states

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69 Ibid 73 (citation omitted).

70 Ibid.

71 Ibid 73 n 1.

72 Ibid 74 (citation omitted).

automatically incorporate treaties and custom without the need for municipal legislation.[73]

In an extensive footnote, Lauterpacht pushed the point further to contend that the 'classical English-American' doctrine of international law being part of the law of the land was a 'powerful argument' for individuals being directly bound by international law, and that Triepel went to great lengths to deny its validity to avoid this consequence, in turn influencing Oppenheim and spurring the latter's theory against it.[74] Lauterpacht contended that Triepel failed to understand the British use of 'acts of transformation' made necessary by the constitutional fact that treaty-making powers lie with the Crown and not Parliament, quoting Anson to this effect: '"If it were not so (that is, if all treaties were directly binding upon the subject)," says Anson, "the King, in virtue of his prerogative, might indirectly tax or legislate, without the consent of Parliament"'.[75] This should be read, Lauterpacht argued, as a 'double function' of ratification; the general endorsement of and assent to a treaty, combined with the necessary, specific changes to municipal legislation.[76]

Ultimately, Lauterpacht saw this technical doctrinal dispute as revealing the weakness of the general analogy of individuals to states, and the personification of the state. This impeded the progress of international law by weakening the idea of international duty, which Lauterpacht expressed in language reminiscent of Westlake: 'The State, it is said, the metaphysical and mystical State, is the subject of duties, if any, not men.'[77] For Lauterpacht this was clear in the works of Westlake, Maine, and above all Bryce, who, 'no doubt well acquainted with the movement which, under the influence of Dicey and Maitland, stressed the real personality of corporations, saw clearly that, whatever may be the merits of these

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[73] Ibid 74–5 (citations omitted).

[74] Ibid 75–8 n 2.

[75] Ibid 76 n 2.

[76] Ibid 77 n 2.

[77] Ibid 79.

doctrines in the field of political theory, any exaggerated conception of the juristic personality of the State is disastrous for the progress of international law'.[78] Ending the discussion, Lauterpacht endorsed Lorimer's view that similarities in the 'branches' of jurisprudence followed from a necessary law, but Lauterpacht insisted it was not from the 'philosophic naturalism' Lorimer propounded but rather 'corroborated' by 'a theoretical investigation in the principles of positivist doctrine', and by the practice of states.[79]

Having concluded his discussion of the histories and theories of analogies, Lauterpacht turned to state practice in various topics in international law: territorial and maritime sovereignty, succession and responsibility, and treaties as contracts. The final of these was an issue of 'paramount importance': sovereignty over mandates, and the analogy of the League as sovereign. Lauterpacht dubbed this an unfortunate 'political problem' that tested the possibilities of the League and its new international order.[80] Lauterpacht argued that the League held ultimate sovereignty over the mandates, which was delegated to the mandatory powers not through any public law idea of authority, but by general ideas of trust, guardianship and principal–agent relationships. This view began with the internal powers of sovereignty. Territorial sovereignty was reflected in inhabitants taking the nationality of the sovereign, the sovereign's rights to dispose of the territory, use its produce and revenue, levy troops from its population, institute any desired fiscal policy, and that other states are generally excluded in interfering in the 'internal administration' of the territory'.[81] While one or two of these rights might be absent without affecting a claim of sovereignty, without any of them the administering power is not sovereign.[82]

78 Ibid 79–80.

79 Ibid 86–7.

80 Ibid 192–3.

81 Ibid 194.

82 Ibid.

Examining the many limits to these powers within the various mandate classes, Lauterpacht insisted that their cumulative effect showed the mandatories were not sovereigns over these territories. Instead, 'mandatory' implied a corresponding 'mandant' who is the principal, regardless of 'how nominal the authority of the mandant may be': here, the League's 'ultimate sovereignty' was a 'necessary inference'.[83] The general principles derived from private law provided this link. All systems of domestic law placed ultimate authority in the mandant, including in different branches: 'Commercial law may adapt the conception of mandate to special requirements of business and commercial intercourse. So, also, constitutional law may adapt it for its special purposes'.[84] But none of these changes collapsed 'the basic relation of derivation of authority': the mandatory can never move its legal relationship with the mandant from agent–principal to a mere instrument of the mandatory's policy.[85] That the League had not initiated the mandates, and did not hold distinct juridical personality provided no bar to Lauterpacht's view. The Council's approval of the mandates established the relationship, placing legal sovereignty with the League, and its exercise with the mandatory powers.[86] But this relationship gained its content not by the specific rules of trust or guardianship in one or other national legal systems, but by the aggregate rules from European domestic laws, which became Lauterpacht's general guiding principle throughout his treatment of treaties. Only the rules of private law that have universal or near-universal recognition apply to mandates, and these rules are 'few and simple', such that the Roman ideas of mandate and rules from the English law of trusts lead to the same broad outline in the legal construction of mandates and guardianships: 'These general and fundamental principles are the relation of derivation of powers or delegation on the one hand,

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83 Ibid 196.

84 Ibid 196–7.

85 Ibid.

86 Ibid 198–9.

and of trust, duty, and confidence on the other', and the technicalities of these systems of private law are not relevant to interpreting mandates.[87]

Lauterpacht concluded *Analogies* with reflections on the structural commonalities between international and internal legal communities. He urged a 'vigilant attitude of criticism' against those suggesting the differences of psychological, economic and social structures between international and internal communities that made analogy superficial.[88] More broadly, law must recognise and be based on sociological and historical facts, '[b]ut it can never be a mere reflection of them'.[89] In every legal community the 'constant conflict' between right and justice and 'the immediate powerful interests shaping the law' necessitated caution about the tension between stability and change, especially 'where every predominant interest asserts itself as law'.[90] Internal legal orders can provide one way of creating, maintaining and developing the international legal community to prevent 'discretionary', 'wanton and repugnant' assertions of lawfulness.[91] In this pursuit, Lauterpacht placed himself within an 'ever-growing' tradition from Westlake and Lorimer to Kelsen and Duguit, to convince the world — 'the student and statesman' — that like domestic law, international law is properly and justly addressed to the individuals that make up states, and that this was the future for the classical and Grotian view that nations were moral individuals 'respectu totius generis humani'; related to the whole human race.[92]

D *Conclusion*

Jennings' first works consistently argued that the international status of dominions was a question of imperial not international law, and maintained the absolute powers of the Crown over colonies and mandates, even where those grants

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87 Ibid 200.

88 Lauterpacht, *Analogies* (n 52) 304.

89 Ibid.

90 Ibid.

91 Ibid.

92 Ibid 305–6.

stemmed from the League. Meanwhile, Lauterpacht analysed the constitutionalization of the international legal community that he initially saw as demonstrating the misguidedness of analogising domestic and international law, which maintained the errors of personified states that stood in the way of real, genuine international community. Lauterpacht then developed an account of the foundations of legal systems that explored the limits of analogies between international and domestic law that ultimately built to the opposite conclusion of Jennings' positions: international law bound Britain in its imperial-constitutional government, just as it bound all states and their peoples.

III RULES OF LAW, 1933–45

A *Introduction*

This Part examines how Jennings' and Lauterpacht's early interests shifted towards a parallel examination of various forms of the 'rule of law'. For Jennings, it involved analysing the impact of imperial government on constitutional arrangements in the British Isles, and his acknowledgment that Parliament was practically constrained by international laws. These early points led him to use the British imperial constitution of the mid-1930s as a model for liberal international order, arguing during the Second World War that re-establishing international law and the domestic laws of occupied nations meant more than a simple vision of law and order, and instead a rule of law 'based on something like the principles of British liberalism'. At the same time, Lauterpacht began revising his 1920s account of municipal law to expound a more naturalist, systematic analysis of law generally, which was central to his more radical project of arguing that law suffused all aspects of state policy, internal or external. Lauterpacht came to articulate this in the appealingly British language of the international 'rule of law', with the conclusion that all disputes, private, public, or international, must be capable of adjudication.

