

---

# *International Law as Therapy: Reading The Health of Nations*

Martti Koskenniemi

When I first read *Eunomia* as it came out in 1990, I was as baffled about it as most of its readers. It was a hard read because of its unconventional prose and because of the difficulty to situate the work by reference to any academic tradition – visible most puzzlingly in the complete absence of any notation. It was even unclear what the genre was in which this book had been written. Fortunately, I was called up to write a review for the *American Journal of International Law*, which enabled me to carry out a more sustained engagement with the work.<sup>1</sup> But increasing familiarity with the work has not made these large questions go away. The more one could look away from the form of Philip's writing, the more another set of questions set in – namely questions about what really was its message and, above all, its political implications, including political and institutional consequences for the work of the international lawyer. In this brief contribution I would like to discuss Philip's second major book, the justly award-winning *The Health of Nations*, especially by juxtaposing its form and its content and with the view to elucidating this one question: How revolutionary is it?<sup>2</sup>

I have been both fascinated and troubled by Philip's work. It is both easy and hard. It is easy in the sense that many of the things that are suggested seem practically self-evident. It is not difficult to accept Philip's analysis of the present state of human society, and especially of what he calls, in perfect logic, the international unsociety. Yet I am puzzled by the fact that the division of the social world into two spheres – the international and the domestic – that emerges as one of Philip's principal targets as being not only arbitrary but also obstructive of all beneficial change has been uncontroversial among international lawyers for most of the past century. Many other points that Philip makes – his critique of bureaucratization and of state egoism, of absence of a historical consciousness, of capitalism's alienating effects, and so on – are points that many (though possibly not all) international lawyers would agree with. And they have agreed with these points from the moment when Philip writes that philosophy ended – from around 1870 – and was replaced by the professional vocabulary – and credo – of liberal legal cosmopolitanism.

<sup>1</sup> See 87 *AJIL* (1993), at 160–164.

<sup>2</sup> P. Allott, *The Health of Nations. Society and Law beyond the State* (2002) [hereinafter *The Health of Nations*].

The hardness lies in deciphering what one should do about the analysis. The policy implications elude the reader. What does *The Health of Nations* really call upon its readers to do? This is an aspect of this book, too, which refuses to situate itself anywhere. Philip does not declare himself member of any school; there are few living writers in his footnotes (until recently, there were none); it is exceptionally hard to make out how one should react to what on the surface appears as a devastating criticism of the way societies are. This may of course be an aspect of the reader's uncertainty. Suspicious of a text that does not declare its party affiliation on the first page, the reader is invited to perform an exceptionally difficult feat. Decide yourself!

But there is another, a more important hardness. This has to do with the appeal to the self-evidence of Philip's propositions. Unmasking, crying out that the emperor has no clothes has become such a standard trope of modernity that unmasking may have itself become part of the problem.<sup>3</sup> This is most visible when the writing takes on an ironic (or is it cynical?) tone – for instance in Philip's imagined lecture to a class of law students in the year 20–. The irony betrays a resignation, or a *ressentiment*: well, I tell you the emperor has no clothes though I know you do not believe any of this because you are so indoctrinated in believing in them – 'and then you can go off and play computer games or bingo or whatever it is you really enjoy doing'.<sup>4</sup> The irony eats away the force of the criticism and the reader is left frustrated, even angry: 'so what do you know, you self-styled unmasker – you want to reveal the truth to us but all you come up with are these platitudes; we at least know the world is a complex place where nothing is quite what it seems – we reject your sense of superiority'.

Recently, in *The Health of Nations*, that ironic tone is gone, fortunately. But the sense that it is hard to take this still lingers precisely because after the effect of the wonderful style – and I will come back to this – has been excluded, there is still a sense that all this is too easy, that politics cannot just be a matter of imagining a better future, that if history teaches anything it is that even as a revolution in the mind is necessary, change also calls for a revolution in the streets. And if a revolution in the streets is called for, well, then, the easy self-evidence of truth about society vanishes and some egg-breaking will seem necessary; there will be winners and losers, and it will be necessary to choose sides. It is this, in my view, that accounts for the hardest obstacle for a full acceptance of Philip's work and message – and, let me note, an obstacle that does not contradict his analysis.

