

# **INTERNATIONAL NEGOTIATION IN THE TWENTY-FIRST CENTURY**

Alain Plantey

Translation by Frances Meadows



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## Foreword |

Any publishing house anywhere in the world would be honoured to secure the publication rights on a book written by Ambassador Alain Plantey. The University of Texas at Austin is thus, understandably, both honoured and delighted that the author of this book has allowed us to include it in its new series *Studies in Foreign and Transnational Law*. For, as the summary of his life and work (given on the book flaps) suggests, his has been a rich and varied life at the centre of French politics, diplomacy, judicial and intellectual life. For Alain Plantey has served his country as a judge in France's most senior Administrative Court, an Ambassador-at-large, representing General de Gaulle (with whom he started working soon after they met at the end of the War), as an author (with more than twenty books and scores of legal articles on varied topics to his name), as a draftsman of France's famous 1958 Constitution, as a Member (Fellow as we would say in Anglo-American parlance) of the Academy of the Moral and Political Sciences, subsequently its President and, eventually, President of the entire *Institute of France* (the umbrella organisation of the Five Academies). The variety of his interests is breathtaking, equalled only by the excellence achieved while cultivating them and the honours he has received from many countries and varied quarters of social life. All come together in this highly original book on international negotiation.

There is no law of any kind without negotiation and this is especially true of public international law. This is why, in a series of books on international law, there is place for a work devoted to negotiation – understood, as its distinguished author said in the preface to the first edition, as a method, a style and an art, and studied from the perspective of the lessons of history and experience. This then is a book about means rather than ends, process rather than content.

Negotiation is sometimes taken for granted – wrongly so because without it there would be no international relations, trade or cooperation, no *détente*, no alliances, no international law, no machinery for dispute resolution and no peace and stability. Countries that flourish – the history of the author's own country offers an excellent illustration – owe their survival and much of their prestige as much to the skills of their diplomacy as to the force of arms. So this book takes us to the borderland between law and political science. The history, philosophy and techniques of international negotiation make for fascinating, and important, study – to my knowledge a task rarely, if ever, undertaken until Ambassador Plantey addressed the subject and brought to it the breadth of his historical scholarship, legal expertise, broader culture and insight.

This book first saw the light of day in 1994. By 2002 successive reprints had run out and the accelerated pace of international change was such that a new edition was launched. Four years later, the pace of change has remained as rapid as it ever was and this has called for substantive rewriting of parts of the French edition and not just a well-overdue translation of this book so as to make it available to an English-speaking public. This pace throws into sharp focus the need for international relations to adapt by negotiating. It also prompts a second observation: very many of the trends predicted by the author when this book first appeared in 1994 – for instance, concerning terrorism, ideological confrontation and global environmental issues – have (alas) been borne out, sometimes with alarming accuracy. His underlying analysis of the factors and considerations that influence negotiation, however, has not changed.

At the beginning, the author reminds us, the methods of diplomacy were fashioned out of those of trade. Even now, the links between commerce and political power remain strong and, as the author illustrates, some of the most critical and controversial negotiations of modern times take place within the framework of the World Trade Organisation (WTO). On a more general level, every negotiation is an exchange, the subject of which has a different value to each party.

The classic model of bilateral negotiations between plenipotentiaries has to some degree been overtaken. The challenges facing international society in the new century are of a radically different order: they are global, urgent and potentially devastating. The international community must organise and negotiate collective responses to the threat posed by weapons of mass destruction, and collective regulation of the use of the planet's scarce resources. There is no time to lose. The focus in future will be on prevention, limitation and security. Solidarity, not only between nations but other parties with a stake, must be negotiated, whether in summits or international conferences or organisations, official or otherwise. From the United Nations down, the primary function of international organisations is to serve as fora for negotiation, in which States can execute their manoeuvres, and, as the author shows, the traditional model is proving adaptable.

