

ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

# Prometheus caged: The exiling of Napoleon and the Law of Nations, 1814–1821

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## Abstract

This article explores the exiling of Napoleon Bonaparte, Emperor of the French, in 1814 and 1815. It argues that in confronting Napoleon's sovereignty and trying to remove him, the allies were forced to make a highly pragmatic, improvisational, and incoherent use of international law. Much of this stemmed from that fact that they were trying to implement a Great Powers political system within and through a legal system that was antithetical to any such concept. Because of this the allies move between employing traditional, domestic understandings of sovereignty, to treating sovereignty as something capable of international control and distribution. This results in an incoherent legal argument and narrative, with each turn of the tale adding layer upon layer of further confusion and contradiction. The conclusion of all this is Napoleon's miserable dispatch to St. Helena by the British government – speedily done and in fear of a legal challenge.

**Keywords:** exile; Great Powers; Napoleon; sovereignty; Vattel

## 1. Introduction

Napoleon caused some difficulties for the sovereigns of Europe during his time as Emperor of the French. He caused no less trouble in defeat. Overthrown first in 1814 by invading allied powers and dispatched to an exile on Elba, Napoleon returned to France the following year to seize power<sup>1</sup> only to be defeated again (and for good) at Waterloo.<sup>2</sup> Thereafter, he was exiled to the remote Atlantic Island of St. Helena where he died in 1821, still under British custody. While these two moments – 1814 and 1815 – are remembered primarily for their acute military and political struggles (Napoleon was not one to give up power easily), they are no less important for the history of international law. For better or worse, Napoleon was the sovereign of a great power. In dealing with him in defeat, the allies (principally Russia, the UK, Austria, and Prussia)<sup>3</sup> had to navigate that sovereignty, devising legal solutions (or at least justifications) through which Napoleon could be exiled or otherwise punished/removed as a threat.

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<sup>1</sup>An escapade that has become known as 'The 100 Days'.

<sup>2</sup>These events can be found in any of the plethora of books outlining Napoleon's life. For an account of the military dimension see D. Chandler, *The Campaigns of Napoleon* (1973). Containing both the military aspects as well as the political, see M. Price, *Napoleon: The End of Glory* (2016).

<sup>3</sup>The use of the term 'allies' for the victorious powers is somewhat misleading. Napoleon's army also made extensive use of alliances and non-French soldiers.

This article explores these improvised attempts. ‘Improvised’ is not an idle word selection – no unified legal methodology was employed by the allies, with different doctrines and devices being deployed in different settings and by different allied powers depending upon their respective (and changing) motivations. Generally, the allies attempted to transfer the generation and the foundation of sovereignty from a domestic setting into something capable of co-ordination and distribution at the global level. But this practice is far from uniform or stable. During 1814 and 1815 respectively, the contours of sovereignty were fluid, creating a method of legal argument that slides incoherently between conceptual gauges. Because of that movement, the role of sovereignty here is essentially ambivalent: it (sometimes) serves as tool to legitimate action and (sometimes) acts as a constraint that must be confronted, and depending upon the exigencies of the moment, multiple ideas of sovereignty can be simultaneously engaged, making sovereignty (paradoxically) at once facilitative and inhibitive.<sup>4</sup>

A great part of this incoherence surrounding sovereignty comes from the structural transformations and confrontations taking place within the law of nations and European politics at that time – each of which would leave their mark on the treatment of Napoleon. Firstly, from the dual pressures of Enlightenment literature and the challenge posed by the revolutionary French Republic, the location of sovereignty was shifting from the personal rights of monarchs to being embodied in the nation.<sup>5</sup> Second, the natural right foundations of the law of nations, found in the treatises of Pufendorf and Vattel, were evolving towards the proto-positivism of thinkers like Hauterive, Martens, and Klüber. Third, there was a movement towards a unified Great Power system of international relations, in which five main powers would abrogate to themselves the capacity to manage disputes between states, control territorial distribution, and to interfere in the affairs of less powerful states as and when occasion demanded.<sup>6</sup> The culmination of these transformations was the international order emerging from the Vienna Congress: an order of sovereign states, professional inter-state diplomacy, all under the aegis of five dominate European powers – dividing and assigning territory (on population and other metrics) to preserve the balance of power, suspending the sovereignty and intervening in the internal affairs of weaker states when they threatened the ideological roots of the established order.<sup>7</sup> In the course of these transitions and ruptures leading to the Vienna system – the opening up of conceptual cracks and liminal spaces – the boundaries and hierarchy between the national and international, the monarch and the nation, natural law and positivism, would become necessarily destabilized, and it was around and through sovereignty doctrine that this destabilization manifested itself.

The connections between this Great Power system and sovereignty have previously been explored by Gerry Simpson.<sup>8</sup> According to him, while all states were nominally sovereign and equal, the Great Powers in 1815 were able to instantiate a legal hierarchy and anti-pluralist order that legitimated their intervention in other nations – nations that were deemed ‘outlawed’.<sup>9</sup> Whether Napoleonic France was an outlaw state is unclear in Simpson’s analysis, as he tends to fast-forward through the Napoleonic Empire, to a restored Bourbon France welcomed into

<sup>4</sup>That international legal discourse has been organized around an indeterminate binary is a well-established one within the literature. See D. Kennedy, *International Legal Structures* (1987); M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006). In contrast to the binary presented by Koskenniemi, I am not suggesting that the dialectic in response to Napoleon moved between utopian and apologetic styled arguments. The fundamental axis is one concerning the location of sovereignty, between the primacy of the national and international.

<sup>5</sup>M. Belissa, *Repenser L’Ordre Européen (1795-1802): De La Société Des Rois Aux Droits Des Nations* (2006).

<sup>6</sup>H. M. Scott, *The Birth of a Great Power System, 1740-1815* (2013), 1–7. The Great Power system was not a replacement of the balance-of-power concept typically associated with Europe but its refinement. E. V. Gulick, *Europe’s Classical Balance of Power: A Case History of the Theory and Practice of One of the Great Concepts of European Statecraft* (1955).

<sup>7</sup>For a recent analysis of the Congress of Vienna and the construction of this order see G. Sluga, *The Invention of International Order: Remaking Europe after Napoleon* (2021).

<sup>8</sup>G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004).

<sup>9</sup>*Ibid.*, at 6.

the Concert of Europe.<sup>10</sup> This omission is surprising since Napoleon was formally outlawed by the Great Powers after his flight from Elba. In contradistinction to Simpson's glossing over of Napoleon, this article argues that if we are properly to understand the emergence of the Great Power system and the role of sovereignty within it, the influence of Napoleon must be recognized. Through the emergency his reign came to represent (his attempted replacement of the European political system with his own monolithic imperial one), Napoleon provided the (or at least an, important) impetuous for the transformation in international relations and law, and, in turn, the justifications and devices surrounding his exile provide signposts or artefacts of that transformation. Concentrating on these artefacts allows us to appreciate that the Great Power system was unplanned and incoherent. The allies were treading new ground in 1814 – improvising. They were presented with an unprecedented situation and drew pragmatically upon whatever legal tools they could find to both articulate that situation and to facilitate their intention. The desired result (at least for some of the allies) may have been achieved – Napoleon contained and a new system of law and politics established – but that result should not be offered as a gloss to assert the presence of a clean legal mechanism or transition. The birth of the Vienna system is founded upon an incoherent, yet mutually reinforcing, splicing of conceptual layers. And when we concentrate on how political actors employed and braided together those various layers of structural incoherency that were employed to construct Napoleon as the criminalized, outlawed, and imprisoned 'monster', we gain an appreciation of just how much the European order of sovereign states is founded upon an originating mythology of untameable Napoleonic violence.

In undertaking this analysis, the scope of my own article should be addressed at the outset. The events of 1814 and 1815 were the product of a complex and dynamic military and political crisis. The challenges it posed developed, making it a mistake to believe that the solutions of 1814 and 1815 were the answer to a stable set of problems that were present as far back as 1805. The upshot of this is that the article will limit itself to presenting those facts which render 1814 and 1815 explicable without trying to establish macro-patterns of causation or unity across the Napoleonic and Revolutionary period. This does carry with it the cost of passing over important dimensions of those preceding years, but this limitation is a precondition of the proposed study and one that I readily acknowledge and can only apologize for. In addition to the years prior to 1814, there is the issue of the Congress of Vienna that unfolded in tandem with Napoleon's defeat, and the changes within the law of nations that the Congress inaugurated in the years following 1815.<sup>11</sup> The Congress of Vienna – convened to restructure Europe following Napoleon's defeat and the collapse of the French Empire – is a direct manifestation of the changing nature of European international relations, exemplifying the transition to a Great Power system outlined above. As such, the exiling of Napoleon forms a vital juxtaposition to it: both cast a light upon the other which must be acknowledged, but the focus here remains on Napoleon. Vienna will be discussed only in as far as it provides that broader context in which to situate Napoleon.

Another point is that this investigation of sovereignty and international law in the exiling of Napoleon takes place within a wider field of study. Much scholarship has gone into exploring both the historic and contemporaneous ways in which international law has intersected with 'civilization' ideology to impose and legitimate a particular power paradigm and hierarchy. Within such accounts, sovereignty usually has pride of place as the organizing doctrine or mode of argumentation that achieves and connects these moments (or processes) of oppression.<sup>12</sup> Quite rightly, this

<sup>10</sup>*Ibid.*, at 249.

<sup>11</sup>The importance of the Congress is captured in many periodizations of international law. See H. Duchhardt, 'From the Peace of Westphalia to the Congress of Vienna', in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 628; W. Grewe, *The Epochs of International Law* (2000).

<sup>12</sup>For work in this vein see A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); P. Chatterjee, *The Black Hole of Empire: History of a Global Practice of Power* (2009); D. Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference', (1996) 5 *Social and Legal Studies* 337; R. Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (2019), 6. Critical

scholarship has largely focused upon the periods of colonization, decolonization, and neo-colonization as the most urgent sites of current global injustice. It is not my intention here to present the fall of an imperial hegemon along similar lines – Napoleon directly participated in colonial practices (he led the French invasion of Egypt in 1798),<sup>13</sup> tried to reimpose slavery in Haiti,<sup>14</sup> and established a European empire. Hardly a disempowered victim. Nevertheless, the investigation of sovereignty doctrine within Napoleonic Europe still merits attention. First, the legal studies of this period are meagre and largely follow the well-worn path of dismissing 1800–1815 as of little interest for international legal scholarship;<sup>15</sup> second, the exiling of Napoleon casts light on how sovereignty figured in the relationships between the Great Powers themselves as opposed to non-European or economically and militarily weaker European powers; third, the exiling of Napoleon was a prerequisite foundation for the Congress of Vienna and the establishment of the Great Powers system – understanding, then, how that exile was legally justified is important for the theorization of that order’s foundations; and fourth, the complicated picture the exiling of Napoleon presents problematizes those analyses that impute macro structures (or pathologies) that recur continually (albeit in different guises) over the centuries of international law’s history. Confusion, incoherence, and improvisation define 1814 and 1815.

Finally, a few words should be said regarding the type of history this article will pursue. Primarily, the study will be focused upon the texts and theories of sovereignty propounded by the main international legal thinkers of the time, and the ways in which the exiling of Napoleon troubled and stretched those accounts. As far as is possible, I base my analysis in the letters, statements, proclamations, and treaties made by political actors and commentators.

The article proceeds in four parts. The first presents some necessary historical and legal context, exploring the law of nations and sovereignty at the turn of the nineteenth century. The second part investigates the allies’ use of international law during the invasion of France. The third explores the exile of 1814 to Elba; and the fourth, the exile of 1815–1821 on St. Helena.