We all agree in the goal of 'making the nations sane'<sup>5</sup>, as Philip puts it. And no doubt, this requires, among other things, making them democratic. We also agree, to quote Philip again, that 'Democracy will be defined, not in terms of institutional arrangements and constitutional guarantees (which can so easily be a mask for illusion, corruption, exploitation, and decadence)'.<sup>6</sup> But what then to do when Philip

<sup>3</sup> As argued in Peter Sloterdijk's important, *Critique of Cynical Reason* (Transl. by Michael Eldred, Foreword by Andreas Huyssen, 1987).

<sup>4</sup> Allott, 'New International Law. A First lecture of the Academic Year 20–', in P. Allott *et al.*, *Theory and International Law. An Introduction* (1991) 108.

<sup>5</sup> *The Health of Nations*, at 131.

<sup>6</sup> *Ibid.*

continues that democracy should be defined ‘in terms of the health and happiness of the people’. How useful as a call for action is that? Surely these notions are no less immune to ‘illusion, corruption, exploitation and decadence’ than any other contemporary slogans.<sup>7</sup> References to Foucault and Marx are among the few that appear throughout Philip’s writings. Surely we need to remember what they wrote about the use of ideas such as ‘health’ or ‘happiness’ as names for subtle forms of oppression.

So this is my quandary. How to fit the unmasking ethos, the attack on all public structures of thought and action with which one intuitively agrees wholeheartedly, with the leap of faith demanded of the reader into a world of complete innocence, unmediated solidarity, love – ‘health and happiness’. This leap of faith may seem easier because it is embedded in a baroque aesthetic; but surely unmasking will require also unmasking that aesthetic.

## 1 A Baroque Aesthetic

The first thing that catches one’s attention in Philip’s work is the aesthetics, an aesthetics of *grandeur* within which it is enfolded. It is a Bernini sculpture, a poetic sermon, Zarathustra speaking. There are many ways in which this stylistic effect is achieved. It is achieved by an ascending *staccato*: repetition of simple sets of words at the beginning of successive sentences.

To conceive of *international law* as the true law of a true international society is to deny the ideas that international law is not law or is not law of a society. To conceive of *history* as a possible story of all human collective self-constituting is to deny the idea that there is *not*, and cannot be, a history of international society. To conceive of the institutional arrangements of inter-statal international society as possible institutions of an international *society-under-law* is to deny the idea that international law is merely the externalising of national government. To conceive of the history of interstatal society as the history of the *abuse of public power* is to deny the idea that diplomacy is the natural default-system for organising a world of ‘states’. To conceive of *international society* as the society of all human beings, and the society of all societies, is to deny the idea that the human world is a state of nature in which all human beings must continue to pay the terrible price of unsocialised power.<sup>8</sup>

In this paragraph, as in countless other paragraphs in *Eunomia* and *The Health of Nations*, several stylistic moves unite to create a rhythm of intensive vertigo: the steady beat that opens each sentence: ‘To conceive . . .’; the flow of the italicization from the starting-point of ‘international law’ to the sudden, sharp ‘is’ and ‘is not’, then streaming into the long and abstract ‘history’, ‘society-under-law’, ‘abuse of power’ and ‘international society’ and back to the cadence of the final ‘is’; the lightness of the play with words such as ‘international’ and ‘society’ as they turn up in different variations at surprising intervals in successive sentences. This is surely an invitation to a *viva voce* reading – perhaps even more to a dance whose tempo promises to align with the rhythm of one’s heart so that in the end no distinction can be made between the music and the dancer. They have become one *Gesamtkunstwerk* in which the harmony

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* at para 1.67, 34–35, chapter references within parentheses omitted.

between aesthetics and proposition, form and content seeks to convey to us an overwhelmingly convincing image of hidden (because transcendently guaranteed) order. This is Baroque: the work's movements representing the world's intrinsic structure of which that representation is a part.<sup>9</sup>

This impression, or feeling, is achieved by other stylistic devices, too, for instance by repeated recourse to archaism, or biblical expressions – sentences that draw a conclusion are often opened with 'And so it is that. . . .' – a technique that bridges the gap between argument and conclusion by drawing upon an obscure association to something vaguely religious or deeply philosophical.