It is a curious paradox that, in parallel with the spread of democracy, State sovereignty – the traditional framework of diplomatic negotiation – is being eroded by the expansion of multinational corporations, the Internet, the mass media and the increasing role of civil society and non-governmental organisations. Also, an increasing proportion of what might be described as traditional diplomatic negotiation takes the form of participation in multilateral conferences and institutions rather than bilateral 'single-issue' diplomacy. That said, as the author shows, the nation-state has retained its character as the primary actor in international relations. 'Summit' negotiations are ever more frequent, and the author suggests that the increasing rigidity of international organisational procedures may even prompt a revival of bilateral diplomacy.

Change has been particularly dramatic within the European Union, both in terms of its expansion and internal functioning. The author has thus substantially revised the chapter on the European Union to take account of developments, including the referenda held on the draft 'Constitution', which took place as the laborious task of the translation of his book was in mid-stream. Some of the

patterns and structures of negotiation emerging within Europe are highly innovative.

The history of traditional diplomacy, and therefore of diplomatic negotiation, began in Europe. This, coupled with the fact that the book was originally written in French and aimed at a French readership – inevitably one would suggest – gave it a certain Eurocentric flavour. Some (but not all) of this has survived the process of translation and updating. But the universality of the message of the book has not, thereby, been diminished. References to European history have been retained, and sometimes expanded, wherever they seemed to offer powerful illustrations of phenomena still relevant today, both in Europe and elsewhere. Others sections or references, more obscure or more appropriate to a purely French audience, have been eliminated. This has been true of many older French language footnotes, despite their intrinsic value to pure researchers, and this has been done so in order to make the book more approachable to a much wider readership. Thus, students of international relations, diplomats, lawyers, politicians and, indeed, anyone engaged in international business should find a wealth of material for reflection in its pages.

The book is divided into four main sections. Part I deals with ‘Diplomatic Negotiation’. Part II covers ‘Institutional Negotiation’. Part III looks at ‘Prospective Negotiation’ while Part IV looks at ‘Negotiation as A Political Art’. The traditional presentation of French academic textbooks is that of numbered paragraphs, with key ideas in italics and cross-references to paragraphs rather than pages, as well as the usual index. In order to preserve the essential integrity of Ambassador Plantey’s book, and simplify the already complex task of translation of such a highly nuanced work, we have chosen to retain this formula. There is also a substantial bibliography, which the author has kindly updated for this edition. Together, these should help researchers, young or not so young, to build on this innovative work.

A work of such size, breadth, complexity and style does not lend itself easily to translation. In addition, the author of this Foreword has had the privilege of working with the author of this book for many years now and has developed a healthy respect for Ambassador Plantey’s linguistic abilities, attention to nuances and fastidiousness. For a long time finding a translator that could rise to such a challenge felt like an unrealisable dream, and finding the funds to back such an operation remained for long a near impossibility.

Happily, the School of Law of The University of Texas at Austin, thanks to the cosmopolitan interests of its then Dean (and now President of the entire University) Professor William Powers Jr., decided to launch its new law series, and my recommendation that this opus magnum be included in the series was accepted. With Professor Powers ‘on board’, the financial support of the M. D. Anderson Foundation of Houston soon followed, which was given with the imagination and grace which so often characterises the gestures of selfless benefactors. No doubt, the most effective advocate for this gesture was my good friend Mr. Gibson Gayle, formerly Managing Partner of the great American law firm of Fulbright and Jaworski. It is most appropriate that his interest in strengthening American–French relations should be recorded by us as it has already been acknowledged by the

French State which made him a *Chevalier de la Legion d'honneur* for his part in setting up the website of translated cases of the three French Supreme Courts and, most recently, an imaginative programme of Judicial Fellowships that will allow young French judges to spend some time in the United States familiarising themselves with some of the best achievements of American law.