## 2. Great Powers, sovereignty, and the changing face of the Law of Nations in the late eighteenth century

Napoleon emerged into a Europe marked by military violence and political change. In the western parts of the continent alone three large scale conflicts had occurred in the 70 years before his birth: the War of Spanish Succession,<sup>16</sup> the War of Austrian Succession,<sup>17</sup> and the Seven Years

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approaches, however, are not limited to the study of empire and colonialism. See H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), 1; D. Buss, ‘Performing Legal Order: Some Feminist Thoughts on International Criminal Law’, (2011) 11 *International Criminal Law Review* 409; F. N. Aolain, D. Haynes and N. Cahn, *On the Frontlines: Gender, War and the Post Conflict Process* (2011); M. Krook and F. MacKay (eds.), *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (2011); D. Otto, ‘“Taking a Break” from “Normal”: Thinking Queer in the Context of International Law’, (2007) 101 *Proceedings of the 115<sup>th</sup> ASIL Annual Meeting* 119.

<sup>13</sup>P. Strathern, *Napoleon in Egypt* (2008).

<sup>14</sup>The Haitian Revolution is receiving increasing academic attention. See A. Ferrer, *Freedom’s Mirror: Cuba and Haiti in the Age of Revolution* (2014); L. Dubois, *Avengers of the New World: The Story of the Haitian Revolution* (2005).

<sup>15</sup>See Duchhardt, *supra* note 11, and A. Cassese, *The Human Dimension of International Law: Selected Papers* (2008), 90. In his expansive history of the law of nations, Koskenniemi has done important work on exploring the international legal imagination of Napoleonic figures, such as Hauterive and Reyneval; however, he makes little reference to the legalities of removing of Napoleon. See M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (2021). In the French literature, Thierry Lentz has accomplished important work on Napoleon’s own practice and understanding of the Law of Nations. See T. Lentz, ‘Napoléon et le droit des gens’, in T. Lentz and Y. Bruley (eds.), *Diplomates au Temps de Napoléon* (2014), 225.

<sup>16</sup>1701–1714. Fought over who would inherit the throne of Spain following the death of the childless Charles II.

<sup>17</sup>1740–1748. Following the death of Emperor Charles VI, his only heir was his daughter Maria Theresa. There were disputes as to whether Maria could inherit her father’s possessions, giving foreign powers the excuse to intervene. Principal amongst these was Frederick II of Prussia, who attacked and occupied Silesia.

War.<sup>18</sup> In the course of these wars the structure of European relations had fundamentally changed. Prior to 1740, (western) continental politics<sup>19</sup> had been dominated by French power and its antagonism to the Habsburgs and Britain.<sup>20</sup> The power of these three actors, however, was never overwhelming. Medium powers (such as Bavaria, Denmark, and Sweden) still exercised significant influence and could fundamentally shift the balance in any conflict.<sup>21</sup> However, after suffering painful defeats in several major conflicts, France went into decline, making way for the introduction of new dominant nations, principally Prussia and Russia, from central and eastern Europe into the previously western political equation. The expansion of the Great Powers from three to five was accompanied by the reduction (if not outright destruction) of weaker entities. On the one hand, they simply lacked the material and political resources to wage war on the scale of the Great Powers, but more invidiously, for every expansion of one Great Power, the others (on the altar of the balance of power) demanded an equal increase. The consequences of such calculations are exemplified in the division of Poland, in which an entire nation was carved up between Prussia, Austria, and Russia.<sup>22</sup>

The rise of the Great Powers was dependent upon a deeper transformation: the supremacy of the sovereign state in European politics. Alternative forms of political and legal ordering had been rapidly overtaken economically and militarily (if not outright destroyed like Poland).<sup>23</sup> The co-ordinative benefits and the enhanced resource extractive capabilities of the state had enabled the sovereign state to finance and prosecute wars on increasingly larger scales. That Frederick the Great of Prussia was able to hold his own in a continental war against multiple foes for seven years is a testimony of this fact.

But while the sovereign state was obtaining pre-eminence, the actual justification and logic of sovereign power was undergoing powerful transitions of its own. From the absolutist theories of Bodin that invested a prince with almost unfettered legal power from the auspices of the divine,<sup>24</sup> sovereignty was, first, increasingly secularized and horizontalized. In the writings of Hobbes<sup>25</sup> through to Locke<sup>26</sup> and Rousseau,<sup>27</sup> sovereignty became understood as the product of a social contract between private individuals, with this contract to varying degrees being justified or mandated by natural law.<sup>28</sup> The divine gift of sovereignty to an individual (a top-down modelling of legitimation) ceased to dominate (at least philosophically). For Rousseau especially, sovereignty did not even inhere in an individual but remained the embodiment of the ‘general will’ of that

<sup>18</sup>1756–1763. The Seven Years War is really two wars: one fought in the colonies between the UK and France, and the other taking place in central Europe as Empress Maria formed a coalition to take back Silesia and humble Prussia.

<sup>19</sup>The east had its own system and the central antagonism with was the Ottoman Empire. See Scott, *supra* note 6, at 36.

<sup>20</sup>*Ibid.*, at 6, 35, 117–21, 143–4.

<sup>21</sup>*Ibid.*, at 6.

<sup>22</sup>*Ibid.*, at 157–69, 201–13.

<sup>23</sup>H. Spruyt, *The Sovereign State and its Competitors: An Analysis of Systems Change* (2020).

<sup>24</sup>J. Bodin, ‘Six Lives of the Republic’, in J. Franklin (ed., translator), *On Sovereignty: Four Chapters From the Six Books of The Commonwealth* (1992). The absolutist understanding of sovereignty is the traditional reading of Bodin: J. Franklin, *Jean Bodin and the Rise of Absolutist Theory* (1973). That being said, it is somewhat inaccurate to say that Bodin’s sovereignty is unfettered. The sovereign must still respect natural and divine law. However, it is not for a subject to resist a sovereign if they break that law (see Bodin, *supra* note 24, at 119–20).

<sup>25</sup>T. Hobbes, *Leviathan* (N. Malcolm (ed.), 2012), 132.

<sup>26</sup>J. Locke, *Second Treatise of Government* (M. Goldie (ed.), 2016).

<sup>27</sup>J. J. Rousseau, *The Social Contract: Or, Principles of Political Law* (1893), 25. For an in-detail commentary on Rousseau’s famous text see D. L. Williams, *Rousseau’s Social Contract* (2014).

<sup>28</sup>It must be stressed that the differences between the social contract theories are significant. For Hobbes, the state of nature is a brutal place where life is short (see Hobbes, *supra* note 25, at 97); to Locke, the state of nature is governed by a comprehensive natural law that is available to everyone to execute (see Locke, *supra* note 26, at 5–6); Pufendorf has two contracts: one establishing civilization and the other deciding the mode of government to be adopted. To Rousseau the state of nature is to be preferred over civilization; civilization represents a corruption of nature through its pursuit of private property and the social contract. See J. J. Rousseau, *Discourse on Inequality* (translated by M. Cranston, 1984); M. Plattner, *Rousseau’s State of Nature: An Interpretation of the Discourse on Inequality* (1979).



consenting group.<sup>29</sup> Second, the purposes of sovereignty began to change. While the Bodian sovereign was (to a limited extent) constrained by Christian understandings of the ideal patriarch, this new sovereignty was increasingly and explicitly couched towards the benefit of the people. How this was defined varied. For a thinker like Locke, this meant the protection of property.<sup>30</sup> Other writers were more general. Vattel, for instance, insisted that sovereignty was ‘established only for the common good of all citizens’<sup>31</sup> and that a prince ‘ought to direct all his views, all his steps to the great advantage of the state and people who have submitted to him’.<sup>32</sup>

Notwithstanding these transformations, the location and generation of sovereignty remained firmly rooted in the *domestic*. For writers as diverse as Hobbes, Rousseau, Pufendorf, Vattel, Martens, and Klüber, the social contract producing the sovereign power is an internal creation stemming from natural law. It is an unalienable right that cannot be usurped by foreign powers. This privileging of the domestic in the generation of power and authority provided the frame through which action and interaction was understood in the international space. Because the social contract based (positive) legal and political obligation on the premise of a consenting community, it implicitly produced boundaries between those within the community and those without. Those without (even if formed into their own society) existed to those within as in the state of nature. They were, formerly speaking, equals in this state of nature and bound by duties of natural law,<sup>33</sup> but only a social contract *between* those societies and the production of a global sovereign power could usher in a state of law.<sup>34</sup> Sovereigns could engage in treaty-making, but lacking a wider sovereign force, these positive instruments were of limited legal value.

These conceptual connections between law, sovereignty, and social contract created an international space of limited legality.<sup>35</sup> Many commentators bemoaned the apparent lawlessness of European politics: Kant famously labelled the protections offered by natural law theorists as ‘miserable comforters’.<sup>36</sup> British jurisprudence, with its emphasis on empirical experience as an epistemic foundation, was sceptical about the very reality of a law of nations. For Hume and Bentham,<sup>37</sup> the law of nations could exercise binding effects through inculcating a habit of obedience amongst sovereigns, but the expansiveness of these norms was necessarily limited. As to Austin, writing in the 1830s, law was nothing more than the empirically observable command of a sovereign followed by a sanction – international law had none of this and could not, therefore, be considered law.<sup>38</sup>

<sup>29</sup>See Rousseau, *supra* note 27, at 25. For writings on Rousseau’s ‘general will’ see J. Cohen, *Rousseau: A Free Community of Equals*, (2010); F. Neuhauser, ‘Freedom, Dependence, and the General Will’, (1993) 102(3) *The Philosophical Review* 363; P. Kain, ‘Rousseau, the General Will, and Individual Liberty’, (1990) 7(3) *History of Philosophy Quarterly* 315; A. Levine, *The General Will: Rousseau, Marx, Communism* (1993).

<sup>30</sup>See Locke, *supra* note 26, at 63: ‘The great and chief End therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the preservation of their Property.’ For commentary on Locke’s philosophy see R. Corbett, *The Lockean Commonwealth* (2009); J. Franklin, *John Locke and the Theory of Sovereignty* (1978); L. Thomas, *Locke on Government* (1995).

<sup>31</sup>E. Vattel, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (2011), 31.

<sup>32</sup>*Ibid.*, at 70. As with Bodin, the exact parameters by which a subject could resist a sovereign were heavily curtailed. For Hobbes, the sovereign cannot even breach the social contract (for he is not a party to it). See S. Sreedhar, *Hobbes on Resistance: Defying the Leviathan* (2010) for a piece exploring the capacity of citizens to resist the sovereign power.

<sup>33</sup>These are variously composed between natural law thinkers. For Vattel, states are bound to pursue the mutual perfection of one another’s society (see Vattel, *supra* note 31, at 193), but this is limited in that states are better able to look after themselves than an individual (*ibid.*, at 209) and that the lack of a sovereign prevents its full realization (*ibid.*, at 199).

<sup>34</sup>See Vattel, *supra* note 31, 192.

<sup>35</sup>M. Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law’, (2009) 15(3) *European Journal of International Relations* 395.

<sup>36</sup>I. Kant, *Perpetual Peace* (2016); S. Neff, *Justice Among Nations* (2014), 188; see Koskenniemi, *supra* note 15, at 872.

<sup>37</sup>D. Hume, *A Treatise of Human Nature* (Penguin Classics, 1985); J. Bentham, ‘Principles of International Law’, in J. Bowring (ed.), *The Works of Jeremy Bentham* (1838–43), vol. III, at 537.

<sup>38</sup>J. Austin, *The Province of Jurisprudence Determined* (1998).