So it is that international society now contains the potentiality of a human future determined by the unrelenting force of the social actual. . . .<sup>10</sup>

'So it is' – but precisely what is? To say that 'what tomorrow will be is determined by what today is' would of course be true, but trivial. To become a call to political action – that is the context in which the sentence appears – the triviality must be made to seem a truth that is both hidden and self-evident so that the unmasking ethos can do its work. The listener is engaged – after all, the sentence says something that is already known, but now known with the aura of a revelation of an incontrovertible ('so it is') truth. And when the reader has finally relinquished all defences, he or she may perhaps be able to feel at home with such things as 'the reality of reality'<sup>11</sup> and the 'transcendental philosophy of philosophy, the human mind transcending all previous transcending of itself in consciousness',<sup>12</sup> and may accept the call to especial watchfulness by being reminded that 'evil minds corrupted the minds of millions'.<sup>13</sup>

And what function does this form serve? Well, surely nothing short of this kind of language can create the impression that 'perennial truths' are being conveyed. Something more takes place here than mere argument. The style invites the reader to step into the stream of history, somewhat like the Palace of Versailles, to participate in the conversation of humankind that is taking place here. Within one page, taken almost accidentally from *The Health of Nations*, the reader is invited to agree with – or at least consider – propositions from Hegel, the German *Aufklärung*, Wittgenstein, Freud, Marx and Charles Darwin – not just as names, dropped in accordance with academic convention, but as flags for enormous propositions, all fitted within the space of 37 lines.<sup>14</sup> Grand words: we are faced with *infinite* possibility, *formidable challenge*,<sup>15</sup> 'precious moments of illumination'.<sup>16</sup> A 'New Enlightenment' will demonstrate that there

<sup>9</sup> For such a reading of Baroque with reference to 18th-century court culture with a 'mixture of ambition and anxiety', especially in Louis XIV, see T. C. W. Blanning, *The Culture of Power and the Power of Culture. Old Regime Europe 1660–1789* (2002), at 30 *et seq.*, 59, 73.

<sup>10</sup> *The Health of Nations*, para. 3.51, at 94.

<sup>11</sup> *Ibid.*, at 74

<sup>12</sup> *Ibid.*, at 99.

<sup>13</sup> *Ibid.*, at 91.

<sup>14</sup> *Ibid.*, at 97–99.

<sup>15</sup> *Ibid.*, at 99.

<sup>16</sup> *Ibid.*

is 'only one human world'.<sup>17</sup> There, 'the self-knowing of the human mind'<sup>18</sup> will be reflected in 'the substance of human self-contemplating'.<sup>19</sup>

There are other techniques. The numbering of paragraphs in both *Eunomia* and *The Health of Nations* suggests that each idea is precisely where it should be. That the world as ideas can be faithfully organized as a totality of paragraphs, divided and subdivided in groups; so that understanding the world is to be able to reproduce it like a Bach fugue, as an unfolding of parallel and symmetrical themes in mathematical succession. This is monism: what is said in paragraph number 3.51 of *The Health of Nations*, for instance, quite simply reproduces truth number 3.51 in the world's architecture. Appearance meets with reality so that it is no longer possible to separate one from another: two melodic lines meet so that the listener hears only one, and feels harmony. If Philip writes that there are 'eight systematic implications of [such] an idea of the social function of law in general',<sup>20</sup> then eight there are, no more and no less – like the insect that has eight legs as a definition of its species.

This style simultaneously affirms and erases the authorial voice. This is an absolutely central aspect of the aesthetic effect of *Eunomia* and *The Health of Nations*. *Affirmation*: this is a writing that one seldom sees – one tends to think it not only rare or personal but highly idiosyncratic. A few lines of this text, and every international lawyer will know who has written them. *Erasure*: but it is a voice that denies its own personality and seeks to rise above anything as superficial or flimsy as authorial. Where Roland Barthes famously analysed the *effet de réel* in literature, the power of the literary style – the style of 'realism' – to create the impression that reality itself spoke in it, Philip uses an *effet d'histoire* – an effect as if history itself were speaking in his writing. I do not only mean that the first person is absent. It is absent in most writing that aspires to a 'scientific' or objective analysis. The lack of the first person here connects with an exceptionally powerful sense that something larger is being conveyed than mere authorial meanings, that the text itself is part of the stream of historical narrative within which it invites the reader: this was written by reality herself, and not in a disinterested manner but in order to make a normative point.<sup>21</sup>

Thus Philip often makes analytical and normative propositions appear as if they were propositions about history. Their truth-value and normative power emerge from the appeal of the narrative he tells about the way the world came to be as it is. In the essay on 'Globalisation From Above', for instance, the need for and direction of change in international society are deduced from a history of the development of the notion of 'the ideal'. We are told that in Greek thought, there first developed the capacity of rationalized abstraction: the particular as an instantiation of its universal idea.

<sup>17</sup> *Ibid.*, at 95.