Ambassadors, deans, institutional benefactors and senior attorneys thus came together in order to ensure the appearance of this book in the English language. And what brought them all together was, first and foremost, the open-mindedness one finds in persons of culture and intellectual curiosity quick and able to recognise something good when they see it. But their efforts were also supported by the belief they all share in strengthening American–European relations in general, and American–French relations in particular. For, despite occasional ups and downs in their international relations, the cultural and political links between France and the United States are not only old but also valuable to both and must therefore be kept in good repair. This book fits in this wider effort, and for its author – committed as he is to the idea of give and take, so implicit in the notion itself of negotiation – it must be seen as a living embodiment of a life's beliefs.

Yet all these good intentions, great scholarship and wish to innovate would still not have sufficed to bring this project to fruition if it were not for Frances Meadows. She may be here thanked last but never did the expression 'last but by no means least' have more significance than in this instance. For her unique background, scholarly as well as practical, has made her 'sensitive' to the culture and language of two great nations. Above all, her success has not deprived her of her 'humanity'. For though an acclaimed professional translator, she immediately recognised the intellectual merits of this project and agreed to undertake the extremely onerous task of translating this work on terms which almost amounted to a gift of her valuable time.

To Ambassador Plantey we thus owe a great, indeed unique, work, and to Frances Meadows we are grateful for a most readable rendition of a text written in a language which for many has come to be the embodiment of elegance and style.

*Sir Basil Markesinis QC, FBA,  
Corresponding Member of the Institut de France*

# Abbreviations |

## I – International institutions

ADI	Haye Academy of International Law
CJEC	Court of Justice of the European Community
CSCE	Commission on Security and Cooperation in Europe
ECSC	European Coal and Steel Community
EEC	European Economic Community
EHRC	European Human Rights Commission
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ILO	International Labour Organisation
LN	League of Nations
OECD	Organisation for Economic Cooperation and Development
OPEC	Organisation of the Petroleum Exporting Countries
OSCE	Organisation for Security and Cooperation in Europe
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNITAR	United Nations Institute for Training and Research
WEN	Western European Union
WTO	World Trade Organisation

## 2 – Bibliography

AEAP	<i>Annuaire européen d'administration publique</i>
AFDI	<i>Annuaire français de droit international</i>
AJNU	<i>Annuaire juridique des Nations Unies</i>
CDE	<i>Cahiers de droit européen</i>
CMLR	<i>Common Market Law Review</i>
CNRS	<i>Centre national de la recherche scientifique</i>
ELR	<i>European Law Reviews</i>
JCMS	<i>Journal of Common Market Studies</i>
OJEC	<i>Official Journal of the European Community</i>
RCADI	<i>Recueil des cours de l'Académie de droit international</i>

Rec.	<i>Recueil officiel des jugements</i>
RGDIP	<i>Revue générale de droit international public</i>
RMC	<i>Revue du Marché commun</i>
RTDE	<i>Revue trimestrielle de droit européen</i>
SFDI	<i>Société française de droit international</i>

# Contents |

<i>Foreword</i>	<i>ix</i>
<i>Abbreviations</i>	<i>xiii</i>
Introduction	1
<b>Part I: Diplomatic Negotiation</b>	<b>13</b>
<b>Chapter I: Diplomatic Negotiation and the Themes of War</b>	<b>15</b>
Section 1: The confrontation of forces	16
§1. The temptation of force	18
§2. The balance of power	26
§3. Force versus negotiation	34
§4. Negotiation and war	42
Section 2: Thought and action	48
§1. Negotiation as a tactic	48
§2. Implementing the strategy	58
<b>Chapter II: Diplomatic Negotiation and Trade</b>	<b>67</b>
Section 1: The balance of interests	68
§1. Trade between nations	69
§2. Attempting compromise	76
§3. Mediation	83
Section 2: Trust and skill	88
§1. Good faith	89
§2. Tacit negotiation	93
§3. Time	95
§4. Duration	98
§5. Dexterity	102
<b>Chapter III: Diplomatic Negotiation and the Rule of Law</b>	<b>107</b>
Section 1: Reconciling sovereignties	108
§1. Sovereignty in negotiation	109
§2. Equality and reciprocity	119
§3. Eligibility to negotiate	123
Section 2: Norm and contract	128
§1. Respect for principles of law	130
§2. The validity of commitments	134