B *'Something Like the Principles of British Liberalism': Jennings' Internal and International Rules of Law*

Jennings' late 1920s works on the difficulties of imperial-international law formed an early foundation for his later, wider rebuke to the gaps and inadequacies of

Dicey's late nineteenth century vision of the British constitution. This was partly about a change in the municipal. By the 1920s, these problems had become so glaring as to make Dicey's work, in Jennings' view, of little contemporary use, despite Dicey's thorough enduring influence.[93] As Jennings wrote in the preface to the 1959 edition of *Law and the Constitution*, if there were any heretics in 1930s English constitutional thought, 'they were to be found among those who regarded themselves as "orthodox"'.[94] That orthodoxy took Dicey as essentially correct but in need of qualification and updating. To Jennings, teaching and writing in the late 1920s, local government, cabinet conventions and the relations between the UK and the Commonwealth simply 'could not satisfactorily be fitted' within the Diceyan orthodoxy.[95]

Jennings' other 1930s interest was in placing local government law within the ambit of public law teaching, scholarship and practice that reflected the new importance of the 'municipal'. What is significant about this shift in both policy and theory is that for Jennings it reflected turning inward of both Parliament and the Executive, away from their imperial functions and toward a domestic sphere now characterised by the provision of social services and the implementation of economic reform that reflected the new idea of 'administration' previously and famously rejected by Dicey as inapposite to the British system. His own autobiographical writings insist that it was the importance of local government to the practice of his students at Leeds — rather than the influence of Harold Laski and left-wing politics — that set him on the path against Dicey and towards writing *The Law and the Constitution*.[96] Jennings saw the municipality as the place where urban life is regulated. Local government law was, as he put it in 1939, 'the means

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93 See the both laudatory and critical W Ivor Jennings, 'In Praise of Dicey, 1885-1935' (1935) 13 *Public Administration* 123.

94 Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959) vi.

95 Ibid v.

96 Bradley, 'Sir William Ivor Jennings' (n 11) 721–22.

by which urban life becomes possible'.[97] The rapid expansion of the legal powers of authorities responsible for delivering socially progressive policy and services was the 'municipal revolution', seeded in the 1835 establishment of the first municipal corporations.[98] Jennings saw this as a shift from an old nineteenth century imperial executive to a wider use of discretion in policy implementation at home. The nineteenth century executive was tasked with domestic policing, government of the colonies, control of the armed forces, and levying small taxes: '"Executive" was, indeed, the correct word. For the internal functions of the State were largely ministerial', and discretion was mostly afforded to judges, while executive officers had limited discretionary power, except for foreign relations and the military. The rise of public services — health, education, employment exchanges, housing, public transport — had expanded the administrative 'machinery' since the 1870s.[99] Jennings incorporated them into an account of the constitution not by their functions, which he saw as an unclear mix of policing, regulation, and the 'general external functions of the old "executive"' — that is, its colonial role — but instead by their new institutional locations: the central government, independent statutory authorities, and local governments.[100]

Parliament was also changing. By the late 1930s, Jennings agreed that Parliament was constrained 'in practice' by the rules of international law, but that the incorporation of international law into British law — as 'part of the law of England' — meant only that British law is 'presumed not to be contrary to international law'.[101] Jennings expressed this as a series of assumptions about the territorial extent of laws, jurisdiction over the seas, and the powers of the crown — as including those held by a government under international law, and not

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97 W Ivor Jennings, *Principles of Local Government Law* (University of London Press, 2nd ed, 1939) Preface.

98 W Ivor Jennings, 'The Municipal Revolution' in Harold J Laski, W Ivor Jennings and William Robson (eds), *A Century of Municipal Progress 1835–1935* (Allen, 1936) 55.

99 Ivor Jennings, *The Law and the Constitution* (University of London Press, 2nd ed, 1938) 171–3.

100 Ibid 173ff.

101 Ibid 154.

including powers which would be contrary to international law.[102] This amounted to the doctrine that English courts will give English law the meaning 'most consistent' with international law.[103] In a lengthy note, Jennings disagreed with Lauterpacht's 1935 view that customary law was part of the common law. While Jennings agreed that courts would not presume a contradiction between custom and the common law, 'if it means that whatever is accepted customary international law is *per se* part of the common law, so that a modern rule of international law overrides principles already established by decisions of the courts, it cannot, in my opinion, be accepted', and, moreover, the cases quoted by Lauterpacht did not support his apparent view.[104] Instead, Jennings emphasised that the common law provided a superior source of protection for foreigners. In the absence of legislation and even if international law allowed it, the Crown could not abrogate common law rights of foreigners like assembly or due process.[105]

Jennings conceptualised the constitutional position of international law, however, as a constitutional convention rather than firm law, and one that allowed parliament to legislate itself into actions or internal laws that might constitute breaches of international obligations, though practically and normatively constraining it from doing so:

> [A]ny breach of international law by the United Kingdom will give to the country injured a claim against this country which may be enforced by any means available by international law for the time being (such as consideration of the matter by the Council or Assembly of the League of Nations or by the Permanent Court of International Justice, or even, subject to the Kellogg Pact, war). This means that the United Kingdom, through legislation enacted by Parliament, may be liable to give redress to a foreign Power. This does not impose any legal obligation upon Parliament. But it means in fact that Parliament will not deliberately, and ought not to, pass any

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102 Ibid.

103 Ibid.

104 Ibid 155–7 n 1, citing Hersch Lauterpacht, *Oppenheim's International Law* (Longmans, 5th ed, 1935) vol 1, 36.

105 Jennings, *Law and the Constitution* (n 99) 155–7 n 1.

> legislation which will result in a breach of international law. Consequently international law limits the power of Parliament through the operation of constitutional convention.[106]

A second set of international-imperial conventions grew out of the constitutional relations with the dominions and the mandate territories. Regarding the mandates, however, Jennings maintained his earlier view that, as a matter of constitutional law, their government was 'within the entire discretion of the Crown', and while the UK was bound by the terms of the mandates concluded and approved by the League Council, '[t]he fact that the obligations arise out of international law makes no difference' to this absolute constitutional discretion.[107]

Jennings' account of international law and imperial and mandate relations rested on a view of the rule of law that, innovatively for his time, held both internal and international forms. Beginning the chapter on English constitutional law with the rule of law, Jennings started not with England's constitutional history or the major principles, but instead with ideas of law and order in the context of instability at the international level. Jennings stated that the idea that it is 'necessary to establish "the rule of law" in international relations' is a recurring suggestion in contemporary discussions; that international law exists but is not obeyed, that diplomacy is based on force rather than law, and that establishing the 'rule of law' would lead to order, peace and the settlement of international disputes according to law.[108] For Jennings, this appeal 'expressly or impliedly draws a parallel between international society and the internal society of a modern State'.[109] International society today, however, resembled feudalism, where 'lawless and law-abiding barons alike felt that their security rested primarily upon the number

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106 Ibid 157. See also Jennings, *Law of the Constitution 5th Ed* (n 94) 175–6, identical save for updated references to the League and the PCIJ, reading 'Security Council of the United Nations or by the Court of International Justice, or even war'.

107 Jennings, *Law and the Constitution* (n 99) 95 n 9.

108 Ibid 41.

109 Ibid 41.

of their retainers and the impregnability of their castles'.[110] The difference is that the 'natural solution' to this problem, stemming from Roman imperial traditions, was to recognise 'the authority of an overlord, a king or an emperor'.[111] Jennings went on to contend that the rule of law was largely established internally, despite civil unrest, in the simple sense of 'the existence of public order', which depended on the existence of a superior power to use force to stop lawlessness: 'One lawless man, like one lawless State, can destroy the peace of a substantial part of his world. Force is necessary only for the lawless and can be used only if the lawless are the exceptions'.[112] While this basic sense of 'law and order' has been established in most states and is a 'universally recognised principle', in Britain, Jennings insisted, this experience had been one of liberalism or liberal-democracy that is not necessarily shared by other nations.

In Jennings' final analysis, the rule of law in the simple sense of law and order is present in 'all civilised States' and encompasses a range of governmental forms, including non-democratic and aggressively expansionist states.[113] If it means something more than that, it must rest on a more comprehensive theory of government which usually 'includes notions which are essentially imprecise' — control of the executive, limited legislative powers, and so on — but which are besides the central requirement that it be based on the 'active and willing consent and cooperation of the people'; an anti-formalist, substantive account of democracy.[114]

During the Second World War, Jennings revisited this vision of the rule of law and re-drew it as holding an essentially British — rather than generically democratic — substance that emphasised parliamentary control of the executive. He drew close parallels between domestic and international versions of the rule of law,

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110 Ibid 41–2.