<sup>18</sup> *Ibid.*, at 81.

<sup>19</sup> *Ibid.*, at 74.

<sup>20</sup> *Ibid.*, at 290.

<sup>21</sup> For the uses of historical writing in these ways, and on the moralizing character of history as narrative (in contrast to, for instance, chronology), see White, 'The Question of Narrativity in Contemporary Historical Theory', in H. White, *The Content of the Form. Narrative Discourse and Historical Representation* (1987), at 35–57 and *passim*.

Then developed dialectics – the presentation off all ideas in terms of a duality, idea and its negation. Finally, turning to its environment, the mind conceived present society as a dialectical relationship between actuality and ideality: social life as a process of becoming that which is already embedded in its present being. The present pregnant with the future.<sup>22</sup> To know the future – and more importantly, to know how oneself should act in the future – one should know the present. But the present could only be understood by reference to its past.

Now this narrative is told as history comprising three successive stages taken by the collective mind in order to emerge where it now stands: facing the necessity to judge the international world by reference to its ideals of the good society. The mind cannot avoid – dialectically – assessing actuality in view of its ideal properties (its possibility and its desirability). History itself, to quote Philip, ‘generates a powerful attractive force inclining us to actualise it’.<sup>23</sup> This is romanticism: if evolutionary biology generated physical love to negate physical separation, ‘so it has made possible the power of spiritual love to negate the opposition between the present and the future with a view to the creation of better life, including better life in society’.<sup>24</sup>

## 2 The Politics of Conservative Revolution

So the need for political action – and presumably radical change – arises naturally from the irresistible flow of history understood as the phylogenesis of the human mind. There is no analysis of the state of the present. It is simply taken as a disaster. And how did it come to be such a disaster? This is an absolutely crucial point in Philip’s analysis. How did history go wrong? Because people – or at least some particularly well-positioned people – became mad. The mind went crazy by succumbing to the most human of inclinations: greed, egoism, evil. This is why a revolution in the mind and not in the streets is necessary – a revolution conceived as therapeutic treatment of an illness: politics as psychiatry.

Fortunately, history which has created the illness has also provided its cure. The analysis suggests that just as there has been a single history that has taken us to this point, the natural, biological, social etc. laws – if only they were allowed to function unhindered – will also undo the disaster that is the present. *Moral freedom is moral desire*.<sup>25</sup> That is, once the mind understands its predicament in history, it will be able to draw the right conclusions for a transformation of the present. The fact of human

<sup>22</sup> Allott, ‘Globalisation from Above’, in *The Health of Nations*, at 81–84.

<sup>23</sup> *Ibid.*, at 83.

<sup>24</sup> *Ibid.*

<sup>25</sup> Something here smacks also of the utopian Left – especially the view that the problems of society are psychological, the tragedy of the simultaneous offer and fear of freedom in modernity on the one hand, and the recapture of freedom through combining ‘imagination’ with a planned economy. See e.g. E. Fromm, *The Fear of Freedom* (1960), esp. at 207–238 and *Idem, Beyond the Chains of Illusion* (1962). Likewise, parts of *The Health of Nations* recuperate the (Left) critique of technology and of the ‘happy consciousness’ of a one-dimensional society in which, as Marcuse once put it, the ‘ideal’ is reduced to the ‘real’, as well as, perhaps, the creative cure of dialectics in the service of transcendence. See especially H. Marcuse, *One-Dimensional Man* (2nd ed., 1991).

disagreement is wiped away here (though it emerges elsewhere): like the naturalism of Rousseau's critique of Grotius and Burlamaqui, like the capitalism of Marx's critique of it, and like communism, as portrayed in Hayek's attacks, there is a sense of natural necessity for the transformation that leads to the question and the danger of the conscious avant-garde. How does Philip know? And why should we believe him?

The *effet d'histoire* calls upon the readers' agreement to a political project: the three stages, the present condition, the love – the moral desire – that will impel us from this towards the future. A political conclusion – revolution in the mind – is drawn from a historical aesthetic: sensitive to it, the avant-garde will understand the message of history, and is able to feel love.

To this type of aesthetics is connected a particular kind of politics, the politics of conservative revolution.<sup>26</sup> Four aspects characterize its sensibility. These are the points of disagreement with Philip's work that I was requested to introduce. Let me briefly run through them.