## Contents

§3. Concluding the agreement	138
§4. After the negotiation	145
§5. The duration of the commitment	147
<b>Part II: Institutional Negotiation</b>	<b>155</b>
<b>Chapter I: Alliances</b>	<b>159</b>
Section 1: The nature of alliances	160
§1. The pact	161
§2. The bond	163
§3. Equality or predominance	165
Section 2: The diplomatic effect of alliances	169
§1. Alliances in negotiation	171
§2. Negotiation within the alliance	175
<b>Chapter II: Conferences and Organisations</b>	<b>181</b>
Section 1: Multipartite conferences	182
§1. Preliminary negotiations	184
§2. Multilateral participation	187
§3. Balances and choices	192
Section 2: International organisations	197
§1. The institution as a product of negotiation	198
§2. Institutionalised multilateralism	203
§3. The organisation as an actor in negotiation	212
§4. An instrument of diplomatic manoeuvre	218
<b>Chapter III: The European Union</b>	<b>223</b>
Section 1: The framework for dialogue	227
§1. A favoured dialogue	229
§2. Institutions and rules	234
§3. Political cooperation	241
§4. The Community system	246
Section 2: External negotiation	252
§1. The capacity to negotiate	254
§2. The areas of negotiation	259
§3. The conduct of negotiation	266
§4. Union negotiation and joint negotiation	273
<b>Chapter IV: Organisational Negotiation</b>	<b>279</b>
Section 1: Organised negotiation	280
§1. Developing the structures	281
§2. Easier procedures	287
Section 2: Regulation by negotiation	295
§1. Normative negotiation	297
§2. From management to integration	302
§3. Enforcement by negotiation	308

<b>Part III: Prospective Negotiation</b>	<b>315</b>
<b>Chapter I: The Aggravation of Threats</b>	<b>319</b>
Section 1: The polarisation of hegemonies	320
§1. Managing deterrence	322
§2. Strategic challenges	329
Section 2: The spreading risks	335
§1. Tactical autonomy	337
§2. Conflict prevention	341
<b>Chapter II: The Increasing Complexity of International Relations</b>	<b>351</b>
Section 1: Transnational factors	352
§1. The multinational economy	353
§2. Cultural <i>rapprochement</i>	359
§3. The expansion of ideologies	364
§4. Internationalism in professions and cultures	370
Section 2: The birth of a global vision	373
§1. International competition or integration	374
§2. Negotiating a world order	386
<b>Chapter III: The Prospects for Negotiation</b>	<b>393</b>
Section 1: Refining the methods	394
§1. Information	395
§2. Communication	404
§3. Forecasting	409
§4. Decision-making	415
Section 2: Anticipation and hypotheses	425
§1. The negotiation of ideas	426
§2. The normative dynamic	430
§3. The risk of unintended consequences	438
<b>Part IV: Negotiation: A Political Art</b>	<b>447</b>
<b>Chapter I: System and Strategy</b>	<b>449</b>
Section 1: International and national systems	450
§1. The system	452
§2. Sub-groups	455
§3. The State	459
Section 2: Negotiation and acts of State	462
§1. Diplomatic strategy	463
§2. Negotiation as an instrument of policy	467
<b>Chapter II: The Skills of the Negotiator</b>	<b>475</b>
Section 1: The role of personality	476
§1. The choice of envoy	477
§2. Collective efficiency	485
Section 2: Summit negotiation	490

Chapter III: Negotiation and State Power	497
Section 1: The mission of government	498
§1. Government prerogative	499
§2. Bureaucratic structures	503
§3. The role of the legislature	507
Section 2: Public opinion and negotiation	512
§1. Diplomatic secrecy	513
§2. The support of public opinion	517
Section 3: Democracy and negotiation	523
Conclusions	529
<i>Index</i>	531

# Introduction |

1 – For every nation, history is an adventure. Each one confronts a succession of uncertainties, dramas and sometimes grave risks, the worst of which for mankind is that, to this day, the survival of whole populations, especially in the developing world, remains threatened. The forces that unite nations and set them against each other have been rooted for centuries in basic needs or religious ideals. National sentiment is now giving them fresh impetus. From the time nations first came into existence as stable and organised entities, their relations have often been marked by distrust, fear and sometimes hostility, with no people willing to sacrifice its interests to those of the others, unless constrained to do so by threat, force or necessity.

