Peace and Justice

Valedictory address by

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Tilburg University

Understanding Society

Prof. Dr. Ernst M. H. Hirsch Ballin (born in Amsterdam in 1950) concludes his work as distinguished University Professor at Tilburg University with this valedictory address. He was appointed Professor of Constitutional and Administrative Law at this university in 1981 and subsequently taught international law and legislation issues and, from 2011, Dutch and European constitutional law. He completed his degree in law at the University of Amsterdam, followed by a doctorate cum laude on 'Public law and policy' in 1979. From 2011-2020 he was part-time Professor of Human Rights at the same university. He has been a member of the Royal Netherlands Academy of Arts and Sciences since 2005.

As well as teaching and research, his career in law has included holding office as a judge on the Central Board of Appeal and in the Administrative Jurisdiction Division of the Council of State, as well as tasks in civil society organisations such as Cordaid and the Anne Frank House Foundation. He has also been a member of several advisory councils and advisory committees, including, until 2021, the Advisory Council on International Affairs and currently the Scientific Council for Government Policy. He twice interrupted his academic career to assume political office as Minister of Justice (1989-1994 and 2006-2010, with the first term being followed by six years in Parliament) and Minister of the Interior and Kingdom Relations (2010).

His recent books include the *Advanced Introduction to Legal Research Methods* (Edward Elgar, 2020) and *Trust Beyond Borders: Selected Papers on the Significance of Human Rights and the Rule of Law* (Eleven, 2022).

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Prof. Dr. Ernst M. H. Hirsch Ballin

Valedictory address,
presented on the occasion of his retirement as distinguished University Professor at Tilburg University on 13 May 2022

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Peace and Justice

1 Introduction

Rector Magnificus,
Your Excellencies,
Dear Board Members, colleagues and students,
Dear family, friends and other guests,

It is not that I chose the subject of this valedictory address many months ago with any foresight. In fact, it was 7 March before I wrote the first words; until then, I had intended to talk about 'progress in legal science'. But with a horrific war now raging in Ukraine, I imagined that you and I would inevitably wonder whether it was appropriate to talk about progress at a time when, elsewhere in Europe, law is being systematically violated and crimes committed, with untold suffering as a result. Of course, I can point out that I would have been discussing progress in the *science* of law, not in law itself. And progress in legal science can certainly be observed, as I will soon be discussing in my essay for the *Thijmgenootschap*.

Similarly, progress in *law*, too, has been achieved in many respects, sometimes by trial and error, including in administrative law and in the recognition of European fundamental rights. Where this is not the case, our task as researchers includes a duty to understand where and how legal development is failing, as we are now seeing in international relations, where people are being denied the right to live in peace. But is the current state of war in Europe merely the result of a lack of respect for the law, or also the result of imbalanced legal development? This is a question that lawyers should not shy away from. Over the years, in my lectures and publications, I have reminded my audiences how often lawyers have put their knowledge at the service of injustice. These lawyers include Roland Freisler, the furious and ranting president of the *Volksgerichtshof* that imposed thousands of death sentences in the Nazi era, and a man who gained his doctorate in law *summa cum laude* in Jena in 1922.[1] Vladimir Putin, too, graduated in law – in his case, from Leningrad State University in 1975 – and then joined the KGB.[2] And sometimes lawyers simply look the other way. In late 1940, for example, the members of the Dutch Supreme Court signed the Aryan Declaration, even though this would entail the dismissal of their own president. These prominent jurists thus missed the opportunity to mark the occupiers' exceeding of the

[1] Walter Pauly & Achim Seifert, *Promotion eines furchtbaren Juristen: Roland Freisler und die Juristische Fakultät der Universität Jena*, Tübingen: Mohr Siebeck 2020.
[2] Bill Bowring, *Putin's dissertation and the revenge of RuNet*, Open Democracy 2014, https://www.opendemocracy.net/en/odr/putins-dissertation-and-revenge-of-runet/.

limits of their competence in international law,[3] with this declaration providing the occupiers with an instrument to first deprive Jewish civil servants of their professional positions, and soon also of their other rights, including their right to life.[4] In February 1941, by contrast, striking Amsterdam dockworkers showed they had a better understanding of right and wrong.