First of all is the appeal to self-evidence. That the present moment is a disaster is taken for granted. But that is not the main point. What is also taken for granted is that *everyone already knows this*. This is the boy crying out that the emperor is in fact naked. We know that the international world is pain and suffering and injustice; that people – Philip says somewhere 'morally sensitive people' – feel pain and anguish about the world is simply a fact. If you do not feel this, well, then you are not morally sensitive, or perhaps, then your mind is sick. The writing is so strong, the *effet d'histoire* so compelling, that there is no room for argument; there is only the avenue of stepping in its stream in full agreement.

I sat in a taxi in Geneva on my way from the session of the International Law Commission to the airport two weeks ago. The cab driver asked where I was coming from and as I referred to the UN he slowly but with increasing sharpness – also with increasing voice and less attention to the traffic around us – starting criticizing the world leaders – 'what have they ever done for anyone. They come here to their endless meetings, stay in the best hotels, eat in the best restaurants. They come to Geneva only to smoke their big, fat cigars and to check their bank accounts while the rest of the world is compelled to look at the swollen stomachs of the children of their countries. Les politiciens, les ambassadeurs, l'ONU – ce sont des mafias ce gens-la. No Monsieur, je dit, ne venez pas ici. Rester là ou on a besoin de vous. Ne trahissez pas votre people en mangeant de foie gras en Genève.' I have to say I felt anxious about how to respond. After all, I had to make sure he would take me to the airport. I needed not to disagree with him, at least not too sharply. And what was there to disagree with, apart from the tone of voice, the racism of his remarks.

<sup>26</sup> By 'conservative revolution' I do not mean the aesthetics of politics of the American new right but rather a more traditional European sensibility, manifested in Edmund Burke and, perhaps, in part in the cultural Right (and paradoxically also Left) of the Weimar republic. See e.g. R. Woods, *The Conservative Revolution in the Weimar Republic* (1996). See also J. Herf, *Reactionary Modernism. Technology, Culture, and Politics in Weimar and the Third Reich* (1984), especially the discussion at 18–48. Of course, there is no glorification of violence anywhere in Philip's writing.

I do not think these are Philip's views. But I want to suggest that there is something in those views that links up with Philip's view of the present world as a disaster as being self-evident and no longer worth argument and demonstration. But if all this is so self-evident, why then can this go on and on. In Philip's words, 'Why do we put up with it all?'

This brings me to the second aspect of Philip's politics that I associate with the conservative revolution. The problems of the world are imputed to the evil manipulations of national élites and political leaders. While the people know the truth (morally sensitive people, that is) the leaders that have, in their self-interest quest, thrown a smokescreen over the truth. They use the Vattelian separation of the domestic from the international so as to project their self-interest as the interest of their nations.<sup>27</sup> By making the people believe in those nations, they have made them their servants. As with my cab driver, a particular burden falls on the diplomatic class, the *international Hofmafia*. Had the driver been an educated man, he might have used that expression. But he certainly would have agreed with Philip: 'The only human right which is universally enforced is the right of the rich to get richer'.<sup>28</sup>

The problems of the world thus emerge from 'a clique of cliques, a conspiracy of one small part of the governing classes of . . . national societies'.<sup>29</sup> This all started with the *ancien régime*, was articulated by Vattel and transferred into politics with the Vienna settlement of 1815 and the inauguration of the Public Law of Europe. Bad turns to worse: 'Twentieth-century international politics has seen the rise of an international ruling class of unprecedented size, power and arrogance'.<sup>30</sup> We do not need to look far to see the members of that class. The ideas of 'governance' (instead of government) rule within the European Union – connoting government by the ruling class instead of the society itself.<sup>31</sup> 'The EU is the greatest achievement of the new international ruling class'.<sup>32</sup> No doubt the Geneva cab driver would agree.

The conservative idea of corruption ran through his comments as they animate much of Philip's work. The *ancien régime* was corrupt by definition. More severe is the betrayal of the heritage of the French and American revolutions in the course of the 19th century, in particular the perpetuation of the division between the national and the international realms. Since the 1870s, Philip suggests, almost nothing has gone right. Philosophy and constructive thinking ended in the mid-19th century. Up until then, social dialectic took its natural course. But then something happened and everything stalled. 'Social philosophers, despite their achievements in the revolutionary

<sup>27</sup> This is a point that Hans Morgenthau often made and with emphasis. He however saw it as an aspect of the nature of politics: power politics among states was based on a transference of the individual's drive for self-assertion. Unlike Philip, Morgenthau was not a 'revolutionary' – he did not believe this process could essentially be changed. See M. Koskeniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (2001), at ch. 6 and R. N. Lebow, *The Tragic Vision of Politics. Ethics, Interests and Orders* (2003), at 222–230.