Notwithstanding this, continental natural law scholars (especially amongst German theorists) could be quite expansive in imposing constraints upon belligerent sovereigns through the ‘Just War’ doctrine.<sup>39</sup> While this is not the place to engage in a comprehensive review of that doctrine, one dimension of it is of particular relevancy for analysing 1814–1815. This is the grounds for collective security and for punishing warmongering sovereigns. Emer de Vattel (still influential in the age of Napoleon) asserted that a war should only be entered into, and pursued as far, to ensure a nation’s security and the protection of its rights.<sup>40</sup> This imposed limitations as to how far a war could be carried: as soon as an enemy nation laid down its arms and sued for peace (offering necessary compensation and security against further harm) then the war had to cease. If a nation obstinately refused all peace advances, then the enemy sovereign could be subjected to a ‘complete and decisive victory’, being ‘absolutely reduced and subjected’.<sup>41</sup> This ‘complete victory’, however, did not impose a right to divide up the defeated state or to change the sovereign or system of government. A more radical extension of these rules applied to belligerent or warmongering sovereigns. That sovereign,

who without just cause breaks the general peace, unavoidably does an injury even to those nations which are not the object of his arms; and by his pernicious example he essentially attacks the happiness and safety of every nation upon earth.<sup>42</sup>

These nations, as a consequence, have ‘a right to join in a general confederacy for the purpose of repressing and chastising him [the belligerent sovereign], and *depriving him of a power which he so enormously abuses*’.<sup>43</sup> The sovereign is personally responsible for the unjustness of his wars and, as Vattel suggests, the international community may ‘deprive’ the culprit of his sovereign power. What exactly ‘deprive’ means, however, is left unexplained. Vattel does describe the ‘evils’ a warmongering sovereign brings down upon his own people, ‘lavishing her blood to gratify his inordinate passions’.<sup>44</sup> This could be construed as implying that a warmongering sovereign breaks the social contract and thus becomes a tyrant, legitimating his removal by the international community. However, Vattel stops short of arguing that foreign nations had the power to disqualify someone as a sovereign or to impose a new sovereign upon a people. That was an unalienable right of the consenting community.<sup>45</sup> The sovereign could be declared a criminal but would nevertheless remain a sovereign. ‘Vattel thus concluded that civilised warmongers deserved special treatment regardless of the heinousness of their conduct.’<sup>46</sup>

The arrival of the French Revolution and the Napoleonic Empire irrevocably marked the pre-existing law of nations, accelerating existing changes and ushering in new challenges.<sup>47</sup> Based on the natural law philosophies that placed the generation of sovereignty within the nation, the Revolutionaries would struggle in a crusade against the crowned heads of Europe, eventually establishing a number of ‘sister-republics’ that threw into disarray the established balance of

<sup>39</sup>For general histories of the just war doctrine see D. Brunstetter and C. O’Driscoll (eds.), *Just War Thinkers: From Cicero to the 21<sup>st</sup> Century* (2018); J. T. Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (1981).

<sup>40</sup>See Vattel, *supra* note 31, at 302. For some general discussions of Vattel’s work see: V. Chetail and P. Haggemacher (eds.), *Vattel’s International Law in a 21<sup>st</sup> Century Perspective* (2011); P. Schröder (ed.), *Concepts and Contexts of Vattel’s Political and Legal Thought* (2021); S. Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (2004).

<sup>41</sup>See Vattel, *supra* note 31, at 432.

<sup>42</sup>*Ibid.*, at 431.

<sup>43</sup>*Ibid.*, (emphasis added).

<sup>44</sup>*Ibid.*

<sup>45</sup>W. Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security* (2013), 151.

<sup>46</sup>*Ibid.*

<sup>47</sup>E. De Waresquiel, *Talleyrand. Le prince immobile* (2019), 285.

power.<sup>48</sup> Under the pressure, a general feeling arose that the old system was perishing in the ensuing conflict, and that new foundations of order were needed.<sup>49</sup> Released in 1793, Kant's *Perpetual Peace*<sup>50</sup> would unleash an academic frenzy in Germany – styled ‘une guerre de plumes’<sup>51</sup> – of designing and imagining new plans of achieving perpetual peace and the realization of the natural rights of peoples. Fichte and Schlegel would both contribute, supporting, along with Kant, the Revolutionary French armies even as they turned to conquest and intervention in other states – the spread of republicanism was considered a vital prerequisite of lasting peace.<sup>52</sup>

By 1800, this movement was running out of momentum as disillusionment with the Revolution spread. Accelerated by the antagonism between republic and personal monarchy, the abstracted idea of the state would begin (by no means definitively, as we will see) to take pre-eminence in practice rather than the rights of peoples or monarchs. Napoleonic foreign policy from 1800, under the influence of figures such as Portalis and Hauterive,<sup>53</sup> became realist, state-focused (at least before his coronation as Emperor), and positivistic.<sup>54</sup> Natural law could control the excess of sovereigns but not inform their decision making. Only treaties between states were binding. Friedrich Georg Martens (perhaps the leading law of nations scholar of his day and no supporter of Napoleon), in turn, would still ground his work in the natural rights of the subject and the social contract. Nevertheless, his study focused upon the positivist developments of the bare natural bases of the law of nations, concentrating on treaties and customary law between sovereign nations.

As to the possibility of intervening in other states, the literature from 1800 has pronounced ambivalences. Joseph Matthias Gérard de Rayneval, former French diplomat under the *Ancien Régime* and legal scholar, would allow for offensive alliances against tyrannical sovereigns. Such sovereigns are the ‘monster of the natural and societal order’.<sup>55</sup> They sunder the social contract between them and their people, leaving them free to be pursued and removed by foreign powers.<sup>56</sup>

Within the *Précis* of Martens, the situation is more ambiguous. On the one hand, space is made for making war to uphold the balance of power. If a nation acquired a preponderance of territory (even through legitimate means)<sup>57</sup> so as to compromise the independence of its peers,<sup>58</sup>

<sup>48</sup>For a recent analysis of this process and its connections to international law see E. J. Kolla, *Sovereignty, International Law, and the French Revolution* (2017).

<sup>49</sup>In 1800, Alexandre d'Hauterive would go so far as to suggest that, following the division of Poland, the rise of Prussia and Russia, and the colonial acquisitions of Great Britain, the old balance of power and ‘European public law’ established at Westphalia had been destroyed. The Revolution, for Hauterive, is inherently tied to the international order: ‘de cette forte et inévitable commotion est résultée la destruction complète d’un système incohérent . . . les germes d’une anarchie politique avaient été jeté en Europe, par les mêmes causes qui avaient jeté en France les germes de l’anarchie sociale’. (‘from this strong and inevitable commotion has resulted the complete destruction of an incoherent system . . . the germs of a political anarchy have been thrown into Europe by the same causes that threw into France the germs of social anarchy’). A. D’Hauterive, *De L’État de La France, A La Fin De L’an VIII* (1800). In response to Hauterive, Friedrich Gentz would provide a robust critique. See F. Gentz, *On the State of Europe Before and After the French Revolution* (1802).

<sup>50</sup>See Kant, *supra* note 36.

<sup>51</sup>‘war of pens’.

<sup>52</sup>See Belissa *supra* note 5, at 389–407.

<sup>53</sup>For commentary on Hauterive and his influence upon international diplomacy and law see I. Richefort, ‘Une grande figure de la diplomatie sou l’Empire: Alexandre d’Hauterive’, in Lentz and Bruley, *supra* note 15, at 81; R. Cahen, ‘Hauterive et l’école des diplomaties (1800-1830)’, (2020) 18 *Clio@Temis Revue électronique d’histoire du droit*.

<sup>54</sup>T. Lentz, *Nouvelle histoire du premier empire IV. Les cent jours 1815* (2010), 234.

<sup>55</sup>G. Rayneval, *The Last Waltz of the Law of Nations: A Translation of the 1803 Edition of De Rayneval’s The Institutions of Natural Law and the Law of Nations* (translated by J. Allain, 2019), Book II, Chapter V, §8.

<sup>56</sup>*Ibid.*

<sup>57</sup>G. Martens, *Précis du Droit Des Gens moderne de l’Europe fondé sur les traités et l’usage* (1821), Préface à l’édition Allemande de 1796, IV §120.

<sup>58</sup>*Ibid.*, at IV §121.



the affected states would be entitled to ally themselves against the offending state in question.<sup>59</sup> However, the maintenance of the balance of power does not clearly establish a license, for Martens, to remove troublesome sovereigns – they can place the state back to its just dimensions, but little more. Beyond the balance of power, the possibility of intervention within Martens hinges upon his construction of the state and nations. A *nation*, for Martens, is produced when groups of individuals or family agree, expressly or tacitly, to fixing the limits of their respective rights and duties, and guaranteeing their observation.<sup>60</sup> This nation, however, does not usher in the civil state: the rapports between the individuals, between the collective and the individual, and between that collective and external entities, are still governed by natural law principles. A state is only produced when that people ‘s’unit sous un *pouvoir législatif, exécutif et judiciaire* commun et suprême, qui fixe et garantit des droits’.<sup>61</sup> There must, in other words, be a sovereign power. Importantly, a state can cease to be so through ‘*tombant en anarchie*’<sup>62</sup> – if its sovereign power collapses – reducing it back to the prior condition of a nation (France during the Revolution is cited as an example).<sup>63</sup> It retains natural rights in that condition, but not those of independence that attach to statehood. Therefore, in moments when the repository of sovereign power becomes destabilized, foreign powers can legitimately interfere to a limited extent. This, however, does not cast much light on the possibility of removing a firmly seated sovereign by a third-party state.

Johann Ludwig Klüber (writing in 1819) would share much common ground with Martens. While being more alive to the possibility of abuse, he affirmed that ‘il incontestable, que chaque puissance est fondée en droit de s’opposer à tout démarche injuste d’une autre puissance, dont le but est de s’arroger de la domination, de l’agrandissement, de la prépondérance, ou la monarchie universelle’.<sup>64</sup> Perhaps in contrast to Martens who limited the rights of a state in the event of ‘anarchie’, Klüber placed important limits on the ability of states to intervene in the event of internal disputes of another states. In the moment of a contestation of the sovereignty of the state, all a foreign power may do is to provisionally support one power. ‘Ni lors de discords civiles, d’une rébellion, ou du détronement d’un prince, un état étranger n’aurait que provisoirement reconnu un des parties; cela ne porterait jamais préjudice aux droits d’un autre parti.’<sup>65</sup> Whatever the outcome of the dispute, even should it be the party they did not support, the external power must respect the conclusion.

In contrast to both Martens and Klüber, Friedrich von Gentz (future Austrian minister, close collaborator of Metternich, and staunch opponent of Napoleon), writing in 1802, would go further and contest the existence of a right of absolute non-intervention. Speaking of Revolutionary France, Gentz argued that interference is permitted against a state (especially one that is a principle state of Europe) that becomes subject to a ‘disorder so great, general, and permanent (it must have all these qualities), as manifestly to endanger the neighbouring powers’.<sup>66</sup> In such a circumstance, where ‘the right of legislation is disputed by a variety of claimants’, ‘a coalition against the *destroyers of France*, not against France herself, would have been prudent, just, and beneficial’.<sup>67</sup> Such intervention must preserve the independence of the country and has no right to impose a

<sup>59</sup>*Ibid.*

<sup>60</sup>*Ibid.*, Introduction, §2.

<sup>61</sup>‘unite under a legislative, executive and judicial power, common and supreme, which fixes and guarantees rights’. *Ibid.*, Introduction, §3.

<sup>62</sup>‘falling into anarchy’.

<sup>63</sup>*Ibid.*, Introduction, §4.

<sup>64</sup>‘it is incontestable that each power has the right to appose any unjust step by another power, the goal of which is to aggregate to itself domination, aggrandisement, preponderance, or universal monarchy’. J. L. Klüber, *Droit Des Gens Moderne De Le L’Europe* (1819), §42. In his footnotes, he cites the war against Napoleon as such an example.

<sup>65</sup>‘During a civil discord, a rebellion, or the dethronement of a prince, a foreign state has only provisionally recognized one of the parties; this never carries with it a prejudice to the rights of the other party.’ *Ibid.*, §52.

<sup>66</sup>See Gentz, *supra* note 49, at 199.

<sup>67</sup>*Ibid.*

new constitution upon the nation. The duty of the foreign power is nothing more than to ‘remove every *unnatural obstacle* to a proper constitution’,<sup>68</sup> to restore law and order, and ‘to give freedom to the lawful depositing of sovereign authority’.<sup>69</sup> In this way, Gentz opens up a critical (and exploitable) gap between the real interests of the nation and a corrupting element – a corrupting element that, once figured as such, may be subjected to the scalpel.