Being highly educated in the instrumental techniques of their profession may alienate lawyers from the humanity that must characterize law. And that is precisely why we need to draw attention in legal education to the constitutional foundations of legal systems, to conduct critical research into hidden power relations, and to examine the development of the law through the prism of human rights.[5] There is also such a thing as orthopedagogy in law, with the essence of this being to clarify how the law must be constituted in order for us to be able to rely on it and prevent it from being abused. *Trust in the law* was the title of the address I gave when accepting my chair at this university on 2 April 1982.[6] And *Peace and Justice* is the title of this farewell address.

3 More on this subject can be found in my book *Tegen de stroom: Over mensen en ideeën die hoop geven in benarde tijden (Against the current: On people and ideas giving hope in difficult times*), Amsterdam/Antwerp: Querido 2016, p. 43-44.

4 Corjo Jansen m.m.v. Derk Venema, *De Hoge Raad en de Tweede Wereldoorlog – Recht en rechtsbeoefening in de jaren 1930-1950 [The Supreme Court and the Second World War – Law and legal practice in the years 1930-1950]*, Amsterdam: Boom 2011, p. 92-94. See also P.E. Mazel, *In naam van het Recht: De Hoge Raad en de Tweede wereldoorlog (In the name of the law: The Supreme Court and the Second World War)*. Arnhem: Gouda Quint 1984.

5 This is also the theme of my *Advanced Introduction to Legal Research Methods*, Cheltenham/Northampton MA: Edward Elgar 2020.

6 *Vertrouwen op het recht: Over de plaats van de wet in de rechtsorde [Trust in the law: On the place of the law in the legal order]*, Alphen aan den Rijn: Samsom 1982; edited version entitled 'Het grondrecht op vrijheid en de wet', in: *Rechtsstaat en beleid: Keuze uit het werk van mr. E.M.H. Hirsch Ballin*, Zwolle: W.E.J. Tjeenk Willink 1991, p. 163-208.

2 Justice requires peace; peace requires justice

independence and sovereignty of Ukraine, Kazakhstan and Belarus within their existing borders in the Budapest Memoranda. But all these agreements and treaties have been flagrantly violated by the current war.[10]

Thus, while international law has normatively corroborated the fundamental illegitimacy of aggression and attacks on the civilian population, it lacks the means to effectively enforce these norms against aggressors,[11] thereby further emphasizing that the efficacy of legal norms depends on their constitutional anchoring in a legal order that holds a community together. That community may be a national community, but – as we thought, and still hope – it can also be the 'international community'. This community manifested itself in 1945 in both Nuremberg and Tokyo, where crimes against peace, war crimes and crimes against humanity committed by the German Nazi regime and the Japanese imperialist regime were punished, albeit only after untold human suffering and the military defeat of these regimes.[12] This path was continued, inter alia, by the establishing of the International Criminal Court in the Rome Statute of 1998 and later, after lengthy negotiations, by adding the definition of the core crime of aggression. That was the outcome of the 2010 Conference of States Parties in Kampala, where I represented the Netherlands in my former capacity as Minister of Justice.[13] Even then, however, it was clear where the vulnerability of this additional agreement lay: by appealing to sovereignty, the binding force of international law continues to depend on the consent of the states on which obligations are imposed.[14] If the acceptance of such obligations everywhere were to be entrusted to democratic governments, the world would look much more peaceful: states that have been constituted as democratic states governed by the

[10] Memorandum on Security Assurances in connection with the accession of the Republic of Belarus, the Republic of Kazakhstan and Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons, Budapest, 5 December 1994.