<sup>28</sup> *The Health of Nations*, at 92.

<sup>29</sup> *Ibid.*, at 380.

<sup>30</sup> *Ibid.*, at 396.

<sup>31</sup> *Ibid.*, at 162.

<sup>32</sup> *Ibid.*, at 397.



reconceiving of national society, mysteriously failed to extend their vision to encompass the condition of humanity as a whole.<sup>33</sup>

It was due to this failure that it has been, for instance, possible 'to induce people to suppose that it was their patriotic and moral duty to kill and be killed by their neighbours on behalf of their so-called commonwealths'. That people came to hold this as natural was the great scandal. 'Evil minds corrupted the minds of millions'.<sup>34</sup>

The third aspect of this idealism is the appropriation of the voice of the first person plural. Against the corruption of the ruling classes, Philip puts an undefined 'we'. 'The people and the peoples of the world must find a way to communicate to the holders of public power – the *international Hofmafia* – their moral outrage at the present state of the human world'.<sup>35</sup> The first person plural will undo the corruption of the third person plural. 'We have learned' that the conditions of modernity, Philip argues, borrowing from Marx, that have made this ruling class possible have also created the conditions of its downfall. But how does that happen? How do 'we' bring down the ruling class? This is an aspect of the absence of a political theory in Philip's writing. After the 'Nations' have been restored in their 'Health' through the therapeutic effects of everyone finally seeing the truth, all the rest (what rest?) will either happen automatically or will be left for the projects that enlightened human beings will now be able to agree upon in their (now enlightened) political processes.

And the fourth aspect has to do with the precise description of the disaster of the present. Where does the unacceptable nature of the present lie? Universal values were degraded after 1945 by rationalization, legislation, bureaucratization. In place of these values, Philip writes, we now experience the hegemony of the economic field, the spirit of pragmatism, the poverty of modern politics and of modern philosophy.<sup>36</sup> From all this an indictment against modernity emerges, its alienating effects connecting with a distinct conservative tradition. The loss of universal values and of spirituality in general appears culturally as a loss of authenticity of our communities and indeed the replacement of a live sense of community with rampant individualism. The narrative that leads from (primal) unity to (modern) fragmentation resonates with Rousseau and Heidegger: not least when 'technocratic fallacies' are identified as responsible for impeding 'Europe's reunification'.<sup>37</sup> In the complete immanence that modernity pretends

<sup>33</sup> *Ibid.*, at 90.

<sup>34</sup> *Ibid.*, at 89, 91. There is an aspect of élitism in these views. 'A revolution in the mind' is accomplished everywhere by the greatest minds. In Philip's discussion of the Crisis of European Constitutionalism – the most spirited of his spirited writings, the nature of European societies – Britain, France, Germany – is completely told as a narrative of great minds – Goethe, Michelet, Hegel, Arnold. No doubt, Philip would not say that those minds actually *created* the work of imagination in which their countries recognized themselves. But they acted as necessary instruments for the spirit of the nations to realize itself. The same effect appears in the role Philip gives to Emmerich de Vattel in creating – or again, perhaps better 'articulating' – the split between the domestic and the international that became internalized in our understanding of the nature of human social reality and which, for Philip, is responsible for the conditions of unsociety in today's world.

<sup>35</sup> *Ibid.*, at 399.

<sup>36</sup> *Ibid.*, at 311–312.

<sup>37</sup> *Ibid.*, at 218.

to be '[w]hatever remains of the transcendental (in religion and philosophy) is seen merely as a socially tolerated contingency'.<sup>38</sup>

Now this loss of spirituality is conceived as a collective madness, a *psychopathology* reproduced incessantly in 'the actual day-to-day practices of human beings'.<sup>39</sup> The slow grinding of the historical machine through the motions of its individual nuts and bolts – that is to say, all of us – 'has produced a diseased social reality, a psychopathic condition which threatens the survival of the human species'.<sup>40</sup> Those members of 'exceptional social power may even impose their own psycho-pathology on the society they dominate'. As a result of individual madness, society goes mad.<sup>41</sup> Where national constitutions were allowed to develop naturally, no such natural development occurred in the international realm. All that was there was 'an intoxicating mixture of urbane diplomacy and mass murder'.<sup>42</sup>