111 Ibid.

112 Ibid 42–3.

113 Ibid 59–61.

114 Ibid.

contending that, at either level, its conceptual content was fundamentally British, contained in British constitutional and parliamentary history 'and the works of publicists who consciously or unconsciously provide ammunition for political artillery'.[115] Moving beyond the contemporary view that Dicey's popularisation expressed its essence, Jennings instead traced its history through Aristotle, Occam and the Revolutionary Settlement to the contemporary discretionary government most clearly seen in the expansion of social services, which required 'a new technique of government and a new alignment of governmental powers'.[116] Arbitrariness, and not discretion as such, was where Jennings found the breakdown of the rule of law, and Dicey's failure was in missing the 'most fundamental element' in British controls of discretion, namely the control of government by parliament, and the control of parliament by the people.[117] Seeing the rule of law as generally controls 'exercised by one governmental authority upon another'[118] — neither necessarily by a court, nor necessarily total[119] — Jennings ultimately concluded that executive wartime powers, while 'as vast as those of any dictator', remained subject to parliamentary oversight and control, which he insisted would prevent any abuses.[120]

Earlier in the piece, and more striking, was Jennings' treatment of the international aspects of the rule of law. Noting again that the phrase 'rule of law' has 'mainly' been used in the context of international affairs to mark its absence between states, the lack of recourse through the League, and the outbreak of the war to 're-establish the rule of law', Jennings saw it as holding here 'much the same meaning as "law and order"', implying that diplomacy should be regulated by international

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115 W Ivor Jennings, 'The Rule of Law in Total War' (1941) 50 *Yale Law Journal* 365, 365.

116 Ibid 371–2.

117 Ibid.

118 Ibid 372.

119 Ibid 374.

120 Ibid 386.

law not force.[121] But Jennings insisted on a more capacious meaning that linked international and internal concepts of the rule of law:

> Yet, the rule of law has always meant more than order. International law should be re-established, not because it is law, but because it is good law. The Germans have re-established law and order throughout western Europe, but no British politician outside the internment camps has yet praised Hitler for establishing the rule of law. On the contrary, it is asserted that the law is the rule of the despot and the order the tyranny of the tyrant. In truth, it is the immediate aim of British strategy to create disorder in the occupied territories in order that the oppressed peoples may re-establish the rule of law. The rule of law means, therefore, not merely public order, but public order based on something like the principles of British liberalism.[122]

This formulation, reminiscent of his 1938 account but applied to the realities of the war itself, saw Jennings unsurprisingly denying tyranny the character of the rule of law; as merely public order that lacks the substance of 'something like' British liberalism. In doing so he mixed international and domestic conceptions without much clarity about the content or basis of the international version. It seems to need not just law and order, but also to be based — at the very least — on whatever principles the 'comity of nations' has given to it, though ideally moving closer to British liberal conceptions. Adherence to this British content seem, then, to be Jennings' real prerequisite to 're-establishing' the 'good law' of international law.

C *Lauterpacht's System*

Lauterpacht's concern throughout the 1930s was to establish this kind of 'good' law, at both the international and domestic levels, in the first place. He looked to the connections between international and municipal legal systems to articulate this, and, like Jennings, used the British language of the 'rule of law', albeit with a more universalist and naturalist meaning.

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121 Ibid 365–6.

122 Ibid.

Lauterpacht's *Function of Law in the International Community* was originally conceived in the late 1920s as a demolition of the idea of 'political' issues in international law, that states might claim their 'vital interests and honour' (or, in the more modern language, their 'essential' or 'security' interests) preclude the arbitration of their disputes with others.[123] Not only did *Function* deal in detail with technical legal problems around international jurisdiction, but it also provided an influential idea of 'legalistic cosmopolitanism', or, an internationalised 'rule of law'.[124] Its lasting importance as arguably the most significant twentieth century text of Anglophone international law came from its careful sensitivity to the way in which institutional choices could distribute spiritual, philosophical and material values in national and international legal systems.[125]

As he worked on the technical doctrinal arguments, Lauterpacht came to recognise the fundamental questions of all legal systems at stake: '[a]s in any other system of law, so also in that which governs the relations of States *inter se*, the question of the limits of the rule of law is the central problem of jurisprudence'.[126] Both juristic debate and the tumults of the late 1920s and early 1930s — the stalled projects of the League of Nations, economic collapse in the Depression, and the collective security challenges from Japan, Italy and Germany — had fixed once more on the perennial problem of national and international links and tensions, here, specifically, the presence of national legislatures and the absence of an international one, which created difficulties for articulating compromises between 'legal stability' and 'social change', and arguably created problems for classifying international disputes or 'urging any limitation of the rule of law among States'.[127] These central issues of the relations of law to morality, and law reform's task of reflecting changing social conditions while ensuring legal stability, and the adjudication of disputes to create both security and justice were dealt with

123 Koskenniemi, 'Introduction' (n 48) xxix–xxx.

124 Ibid xxxi.

125 Koskenniemi, 'Function of Law' (n 49) 366.

126 Lauterpacht, *Function* (n 48) vii.

127 Ibid vii–viii.

effectively within European states, but remained unrealised internationally. To understand the specifically international character of these problems, Lauterpacht looked in several instances, with caution, to analogies with municipal law. Ultimately, these explorations would build to a general conception of law which treated international and municipal law as its two constituent elements.[128] Lauterpacht's system emerged from several points of connection between them.

The first point of connection was in Lauterpacht's concept of justiciability and the issue of gaps and the completeness of a legal system. Lauterpacht began *Function* with the internal/external divide, here fundamental to the source of norms:

> The function of law is to regulate the conduct of men by reference to rules whose formal — as distinguished from their historical — source of validity lies, in the last resort, in a precept imposed from outside. Within the community of nations this essential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of States which deduces the binding force of international law from the will of each individual member of the international community.[129]

At the international level, sovereignty forms the basis of a state's rights to determine the rules of international law by which it will be bound, leading to states requiring unanimity for changes to international law, and retaining the right to adjudicate whether and which rules of law actually apply to them.[130] Lauterpacht conceived of these absolute doctrines of sovereignty as 'carefully built' by international lawyers, which in turn formed the basis for newer doctrines to limit the reach of international adjudication that contended that political or non-legal disputes and the fundamental interests of states always remained outside international law.[131]

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[128] Ibid 25.

[129] Ibid 3.

[130] Ibid 3–4.

[131] Ibid 5.

Against these supposed gaps, Lauterpacht raised a concept of justiciability derived from municipal law. Within the state, all conflicts between citizens are justiciable, whereas, in the positivist, gap-endorsing argument, disputes between states are only justiciable if those states have consented to a court's jurisdiction.[132] For Lauterpacht this shows international law's 'slow progress': 'solutions, long accepted in national jurisprudence as being dictated by the very existence of legal order, have failed to secure acceptance by international lawyers for almost two generations'.[133] Lauterpacht contended that positivist theories focusing on national legal systems had long grappled with questions of the limits of judicial function — the ability of judges to decide a case in the possible absence of an applicable rule — and these theorists concluded that 'the very fact of the establishment of a community under the reign of law' meant judges could not refuse to decide a case.[134] This was clear in England, and the basis of the common law itself, but Lauterpacht argued it also followed a priori from the existence of a legal community at all, and its necessary prohibition on violence. While there may be gaps in statute laws and customary laws, there can be no gaps in the 'legal system taken as a whole'; any purported gaps are filled by the functions of legal organisation, the 'first function' of which is to preserve peace by stating the foundational precept that '"there shall be no violence"'.[135] Where law declines to adjudicate, force becomes the only means of resolving disputes, which violates law's 'primordial duty' itself to stop violence.[136] What Lauterpacht saw here was a contradiction of positivist thinking, expressed in the language of 'spheres'. At the municipal level positivism denied justiciability gaps, but at the international it began from that assertion.[137] This rejection of the rule of law at the international level made international law positivism both an unsound doctrine, misidentified

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[132] Ibid 20–21.

[133] Ibid 60.

[134] Ibid 61–2.

[135] Ibid 64.

[136] Ibid.