[11] Göran Sluiter, 'Het strafrechtelijke antwoord op de oorlog in Oekraïne' ['The criminal justice answer to the war in Ukraine'], blog, 9 March 2022, *Nederland Rechtsstaat*, https://www.nederlandrechtsstaat.nl/het-strafrechtelijke-antwoord-op-de-oorlog-in-oekraine/.

[12] Jan Klabbers, *International Law*, 3rd edition, Cambridge/New York: Cambridge University Press 2021, p. 240.

[13] *Parliamentary Documents II* 2009/10, 28 498, no. 22 (letter from the Ministers of Foreign Affairs and Justice of 12 July 2010).

[14] And that will continue to be the case. See Mark Mazower, *Governing the World: The History of an Idea*, London: Penguin 2013.

rule of law do not go to war with each other.[15] Indeed, the Dutch Constitution explicitly commits itself, in Article 90, to the development of the international legal order.[16]

Together, you and I probably share the intuition that peace and justice are intrinsically linked, especially if we refer to *justice*, and not just to *law*. After all, it is not the formal concept of law as a regulatory technique, but rather justice that differs from and is the opposite of injustice, both in form and content; as we can see, for example, in common parlance, where people speak of 'doing justice to someone'. Just like justice contrasts with injustice, so peace contrasts with war, we would like to think. We can see right now how much crime has resulted from the war in Ukraine. But this recognition, unfortunately, is a recognition of crime being committed *again*. Because let us not forget that this was also the case, for example, in the no less cruel war in Syria. Syria, though, belonged in the mind-set of many people here to a different world.

'Righteousness and peace will kiss each other' in the Psalmist's vision (Ps. 85:10b). Justice, or righteousness in the understanding of the Hebrew Bible, always includes compassion, especially towards those who are oppressed (Ps. 146:7-9). Peace signifies a blessed life in communion with God, people and nature.[17] But, sadly, anyone who thinks that two thousand years of spreading Christianity will have made war in relations between peoples increasingly less accepted will be disappointed. Although 'injustice' is always spoken of disapprovingly (which is why the biggest crooks seek to portray their wrongdoings as justified, phrased in legal terms with the help of willing lawyers), war is all too often presented in a heroic interpretation and as a means of combating injustice, with 'Holy wars' such as crusades and armed jihad

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15 Spencer R. Weart, *Never at War: Why Democracies Will Not Fight One Another*, New Haven/London: Yale University Press 1998. Immanuel Kant pointed to the connection between war and form of government as early as 1795; see note 34.

16 Under Article 3 of the Statute for the Kingdom of the Netherlands, this provision applies to the Kingdom as a whole. On the origin and meaning, see E.M.H. Hirsch Ballin, 'Artikel 90 Bevordering internationale rechtsorde', in: E.M.H. Hirsch Ballin, E.J. Janse de Jonge and G. Leenknegt, *Uitleg van de Grondwet*, The Hague: Boom juridisch 2021, p. 877-882; English translation 'Article 90 of the Constitution of the Kingdom of the Netherlands', in: Ernst Hirsch Ballin, *Trust Beyond Borders: Selected Papers on the Significance of Human Rights and the Rule of Law*, The Hague: Eleven 2022, p. 299-306.

17 David Moe, 'Justice and peace will kiss each other', in: *The Presbyterian Outlook*, 12 August 2016, https://pres-outlook.org/2016/08/justice-peace-will-kiss/.

being obvious examples of this. Indeed, the boundaries of self-defence are not always distinct if prevention is included. The current Russian aggression, too, has been accompanied by a perverse 'sanctification'. Such motivations cynically instrumentalize and normalize war and violence.