### 3. The road to Paris: January–April 1814

From his coronation as Emperor of the French in 1804, Napoleon had overcome a series of military coalitions launched by various European powers.<sup>70</sup> In doing so, he extended France’s hegemony over central and southern Europe, humbling the crowns of Austria and Prussia in the process, making and un-making kingdoms and principalities as policy required. This edifice would come crashing down in 1812 following a disastrous invasion of Russia.<sup>71</sup> His army destroyed, Europe saw its opportunity to rid itself of Napoleonic domination. The Austrians and the Prussians joined the advancing Russians, while the British army advanced through Spain to France’s southern border. By 1814, France faced an overwhelming allied invasion.

In early 1814, none of the allies had much interest in making peace with Napoleon or in seeing him remain on the French throne. While different leaders pursued very different policies in affecting this intention,<sup>72</sup> the shrewd diplomacy of Metternich (the Austrian foreign minister) was able to guide the alliance in a careful de-legitimization of Napoleon that played perfectly to ideas of the balance of power in Martens, the Vattelien warmongering sovereign, and the Gentzian split between the real interests of a nation and a criminal element. As Siemann suggests, through this policy, Metternich was able to legalize the continued allied invasion by portraying them as the defenders of Europe and the real interests of France.<sup>73</sup>

Even before the events of 1814, Metternich’s diplomatic and legal strategy was well underway. In the winter of 1813, he released the Declaration of Frankfurt to the French people.<sup>74</sup> The Declaration expertly drove a wedge between France and Napoleon.<sup>75</sup> It declares that:

<sup>68</sup>*Ibid.*, at 200–1 (emphasis added).

<sup>69</sup>*Ibid.*

<sup>70</sup>Napoleon’s life has been the subject of countless biographies. For a representative selection see J. Tulard, *Napoléon ou le mythe du sauveur* (1977); G. Gengembre, *Napoléon. La vie. La légende* (2001); G. Lefebvre, *Napoleon* (2011); A. Roberts, *Napoleon the Great* (2015); P. Dwyer, *Napoleon: The Path to Power* (2008); P. Dwyer, *Citizen Emperor* (2013); M. Broers, *Napoleon: Soldier of Destiny* (2015); M. Broers, *Napoleon: Spirit of the Age* (2018); P. Gueniffey, *Bonaparte* (2017); A. Zymoski, *Napoleon: The Man Behind the Myth* (2019); A. Castelot, *Bonaparte* (2019); A. Castelot, *Napoléon* (2019).

In recent years, the study of the Napoleonic period has shifted from the man to his empire. For analyses of the various aspects of Napoleon’s empire and its implications see M. Broers, *Europe Under Napoleon 1799–1815* (1996); A. Jourdan, *L’Empire de Napoléon* (2000); J. Boudon, *Histoire du Consulat et de L’Empire* (2001); T. Lentz, *Nouvelle histoire du Premier Empire*, in 4 vol. (2002–2010); P. Dwyer and A. Forrest (eds.), *Napoleon and his Empire: Europe 1804–1814* (2007); P. Dwyer (ed.), *Napoleon and Europe* (2001).

<sup>71</sup>This invasion was to force Tsar Alexander I back into an alliance against the UK. A. Zamoyski, *1812: Napoleon’s Fatal March on Moscow* (2005); D. Lieven, *Russia Against Napoleon: The Battle for Europe 1807–1814* (2016).

<sup>72</sup>Tsar Alexander would have no truck with Napoleon, believing that the stability of Europe could only be achieved with a French leader other than Napoleon. He frequently was at odds with Metternich’s policy, which he interpreted as a willingness to reach an accommodation with Napoleon. See Lieven, *ibid.*, at 470.

<sup>73</sup>W. Siemann, *Metternich: Strategist and Visionary* (2019), 374–96. It should be noted that this is a revisionist account of Metternich. The previous orthodoxy was that Metternich wanted to make peace with Napoleon, only changing his mind when Napoleon had refused all entreaty. See Price, *supra* note 2, at 158.

<sup>74</sup>This followed a careful peace representation that Metternich was confident would be rejected. See Siemann, *ibid.*, at 375.

<sup>75</sup>Price also accepts this interpretation, but nevertheless criticizes Napoleon for not going along with them. See Price, *supra* note 2, at 158–71.

[t]he allied powers are not at war with France, but with that haughtily announced preponderance, that preponderance which, to the misfortune of Europe and of France, the Emperor Napoleon has for too long a time exercised outside of the boundaries of his empire.<sup>76</sup>

The allies, the Declaration goes on, do not wish to humble or dismantle France, ‘because a valiant nation should not lose rank for having in its turn experienced reverse in an obstinate and bloody conflict’.<sup>77</sup> The allies only fight to ensure ‘a wise distribution of power and a just equilibrium’, ‘until the political condition of Europe shall be again consolidated’, and ‘vain pretensions’ jettisoned in favour of assuring the sanctity of treaties.<sup>78</sup> Here, Metternich carefully ensured that the allied mission corresponded to ideas of just war. Napoleon is the belligerent who rejects any and all reasonable peace proposals – the allies merely desire the re-establishment of justice and the balance of power. Importantly, the Declaration does not stray too far into the protected space of French sovereignty. While painted as a warmonger, Napoleon remains ‘Emperor Napoleon’. A unilateral deposition is avoided.

Metternich’s stratagem continued into the conference of Châtillon<sup>79</sup> where final crunch talks were held with Napoleon.<sup>80</sup> Rather than an ingenuous attempt at negotiation, Metternich’s instructions to the allied representatives, Siemann argues, ‘amounted to a complete dismantling of the Napoleonic empire’.<sup>81</sup> Pushing beyond the demands made at Frankfurt, all French territorial claims to Italy, Germany, Switzerland, and the Netherlands were to be rejected. Austrian influence in Italy and Germany, and Bourbon control over Spain, would be reinstated. For Siemann, ‘[w]hen looking at the instructions in their entirety, they can only be understood as “an order to Napoleon that he should abdicate which is dressed in unfillable demands”’.<sup>82</sup> And this is how Napoleon took them. To accept these demands would place Napoleon in contravention of his coronation oath, to protect the territorial integrity of France.<sup>83</sup> Since Italy and the Netherlands and significant portions of Germany had fallen under French control before his seizure of power, he was being asked to leave France smaller than when he had found it. Such a concession he took ‘to be an unbearable affront’ . . . ‘cowardice, betrayal, humiliation, scorn’.<sup>84</sup> In orchestrating the negotiations at Châtillon to bait Napoleon’s refusals like this, Metternich was able to further strengthen the image of a belligerent and warmongering sovereign that could not be reasoned with.<sup>85</sup>

Notwithstanding the diplomatic oversight by Metternich and the determination of Tsar Alexander, the cohesion of the allies was put under severe stress in early 1814 by the allied

<sup>76</sup>Frankfurt Declaration, 1 December 1813, available at [www.napoleon-series.org/research/government/diplomatic/c\\_frankfort.html](http://www.napoleon-series.org/research/government/diplomatic/c_frankfort.html). See also Siemann, *supra* note 73, at 378.

<sup>77</sup>*Ibid.*

<sup>78</sup>*Ibid.*

<sup>79</sup>For a discussion of the events at Châtillon see Price, *supra* note 2, at 187.

<sup>80</sup>Tsar Alexander was opposed to any such conference. Only the threat of Austrian withdrawal from the alliance and news of military defeats forced his acquiescence. See Lieven, *supra* note 71, at 483.

<sup>81</sup>See Siemann, *supra* note 73, at 383.

<sup>82</sup>*Ibid.*, at 384.

<sup>83</sup>See Waresquiel, *supra* note 47, 569.

<sup>84</sup>See Siemann, *supra* note 73, at 384. Anglophone scholarship has typically heaped the blame directly onto Napoleon’s character defects. See Price, *supra* note 2, at 249; H. Kissinger, *A World Restored: Metternich, Castlereagh and the Problems of Peace 1812-1822* (1957), 130–5; P. Schroeder, *The Transformation of European Politics, 1763-1848* (1996), 507; M. Jarrett, *The Congress of Vienna and its Legacy: War and Great Power Diplomacy After Napoleon* (2013), 63. From Napoleon’s perspective, the reduction of France to its former limits would hardly serve to maintain the balance of power. The natural borders were necessary to counterbalance the Austrian, Prussian, and Russian gains in the dismantling of Poland, and Britain’s growing colonial domination. Napoléon Bonaparte, *Correspondance Générale: Vol XV Les Chutes, Janvier 1814-mai 1821* (2018), Letter 37736 and 38394. In this claim, Napoleon echoes the positions set out by Hauterive more than a decade earlier.

<sup>85</sup>To counteract this strategy, Napoleon would frequently state that the *French people* would not accept the proposed peace (*ibid.*, Letter 38394).

infighting and Napoleon's resurgent military prowess. Fearing disintegration, Lord Castlereagh (the British foreign minister, who had established an informal alliance with Metternich), pushed through the Treaty of Chaumont. The treaty, in many ways, represents the formalization of Metternich's political and legal policy, committing the allies to continue the struggle against France should Napoleon refuse a final offer and not to make separate peace agreements.<sup>86</sup>

While the allies' policies thus far had kept them within the letter of the law of nations, the secret articles of Chaumont took them beyond. Within them, for '[t]he re-establishment of an equilibrium of the powers and a just distribution of the forces among them being the aim of the present war', the allies sketched out a plan for a new European order, including the establishment of a German federative system of sovereign states, the Swiss Confederation returned to its former limits, the Bourbons restored to Spain, and Italy reformed of independent states.<sup>87</sup> Here, the allies directly placed the commitment to the maintenance and re-establishment of a specific form of European public order (and their exclusive direction of it) as their war aim.<sup>88</sup> As Zamoyski has argued, '[i]t [the Treaty] identified the four signatories, henceforth the Great Powers, as the arbiters of Europe, in effect enshrining the rights of the strongest'.<sup>89</sup> The allies were now, formally, thinking beyond Napoleon.

While the balance of power had been legally accepted by scholars from Vattel to Martens and Klüber, the fact that the planned distribution was to be orchestrated by four states alone went far beyond accepted law. The execution of this intention would also necessitate massive intervention in the affairs of other states, and it was far from apparent in the law of nations that the allies had any such authority to do so.<sup>90</sup> What is also interesting in the Treaty is what it does not say. The fate of France is not mentioned and nor is that of Napoleon. The logic of public order contained within the treaty would appear to commit the allies to imposing some form of restrictions upon France, but with disagreement still present amongst the allies and Napoleon still in the field, the text stops short of that commitment.

As it happened, while coming close to accepting the allied proposals at Châtillon, Napoleon's military successes led him to decide against accepting anything less than the 'natural borders' of France. In this he played directly into the allies' hands. After months of continual fighting the allies were able to break through and capture Paris. With the French capital falling under Russian occupation (Alexander had ensured his Russians took the lead), the balance of power fundamentally changed. Metternich and Castlereagh's diplomacy had taken the allies far, but a problem

<sup>86</sup>A. Zamoyski, *Rites of Peace: The Fall of Napoleon and the Congress of Vienna* (2008), 167; see Schroeder, *supra* note 84, at 501.

<sup>87</sup>According to Ikenberry, these proposals can be traced back to a diplomatic exchange between Alexander and William Pitt in 1805. G. J. Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars* (2016), 81.

<sup>88</sup>For many commentators Chaumont is a turning point. For Schroeder, Chaumont marks the point where the allies' each subordinated the full realization of their parochial intentions to that of the common good. As such, it 'laid the foundations for victory, peace, and post-war security'. See Schroeder, *supra* note 84, at 501–4.

<sup>89</sup>See Zamoyski, *supra* note 86, at 168. Gulick stresses that Chaumont represents the refinement of the balance-of-power system. See Gulick, *supra* note 6, at 56.

<sup>90</sup>A fact that Napoleon was aware of and willing to exploit. He instructed Caulaincourt, his representative at the conference, to object that:

Toutes les puissances d'Europe devant être indépendantes, toutes savoir l'Espagne, la Suède, le Danemark, la Bavière, la saxe, le Wurtemberg, la Suisse, etc., doivent être représentées au congrès... la France ne saurait reconnaître l'espèce de suprématie qui résulterait de toute manière de procéder, au profit des quatre puissances alliées sur les autres puissances de l'Europe, et qui exclurait la France du système européen.