2 – This holds true especially for States founded on the model fashioned in Europe five centuries ago out of the principles of Roman law, of *the State as the legal and organisational embodiment of a group of people with stable and lasting control over a territory*. *The model is still valid in an international society made up of a juxtaposition of States, showing ever-increasing fragmentation because their numbers are not limited by any rule or proportion.*

3 – In this sense at least, there is nothing immutable about the way the world is divided. Numerous ideologies and religions have aspired to outgrow the phenomenon of the nation, and some of them have, up to a point, succeeded. The pressures weighing upon the State structure, both internally and externally, are heavy.<sup>1</sup> Nor is their growth at an end, judging, for example, by the problems contemporary States must face either because they are too small or too large, or because they are multi-ethnic.

Alongside the power of States, if not in opposition to it, are the private interest or pressure groups whose strength and dynamism have launched them onto the international stage.

4 – No matter how much more organised international life becomes, and irrespective of the strengthening of relations between peoples, the global expansion of trade and the effects of universalist ideologies, the phenomenon of the State remains an absolute contemporary reality. Even the most recent political developments and diplomatic negotiations among the nations of Europe have this as their legal frame of reference. Leaders of revolutionary movements, too, clothe their strivings in the banner of a patriotism or 'separatism' inherited from a

1 W. FRIEDMANN: *Théorie générale du droit*, Paris, LGDJ, 1965.

tradition that is foreign, if not contrary, to their ideals. Nations that have recently won their freedom not only adopt all the usual signs of sovereignty – flag, anthem, currency and embassies – but, before they have even defined their policies and secured the foundations of their independence, they also practise a form of nationalism that today seems excessive, aggressive and outmoded. (see 1866)

The past century confirmed the sometimes explosive strength of ethnic ties: the dissolution of the Soviet Union gave place to the Russian nation, which reappeared in its original form and with its traditional symbols. (see 339)

5 – The newer the nation-state, the more easily it appears to take offence: this is because it derives its legitimacy from the struggle for emancipation, especially in the eyes of the people who had previously been dominated. The difficulties of mere existence are no obstacle: countries must assert their nationalism in order to survive, in the words of Luis Etcheverria, and also in order to grow. Léopold Senghor observed that, to have the strength to assimilate European culture, they must first be true to their own.

6 – The division of territories, artificial though it is, and the attachments of populations, even when contested, are fundamental to international life just as they are to animal biology. Law and practice will usually question these divisions only as a last resort, but instead extend their limits outwards even over air and sea.<sup>2</sup> (see 652)

In spite of all the problems posed by European State frontiers, the principle of maintaining the status quo was established without any real difficulty at the start of the Helsinki Conference on Security and Cooperation in Europe in 1973, after which some frontier modifications were agreed upon (in 1995, 1996 and 1997). (see 76, 2273)

The Balkan area of Europe, Central Asia and Central Africa are examples of areas where it is becoming increasingly clear that border disputes have huge potential to explode and to jeopardise the normal diplomatic process.