3 Moral and legal limits of wars

What Christianity has nevertheless generated is questions qualifying war and peace as a *moral* question. There was certainly no question of normalizing war for the great thirteenth-century theologian and philosopher Thomas Aquinas: he saw peace as the morally desirable condition, no matter how many wars were waged: 'Peace is the immediate result of charity, for love is a unifying force.'[18] War was not normal in his eyes. The starting question in his exposé on this subject was the question of whether war is sinful.[19] No, not always, was the thrust of his argument: under strict conditions, war can be justified, such as in a fight under legitimate authority for a just cause – in response to injustice committed –, provided that the monarch orders it with pure intentions (*auctoritas principis, causa iusta, recta intentio*), and with the necessary and proportionate use of force in self-defence against, for example, looting.[20]

This message was addressed to the rulers of the time. Aquinas rejected the idea of warfare as a kind of military duel. To say that the ends, in his line of thought, could justify the means of war goes too far. His argument boiled down to the belief that a justifiable end would make the means of war non-sinful, which of course is not the same as holy. Aquinas' doctrine of war (*bellum iustum*), which is justified only under certain circumstances, has had a long-term effect. Francisco de Vitoria and others who built on Aquinas shifted, for example, the emphasis from virtue ethics to that of law,[21] while rationalizations of war increasingly gained influence. Hugo Grotius, meanwhile, occupied an intermediate position, which my colleague Randall Lesaffer describes as dualistic: on the one hand, Grotius confirmed the moral appeal to the rulers, while on the other hand he also saw such norms as resulting from rational analysis: the *ius gentium* that everyone must reasonably accept.[22]

18 *Summa Theologiae* II.II, qu. 26, art. 3, ad 3.

19 On the meaning and impact of this text to date, see Gregory M. Reichberg, *Thomas Aquinas on War and Peace*, Cambridge: Cambridge University Press 2017.

20 *Summa Theologiae* II.II, qu. 40, art. 1; II.II, qu. 69, art. 4. Gregory M. Reichberg, *Thomas Aquinas on War and Peace*, p. 32, 154 and 192-193.

21 Reich, *ib.*, p. 79; Annabel Brett, 'Francisco de Vitoria (1483-1546) and Francisco Suárez (1548-1617)', p. 1087, in: Bardo Fassbender & Anne Peters, eds., *The Oxford Handbook of the History of International Law,* Oxford: Oxford University Press 2012, p. 1086-1091.

22 Randall Lesaffer, 'The Laws of War- and Peace-Making', p. 445 and 450, in: Randall Lesaffer & Janne E. Nijman, *The Cambridge Companion to Hugo Grotius*, Cambridge/ New York Cambridge University Press 2021, p. 433-456.

The moral boundaries of war retained considerable influence, in a more or less secularized form, until the nineteenth and twentieth centuries, and continue to do so today. Since the Enlightenment, however, and under the influence of writers such as Thomas Hobbes (1608-1679), these moral boundaries have been supplanted by 'realistic' theories that present military power and the occupation of 'space' by states as normal, and contrast with the later idealism of Immanuel Kant. Meanwhile, in the eighteenth century, the Swiss diplomat Emer de Vattel legitimized preventive war as a means of defence against an enemy, and one no longer limited by demands of proportionality. The power to wage war was simply a power associated with sovereignty.[23]

The orderly course of warfare, from the declaration of war to the peace treaty, thus became the *ius publicum Europaeum*, as described by Carl Schmitt in almost nostalgic terms in 1950. War was portrayed as a struggle against an enemy – as he also saw domestic politics – by military means, but not aimed at destroying the enemy.[24] In Schmitt's view, the Treaty of Versailles (1919) represented a break with this *ius publicum Europaeum* because it regarded the initiation of war as a crime.[25] Indeed, the First World War was the last of the wars that had been fought in Europe over the centuries because of monarchs wanting to expand or maintain their influence territorially, and that had been ideologically associated since the nineteenth century with nationalist feelings and feelings of ethnic superiority. But while the *Ordnungsidee Nation,*[26] as developed from the late-eighteenth century, remained dominant under changed and divergent political conditions,[27] the *Landnahme*, as Schmitt refers to it, was able to continue in other parts of the world in spaces that, in the colonialist view, remained undivided.[28] Thus European governments unabashedly coordinated the final phase of usurping Africa at the Berlin Conference (1884-1885), with the ideology of a *'sozialdarwinistisch-rassistisch verstandener internationaler Liberalismus'* being