[137] Ibid 68.

with domestic legal positivism, and, ultimately, 'the very negation of its prototype in the sphere of municipal jurisprudence'.[138]

Lauterpacht's second connection between the domestic and international built on the first: the development of international law, contrasted with stability and change in municipal legal systems. The international legal system clearly imperfectly organised the international community. While improvements to the shortcomings of municipal law's organisation of the national community are built into those systems, in international law these gaps are much more significant 'not only in bulk, but also in intensity', and filling them may affect fundamental parts of international law.[139] As with *Analogies*, Lauterpacht in *Functions* contended that general principles of law, including both private and public law, as worked out in national systems, could be used to fill these gaps and develop and change international law.[140]

Turning to the question of change in legal systems, a central problem for legal philosophy generally, Lauterpacht stressed that the issue of legal change at the international level could be easily overstated. It is not a problem peculiar to international society, but of all societies, and one main factor limiting the problem is its present restriction to only regulating states externally.[141] International law is largely confined to regulating matters around the external relations of states: 'It does not and cannot aim at regulating the lives of the members of the international community in the same intensive and pervading manner as municipal law does. It is mainly adjective law. It is, more than any other kind of law, a regulation of competencies.'[142]

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138 Ibid 69.

139 Ibid 81.

140 Ibid 115ff.

141 Ibid 248–9.

142 Ibid 249.

What is needed is a change in the political organisation of the international community to make its law have internal effects. Only when it 'regulates in detail the life of its individual members in its internal aspects' will it be able to address the 'constant flux of changes' that make legislation necessary.[143] Instead, international law remained more 'static' than domestic law not because there is no international legislature, but because it only regulates relations that are 'not in themselves liable to be affected in a decisive manner by economic and other changes'.[144] While internal state law provides a machinery to formally recognise changes in power and influence, international legal institutions have not yet developed a similar machinery. But Lauterpacht also insisted that a state's 'internal growth' — an increase in its power — need not lead to an external expression of that power: removing the legal admissibility of force and entrenching the duty of judicial settlement in international organisation should break the fallacious relation between these things, principally through an international legislature and judge-adapted law.[145]

The third and final connection between domestic and international law appeared in Lauterpacht's ultimate aim in the final chapters of *Function*: the comparison and differentiation between internal and international forms of the rule of law. Lauterpacht offered a detailed rejection of earlier visions of international law that saw it as deficient, arguing that these were based on a misguided comparison with municipal law and its concepts of the rule of law.[146] International law serves the higher interests of the international community. Jurists who saw international law as non-existent (Hobbes, Spinoza), not law (Austin), or weak law (Oppenheim, Holland) all laid the foundations for contemporary visions of 'denying' international law by labelling it a 'specific' law.[147] For Lauterpacht, this amounted only to arguing that it is defective when 'viewed from the narrow perspective of

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143 Ibid.

144 Ibid 249–50.

145 Ibid.

146 See further ibid 390–8.

147 See ibid 400–5.

municipal law'.[148] In fact, these supposed 'defects' are just reminders that municipal law is not the only conception of law, but rather 'only an historical category' amidst a 'wider conception'.[149] Lauterpacht endorsed Westlake's point that the controversy can be solved by refusing to think of 'the law of the land' as the 'only proper kind of jural law' and thus refusing to require that international law follow characteristics appropriate to municipal law.[150] Finally, he endorsed the arguments of German jurists that the 'the orthodox concept of law is not sacrosanct', that law must be adapted to the requirements of 'actual life', and that this is a question about the 'delicate problem' of law's creation and development.[151]

With these points made, Lauterpacht arrived at his 'central problem' of the legal nature of international law, formulated as a series of questions about its relation to states, municipal law, and law in general:

> To what conception of law must international law conform in order that it can accurately be described as law? Is it a conception of law deduced from the positive legal order within the State, i.e. a conception of general jurisprudence in modern society? Or is it a conception of law made so elastic as to embrace the body of rules regulating at present the mutual relations of modern States? Shall international law be guided, while admitting its own shortcomings, by the generally accepted notion of law which few would venture to deny but for the necessity of defending the legal nature of international law? Or shall it broaden it and impart to it some of its elasticity? Shall international law aim at improvement by trying to bring its rules within the compass of the generally accepted notion of law, or shall it disintegrate it and thus deprive itself of a concrete ideal of perfection? [152]

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[148] Ibid 406.

[149] Ibid.

[150] Ibid.

[151] Ibid.

[152] Ibid 406–7.

Lauterpacht then rejected the answers of the dualist jurists who saw municipal law as a law of subordination of subjects to superior legal will and international law as merely a law of coordination between equal states: Jellinek emphasised self-limitation and saw sovereignty as determining one's own competence; Kaufmann emphasised subordination as only truly possible within the state; Triepel thought self-limitation impossible and instead located international law's obligatory force in the common will of states; and Cavaglieri and Anzilotti, finally, abandoned coordination by contract to see it as objective: *pacta sunt servanda* — that agreements will be kept — is a constitutional, a priori rule that cannot be 'proven'.[153] Lauterpacht rejected this division of coordination and subordination as based on an incoherent command theory. Law can command without that command coming from an 'organized political authority', and arguments against that fall back on the antiquated idea that law is the psychological will of a real group.[154] Without this command view, Lauterpacht saw the idea of a state being objectively bound by an obligation that led, logically, to courts, which do not impose new obligations but rather 'ascertain existing law', giving effect to state will by articulating its obligations under international law.[155]

Whereas the 'initial hypothesis' of municipal law is that state will, through the constitution or the will of the monarch, must be obeyed, international law should take the original hypothesis that the will of the international community, rather than its states, must be obeyed. Lauterpacht called this '*voluntas civitatis maximae est servanda*', seeing this international will expressed in treaties, customs, general principles of law, where the *civitas maxima* was not the state but rather the 'super-State of law … existing over and above national sovereignties'.[156] *Pacta sunt servanda* was a 'beneficent transition' between international law as the collective will of states to being based on 'law's impersonal sovereignty'.[157] Lauterpacht's

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[153] Ibid 409–18.

[154] Ibid 419–20.

[155] Ibid 420.

[156] Ibid 421–2.

[157] Ibid 422.

new hypothesis was a functional one, which 'courageously breaking with the traditions of a past period, incorporates the rational and ethical postulate, which is gradually becoming a fact, of an international community of interests and functions'.[158]

More than just a 'matter of wording', Lauterpacht insisted that this different starting point expressed the real nature of the international legal system, and lay the ground for his view of the necessity of compulsory adjudication.[159] International law's 'specific character' had made jurists 'insensible to the juristic heresy' of insisting on rules of international law without also requiring compulsory adjudication of disputes.[160] State refusal to submit to adjudication simply reflects the reality that international law is not a 'coherent and harmonious' system 'governed by an all-pervading unity of the reign of law' but instead generalised and conflicting practices that try to bind together 'political entities each inclined on being a law unto itself'.[161] Municipal law makes the state's interest the supreme law. The state is bound by its will and, 'subject to certain constitutional requirements of form', changes its will by changing the law.[162] But the state can also use 'general provisions of the utmost flexibility' to change law while still remaining 'within the orbit of the law', like invoking political considerations of the safety of the republic.[163]

Lauterpacht linked this thinking not just to German jurists like Jhering who promoted a view of state constitutions as 'political law', but also, intriguingly, English constitutional lawyers in the mode of Dicey. Dicey's contention that constitutional '[c]onventions, understandings, habits and practices' employed by ministers and officials are 'not in reality laws at all since they are not enforced by

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[158] Ibid.

[159] Ibid 423.

[160] Ibid 426.

[161] Ibid.

[162] Ibid 429–30.