(All the European powers must be independent; all know that Spain, Sweden, Denmark, Bavaria, Saxony, Wurtemberg, Switzerland, etc., must be represented at the conference... France will not recognise the kind of supremacy that will result in any manner of proceeding that profits the allies' power over the other powers of Europe, and which will exclude France from the European system.)

(See Napoléon, *supra* note 84, Letter 38394).

remained. For Vattel, even a criminal sovereign could only be removed by the state in question; and for Gentz,<sup>91</sup> while a criminal element could be suppressed, this did not lead to a right of affecting constitutional change. No matter how just they painted their war, for the removal of Napoleon to be legal the allies needed the participation of the French *themselves*. The capture of Paris had given the allies control over the core French institutions of state. Whether that capture could realise political success depended upon Alexander's next steps.<sup>92</sup>

#### 4. The Treaty of Fontainebleau and the Emperor of Elba: 1814–1815

Two things swung the balance in the allies' favour. The first was Napoleon's faltering political legitimacy within France itself and the readiness of the French political elite to remove him. The second was Alexander's decision to ally himself with Talleyrand – the former French foreign minister.<sup>93</sup> Talleyrand had connections everywhere, and was 'probably the only man in the French political elite who knew how to handle the transition from the Napoleonic empire to monarchy in a peaceful way'.<sup>94</sup> Under Talleyrand's influence,<sup>95</sup> Tsar Alexander issued the following declaration to the French:

The allied powers having occupied Paris, they are ready to receive the declaration of the French nation. They declare, that if it was indispensable that the conditions of peace should contain stronger guarantees when it was necessary to enchain the ambition of Napoleon, they would become more favourable when, by a return to a wiser government, France itself offers the assurance of repose. The allied sovereigns declare, in consequence, that they will no longer treat with Napoleon nor with any of his family; that they respect the integrity of old France, as it existed under its legitimate kings—they may even go further, for they always profess the principle, that for the happiness of Europe it is necessary that France should be great and powerful; that they recognise and will guarantee such a constitution as the French nation may give itself. They invite, consequently, the senate to appoint a provisional government, which may provide for the necessities of administration, and establish such a constitution as may be fitting for the French people. The intentions which I have just expressed are common to me with all the allied powers.<sup>96</sup>

The declaration carefully invokes established ideas of the law of nations. First, the 'complete victory' of Vattel is made emphatic here: Paris is occupied, and the French comprehensively defeated. Second, the justness of the war is argued. Napoleon has been a belligerent warmonger who the allies will no longer treat with – he is not a 'legitimate king'. In good Gentzian terms, they express their desire for safeguards from the French against any future aggression, point to their

<sup>91</sup>Perhaps ironically, Gentz himself, present with the Austrian staff, was opposed at this point to the removal of Napoleon. See P. Sweet, *Friedrich Von Gentz: Defender of the Old Order* (1941).

<sup>92</sup>See Lieven, *supra* note 71, at 515. For a history of Alexander's time in Paris see M. Rey, *Un tsar à Paris* (2014).

<sup>93</sup>See Zamoyksi, *supra* note 86, at 173; Kissinger, *supra* note 84, at 136–7; Price, *supra* note 2, at 230; Lieven, *supra* note 71, at 517. For biographies of Talleyrand see P. Dwyer, *Talleyrand* (2002); R. Harris, *Talleyrand: Betrayal and Saviour of France* (2007); see Waresquiel *supra* note 47.

<sup>94</sup>See Siemann, *supra* note 73, at 394.

<sup>95</sup>For a detailed account of Talleyrand's political manoeuvring see Waresquiel, *supra* note 47, at 563–78. See Lieven, *supra* note 71, at 518.

<sup>96</sup>A. Alison, *History of Europe from the Commencement of the French Revolution to the Restoration of the Bourbons in 1815* (1860). This declaration is very similar to that suggested to Castlereagh from Lord Bathurst and the Prince Regent. In that proposed declaration the instability of Europe and the horrors of war were directly attributed to Napoleon, 'and that although nothing could be more foreign to the intentions of the allied powers, than any attempt to prescribe to an independent nation, either the person of its sovereign or the form of its government' the restoration of the Bourbons was necessary for 'procuring permanent happiness and tranquillity to France itself and to the rest of Europe'. C. K. Webster, *British Diplomacy, 1813–1815: Selected Documents Dealing with the Reconstruction of Europe* (1921), Bathurst to Castlereagh, 27 February 1814, 162.



desire of upholding the balance of power as their war aim, and that they do not intend to divide up or compromise the integrity of ‘old France’ (a comment that does imply that all the Revolutionary and Napoleonic conquests would be stripped from France). Crucially, Alexander does not slip into unilaterally dethroning Napoleon. While he announces that the allies will no longer treat with Napoleon, Alexander calls for the ‘declaration of the French nation’ and invites the senate to appoint a provisional government and to establish a new constitution. The desired result is starkly apparent (Napoleon removed from power), but the creation of government and the allocation of sovereignty is (at least formally) still left to the sphere of French internal affairs. Louis XVIII (as he styled himself) was not explicitly imposed on France. The allies limited themselves to neutralizing the element that was ‘destroying’ France.

Talleyrand ensured the declaration was seen by the French Senate, using it as a springboard to introduce a motion to have the Emperor Napoleon removed from office, on the grounds of having ‘déchiré le pacte qui l’unissait au peuple français’.<sup>97</sup> This was, ostensibly, a victory – Napoleon’s removal could (at least on paper) be considered lawful for the purposes of international law, rather than the product of foreign coercion.<sup>98</sup> However, several difficulties – and dangers – remained. While theoretically possessing the power to dethrone Napoleon, Talleyrand had no right to convene the Senate, making the session potentially illegal for the purposes of French constitutional law.<sup>99</sup> Even accepting that the dethronement was effective, the Emperor would be rendered a private French citizen. In such a condition, he was invisible to the law of nations – a concern for internal French law. Materially and politically, however, Napoleon was far from invisible. He remained at the palace of Fontainebleau – a mere 40 miles from Paris – with 40,000 soldiers, with little standing between him and the capital. The allies could not simply treat with the new provisional French government (established by Talleyrand with no mandate) leaving Napoleon as their internal problem.<sup>100</sup> It was almost certain that he would take back control. However inconsistent this might be with their previous commitments to the French Senate and national sovereignty, the allies had to lift the domestic French situation up to the international level.

Upon hearing of the Senate’s decision and the claim that the allied quarrel was with him, Napoleon’s first move was to call their bluff by abdicating in favour of his son. If the allies were sincere in their protestations, and happy to leave the formulation of a new French government to the French constitution and people, what objection could they have?<sup>101</sup> Crucially at this juncture, marshal Marmont surrendered his corps to the allies,<sup>102</sup> significantly reducing the military leverage at Napoleon’s disposal.<sup>103</sup> Facing dissent from his other marshals, Napoleon bowed to the inevitable and signed the abdication document – a document in which he renounced the thrones of France and the Kingdom of Italy, and that identified him and his reign as the ‘only obstacle to the re-establishment of peace in Europe . . .’.<sup>104</sup> But Alexander and Talleyrand did not leave matters there: they felt that Napoleon had to be removed from France or given sufficient

<sup>97</sup>‘tear the pact which united him to the French people’. Quoted in Waresquiel, *supra* note 47, at 581; see Lieven, *supra* note 71, at 518; Zamoyski, *supra* note 86, at 180.

<sup>98</sup>It should also be noted that the allies ensured that Louis XVIII reinstatement was done through a senate vote. See Lefebvre, *supra* note 70, at 351.

<sup>99</sup>See Waresquiel, *supra* note 47, at 580.

<sup>100</sup>See Schroeder, *supra* note 84, at 507.

The justifications for Fontainebleau are set out in a letter by Castlereagh to Liverpool: ‘The motives for accelerating the immediate conclusion of this act were the inconvenience, if not the danger, of Napoleon’s remaining at Fontainebleau, surrounded by troops who still, in a considerable degree, remain faithful to him . . .’. See Webster, *supra* note 96, Castlereagh to Liverpool, 13 April 1814, at 175.

<sup>101</sup>There is a possibility Alexander might have accepted a regency. He was still not impressed with Louis, and Bernadotte by this point had proven a disappointment. M. Adams, *Napoleon and Russia* (2014), 516.

<sup>102</sup>See Waresquiel, *supra* note 47, at 582; S. Englund, *Napoleon: A Political Life* (2004), 416. See also F. Favier, *Le Maréchal Marmont* (2017).

<sup>103</sup>See Lieven, *supra* note 71, at 518; Schroeder, *supra* note 84, at 506.

<sup>104</sup>See Roberts, *supra* note 70, at 716.

inducements not to return to France. The allies still did not have the strength or feel bold enough to do this unilaterally (the French army could still react violently).<sup>105</sup> They needed his active collaboration and, moreover, a way of justifying their intentions.<sup>106</sup> Alexander was also seized with chivalrous sympathy for his opponent and desired to treat him magnanimously.<sup>107</sup> The result of Alexander and Talleyrand's negotiations was the Treaty of Fontainebleau.<sup>108</sup>

At face value, the Treaty of Fontainebleau is unremarkable – monarchs had bartered territory and thrones for centuries. But on a closer inspection it represents a crucial moment in both the emerging Great Power system, the tension between the personal sovereignty of monarchs to that sovereignty of states, and in reproducing the incoherent movement between those different gauges of sovereignty that was beginning to typify allied practice. To appreciate this, it is important to remember that Napoleon at this point was an ostensibly private citizen. He had been deposed by the French senate and had (under coercion) abdicated himself. His sovereignty over France (and the territory that had been annexed to it) and his Kingdom of Italy (established in 1805) was over.<sup>109</sup> Additionally, the territories over which his brothers and generals reigned,<sup>110</sup> and which Napoleon, as Emperor, was suzerain over,<sup>111</sup> had all fallen to allied advances.<sup>112</sup> In such a role it was utterly incoherent that he could be signatory party to an international treaty.<sup>113</sup> Alexander and Talleyrand, however, did not allow that point to get in the way. Within the treaty's opening line, Napoleon is referred to as 'His Majesty the Emperor Napoleon'. Despite the aforementioned revocations of sovereignty (and the allies' own assertions that they would not negotiate with Napoleon as Emperor), Napoleon is still designated with the imperial dignity. This recognition of sovereignty allows Napoleon to be a party to the treaty and to perform the necessary legitimating acts that would remove him from France: through the treaty his removal no longer appears as an arbitrary act of strength but an expression of the law of nations and of Napoleon's own consent/sovereignty. As the treaty's first article states,

His Majesty the Emperor Napoleon renounces, for himself, his successors and descendants as well as for each of the members of his family, all right of sovereignty and domination, as well as over the French Empire and the kingdom of Italy as over all other countries.<sup>114</sup>

But that act of recognizing Napoleon's sovereignty is in and of itself crucial. Napoleon is now sovereign because an international instrument *interpolates* him as such. This point is accentuated by how Napoleon's sovereignty is described. Unlike his fellow monarchs whose territories they are sovereign *of* is made explicit, Napoleon's sovereignty is not connected to any specific geographic location. He is simply 'His Majesty the Emperor Napoleon'. His sovereignty is left suspended – de-territorialized – awaiting assignation under and through the law of nations. There is no consenting people or social contract here. The generation of sovereignty has been transferred from

<sup>105</sup>See Dwyer, *supra* note 93, at 140.

<sup>106</sup>There is evidence to suggest that Talleyrand explored the possibility of having Napoleon assassinated. See Price, *supra* note 2, at 225.

<sup>107</sup>See Lieven, *supra* note 71, at 519; Zamoyski, *supra* note 86, at 183; Schroeder, *supra* note 84, at 508.

<sup>108</sup>For an in-depth exploration of these events see T. Lentz, *Les Vingt Jours de Fontainebleau. La première abdication de Napoléon. 31 mars-20 avril 1814* (2014).

<sup>109</sup>The Kingdom of Italy was later absorbed into the Austrian empire under the Treaty of Paris 1814.