7 – Boundary delimitation provides a legal frame of reference for States engaged in dividing populations, resources, the means of production, authority and influence, even where there are disputes going back for centuries. The Europe of the Treaties of Westphalia (1648) is still so much alive that the liberating effects of the euro are limited to those States of the European Union that decided to choose it as their common currency. There are many zones whose status is indeterminate, like the Caspian Sea, that are the subject of acrimonious negotiations over their rich resources. (see 76, 637)

8 – The fate of the nation-state is far from being sealed, as it rests on the living feelings, fears, pride, ambitions and hatreds that embody the power of popular imagination even within the confined area of the old Europe. In spite of a Council of Europe resolution in 1974 and attempts on the part of the Community, no

2 H. RUIZ-FABRI: 'Maîtrise du territoire et rôle international de l'Etat', *Revue des sciences morales et politiques*, 2000. D. BARBERIS: 'Les liens juridiques entre l'Etat et son territoire', *AFDI*, 1999, p. 132.

European government has yet judged the time right to allow diplomatic negotiation between neighbouring regions or to go as far as functional integration. (see 614, 2310, 2321)

The European Union itself makes reference to 'national identities' in the Amsterdam Treaty of 1997, while at the same time its territory has been implicitly enlarged, notably as a result of the reunification of Germany in 1990.<sup>3</sup>

Notwithstanding this, modern civilisation has a tendency to underestimate the strength of tribal or religious attachments. Spread across the territories of several States and without regard for their frontiers, there are some dependent peoples that have preserved their culture, refusing any political subservience and sometimes living in a state of permanent revolt.

For many years to come, citizens will continue to look to the State to reconcile freedom with security and to make and enforce the law. (see 2301)

9 – In an environment still so poorly organised and so unfamiliar with ethics as international society, *no entity will obtain the respect of others unless it is in a position to demand it* – that is, unless it fulfils its conditions, both legal and factual. This is why a common legal denominator has come to exist, based on a kind of reciprocal acquiescence, that expresses not only a nation's capacity to be recognised by others as organised and autonomous, but also the capacity of its authorities to assume the defence of its interests and responsibility for its conduct. That denominator is sovereignty, defined in both diplomatic practice and international law.<sup>4</sup> (see 606)

10 – A territory with resources, a population with strength in numbers and a constituted authority with policies:<sup>5</sup> these are the three components of the legal and political entity that today we call the State, which faces both inwards towards its own government and outwards towards other States. From this derives the principle that it is through the State that the interests of nations and their ideals can be given due consideration at an international level, even including universal ideals such as respect for mankind and its environment, solidarity between nations and peace. (see 2318)

Private sector companies, even the powerful ones, do not operate at the same level, except where their activities are bound up with national strategy, usually in investment or energy production.

11 – Even between those ethnic and tribal groups whose traditions and aspirations bind them together into nations and thereby set them apart from other nations, there has always been fear and prejudice, jealousy and resentment. *Men are brought closer or driven asunder by contradictory forces that change down the ages, depending on their interests and sentiments.* (see 2304)

12 – Any State that follows its own course must expect reaction from others, since there is no reason, *a priori*, why their policies should coincide with its own in all

3 *Institutions européennes et identités nationales*, Brussels, Bruylant, 1998.

4 C. de VISSCHER: *Théories et réalités en droit international public*, Paris, Pedone, 1960.

5 R. ARON: *Paix et guerre entre les nations*, Paris, Calmann-Lévy, 1962.

respects and over long periods. Faced with an uncertain future, therefore, and having made an assessment of its capabilities, a State must marshal and maintain all the means at its disposal to achieve the objectives it has decided upon. As General de Gaulle proclaimed, to play an international role it is necessary to exist by oneself, in oneself and on one's own land.<sup>6</sup>

The disintegration of certain countries following ethnic, political, cultural or religious conflicts has led to the questioning of the traditional foundations of the State: a delimited territory, a defined population and a real authority. This has introduced a new element of unpredictability into diplomacy: territorial dislocation, uncontrolled populations and disputed governments, all of them traps for the negotiator. (see 1616)

13 – Establishing order and harmony among peoples is a magnificent enterprise in which no wartime or peacetime leader has ever succeeded: nations have either dominated or been dominated. Only very late, shortly before its own break-up, did the Roman Empire start to practise the assimilation or unification of races and individuals on a basis of equality and yet it is still held up as the most advanced legal form of political supremacy. Later, Rome in its turn faced submission and ruin.