[23] Reichberg, *ib.*, p. 215-220; Emmanuelle Jouannet, 'Emer de Vattel (1714-1767)', in: Bardo Fassbender & Anne Peters, eds., *The Oxford Handbook of the History of International Law,* p. 1118-1121.
[24] Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 4th edition, Berlin: Duncker & Humblot 1997, p. 114.
[25] *Ib.*, p. 206. In his view, international law applies exclusively between sovereign states; persons no longer have their own place in this regard because they belong to the internal sphere of the state of which they are nationals.
[26] Dieter Langewiesche, *Der gewaltsame Lehrer – Europas Kriege in der Moderne*, Munich: C.H. Beck 2019, p. 19.
[27] *Ib.*, p. 83, 211 and 275.
[28] *Ib.*, p. 16 and 112.

followed outside Europe in the years around 1900.[29] This line of thinking proved persistent and continued to have its adherents throughout the twentieth century and beyond, both in the form of colonialism and nationalism, and particularly in the aggressive relationship between the two that we know as imperialism.[30] Armin von Bogdandy describes Schmitt as having radicalized 'the national state-centrist approach' in his understanding of the political and, even five years after the Second World War, to have endorsed a nationalist 'European' legal thinking that stood in stark contrast to the then nascent European integration.[31]

A further development arose from the increasing impact that the enormous human suffering resulting from wars had on public opinion – at least in Europe, and even though the immense misery caused by colonial repression in other continents went virtually unnoticed.[32] The casualties – dead, wounded and missing – in the battle fought by Austria, France and Sardinia at Solferino in 1859 were so high that they prompted eyewitnesses such as Jean-Henri Dunant to take action to limit and alleviate the suffering. This later led to the establishing of the International Red Cross and the signing of the conventions restricting methods of warfare and aimed at protecting civilian populations (these conventions, in turn, later evolved into the Geneva Conventions of 1949). This part of international law is known as international humanitarian law and applies in armed conflicts. And it was in this same spirit that Florence Nightingale worked to ease the agonies in the Crimean War of 1854-56, and Bertha von Suttner in the Russo-Turkish War of 1877-78.

Bertha von Suttner, however, did not stop there.[33] Instead, she went on to seek to gain support for an undercurrent in European thinking on peace and justice

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29 Jürgen Osterhammel, *Die Verwandlung der Welt – Eine Geschichte des 19. Jahrhunderts*, Munich: C.H. Beck 2009, p. 735.

30 Akbar Rasulov, 'Imperialism', p. 440-441, in: Jean d'Aspremont & Sahib Singh, eds., *Concepts for International Law: Contributions to Disciplinary Thought* (Cheltenham/Northampton MA: Edward Elgar, 2019), p. 422-446.

31 Armin von Bogdandy, *Strukturwandel des öffentlichen Rechts – Entstehung und Demokratisierung der europäischen Gesellschaft*, Berlin: Suhrkamp 2022, p. 80 and 427.

32 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*, Cambridge/New York: Cambridge University Press 2002, is aware of this Eurocentrism. Cf. Arnulf Becker Lorca, 'Eurocentrism in the History of International Law', in: Bardo Fassbender & Anne Peters, eds., *The Oxford Handbook of the History of International Law*, p. 1034-1057.