<sup>110</sup>Joseph had ruled both Naples and then Spain, Louis had briefly been King of the Netherlands, and Jerome was King of Westphalia.

<sup>111</sup>The legal dimension of how Napoleon ran his empire has been under-theorized. The Kingdoms of the Netherlands and Westphalia were nominally sovereign in their own right, Napoleon could intervene as he willed, deposing Louis and annexing the territory of the Netherlands to France in 1810.

<sup>112</sup>With the notable exception of the Kingdom of Naples, which continued to be ruled by Prince Murat until 1815.

<sup>113</sup>For both Martens and Klüber, the authority to participate in a treaty was an emanation of the sovereignty of the nation. It came from *below* – from the social contract.

<sup>114</sup>1814 Treaty of Fontainebleau, Art. I.

a domestic setting to the international, from natural rights to positivist law, and to the personal rather than that of the state. This conceptual movement becomes even more manifest as the treaty goes on. While obliging Napoleon to give up his claims to France,<sup>115</sup> the Treaty guarantees him the sovereignty of Elba,<sup>116</sup> a small island off the coasts of France and Italy. While previously an appendage of the French Empire, the Treaty raises Elba into a sovereign territory and gives it to Napoleon as the territorial manifestation of his sovereignty. No social contract is needed to justify this imposition on the Elbian people.

Through the power of treaty and the written word, Alexander and Talleyrand had ostensibly achieved their purposes and prepared the ground for a Bourbon restoration. Complications, however, were there from the onset. The allies were furious at Alexander concluding the Treaty of Fontainebleau without consulting them, and viewed his generous treatment of Napoleon in that treaty as a blunder.<sup>117</sup> Metternich, for one, was convinced that Elba would prove insufficient in detaining a character like Napoleon.<sup>118</sup> Even Talleyrand had protested that the decision was a mistake.<sup>119</sup> While the Austrians and Prussians swallowed their anger and signed, the British refused, objecting to the way in which it legitimized Napoleon.<sup>120</sup> This raised the dilemma as to whether Napoleon was only a sovereign between those powers that had consented to the treaty or to the whole of Europe. There were also the inconsistencies within the treaty itself. The instrument had interpolated Napoleon as sovereign and made Elba his territory. The allies were obligated through the treaty to respect this. However, Napoleon's placement on Elba was one of exile and quasi-imprisonment.<sup>121</sup>

To be sure, Napoleon's sovereignty on Elba was not entirely illusory. He had liberty to organise the island's administration as he saw fit: displaying his customary energy, he variously reformed the customs and excise laws, established a Court of Appeal and poverty relief systems, built a hospital, and established an inspectorate to investigate widening roads and bridges.<sup>122</sup> The islanders hailed him enthusiastically as Emperor and he designed a new personal insignia.<sup>123</sup> He also established an imperial court on Elba that rigorously followed the etiquette protocols established at the Tuileries palace.<sup>124</sup> But the limitations and the facade of sovereignty were also very clear. For a start, Napoleon was made financially dependent upon the allied powers that deposed him. The Treaty of Fontainebleau granted him with an annual income of 2.5 million francs in order to supplement the island's meagre income. The restored Bourbon monarchy, whose task it was to transmit these funds to the Emperor, failed to pass on a single franc,<sup>125</sup> leaving Napoleon with the choice of either disbanding Elba's defences or facing economic ruin. Perhaps even worse than economic control was the fact that Napoleon was closely minded. The allied powers appointed commissioners to maintain surveillance on Napoleon and report on his behaviour. While ambassadors had always transmitted information back to their respective governments concerning their hosts, the commissioners were essentially probation officers. Perhaps most seriously for Napoleon, the allies were discussing his removal to St. Helena, St. Lucia or the Azores.<sup>126</sup> From October, Talleyrand could write to Louis XVIII that '[o]n montre ici une

<sup>115</sup>*Ibid.*

<sup>116</sup>*Ibid.*, Art. III.

<sup>117</sup>See Zamoyksi, *supra* note 86, at 183; Dwyer, *supra* note 70, at 487.

<sup>118</sup>See Siemann, *supra* note 73, at 395.

<sup>119</sup>See Dwyer, *supra* note 93, at 140.

<sup>120</sup>See Webster, *supra* note 96, Castlereagh to Liverpool, 13 April 1814 at 176.

<sup>121</sup>See Dwyer, *supra* note 70, at 487. It is worth noting that Napoleon attempted suicide before leaving for Elba. *Ibid.*, at 489.

<sup>122</sup>See Roberts, *supra* note 70, at 723.

<sup>123</sup>*Ibid.*; F. McLynn, *Napoleon* (1997), 597.

<sup>124</sup>P. Hicks, 'Napoleon on Elba: An Exile of Consent', in P. Mansel and T. Riotte (eds.), *Monarchy and Exile: The Politics of Legitimacy from Marie de Médicis to Wilhelm II* (2011), 223.

<sup>125</sup>E. Waresquiel, *Cent jours, la tentation de l'impossible: Mars-juillet 1815* (2008), 164.

<sup>126</sup>See Dwyer, *supra* note 70, at 51; Waresquiel, *ibid.*, at 164; N. MacKenzie, *The Escape from Elba: The Fall and Flight of Napoleon, 1814-1815* (1982); Harris, *supra* note 93, at 255.

intention assez arrêtée d'éloigner Bonaparte de l'île s'Elbe'.<sup>127</sup> As Dwyer has concluded, if Napoleon had not fled the island in 1815, he would 'in all probability' not have been allowed to stay: 'At most, he might be offered another place of exile, but there was no guarantee that he would not be worse off.'<sup>128</sup>

This reality of Napoleon's position on Elba poses conceptual challenges. If the Treaty of Fontainebleau was the foundation of Napoleon's sovereignty, then (absent treaty provisions) what authority was there for the allies to curtail it? If anything, the allied action (and especially that of the Bourbons) constituted both a breach of the Treaty and a threat of invasion and armed attack, giving 'Napoleon a perfectly viable excuse for military action against France'.<sup>129</sup> Alexander's 'blunder', as Lieven has described it, in giving his defeated opponent the dignities of sovereignty fundered on, and was fundamentally at odds with, the desire of his other allies to punish Napoleon and/or to consider him a prisoner.<sup>130</sup> Only the Tsar took the treaty seriously, and by 1815 he was losing interest in his old foe.<sup>131</sup> The resulting hypocrisy would be a contributing reason for Napoleon's flight from Elba and a source of future confusion.<sup>132</sup>

## 5. The outlawed emperor: 1815 and the exile to St. Helena

Napoleon landed in France on 1 March 1815.<sup>133</sup> Louis dispatched troops to arrest him but these rapidly defected. Without firing a shot, Napoleon arrived in Paris on 20 March and re-entered the Tuileries. The Kings and Emperors of Europe reacted, initially, with astonishment and consternation. In the disarray, the British were accused of being negligent in their surveillance. Encapsulating the hypocrisy created by the Treaty of Fontainebleau, a member of the British delegation responded that his country was not at war with Napoleon and had no right to watch him

<sup>127</sup>we have here a fairly decided intention of removing Bonaparte from the Ile of Elba'. See Lentz, *supra* note 54, at 281. Napoleon was kept well informed of these developments. While benefiting from his own network of agents, the allies were hardly discreet. The majority of newspapers were full of speculation as to where he would be sent (*ibid.*, at 281). See also P. Branda, *La Guerre secrete de Napoléon. Ile d'Elbe. 1814-1815* (2014).

<sup>128</sup>See Lentz, *ibid.*, at 513. Alongside, and contributing to, the treatment of Napoleon was that of Murat – former marshal and brother-in-law of Napoleon that had held onto the throne of Naples during the Emperor's fall by changing sides and joining the allies. The latter, however, were far from happy with the arrangement, fearing collaboration between Murat and his former master, and seeing the lingering French presence as an impediment to the order they wished to establish. France, in particular, were eager to see the Bourbons restored to Naples. When Napoleon first left Elba, the allies' first reaction was to believe he would land in Italy. No one thought he would dare to appear in France – especially in the royalist south. During the hundred days, Murat would act rashly and against Napoleon's advice, invading Habsburg territory and proclaiming the establishment of a unified kingdom of Italy under his sceptre. Soon afterwards, his army was routed. Murat would finish by being executed by the allies.

<sup>129</sup>See Zamoyksi, *supra* note 86, at 450; Lefebvre, *supra* note 70, at 360. Dwyer recognizes the provoking circumstances but still attributes the blame to Napoleon's restless nature. See Dwyer, *supra* note 93, at 157. Schroeder does accept the provocation but nevertheless pins the blame on Napoleon's megalomania. He argues that the 100 Days was simply the act of an 'ambitious, unscrupulous Corsican general' who 'took advantage of his adopted country's divisions'. The move here to de-legitimize Napoleon as even French (if not a civilized, European, being) is somewhat alarming. See Schroeder, *supra* note 84, at 548–50.

<sup>130</sup>The fundamental tension is summed up by Waresquiel: 'Pourquoi ne pas envoyer l'inquiétant personnage plus loin, aux Açores, ou à Sainte-Hélène par exemple? Mais en vertu de quel droit? Napoléon a signé avec les puissance alliées un traité qui lui donne légalement la souveraineté d'Elbe. Il fait partie du concert des souverains.' ('Why not send the worrying person further, to the Acores, or to Saint Helena, for example? But in virtue of what right? Napoleon had signed with the allied powers a treaty which legally gave him the sovereignty of Elba. He is part of the concert of sovereigns.'). See Waresquiel, *supra* note 125, at 164.

<sup>131</sup>See Dwyer, *supra* note 70, at 514.

<sup>132</sup>McLynn has suggested that Napoleon's anomalous position was the result of British and Austrian collusion. In essence, a situation was created in which Napoleon would have little choice but to return to France, thus justifying allied calls to have him removed from Europe entirely. See McLynn, *supra* note 123, at 604. Though this argument has been refuted: J. Orioux, *Talleyrand* (2006), 617–24.

<sup>133</sup>See Dwyer, *supra* note 70, at 521–3.

like a jailer.<sup>134</sup> Napoleon was the sovereign of Elba, ‘reconnu par un traité international, et non le prisonnier de ses vainqueurs’.<sup>135</sup>

Recovering their composure,<sup>136</sup> a proclamation<sup>137</sup> was announced from the Congress of Vienna on 13 March:

By appearing again in France with projects of confusion and disorders, [Napoleon] has deprived himself of the protection of the law and has manifested before the world that there can be neither peace nor truce with him. The Powers consequently declare that Napoleon Bonaparte has placed himself beyond the pale of civil and social relationships, and that as an enemy and disturber of the world, he has delivered himself up to public vengeance.<sup>138</sup>

The terms and implications of this declaration are momentous.<sup>139</sup> As we have seen, the allies created and acknowledged Napoleon’s sovereignty through the Treaty of Fontainebleau (with Britain dissenting). Regardless of their own subversion of the treaty’s terms (and in their plan to violate it entirely through moving Napoleon’s place of exile), the allies at Vienna perceived Napoleon’s own disregard of the treaty as sufficient licence to withdraw the dignities conferred by it. He had ‘destroyed the sole legal title by which his existence was bound’.<sup>140</sup>

This, however, raises the problem of Napoleon’s status following the termination. Assuming that the declaration had legal effect, does he revert to being a French citizen, a citizen of Elba, or someone entirely stateless – returned to the state of nature? The answer to this was crucial, for if Napoleon once more became a private citizen of France then he would be (as in 1814) invisible to the law, preventing any international action to prevent him from taking the throne of France and (potentially) destabilizing Europe. And as Talleyrand realized, if Napoleon was successful in toppling Louis (a likely prospect) and accepted the Treaty of Paris (concluded with the restored Bourbons following Napoleon’s removal) the allies would have no grounds for hostilities against him (as it happened, Napoleon did accept the Treaty).<sup>141</sup> Louis XVIII had declared Napoleon an outlaw from French law, but Talleyrand was determined to rouse an international response to bolster the faltering king. The allied declaration presents a unique and unprecedented solution to this crisis: it not only revokes Napoleon’s sovereignty but, in effect, outlaws him from *all human civilization*, revoking even his natural law rights, rendering any act of violence against him lawful.<sup>142</sup> As Gentz suggested, through the declaration ‘Bonaparte est donc mis, dans le plus strict du mot, hors le *droit* et hors la *loi*’.<sup>143</sup> His positivist legal right and natural *droit* are

<sup>134</sup>Quoted in Lentz, *supra* note 54, at 348.