[163] Ibid.

the Courts', reflected, thought Lauterpacht, 'the existence within the State of rules, the non-observance of which by the highest legislative or executive organs of the State, far from amounting to a breech [sic] of law, will be constitutive of new law expressive of the changed political necessities of the State'.[164]

While Lauterpacht allowed each state to remain 'a law unto itself' internally, that internal ordering and the interests it reflected did not apply to its capacity as a subject of international law, which does not 'disregard' these important interests, but instead 'recognize[s], measure[s], and adjust[s]' them against the equal interests of other states and the international community.[165] This meant that membership of the international community necessitated rejecting absolute visions of the state: '[t]he sanctity and supremacy which metaphysical theories attach to the State must be rejected'.[166]

The ultimate tasks for making this theory real were abandoning the legal/political dispute distinction and submitting to compulsory adjudication, and insisting that law is no panacea to force, but instead a necessary condition of peace and the basis of 'international solidarity'. This required that states become reluctant to 'rely rigidly' on rights over justice or peace, and, ultimately, to take up peace and pacifism in general as a guiding structural idea: 'peace is not only a moral idea. In a sense [it] is morally indifferent, inasmuch as it may involve the sacrifice of justice on the altar of stability and security. Peace is pre-eminently a legal postulate. Juridically it is a metaphor for the postulate of the unity of the legal system.'[167] Peace, ultimately, was the aim of all law and the link between Lauterpacht's domestic and international.

On the cusp of the dissolution of peace and the Second World War, Lauterpacht would look to municipal courts as places to make these theoretical shifts real. In

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164 Ibid 430 n 1, quoting AV Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 8th ed, 1915) 23.

165 Lauterpacht, *Function* (n 48) 430.

166 Ibid 431.

167 Ibid 438.

May 1939, Lauterpacht explored the question of whether international law formed part of the law of England. Taking his title from Westlake's earlier article, Lauterpacht ruminated on Westlake's first principle, which connected international law to national populations, and linking it to his own rejection of individual–state analogies. Westlake's principle was 'progressive' in that it 'signifie[d] the abandonment of what has been the greatest evil of modern International Law and relations, namely, the dualism of moral and legal standards applicable to individuals acting singly and to individuals grouped in collective units in the form of States.'[168] The doctrine of incorporation was a reminder that the position of the state in international law is not absolute but relative, and powerfully clarified by the true position of the individual within both national and international law. '[T]here is a sphere', Lauterpacht argued, 'in which the law, both international and municipal, recognises individual rights independently of the direct and specific approval of the State', and this is the basis of its 'progressive and beneficent quality'.[169]

Ultimately, Lauterpacht urged readers to recognise that a monistic doctrine of automatic 'adoption' of international law into domestic ought to be seen not as 'subordinating' one system to the other but instead adding to the authority of each sphere:

> In periods of crisis in the international sphere, whenever there reveal themselves tendencies to substitute for the authority of the law of nations an uneasy and precarious balance of physical forces, the task of municipal tribunals in administering and upholding at least some portions of International Law, forming part of the municipal system and rendered real by the sanction of the State behind it, acquires special significance.[170]

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[168] H Lauterpacht, 'Is International Law a Part of the Law of England?' (1939) 25 *Transactions of the Grotius Society* 51, 63.

[169] Ibid 64 and 66.

[170] Ibid 87–8.

Lauterpacht concluded with a vision of the future in which legislative supremacy might give way to written constitutions that 'deprive' their legislatures of any power to legislate contrary to a 'fundamental provision making International Law an integral part of their system', which could not be modified without 'common consent'.[171] That kind of self-subordination would be enforced by courts 'national or international', both with the competence to review and invalidate any legislation contrary to international law.[172]

D *Conclusion*

This Part examined Jennings' and Lauterpacht's joint turn towards the rule of law in the 1930s and 1940s. Jennings argued that imperial administration had changed domestic public law, and that Parliament was practically constrained by the system of international law, giving rise to his account of the rule of law in its internal and international forms, the latter of which demanded re-establishing the post-war world along the lines of British liberalism. Lauterpacht expanded his idea of the functions of international law to reject its supposed inadequacy and insist that domestic and international laws must both serve the same purposes that limited the absolutism and of the state and made adjudication necessary and peace its function. Their final projects in the post-war era would each build into more ambitious schemes for commonwealths that could make these systematic commitments real.

IV NEW COMMONWEALTHS, 1941–60

A *Introduction*

This Part turns to how Jennings and Lauterpacht used their visions of the domestic and international in projects for the commonwealths of the post-war world. Jennings' wartime plans for a European federation modelled its laws on the British Empire, though his post-war theorising around the constitutions for decolonising states aimed to fit them into a renewed Commonwealth, and instead of ruminating

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[171] Ibid 88 note (n).

[172] Ibid.

on their new international legal personality or freedom in domestic law-making, Jennings urged them to stay with British parliamentary traditions and resist the scourge of international socialism. Lauterpacht's post-war scheme of human rights argued for their entrenchment in all national constitutions using a new emphasis on British constitutional history, and presaging the interventionism in domestic legal systems that would become central to ideas of liberal internationalism in the Cold War. This is a return to the themes of Chapter One, commonwealth and empire: Jennings' commonwealth of Europe and the decolonising world, and Lauterpacht's commonwealth of all humanity.

B *Jennings at the End of Empire*

In 1941, Jennings sketched a plan for a federation of Western Europe, including a draft of its constitution. This 'federal union' would improve on the failures of the League, but against those who thought international government only meant replacing sovereign states with a world order — an ideal of 'insuperable' difficulties — Jennings insisted that a Western European federation of democratic governments was the only true solution to many of the world's problems.[173] Its practicability depended on persuading nations to send representatives to an international conference to draft a constitution, which meant persuading public opinion in these nations that this was both urgent and essential, that, in turn, depended on aiming at a constitution that would work to solve these problems without calling for 'too great a sacrifice' in the sovereignty of federating states.[174] For practical reasons, some flexibility in national forms of internal government would be allowed within the Federation, but in broad terms its constituent parts had to be democratic. Jennings insisted that centralising control over defence and foreign affairs for a single Western European bloc, which would attend the League of Nations in unity, was fundamental to peace.[175] Some form of coordinated control over colonial possessions and economic relations within and beyond the

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173 Ivor Jennings, *A Federation for Western Europe* (CUP, 1940) 1.

174 Ibid 2.

175 Ibid 6ff.

Federation was central to avoid repeating the financial and military disasters of the interwar years.[176] These formed the pillars of Jennings view. But he also insisted that it was not a utopian project. The 'empty sentiments' and 'vague Utopianism' that reflected a poor understanding of the practical and theoretical problems involved in such a union were a serious danger.[177] To clarify these practicalities, and outline how powers over foreign affairs, defence, and some controls on economic relations and colonies might operate, Jennings turned back to the only other international organisation he thought effective and guiding: the British Empire's interwar experience of global order.

Analogies with the Empire and illustrations from its successes and failures form much of the arguments that followed. Pleading for the practicality of the scheme and exhorting the Anglophone world to advocate for it, Jennings argued that just as the 'systems' from the 'Mediterranean to the Arctic' are 'copies' of the British system adapted to national characters and 'conditions of national life', his plan was 'based essentially on the British tradition' as it was 'adapted by British people' to the conditions of North American and Australia, and thus the 'initiative' for the scheme must come from those peoples.[178] But the Commonwealth would also endure and be accommodated into the Federation. He insisted that nothing in the plan would formally detract from the King's powers or interfere with imperial–dominion relations — 'The Statute of Westminster of 1931 would not be amended even by the omission of a comma' — but practically it would significantly change Commonwealth intergovernmental relations: the UK could not defend the dominions except through the Federation's processes, and citizenship and immigration status would change, though this would not follow if the dominions were to join the Federation themselves.[179]

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176 Ibid 6–15.

177 Ibid 3.

178 Ibid 156–7.

179 Ibid 34–40.

Following this imperial guide, Jennings' vision for the interaction of domestic and international in his European Federation strongly resembled the Imperial–Dominion arrangements in their 1920s forms, albeit here solidified in a written international constitution, rather than the policy preferences of the Empire and its areas of disengagement with dominion governments. Major foreign policy decisions would be for a Council of Ministers and President, to the exclusion of any 'direct political relations' between individual federated states and outsiders.[180] But plenty of international questions would be reserved to the internal systems of these states. There are 'many subjects of international discussion' that would remain 'entirely within the jurisdiction of the federated States': public health, extradition, mutual enforcement of foreign judgments, bankruptcy, patents, trademark, copyright, and communications.[181] Balancing this internal jurisdiction with the problems usually solved in single-nation federations by delegating all international powers to the Federation prompted Jennings to draft a 'limited treaty-making power', granted to the constituent states, but subject to the Federation's control.[182] The Federation would also hold a legislative power to implement major treaties it signed, and Jennings contemplated a convention for the unification of laws between the constituent states.[183]

But it is in the coda of Jennings' final works that his views on the international and domestic shift at the end of empire. They focused primarily on the kinds of domestic orders that the former colonies should aspire to adapt to their local conditions, mostly along the lines of the British Constitution, though offering little guidance on their newly acquired rights and duties under international law. Jennings was extensively and personally involved in decolonisation as a

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180 Ibid 105.