14 – A nation that enjoys self-determination does so not only through internal politics; it can only succeed by asserting its independence in its dealings with others. If a people fails to invest the effort required to be worthy of national sovereignty, if it does not assume the responsibility of exercising its freedom of choice and defending its positions, its interests and its ideals, another will soon appear and impose its will. Mere possession of means, resources or even power does not guarantee they will be used: there must also be the will to use them.

*Independence is not so much a position as an assertion of will; to invoke a right is to exercise it.* (see 616)

15 – The life of any nation cannot be frozen at a given point in time. Its relations with others follow their course, develop and change. The result is an unending series of actions and reactions, some of them imposed and some of them voluntary, all of which have to be accommodated and coordinated in arriving at a foreign policy. The means deployed and the actions taken in the service of that policy are the ingredients of diplomacy, understood as both the art and the science of relations between Sovereign States.<sup>7</sup>

16 – The modern era is characterised by the proliferation and complexity of relations and communications between nations, in other words by the development of diplomacy. Contrary to what is generally thought, diplomacy plays an increasingly important part in the future of each State: diplomatic decisions are usually taken, and sometimes also carried out, at the highest levels. (see 2325)

6 C. de GAULLE: 'Discours de Dakar, 13 déc. 1959', in *Discours et messages*, III, p. 151: 'l'essentiel, pour jouer un rôle international, c'est d'exister par soi-même, en soi-même, chez soi'.

7 H. NICOLSON: *Diplomacy*, Oxford University Press, 1945.

Networks of influence, communication, cooperation and business create a virtual space expanding in line with the growth in the number and importance of dealings and exchanges they generate. Some of these networks are used for transferring funds, spreading slogans or disseminating ideologies that may be violent and contagious. Some of them, too, have substantial logistical underpinnings.<sup>8</sup> (see 3, 30, 1688, 1690, 1834, 1866)

Many private enterprises and various other groups have also become fully fledged actors on the international scene, forming their own networks in a market where everything can be bought and sold, and almost anything can be negotiated. (see 397, 1821, 1995)

17 – In the international arena as well as within the State, political ends are achieved by decisions and acts which, when combined together and directed towards an objective, constitute a manoeuvre.<sup>9</sup> Manoeuvres become more difficult, more fraught with risk, and sometimes more advantageous, as the rivalry between men and nations, interests and ideals, is stepped up.

Negotiation is one of the forms these relations between peoples and nations can take.

18 – It is advisable to refrain from value judgements about the principle of diplomatic action: it is a fact of political, economic and cultural life. Even a global government, if one existed, could not avoid the need to manoeuvre, albeit internally. Conflict does not always break out into open combat: it may also take the form of emulation, competition or dispute. It finds expression, too, in policies designed to ensure that a given interest will prevail, to avoid a danger, to achieve domination and even to establish a new and stable order.

*There can be no solution to the problem of legitimacy in an environment where there is no common scale of values.*

19 – In his *Nichomachean Ethics*, Aristotle identified the notion of the common good as the ultimate aim of life in any society. Man still shows the same obvious, and normal, desire to project his wishes, his concerns and his ambitions beyond himself and into the future. All living creatures manoeuvre in order to feed themselves, protect themselves and reproduce: the same is true for peoples.

20 – The collective existence of a nation, of society in general, expresses itself through its relations with others – relations which, while adapting to circumstances, are ordered around the constant themes of affirming its existence, expressing the need to protect itself against danger or threat and sometimes also conveying its willingness to resort to aggression in order to claim its rights. Human sciences can, or should, shed light on these dominant themes and explain how they function.

8 M. BONNEFOUS: 'Logique des réseaux, logique des territoires', *Défense nationale*, July 2001, p. 134. M. CASTELS: *La Société en réseaux*, Paris, Fayard, 1998.

9 A. PLANTEY: *De la politique entre les Etats. Principes de diplomatie*, Paris, Pedone, 1992, p. 29.