<sup>135</sup>‘recognized by an international treaty, and not the prisoner of his vanquishers’. *Ibid.*

<sup>136</sup>Events at the Congress had not been going smoothly. Tensions over Poland and Saxon territory were leading to acrimony. See Dwyer, *supra* note 70, at 525. The return of Napoleon and the prospect of further war was looked upon favourably by the Prussians as opening the possibility of acquiring more territory from a defeated France. *Ibid.*, at 526.

<sup>137</sup>Drafted chiefly by Talleyrand in order to support the faltering Bourbon restoration. See Harris, *supra* note 93, at 255; Price, *supra* note 2, at 252; Lentz, *supra* note 54, at 352.

<sup>138</sup>Quoted from Roberts, *supra* note 70, at 737. Interestingly, the British government were initially reluctant to openly agree to a declaration or to support the reinstatement of Louis XVIII. See Webster, *supra* note 96, Castlereagh to Wellington, 16 March 1815, at 313–14. The vacillating British political position is also captured by Lentz. In the Parliamentary debates concerning the declaration, Lord Grey evinced some sympathy for Napoleon, pointing out the failure of France to honour its treaty obligation. See Lentz, *supra* note 54, at 356.

<sup>139</sup>Waresquiel has described the declaration as ‘une arme politique formidable braquée sur Napoléon comme le canon d’un fusil tenu à plusieurs mains’ (‘a formidable political weapon pointed at Napoleon like a gun barrel, held by several hands’). See Waresquiel, *supra* note 125, at 165.

<sup>140</sup>Quoted in Dwyer, *supra* note 70, at 526. This, for Kissinger, is an expression of the new legitimacy hammered out at Vienna. See Kissinger, *supra* note 84, at 176–7.

<sup>141</sup>See Zamoyski, *supra* note 86, at 448.

<sup>142</sup>See Englund, *supra* note 102, at 431; Dwyer, *supra* note 70, 526.

<sup>143</sup>‘Bonaparte is, therefore, placed, in the strictest sense of the word, out of right and out of law.’ See Lentz, *supra* note 54, at 353 (emphasis added).



sundered: 'Il n'appartient plus à l'ordre civil et social.'<sup>144</sup> Talleyrand, for his part, would boast, the declaration 'est certainement l'acte le plus fort qui ait jamais été fait contre un individu'.<sup>145</sup> It places Napoleon not just 'hors la loi', but 'hors du genre humain'.<sup>146</sup>

McLynn has described the outlawing of Napoleon as taking the allies to 'the limits of international law and beyond'.<sup>147</sup> This is not an unfair assessment. Within the jurisprudential treatises of the time, there is little indication that a unilateral declaration by sovereigns could strike an individual personally from all normative bonds of civilization and nature. While Gentz in 1802 alluded to the ability of external powers to pacify the 'destroyers' of a country, that does not obviously stretch to their expulsion from all law, be it natural or positive. Martens entertains the possibility of a state collapsing, leaving the nation with nothing but its natural law connections. This, however, falls far short of the events of 1815 and is not, in any event, predicated upon the acts of external powers. Klüber, in turn, suggested that the only right of the external parties in the event of an internal rebellion or challenge to the sovereign power in a neighbouring state, was to offer provisional recognition to one party, without prejudicing the rights of the other – a limitation that the 'de-humanizing' of Napoleon surely surpassed.

Notwithstanding its conceptual difficulties, the allied declaration was quickly challenged by the unfolding of events in France. Louis XVIII fled, and Napoleon was reinstated as Emperor. A new constitution was drafted (this one leaning heavily into liberal constitutional principles)<sup>148</sup> and ratified by a public vote.<sup>149</sup> Napoleon followed this up by making peace overtures to the allied powers, expressing his disinclination for any renewed French expansionism.<sup>150</sup> For the purposes of an Enlightenment social contract scholar, Napoleon was back to being a lawful monarch of France.<sup>151</sup>

Predictably, the allies did not construe events in the same way. Either Napoleon was obligated not to take the French throne by virtue of his former commitments, justifying the allies' projected campaign to remove him, or his outlawing made his ascension to the throne illegal and illegitimate. As Englund has argued,

<sup>144</sup>'He no longer belongs to the civil and social order.' *Ibid.*

<sup>145</sup>'is certainly the strongest act that has ever been made against an individual'.

<sup>146</sup>'outside the law ... outside the human race'. Quoted in Waresquiel, *supra* note 47, at 644.

<sup>147</sup>See McLynn, *supra* note 123, at 607. Adams describes it as 'spurious'. See Adams *supra* note 101, at 529.

<sup>148</sup>Despite being a trenchant critic of the empire, Napoleon lured Benjamin Constant into composing it. As it happened, the Constitution failed to please anyone, being an incoherent blend between imperialism and liberalism. See Dwyer, *supra* note 70, at 539.

<sup>149</sup>*Ibid.*, at 541. The extent to which the plebiscite indicated support for Napoleon has been questioned. The turnout was poor and the assenting votes less than in 1804. Though Dwyer suggests that the lacklustre electoral performance was probably a symptom of indifference than hostility. See *Ibid.* See also Waresquiel, *supra* note 125, at 435; Englund, *supra* note 102, at 434.

<sup>150</sup>See Englund, *ibid.*, at 429–30. The new liberal constitution was drawn up by Benjamin Constant. See Roberts, *supra* note 70, at 748. Napoleon affirmed that his return was 'l'ouvrage d'une irrésistible puissance, l'ouvrage de la volonté unanime d'une grande nation qui connaît ses devoirs et ses droits' ('the work of an irresistible power, the work of the unanimous will of a great nation who knows its duties and its rights'). The Bourbons did not suit the French, who called back a liberator. Preying again upon the hegemonic behaviour of the allies, he also stressed that 'le principe invariable de sa [the French] politique sera le respect le plus absolu de l'indépendance des autres nations' ('invariable principle of its politics will be the most absolute respect of the independence of other nations') (see Bonaparte, *supra* note 84, Letter 39210). Finally, he wished to resist the allied representation of France as being, 'comme les hommes de [17]93, dans l'anarchie la plus complete' ('like the men of 1793, in the most complete anarchy'). France was engaged in establishing 'une véritable liberté sans anarchie, telle qu'il la faut pour le bonheur intérieur de la nation et sans alarmer aucune puissance' ('a true liberty without anarchy, such that is needed for the interior happiness of the nation and without alarming no power'). (*Ibid.*, Letter 39227).

<sup>151</sup>Of course, events were not as clear-cut as this suggests. Both Napoleon and Louis engaged in a fraught battle over whom embodied the sovereignty of the nation. Louis attracted considerable support from the liberals within Paris but failed to win over the army. See Waresquiel, *supra* note 125, at 87, 140, 168, 208, 214.

In the allied view, the plebiscite to approve the *Acte* [the “Acte Additionale” was the new French constitution] was simply the French citizenry’s illegal reelection of a leader who had been impeached, convicted and incarcerated. In enveloping him in the coils of her “sacred” sovereignty, France had made herself a criminal’s moll.<sup>152</sup>

This was a defence of the Great Power system emerging from Vienna ‘against rebellion from within’, Siemann argues.<sup>153</sup> The allied ‘way of proceeding did not take the sovereignty of states into account’ and there ‘was never the intention of entering into new negotiations with Napoleon’.<sup>154</sup> Indicative of their outlook, the allies declared war against Napoleon *personally*.

On 25 March, the allies renewed the Treaty of Chaumont. The resulting Treaty of Vienna (1815) committed the allies to unite their resources:

for the purpose of maintaining entire the conditions of the Treaty of Peace, concluded at Paris the 30<sup>th</sup> of May, 1814; as also the stipulations determined upon and signed at the Congress of Vienna, with the view to complete the disposition of that Treaty, to preserve them against all infringement, and particularly against the designs of Napoleon Bonaparte.<sup>155</sup>

To this end, the military effort would be directed:

against him [Napoleon], and against all those who should already have joined his faction, or shall hereafter join it, in order to force him to desist from his Projects, and to render him unable to disturb in future the tranquillity of Europe, and the general peace under the protection of which the rights, the liberty, and independence of nations had been recently placed and secured.<sup>156</sup>

The treaty reinforces the previous declaration: through the risk he poses to the European community, Napoleon’s rule cannot be legal or legitimate.<sup>157</sup> He is, in effect, radically alienated from France – an absolute other and existential threat. But this alienation produces a paradoxical interaction with the *domestic* understanding of sovereignty that is tactically exploited by the allies. Employing Gentzian logic, in being outlawed, Napoleon’s validation by the French is conceived as little more than an insurgency that oppresses the *real* interests of the nation. As the treaty stipulates, ‘[t]he present Treaty having no other end in view but to support France, or any other Country which may be invaded, against the enterprises of Bonaparte and his Adherents, His Most Christian Majesty [Louis] shall be specially invited to accede hereunto’. Therefore, the domestic and international sovereignty become (however incoherently) mutually supportive in legally delegitimizing Napoleon.<sup>158</sup>

<sup>152</sup>See Englund, *supra* note 102, at 431; Roberts, *supra* note 70, at 746.

<sup>153</sup>See Siemann, *supra* note 73, at 547.

<sup>154</sup>*Ibid.*

<sup>155</sup>1815 Treaty of Vienna, Art I.

<sup>156</sup>*Ibid.*

<sup>157</sup>For Schroeder, this was an operation of international law: ‘The requirements of international law transcended a nation’s right to choose its sovereign; France was not entitled to choose a ruler incapable of living at peace with Europe.’ See Schroeder, *supra* note 84, at 552. This echoes the argument by Lord Eldon set out below. Siemann also makes a similar argument, but, again, does not explain how the allied actions were ‘based on international law’. See Siemann, *supra* note 73, at 547.

<sup>158</sup>Notwithstanding the fact that Louis XVIII and France were party to the treaty, the allies remained equivocal as to whether the treaty committed them to the restoration of the (re)exiled King. Alexander, sceptical of the Bourbon king from March 1814, felt confirmed in his conviction that Louis could not govern France. While Napoleon had to go, the Tsar would even consider a regency from Napoleon’s son. Castlereagh, in turn, while the treaty of alliance was being ratified in Parliament, stressed that nothing in the treaty should be understood as aiming to impose a government on France. See Lentz, *supra* note 54, at 355–6.