The point at which the conservative revolution crystallizes in *The Health of Nations* is this diagnosis of the international society as mad. The corrective – 'revolution in the mind' – then becomes its therapeutic treatment aimed at re-spiritualization and at curing the collective schizophrenia of the Vattelian error, the division of the world into the domestic and the international. What remains would be to complete the social revolution achieved in national societies but so far not in the international society. In Europe, this would mean the imposition of the 'constitutional idea' over the power of the bureaucracy. The conservatism in all this lies in the suggestion that the voyage is one of returning home after long years of insanity through a therapeutic application of 'the . . . elementary propositions of idealist philosophy'.<sup>43</sup>

Now there are both strengths and weaknesses in this story. On the strength side, it suggests that everything is doable, that progress and freedom are the natural course of history and the only thing is to figure out how this could be channelled in society – this is what the idea of 'constituting' (instead of constitution) seeks to achieve. This resembles the call for transformation repeatedly made by Alejandro Alvarez in the first half of the century and the arguments of the solidarists of the inter-war period, for whom the most important international law representative was Georges Scelle.<sup>44</sup> They too believed that something they called *la solidarité* would bring the factual and normative aspects of society together in a monistic whole. The natural laws of social development themselves – science, technological and economic progress – would eventually sow the seeds of liberation as a matter of mind and obedience: mind to understand what was necessary – obedience once the necessary had revealed itself.<sup>45</sup>

The weakness of solidarism – and I think of Philip's writing – lies in a certain aestheticization of social problems, a downplaying of the importance of actual disagreement,

<sup>38</sup> *Ibid.*, at 373.

<sup>39</sup> *Ibid.*, at 88.

<sup>40</sup> *Ibid.*, at 88.

<sup>41</sup> *Ibid.*, at 292.

<sup>42</sup> *Ibid.*, at 295.

<sup>43</sup> *Ibid.*, at 264.

<sup>44</sup> See especially A. Alvarez, *Le droit international nouveau dans ses rapports avec la vie actuelle des peuples* (1959); G. Scelle, *Précis de droit des gens* (2 vols, 1932–34).

<sup>45</sup> On solidarism in international law, see especially Koskenniemi, *supra* note 242, at ch. 4.

indeed the characterization of it in terms of the error or perhaps ‘madness’ of one (or both) of the parties. Philip’s writing reads like the sermons by the conservative priests in Rousseau’s Geneva in the middle of the 18th century, appealing for love and human goodness over the riots through which the bourgeoisie challenged the corruption in the City Council.<sup>46</sup> In the battle between the bourgeoisie and the aristocracy, the latter always called for a revolution of the mind against the revolution in the streets; a return to what was best in tradition (Burke) rather than forward to freedom in modernity (Constant).

Behind this there is something like a political theology. Philip’s work refers back to a faith that is unquestioned, the transcendental that we recognize in the aesthetic appearance of his writing but that finds no real articulation in his argument – beyond the call to ‘sanity’. Perhaps it cannot find an articulation because God can have no image so that God’s presence will have to remain an elusive, yet tangible absence, the Other of our thoughts and actions. I do not know if my *Genevois* cab driver was a religious man, but he might have been. In his world, people would be better off if they were freed altogether from the political class – if they were, in a true Calvinist fashion, able to communicate with God directly, without the mediation of the professional service-providers. Christ against St Paul!

Law too participates in this *effet d’histoire* as the technique through which a society’s past is carried forward into its future. This is quite a beautiful idea that envisages law as society’s operative, historical memory on the basis of which the society grapples with its present challenges and orients itself towards the future. Again, I am in great sympathy with this sense of the law, even as I recognize its intrinsic (Savignyan) conservatism. How ‘revolutionary’ is that view *eigentlich*? As Philip writes that law is present everywhere, I connect this with Hans Kelsen’s and Hersch Lauterpacht’s view of the absence of gaps in law: for each, law as language always constructed the world as a whole, transforming natural human relations into legal relationships – powers, rights, duties – thus making everything from war to the organization of the economy matters of public interest.<sup>47</sup>

For the past 130 years, international lawyers have tried to rid themselves of the Vattelian division. Modern international law was not born to celebrate sovereignty but to attack it, and the intellectual development of the discipline has been about recurrent attempts to articulate always anew, and thus to strengthen the power of a cosmopolitan and gapless legal system over the sovereign egoism of the state. The ideas of European civilization, the formalism of a Kelsen or a Lauterpacht, the sociological jurisprudence of a Georges Scelle or a Myres McDougal, as well as, for example, the ‘struggle against impunity’ today – have been about doing away with the division of the world into two separate realms of thought and action, the national and the international. And often this leap has been made in terms of the domestic analogy, by conceiving the socialization process in the international world by reference to our domestic

<sup>46</sup> See H. Rosenblatt, *Rousseau and Geneva: From the First Discourse to the Social Contract, 1749–1762* (1997).