33 Janne E. Nijman, 'Bertha von Suttner: Locating International Law in Novel and Salon', in: Tallgren, I. (ed.), *Portraits of Women in International Law: New Names and Forgotten Faces?*, Oxford (UK): Oxford University Press, forthcoming 2022.

that Immanuel Kant had first expressed in *Zum ewigen Frieden* in 1795. Kant opposed the view that the sovereign should have the power to decide on war and peace, believing that this power should be reserved for the representatives of the citizens, given that the latter were the parties who experienced the suffering and damage caused by war. *Zum ewigen Frieden* continues to be regarded as the benchmark of theories of democratic peace,[34] even though, as Willem van der Kuijlen and Thomas Mertens rightly observe, parts of Kant's *oeuvre* are marred by shocking racism.[35] Kant believed that if democracies worldwide were to unite, they would put an end to wars. His views, however, were seen as naïve and were ignored well into the nineteenth century. It took the connection between experiences and insights made by people such as Bertha von Suttner to trigger changes in the collective conscience.

These changes then led to the third and most fundamental nineteenth-century development regarding peace and justice, namely the desire to curb warfare in international law. Bertha von Suttner saw war as a crime and, with the help of Tobias Asser and others, encouraged the work of the International Peace Conferences held in The Hague in 1895 and 1907. The treaty restrictions and prohibitions[36] that were subsequently enacted form the basis of today's international law, which is designed to ensure lasting peace. The establishing of the Permanent Court of Arbitration in 1899 and the Permanent Court of International Justice in 1920 were just some of the results of this movement, with arbitration and jurisprudence intended as the alternative to states resorting to warfare as a means of resolving disputes. In 1922, the Dutch Constitution was enriched by the addition of the stipulation that the government must seek to

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34 Immanuel Kant, *Zum ewigen Frieden und Auszüge aus der Rechtslehre – Kommentar von Oliver Eberle und Peter Niesen*, Berlin: Suhrkamp 2011, p. 21. See the commentary in this edition by Eberle and Niesen, p. 89-216, which addresses, among other things, the issue of failed states and preventive wars with reference to the Iraq war and humanitarian interventions. See also Ulrich Menzel, *Zwischen Idealismus und Realismus – Die Lehre von den Internationalen Beziehungen*, Berlin: Suhrkamp 2001, p.15-24. I discussed the current meaning of Kant's peace theory in my lecture on 5 May 2013 'Een verbond van vrijheid' (https://www.4en5mei.nl/app/uploads/2021/09/5-mei-lezing-2013-ernst-hirsch-ballin.pdf) and the part of *Tegen de stroom* based on this (loc. cit., p. 133-135).

35 Willem van der Kuijlen & Thomas Mertens, 'Was Immanuel Kant a racist? Zwarten, witten, hunnen en hindus', in: *De Groene Amsterdammer* 35/2021, 1 September 2021, https://www.groene.nl/artikel/zwarten-witten-hunnen-en-hindoes.

36 Cf. Arthur Eyffinger, *T.M.C. Asser (1838-1913) 'In Quest of Liberty, Justice, and Peace'*, Vol. 2, Leiden/Boston: Brill Nijhoff 2019, p. 1379.

'resolve disputes with other states by jurisprudence and other peaceful means.'[37] It was not until 1928, however, that the treaty banning war as an instrument of international politics came into being in Paris.[38] Thus the illegality of war – especially of wars of aggression and wars using prohibited means – now came to the fore in addition to and, in many people's eyes, instead of the moral disapproval of war.

However, this great leap forward in the development of international law is fraught with an inconsistency, and an inconsistency on which I want to focus here. You can see this as a modest contribution to critical legal research because it explains the current failure without excusing it. All too often international law is studied as law generated in diplomatic processes; in other words, as law stemming from a world of thought detached from the internal development of law *within* states. For those reading this text with a methodological interest, I would like to emphasize that what is at issue here is the constitutional relationship between external relations of states in international law and their internal condition, whether – and more or less – as a constitutional state under the rule of law, or otherwise. And for those reading this text with a constitutional focus, I would like to emphasize that we are dealing here with the urgent problem, for humanity, of the stagnating development of international constitutional law. And that this stagnation in particular – alongside and in conjunction with efforts to ensure peace – is affecting the efficacy of human rights.