Unfortunately for Napoleon, the resulting war did not end well. Defeated at Waterloo on 18 June and driven back to France Napoleon abdicated for a second time (again in favour of his son – and again the allies refused to recognize Napoleon II's legitimacy).<sup>159</sup> Eventually he placed himself under the protection of British laws and came aboard the British vessel *Bellerophon* on 15 July.<sup>160</sup> The Treaty of Vienna had committed the allies to prosecuting the war against Napoleon so as to 'render him unable to disturb in future the tranquillity of Europe, and the general peace under the protection of which the rights, the liberty, and independence of nations had been recently placed and secured'.<sup>161</sup> But what precisely that meant was left undefined. In light of the Vienna declaration and its insistence that Napoleon had delivered himself up to 'public vengeance', the Prussians maintained that they were entitled to execute him.<sup>162</sup> The British however, would not countenance it – Wellington himself directly expressed his refusal to have any involvement in an extra-judicial execution of his adversary.<sup>163</sup> Even before news of Napoleon's surrender reached him, Castlereagh was advising Lord Liverpool that Britain would have to serve as Napoleon's 'gaolers'. While viewing the task as 'an unpleasant one' and Napoleon's trial in France as the most desirable outcome, he doubted the authority of the restored Bourbon regime to bring Napoleon to trial and execute him as a traitor.<sup>164</sup>

When news of Napoleon's surrender was received, the plan for the British to hold Napoleon crystallized. As Castlereagh relayed to Liverpool: Alexander, the Austrians, and the Prussians approved of the plan, viewing it as the safest option.<sup>165</sup> And as Castlereagh smugly noted, 'after fighting him [Napoleon] for twenty years, as a trophy, he seems to belong to us ...'.<sup>166</sup>

Despite Napoleon now being safely secure aboard the *Bellerophon* and the agreement of the allies obtained, the British still faced a dilemma. Napoleon had come aboard a British vessel and was, formally speaking, under the protection of English laws.<sup>167</sup> In order to imprison or otherwise detain him, the British government required legal grounds. Napoleon had expressed his wish for an honourable exile in England – a request the British government would not allow.<sup>168</sup> But as the Emperor continued to lounge aboard the *Bellerophon*, moored in Plymouth harbour, the risk of a legal challenge mounted. Liberal newspapers and barristers were demanding that a writ of *habeas corpus* be issued and the incarceration of Napoleon defended by the government.<sup>169</sup> One lawyer,

<sup>159</sup>There is a question mark over the legality of Napoleon's abdication. His abdication was conditional on the acceptance of his son as Emperor. In a stormy session of the French upper chamber, La Bédoyère thundered that '[s]i son fils n'est pas reconnu, n'est pas couronné, je dis que Napoléon n'a pas abdicqué: sa déclaration est nulle' ('if his son is not recognized, is not crowned, I say that Napoleon has not abdicated: his declaration is void') (*ibid.*, at 522). More generally, the wider internal French politics here are complex. *Ibid.*, at 509–22; N. MacKenzie, *Fallen Eagle: How the Royal Navy Captured Napoleon* (2009), 38–57; Englund, *supra* note 102, at 444; Dwyer, *supra* note 70, at 551–4; J. Bertaud, *L'Abdication. 21-23 juin 1815* (2011).

<sup>160</sup>See MacKenzie, *supra* note 159, at 165. Napoleon showed considerable vacillation leading up to this moment – even holding out the hope of being permitted to lead France's armies in a renewed war. See Englund, *supra* note 102, at 446; Roberts, *supra* note 70, at 772; Dwyer, *supra* note 70, at 559.

<sup>161</sup>1815 Treaty of Vienna, Art I.

<sup>162</sup>G. J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2014), 49.

<sup>163</sup>*Ibid.*, at 38.

<sup>164</sup>See Webster, *supra* note 96; Castlereagh to Liverpool, at 342.

<sup>165</sup>*Ibid.*, Castlereagh to Liverpool, at 350.

<sup>166</sup>*Ibid.*

<sup>167</sup>See MacKenzie, *supra* note 159, at 189.

<sup>168</sup>The risk of Napoleon gaining public safety or becoming a symbol of future resistance was too great. A. Forrest, *Napoleon* (2012), 296–7.

<sup>169</sup>See MacKenzie, *supra* note 126, at 183. The *Independent Whig* on 31 July thundered:

the banishment of Napoleon to the island of St Helena, merely at the will of the crown ... The character and dignity of the country is not only outraged in such an assumption of power, but the Bill of Rights is actually made a dead letter.

The prominent barrister Capel Lofft made a similar argument in the *Morning Chronicle*, stressing that 'deportation, or transportation ... cannot legally exist in this country, except where the law expressly provides it on trial and sentence'.

Mackenrot, even had the crafty idea of issuing a subpoena to Napoleon to appear as a witness in a libel case.<sup>170</sup> Liverpool's administration were well aware that there were no grounds under English law for Napoleon's imprisonment (an Act of Parliament authorizing the exile on St. Helena would only be pushed through in 1816). The situation in international law did not look much better.<sup>171</sup> One approach to understand the detainment was to view Napoleon as a prisoner of war<sup>172</sup> – though this was open to obvious difficulty that 'no state of war existed between France and Britain' and that Napoleon had surrendered himself freely.<sup>173</sup> Another ground considered was that Napoleon was a pirate or bandit, but this argument had to navigate the problem of Napoleon's coronation in France. Lord Eldon, the then Lord Chancellor, was increasingly forced to rely upon *raisons d'état*, arguing necessity.<sup>174</sup> While the general rules of the law of nations might entitle the French to the selection of their own sovereign, the case of Napoleon is one of 'exception', 'because the safety of every other Country requires that the French Nation should not be permitted to act upon the General Rule'.<sup>175</sup> Eventually, the UK government decided to avoid a direct confrontation with the legal matter at all. Napoleon would be dispatched to St. Helena without trial to justify it.<sup>176</sup> A brushing under the rug if there ever was one.<sup>177</sup>

The 100 Days was over – and so was Napoleon. His gamble to retake the French throne had exacerbated and exploded the legal farce created in 1814. The result was a diminutive exit accompanied by an embarrassed British cough.

## 6. Conclusion: 1821 and the Vanished Emperor

The question of how to deal with a defeated Napoleon presented a unique challenge to the victorious allies. In order to achieve their desired solutions, they engaged in a highly pragmatic, improvisational (and incoherent) use of the law of nations, sliding between conceptual gauges of sovereignty as and when circumstances dictated. Sometimes domestic understandings of sovereignty are used to legitimize decisions, while at others, an international perspective is used to make sovereignty susceptible to control by the Great Powers. From the beginning of 1814 (and before it) the allies' use of international law was, effectively, a sham to justify their intervention in France and removal of Napoleon. Following the capture of Paris in 1814, the allied declaration, while clear in its effort to de-legitimize Napoleon, nevertheless preserved the formalities of French

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See MacKenzie, *supra* note 159, at 192. Of course, not all the British press was so sympathetic. *The Courier* asked how the liberals could defend a tyrant and afford him the protection of laws. Others suggested that Napoleon, as a dangerous animal, should be treated through exceptional measures. The *St. James' Chronicle* even suggested that the British government was acting under natural law. *Ibid.*

<sup>170</sup>G. Martineau, *Napoleon Surrenders* (1973), 180–2.

<sup>171</sup>The imprisonment of Napoleon on St. Helena would be confirmed by the allies in 1818 at the Congress of Aix-La-Chapelle. See Jarrett, *supra* note 84, at 205.

<sup>172</sup>*Ibid.*, at 152.

<sup>173</sup>See MacKenzie, *supra* note 159, at 119. Napoleon was not idle in contesting the British actions. 'Je proteste solennellement ici, à la face du ciel et des hommes, contre la violence qui m'est faite, contre la violation de mes droits les plus sacrés, en disposant, par la force, de ma personne et de ma liberté.' ('I solemnly protest here, in the face of heaven and men, against the violence which has been don't to me, against the violation of my most sacred rights, disposing, by force, of my person and my liberty.') (see Bonaparte, *supra* note 84, Letter 40069).

<sup>174</sup>J. H. Stewart, 'A Legal Opinion by Lord Eldon', (1951) 45(3) AJIL 571, at 575. As Adams has argued:

Given that peace had been restored between France and the allies in early July, he [Napoleon] could not legally be considered a prisoner of war, and it is certainly difficult to imagine what crime he could have been convicted of that would have justified the sentence of permanent exile (let alone one of execution).

See Adams, *supra* note 101, at 533.

<sup>175</sup>See Stewart, *supra* note 174, at 575.

<sup>176</sup>See Bass, *supra* note 162, at 53; MacKenzie, *supra* note 159, at 191.

<sup>177</sup>Interestingly, many political commentaries of the period barely mention the exile. Schroeder and Kissinger skip over the fact without mention or analysis. See Roberts, *supra* note 70, at 778.

sovereignty by leaving the deposition of the Emperor to the Senate. However, this approach conflicted sharply with the Treaty of Fontainebleau that followed the Senate decree. In that treaty, Napoleon is interpolated as sovereign, regardless of his dethronement by the Senate, and then given Elba as his territory. If this was not problem enough, the British, Austrian, and Bourbon opposition to the settlement of Fontainebleau, and their desire to explicitly treat Napoleon as a delinquent, would create a hopelessly contradictory situation. Napoleon was ostensibly sovereign of Elba yet was watched and guarded like a prisoner and made financially dependent upon the Bourbons – who did not convey a single franc. The plenipotentiaries at Vienna even discussed his removal in an open international forum. That Napoleon was then condemned for ‘breaching’ this settlement is such a piece of ironic cynicism that a few historians can be forgiven for thinking the situation was not manufactured from the start. Following Napoleon’s flight from Elba, the allies faced all the legal incoherencies created by Alexander’s ‘blunder’. The outlawing of 1815 went far beyond anything previously imagined in the law of nations, representing a crisis reaction or political statement to sunder Napoleon from the sovereignty of France and the very boundaries of humanity. The allies were not even sure of the implications of Napoleon’s putative outlawing. While the allies ultimately consented to make the containment of Napoleon Britain’s particular headache, Lord Liverpool and Bathurst were so afraid of domestic legal challenge that they dispatched Napoleon to St. Helena without his so much as stepping foot on British soil, let alone a court room.

Some of the inconsistency found in 1814–1815 stems from the fact that the exiling of Napoleon took place within a set of broader structural transformations, in which the law of nations moved from a law of personal sovereigns to that of nations, natural law gave way to positivism, and in which the Great Powers attempted to exert greater legal and political control over other states and individuals – and each of these threads combined to establish the international order emerging from the Vienna Congress. What the fate of Napoleon helps us to see is that this transformation was not coherently imagined and nor were specific legal mechanisms created to affect it. In each of the structural transitions and across them, liminal spaces opened up – conceptual cracks through which unwanted persons or ideas might fall. Navigating and utilizing these fissures, the allies oscillated between applying traditional understandings of state sovereignty, to stretching that existing doctrine in ways it was never designed to do so: treaty-making powers within international law were reserved to sovereign states, yet Napoleon, though ostensibly a private citizen in April 1814, was interpolated with sovereignty in the Treaty of Fontainebleau and granted the island of Elba; the law of nations placed equality and independence of states as a foundational premise, yet Napoleon’s position on Elba was that of a prisoner; while breaching the Treaty of Fontainebleau themselves and lacking an international executive force, the allies were forced, in order to render Napoleon’s flight criminal, to revert away from positivist treaty law and to rely upon the spurious device of natural law outlawing. The final and ultimate act of arbitrary force to detain Napoleon and imprison him until his death lays bare the limits and realities of the events. Each move of the allies had been with the intention of diffusing and neutralizing Napoleon as a political agent – rendering him, and France, less-than-sovereign. With Napoleon possessing sufficient force to cause the allies pause in 1814, he was able to secure the incongruous position at Elba. However, upon losing that force in the summer of 1815, Napoleon was powerless to prevent himself being subject to the violence that had been legitimated (however incoherently done) against him. He was a criminal entity that could be dispensed with beyond the previously accepted rules. Imprisoned on St. Helena thousands of miles from France and Europe, Napoleon is, conceptually and geographically, the remnant and condition of possibility of the Vienna international order. That order, which still forms one of the bases of today’s international order of sovereign states, is founded upon the mythologizing of uncontrollable Napoleonic violence.

The conflict of Napoleon’s status continued until (and beyond) his death. Developing the symptoms of stomach cancer, he died on 5 May 1821. In his will, Napoleon had asked to be buried on the banks of the Seine, but this was declined. In conservative Europe, then under the control of



the Concert of Europe, such a tomb could serve as a potent symbol or shrine for resistance. Instead, Napoleon was buried on the island, at a spot he had enjoyed visiting. To the credit of the British, he was afforded full military honours and interred by the regiment quartered on the island. A gun salute was also granted. However, a row broke out over the stone that would mark the grave. Napoleon's household wanted the imperial 'Napoleon' to be inscribed upon it. The British however, rejected this, insisting it display 'Napoleon Bonaparte'. Neither side backed down; the monument was ultimately left blank.<sup>178</sup>

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<sup>178</sup>*Ibid.*, at 801. His body would only be returned to France in 1840. His tomb can be found today in the Invalides in Paris and may be visited by the public.