181 Ibid.

182 Ibid 107ff.

183 Ibid 109–10.

constitutional architect.[184] His last theory works turned to vast statements of legislative authority and executive power — now asserted by newly decolonised states — but seeing new roots for them in the history of British colonial law-making.

In the 1961 second edition of *Parliament*, Jennings began now with Coke's early seventeenth century vision of parliament's authority as 'transcendent and absolute', not exactly rejecting it, but pointing to its clear functional limits while giving it theoretically global reach: 'The legislative authority of Parliament extends to all persons, to all places and to all events; but the only legal systems which it can amend are those which recognize its authority'.[185] Parliament is not subject to any 'physical' limitation, only those limits recognised by law. Law here meant simply the authority that peoples would practically accept and consent to; 'convenient general propositions' not entirely removed from social and political realities, but 'not necessarily bear[ing] any very close' relation to them.[186] Jennings noted that, regardless of the claims of statutes still on the books that purported to bind 'subjects of the Crown in America', this evidently could not include former colonial possessions over which the UK once exercised jurisdiction.[187]

As part of this view, Jennings once more contested Dicey's arguments that the rule of law prohibited wide discretionary authority and was not well served by delegated legislation. Jennings contended that this ignored the vast history of extra-Parliamentary law-making outside the British Isles,[188] which was, amidst decolonisation, in the process of being dismantled and transferred to new states.

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184 See, eg, Mara Malagodi, 'Ivor Jennings's Constitutional Legacy beyond the Occidental-Oriental Divide' (2015) 42 *Journal of Law and Society* 102; Ivor Jennings and Harshan Kumarasingham, *The Road to Temple Trees: Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Centre for Policy Alternatives, 2015) (Jennings' autobiographical reflections on Sri Lanka).

185 Ivor Jennings, *Parliament* (CUP, 2nd ed, 1961) 1.

186 Ibid 2.

187 Ibid 1.

188 Ibid 474.

Jennings listed the range of Crown rights to legislate in conquered or ceded territories where no local legislature had been set up or the right to legislate reserved, the Crown's wide powers to 'act as [it] pleases outside British territory and against foreigners follows from principles of the common law', orders binding even British subjects in protectorates, trust territories, and Crown rights to legislate for certain settled colonies.[189] Those powers, formerly exercised for Empire, which excluded international law's application in favour of imperial constitutional law, were now to be held by these new sovereigns. Jennings' vision, then, was still for a world order that based its international on both 'something like the principles of British liberalism' as well as something like the principles — to him, practised and proven — of the British Empire.

As both of these foundational orthodoxies began to slip away in the 1960s, Jennings' focus turned to delivering lectures that buttressed and explained his work drafting new constitutions for decolonising states.[190] Amidst wide discussions of diversities in local populations, educational programs, responsible government, the difficulties of constitution-making removed from local conditions, and the constitutional documents themselves, Jennings almost entirely eschewed any discussion of international law for these new states. Instead Jennings' reflections on late 1940s Asian decolonisation concluded with an examination of Commonwealth (rather than international) relations, and the suggestion that the historical and economic ties of the Commonwealth ought to guide newly independent India, Pakistan and Sri Lanka, alongside the likely benefits of a general alignment with British views of the 'power politics' of the early 1950s Cold War.[191]

By the 1960s and the era of African decolonisation, Jennings' concluding suggestions would briefly note that new African states 'have a part to play in the

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189 Ibid.

190 See, eg, the connected works WI Jennings, *The Commonwealth in Asia* (Clarendon, 1951); Ivor Jennings, *The Approach to Self-Government* (CUP, 1956); Ivor Jennings, *Democracy in Africa* (CUP, 1963).

191 Jennings, *Asia* (n 190) ch 8 ('Commonwealth Relations').

international scene'.[192] But Jennings also thought that African leaders should treat their new international powers as carefully as their fledgling domestic governmental forms, given that control over external affairs had until independence been 'matters for the Government of the United Kingdom'.[193] The Commonwealth, Jennings suggested, might be a source of friendly advice, information and diplomatic connections.[194] The danger, however, was of African alignment with communist bloc states, determined to undermine democratic systems, and importing their ideologies alongside international aid and advice.[195] More abstractly, Jennings argued that the very existence of independent states necessarily led to international 'competition', and each state tends to press their internal political organisation and culture as the mark of the ideal.[196] But despite all these international challenges, Jennings concluded that the greater ones remained internal. Constitutions could provide some solutions for self-government, but their success remained for the men — and, Jennings added, women — in public service.[197]

C *Lauterpacht's Commonwealth*

Shortly after Jennings published his constitution for a federation of Western Europe, Lauterpacht finished his own ideal plan to ensure peace through the domestic enactment, throughout the world, of an 'International Bill of the Rights of Man' that would alter the constitutions of all states to fit liberal democratic protections of individual rights. In October 1944, Lauterpacht came to call the War's frequently stated purpose of the 'enthronement of the rights of man' the most difficult problem for international organisation because it touched 'intimately upon the relations of the State and the individual', which, 'even in the domestic sphere is still a disputed province of jurisprudence and of the science of

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192 Jennings, *Africa* (n 190) 84.

193 Ibid.

194 Ibid.

195 Ibid 85–7.

196 Ibid 87.

197 Ibid 88–9.

government'.[198] Individual rights involved a still 'more drastic interference' with state sovereignty than the renunciation of war or establishing compulsory international adjudication; Lauterpacht's other major interwar projects.[199] To succeed, this new project would require 'concrete proposals', as much as a clear recognition of an international 'spiritual authority' — natural rights so-called 'without embarrassment or apologies'.[200] But Lauterpacht described the result as not so much the sovereignty of international law over the domestic laws of states, but rather the 'indestructible sovereignty of "man"' against both levels of legal ordering.[201]

One major intellectual pillar for Lauterpacht's conception of internationalised natural rights was British constitutional law and political theory. The British contribution to ideas of individual rights were relevant to the country's 'attitude' to proposals to make the International Bill of the Rights of Man part of both international law and the constitutional law of England. Britain's position 'outside the orbit of the almost universal trend of safeguarding the fundamental rights of the individual in a written constitution' was not because of the lack of a written constitution but because of British adherence to a flexible rather than rigid constitution.[202] Lauterpacht insisted that despite English detractors against natural rights — Burke, Bentham, and the analytic school with its 'negative and complacent attitude' to them, all of which had now 'become the common heritage of the world' — the 'long list' of Charters of liberty and the works of Milton, Locke and Blackstone, among others, all enthroned natural rights and influenced the various American declarations of rights.[203] But the constitutional theory that Lauterpacht pushed back on here was the absolute supremacy of parliament. Without mentioning Dicey by name, Lauterpacht contended that this theory of the

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198 Lauterpacht, *International Bill of the Rights of Man* (n 51) xxvii–xxviii.

199 Ibid.

200 Ibid xxviii–xxix.

201 Ibid 42.

202 Ibid 54.

203 Ibid 54–6 (note Lauterpacht does indeed list Burke here as a 'detractor' of natural rights).

legislature 'unrestricted by higher law' was 'of comparatively recent origin', and that it needed to be understood in and confined by its historical context; namely as replacing the arbitrary power of the king with a right of subjects to be governed by their representatives.[204]

Lauterpacht also saw this connection between English contributions to natural rights and liberty as central to allaying British resistance to the very idea of an international bill of rights on domestic constitutional grounds. He argued that an international treaty could conform to the constitution and traditions of each state, indeed here by denying the absolutism of any law-making organ throughout the world. While Britain's parliamentary supremacy and lack of judicial review of legislation might be a 'factor' connected with the International Bill forming part of the 'law of States', there was no reason why the Bill could not be implemented according to each state's constitutional forms and traditions.[205] Indeed, Lauterpacht thought it was 'possible' that parliamentary supremacy might be 'deliberately made to yield to the significant innovation implied in an International Bill of the Rights of Man': the Bill would express natural and inalienable human rights, which do deny the 'absolute supremacy of any earthly legislative power'.[206]

Lauterpacht concluded the plan by making municipal law and national courts central to its success. The Bill could not introduce a 'world law', but instead needed to look to states for its enforcement. Their laws must be adapted to the Bill's 'fundamental requirements', but also be used to adapt the Bill to local conditions. The 'municipal law of States cannot be administered by international courts possessing no requisite knowledge of the law, of the legal tradition, and of the social and economic problems of individual States'.[207] International appeals faced objections that were 'so overwhelming' that even considering the

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204 Ibid 60, quoting Frederick Pollock, 'Plea for Historical Interpretation' (1923) 39 *LQR* 163, 165.