<sup>47</sup> See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (2nd ed., 1927); H. Lauterpacht, *The Function of Law in the International Community* (1933).

experience. After all, Lauterpacht's dissertation in London was precisely about private law analogies and when he wrote a draft for a statement to Hartley Shawcross at Nuremberg he inserted a sentence to the effect that '[t]he mystical sanctity of the sovereign State... is arraigned before the judgement of the law'.<sup>48</sup> Shawcross did not include that sentence – and I think correctly. In the end, of course, the Tribunal stated that crimes against humanity are not committed by abstract entities but by individual human beings.

So I want to suggest this: Philip is not really a challenger but a continuer of a tradition that always sought new ways to articulate the basis for a universal law. This may not be visible owing to the level of abstraction of his prose, his unwillingness to engage with institutional proposals beyond sovereignty. Where Kelsen, Lauterpacht or Scelle did engage with the League of Nations or the United Nations, and the vulnerability of their idealism became visible precisely as they were doing this, Philip replaces institutional imagination with a theological purification: instead of St Paul, Christ; instead of Lenin, Marx.

As an international lawyer, Philip seems to be less of a revolutionary than a purifier of tradition – brushing aside institutional tinkering to incite us back to basic axioms and principles ('elementary propositions of idealist philosophy'<sup>49</sup>). His appeal to us is the same as the appeal of a clergyman showing his congregation how far they have strayed from the good path, who speaks again of sin and redemption and all the horrors of hell and thus makes us feel spiritualized as we leave the church to lead our private and professional lives as we have always done. Of course, this is a valuable service. But it is not a revolutionary service.

In his essay on European constitutionalism, Philip finally identifies a three-point agenda of reform: 1) integration of history to the European Union; 2) creation of a public mind and a public politics, and 3) formation of a 'dynamic social consciousness'.<sup>50</sup> Though this is very abstract, it is as concrete as Philip is willing to become. I do not intend to say they are meaningless proposals; I think they point to where the important tasks lie, and I agree with them. But they leave all the work still to be done. First, *what* history or *whose* history is it through which we wish to read the European Union? Second, *what is* a public mind and what kinds of institutions does it require for the politics to become something European politics now is not? And third, how does 'dynamic social consciousness' relate to or differentiate from the projects of good life that different parties, factions, stakeholders, individuals have brought and continue to bring to European institutions?

Philip writes '[t]he only power over power is the power of ideas'.<sup>51</sup> But the power against which ideas are invoked is also the power of ideas – the power of *contrasting ideas*. And the force of the (idealist) critic relies no less on tangible, hard power – position, strategy, manipulation and money – than the force of the *Hofmafia* does. The view

<sup>48</sup> Draft opening statement by Hersch Lauterpacht, Lauterpacht Archive, Cambridge, copy on file with author.

<sup>49</sup> *The Health of Nations*, at 264.

<sup>50</sup> *The Health of Nations*, at 226–228, 283–285.

<sup>51</sup> *Ibid.*, at 228.

that the predicament of the reformer or the revolutionary is usefully described in terms of 'ideas' versus 'power' is wrong. There is no power that would not dress itself in ideas about the good, the right, the useful and so on. Even Himmler's notorious speeches to the SS described the Final Solution in terms of ideals. Power is ideas. And there are no free-floating ideas waiting to be grasped by influence, only ideas transmitted through and calling for realization through institutions and actors well positioned in such institutions. *Ideas and institutional power cannot be detached from each other in the way Philip suggests*. Revolution in the mind calls for a revolution in the streets just as the latter can only take place if the former is already under way. The battle is not between power and ideas but between *ideas and ideas*, between *power and power*. This makes the choice much more difficult: an aesthetic that grasps not only language but also rules, institutions and ways of political being. A real revolution would not lead back to Marx but to Lenin, not to Christ but to Saint Paul.<sup>52</sup>

<sup>52</sup> As controversially argued in A. Badiou, *Saint Paul. La fondation de l'universalisme* (1997).