205 Lauterpacht, *International Bill* (n 51) 65.

206 Ibid.

207 Ibid 175.

possibilities of 'softening the radicalism' of that suggestion was not worth considering in detail.[208] Instead, Lauterpacht saw municipal law as the first place in which the Bill's rights must be enforced: by being 'made part of [states'] municipal law and partak[ing] of the character of a constitutional entrenchment', matched with a 'general' international guarantee by a supervisory authority backed by the possibility of 'intervention by the political international authority' which would hold 'ultimate and effective power' to enforce the Bill's observance.[209] While the central rights like liberty, free trials, and the prohibition on slavery must be observed by states and enforced by their national courts, Lauterpacht acknowledged that wider political and social aspirational rights must simply be left to states to observe without international enforcement. Lauterpacht's list of these rights reflected some interwar and post-war problems more than others: religious and minority protections were strong and multiple, while workers', women's and colonial rights far weaker and incidental. What Lauterpacht had elaborated was a commonwealth of all humanity — or rather, parts of it — built on the adaptation of English constitutional law, and premising its effectiveness on global domestic implementation.

Lauterpacht's plan presaged and influenced many of the major elements of the Universal Declaration of Human Rights and the later twin Covenants, just as Jennings' federation would come to mirror many of the major elements of the European Union's settlement with Britain from the 1970s onwards. Lauterpacht's selective intervention scheme also presaged Cold War discussions and uses of these rights to justify interventions. But in the meantime the British Empire that had shaped their theories of domestic and international law collapsed. With the end of the War came the gradual independence of most of Britain's dominions, protectorates, and colonies in the process of decolonisation. Dying in 1960, Lauterpacht would not see this process in full swing. His last academic works largely examined the new United Nations and its innovations. In the mid-1950s,

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208 Ibid 176.

209 Ibid 177, especially the Pt 3 Art 15 requirement that every state will adopt the Bill 'as part of its domestic law and constitution'.

however, in one of his final pieces, Lauterpacht noted that the 'dogma' that international and municipal law were 'fundamentally different and disparate' had been thoroughly undermined, both by the wide extension of the scope of international law, and the reality that most constitutions around the world now formally incorporated international law into domestic law: '[i]n these — as in some other — respects what in 1924 was iconoclastic has become almost orthodox.'[210] This new orthodoxy was, as Lauterpacht hoped in his International Bill, to be put in service of a commonwealth of all humanity.

D *Conclusion*

Part Three considered the new commonwealths of Jennings and Lauterpacht and their post-war uses of the domestic and international to articulate new legal schemes for peace, decolonised government, and human rights. British imperial-constitutional law remained a strong guidance for Jennings' plan for a European federation in its dealings with inter-state disagreements, and strong models of parliamentary sovereignty with little attention to executive international functions characterised his thoughts on newly independent states. In Lauterpacht's proposal for an International Bill of the Rights of Man, the British constitutional tradition proved pivotal in reorganising the domestic laws of all nations to require their obedience to the standards of human rights, just as these very forms of government and rights would themselves soon become the focus of the Cold War ideological conflict that would feed on and eclipse the collapse of the British Empire.

V CONCLUSION: DISSOLUTIONS

This Chapter has shown how the transformations and fall of the Empire motivated Jennings' and Lauterpacht's radical rethinking of the domestic and international in a range of projects around empire, administration and international community. What began as a focus on the interaction of imperial-constitutional law with the new international legal system, turned to the uses of the 'rule of law' to guide the development of international laws, and, finally, post-war projects of European

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210 Hersch Lauterpacht, 'Brierly's Contribution to International Law' (1955) 32 *BYIL* 1, 2.

federation, decolonised independence and human rights. At that point, the dissolution of the British Empire in the 1950s and 1960s, its replacement with the Commonwealth, and the shift in Western hegemonic power from Britain to America had turned the Empire's global connections of power and law into ones of imposed culture and inescapable history; the real power and law having gone elsewhere to the conflicts of Cold War.[211] British visions of the international and domestic did not cease so much as turn to a different field: general jurisprudence. Shortly after Lauterpacht's death and while Jennings drafted new constitutions for the decolonising world, H L A Hart's analytic legal positivist 'revival' of Austin's perspective influentially contended once more that international law lacked the status of law, for lack of sovereign or command, and could not be analogised to domestic law, where these elements were central.[212] Hart's vision seemed aimed at the failures of the League, the internationalism of the decolonising world, and the apparent 'deadlock' of current international institutions that, in the midst of Cold War, could neither lawfully command nor protect in service of any ideology, but instead operated only through force, if at all.[213] The complexities of the debates over the relationship of international and domestic law now came to be dominated more by the intricacies of linguistic usage. This dissolved into an analytic project that tried abstract itself from the world events and the rise of public and international law and power that had made Jennings' and Lauterpacht's attempts to understand and link or distinguish them so urgent and important, and which burned through the Cold War unabated.

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211 On law and the end of (British) Empire, see Charlotte Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (OUP, 2013) ch 3 ('The Suez Crisis'); Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton UP, 2019).

212 HLA Hart, *The Concept of Law* (OUP, 3rd ed, 1961) ch x.

213 On Hart, primitive law and decolonisation, see Coel Kirkby, 'Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861–1961' (2018) 58 *AJLH* 535. On Cold War, see further Luis Eslava et al (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (CUP, 2017); Matt Craven et al (eds), *International Law and the Cold War* (CUP, 2019).

CONCLUSION: REIMAGININGS

What did these men believe together? What did they pick, sort, and deny to build their histories, identities, and polities in the languages of domestic and international law? Which territories did they stake for these ideas, and what did they expel to do so?

Chapter One contended that the domestic emerged as part of attempts to expel various forms of natural law connected to commonwealth and empire. This was a project of legal theology; a kind of secularisation of principles and themes in natural law thought to present early sketches of the international and domestic that focused on sovereign and state. Writing from the end of Elizabeth's reign to the early reign of James I/VI, Alberico Gentili began to offer the first account of the interaction of the domestic and international by exploring the problems and mutual constraints that might shape or restrict the operation of each, partly achieved by unifying the law of nations with the law of nature. In his first major work on ambassadors, Gentili saw the international as a set of constraints on domestic sovereign power in the service of a humanist commonwealth. In his later works on war and empire, Gentili articulated a much stronger account of absolute domestic sovereignty, analogising disputes between private citizens and sovereigns, examining imperial changes to internal laws, and ending with laudatory ideas of empire as protective jurisdiction that extended the domestic well into international legal spaces. Around the English Civil Wars and Cromwell's Commonwealth, the domestic was put to a set of very different uses, albeit with similar analogies and allegories. Richard Zouche's idea of laws between peoples emphasised the connections between internal civil law and a proclaimed system of the law of nations, using a set of detailed analogies between these two levels to articulate an idea of positive laws changeable by sovereigns in both spheres. John Selden likewise emphasised the laws between peoples, theorising a taxonomy of levels of legal ordering that included the 'domestic civil law', all of which were drawn from genealogies of nations dating back to biblical families that supported British imperial rights to the seas. Thomas Hobbes' well-known account of international and domestic politics included an overlooked but significant

emphasis on analogies between different kinds of leagues within and between families and nations that Hobbes used to articulate spheres of private absolute power within the household, public power within the state, and the ties of nation and family that justified the spread of colonies as the children of the Commonwealth. James Harrington's vision saw this empire as split into 'foreign and domestic', the justice and ordering of each resting on an opposition of control over land and laws that was ultimately used to articulate a messianic imperial mission for Britain to spread its laws throughout the world. But it was with John Locke's post-1688 work that the basis of the 'modern' account of the domestic and international finally emerged, with parliament responsible for the laws of the land, the executive responsible for exercising the powers of the law of nations, and any conflicts or differences between domestic and international law to be resolved by convention and prudence.

Chapter Two then argued the international emerged out of attempts to replace the last vestiges of natural law thought with new emphases on sentiment, utility, anti-nationalism and a new natural law of political economy. Jeremy Bentham's excoriation of William Blackstone's Lockean taxonomy of the spheres of the laws of nature, nations, and municipal law allowed Bentham to articulate a strong account of sovereignty as obedience and command that always had external and imperial dimensions. This laid the ground for his new word 'international' to describe the laws between states, which ought to be guided by principles of utility that should rationally reveal their shared interests to reject sovereign competition and national jealousies. But a parallel international along similar lines appeared in Adam Smith's contemporaneous works, which grounded the sentiment within families and nations as an alternative basis for understanding the common links and interests between them which, for Smith, undermined imperial projects of colonial preference and urged all nations to adopt domestic laws of free trade. In the aftermath of the America and French Revolutions, the domestic and international were put to a range of other uses. Edmund Burke seized on domestic ties to ground a law of civil vicinage that denied the international claims of French Revolutionary constitutions as contrary to the revived natural laws of property. Reacting in a different way, the later works of Bentham critiqued the Revolution's

revival of natural law ideas which gave way to projects of constitutional codes that developed Bentham's account of the international as primarily an internal check on legislative power, culminating in the arguments of the unfinished constitutional code that legislators must approach domestic laws as owing duties to other states and peoples too. In the wake of Bentham's death, two divergent projects for his and Smith's internationals: John Austin's influential rejection of the international as law along Benthamite lines of command and utility, and Travers Twiss's continuation of the international as a project of political economy that concluded with nation and empire.

Chapter Three argued that with the expansion of late Victorian empire, the domestic and international became thoroughly entwined in a range of areas of national and imperial law. A first phase was the apotheosis of independence tied to empire. Parliament became the focus of imperial and international law enactment, and theories of absolute parliamentary sovereignty most closely associated with A V Dicey were significantly inflected by international concerns. Wide debates over the juridical nature of the empire in its domestic, British Isles form, and its international reach turned frequently to limited powers of local self-government and imperial restrictions on full international personality. But the domestic was also used, particularly by John Westlake, as a source of analogies for expanding the reach of international law to support the imperial claims of the 1890s, which also turned on undermining or rejecting the reality of non-European domestic laws. Alongside the fixation on independence came a set of rival claims around the problems of interdependence; the use of international law to reorder and coordinate systems of domestic law throughout the world. James Lorimer fixed on interdependence as the basis for a racial reordering of the world that rejected any strong distinction between domestic and international law. Liberal jurists approached interdependence as reorganising the concerns of domestic law (Dicey) and emphasising states in both their domestic and international forms as at base an aggregate of 'men' (Westlake), to be eventually and influentially used as the basis for sharply distinguishing the domestic from the international, and insisting on states as the only real subjects of international law (Oppenheim). But socialist reactions to liberal personification provided a vision of '*the* International'

that sought to join the class orders of states across borders and critiqued the capitalist formations of domestic and foreign policy alike, announcing a project of capturing each state and reforming their relations along solidarity rather than competition. With the War that loomed over these projects in the early twentieth century came new uses of domestic and international law in peace plans, which would ultimately culminate in ideas of a League of Nations to develop international law to guide the conduct of states, and where each of these themes of race, liberal empire, socialism and peace would loom large.

Chapter Four contended that the transformations and fall of the British Empire motivated radical rethinking of the concepts of domestic and international, exemplified in the work of Ivor Jennings and Hersch Lauterpacht, first in service of explaining changing imperial-constitutional arrangements, then as the basis for a wider idea of an international rule of law, and finally in post-war visions of commonwealth amidst the dissolving empire. 1920s questions about the international personality of dominions and mandate possessions used imperial-constitutional law to limit the applicability of international law. For Jennings, dominion international status was a question of imperial not international law, and while imperial policy conventions gradually ceded genuine sovereignty to the dominions, the crown colonies and mandates remained under the absolute power of the Crown, even where those powers originated in international law in grants by the League. For Lauterpacht, meanwhile, the international legal community was undergoing a process of constitutionalization that, he contended, worked against the fixation on analogies between international and domestic law, which wrongly personified the state and undermined the possibility of stronger international duties and a genuine international community of laws, over which the League was, in the matter of mandates and other things, the real sovereign. In the 1930s, Jennings and Lauterpacht turned to the rule of law. Jennings argued that imperial administration had changed the face of domestic public law, and Parliament was practically constrained by the system of international law, both of which would ultimately lead to a fixation on the rule of law in its internal and international forms. The rule of law was primarily an international problem, and a basic account of it as law and order gave way, during the Second World War, to a

project of re-establishing world and state orders along the lines of British liberalism. Lauterpacht, on the other hand, examined the internal and international forms of the rule of law to reject the supposed inadequacy of international law and insist that domestic and international laws served the same purposes that limited the absolutism of the state and required the submission to adjudication. After the War, Jennings and Lauterpacht would each make the domestic and international central to their post-war projects. Jennings' proposals for a European federation modelled its international connections on the imperial-constitutional law of British Empire, while his decolonisation era theorising saw the internationals of new states as mostly aligned with the emergent Commonwealth. Lauterpacht's proposal for an International Bill of the Rights of Man drew on the British constitutional tradition to reorganise the domestic laws of all nations around human rights; a new commonwealth of all humanity — or rather, parts of it.

Britain's entry into the European Community in the 1970s began the gradual process of importing supranational regional law into British domestic law. Between the Thatcherite project to remove and reshape municipality in Britain and its longer neoliberal pasts,[1] and the fall of the Soviet Union, the 'domestic' in the 1990s made a sharp reappearance, entirely eclipsing the now almost parochial and quaint term 'municipal'. As the globalisation story goes, everything became global and local, with nation-states now more like individual private families in the global village, holding slight idiosyncrasies and shared heritages that were fundamentally unimportant provided they worked within the now world-dominant system of neoliberal global capitalism and its idealised preference for the liberal-democratic state form. Yet the treatment of the domestic and international in that 'New' World Order still resembled its precursors examined in this thesis; from Gentili's pan-humanist commonwealth that served peaceful communication and commerce alongside imperial expansion, through Bentham's international as the rational

1 See Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (HUP, 2018).

alignment of internal laws or Smith's cosmopolitan commercial sentiments, to the imperial ambitions of Dicey and Westlake, to Lauterpacht's vision of the international rights of all subjects.

This thesis has explored the diverse roles and projects for which the domestic and international were used. It fills one part of the significant gap in historical approaches to understanding these ideas, presenting their emergence and development in British legal thought, and laying the ground for histories of them in other legal traditions. More importantly, it has revealed a much broader set of purposes for these ideas than is imagined in today's theorising. The contingency of these past meanings and uses can form one pathway for unsettling and remaking the distinction between them as part of wider efforts to redress the imperial and extractive past with which the domestic and international are intimately bound.

This thesis has been confined to the development of ideas in the past. One important pathway for future work that builds on it is to brings its insights into more direct conversation with present concerns. At least three areas are of special importance: radical transformation of the domestic and international commercial system to redress global inequality; the prevention of domestic civil wars and the international wars they constantly risk; and addressing the existential threat posed by the climate and environmental emergencies within states and collectively. The tensions of domestic and international law are central elements in each of these current problems. The jurists examined here also dealt constantly with the general categories of commerce, war, states and nature that correspond to these present concerns. As this thesis has demonstrated, British contributions to shaping the domestic and international were deeply inflected by projects of empire. New approaches, preferably drawing on a wider range of legal traditions, will need to work to undo the assumptions and structures that empire has placed into these categories. Projects of a better future can only be built on clear readings of projects of the past. New paths will need to reimagine the domestic and international. They may reshape it, or abolish it, or find some other means that can heal the crude split.

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