What I want to highlight here is that dates and events do not mark dividing lines between epochs and associated lines of thought. New forms of thought, such as Bertha von Suttner's radical critique of warfare, emerge well before they are properly understood, while old views continue to be applied, even if they are legally outdated, or amalgamate with new ones. While the movements that brought about the abolition of slavery, the start of international humanitarian law and The Hague Peace Conferences in the second half of the nineteenth century were a 'moral correction to normative minimalism' between states, they had only a limited impact on the power politics of the great powers. And while there was consensus on apolitical, technically oriented international norms, such as those

[37] Article 57, first sentence. This was replaced in 1953 by the current Article 90, which obliges the government to promote the development of the international legal order.

[38] General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 27 August 1928, *League of Nations Treaty Series* 1929, 233.

in the International Postal Union, real international relations continued to follow the old patterns of power struggle, using all the means at their disposal.[39]

Neither the First World War nor the reverting to old patterns barely ten years later, for example, were prevented by the 'spirit of The Hague',[40] which, according to the historian Jürgen Osterhammel, did nothing to change political decision-makers' thinking. The treaties of Versailles and other Parisian suburbs,[41] quite apart from the unwise and rigorous 'settling of scores' with the defeated states,[42] were the result of attempts to build a new international order based on the recognition of ethnic groups, whereby previously multi-ethnic states had to make way for 'nation states', in accordance with the principle of self-determination accepted as a guideline by the President of the United States, Woodrow Wilson.

The 'peacemakers' at the time attempted to resolve the effectively insoluble problem of so many people from different linguistic or cultural backgrounds living alongside each other, especially in Central Europe, by high-handedly and often arbitrarily drawing boundaries between groups of people. But seeking to accommodate large numbers of people as a minority population in a country controlled by a majority, which considered the country to be its own, was asking for difficulties.[43] Admittedly these difficulties were mitigated by providing guarantees for minorities under the auspices of the League of Nations (insofar as these minorities were not expelled) and holding plebiscites over some disputed border areas; in turn, however, these 'safeguards' simply created a Pandora's box of new tensions. The consequences of the paradigm accepted in 1919 for

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39 J. Osterhammel, *Die Verwandlung der Welt. Eine Geschichte des 19. Jahrhunderts* (ib.), p. 725-735.

40 *Ib.*, p. 731.

41 Margaret MacMillan, *Peacemakers: Six Months that Changed The World*, London: John Murray 2001.

42 'That burden was much heavier than traditional war indemnities. Altogether it was a discriminating peace.' Peter Krüger, 'From the Paris Peace Treaties to the End of the Second World War', in: Bardo Fassbender & Anne Peters, eds., *The Oxford Handbook of the History of International Law,* Oxford: Oxford University Press 2012, p. 679-698 (quotation: p. 686).

43 See Margaret MacMillan, *Peacemakers: Six Months that Changed the World*, London: John Murray Publishers 2001, pp. 36-39. As Janne E. Nijman explains, 'In Paris, the peacemakers responded to the destabilizing forces of European nationalism by creating new and enlarged national states to succeed the four multinational empires and by laying down an international system to protect national minorities living within these states,' 'Minorities and majorities', in: Bardo Fassbender & Anne Peters, eds., *The Oxford Handbook of the History of International Law,* Oxford: Oxford University Press 2012, p. 95-119 (quotation p. 111). See also Anna Meijknecht, 'Minority protection systems between World War I and World War II', in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press 2008.

minorities, the stateless and the expelled were later denounced by Hannah Arendt in *The Origins of Totalitarianism*.[44]

Through their collectivism, the treaties of 1919-1920 served to perpetuate the misery caused by the confrontation between nationalism and imperialism from the nineteenth century onwards across Europe and the Middle East, where that confrontation was fuelled by a multi-ethnic demographic.[45] The real effects of the old lines of thinking thus proved to be both greater and stronger than the moral and legal correctives.

44 Hannah Arendt, *The Origins of Totalitarianism (New edition with added prefaces)*, New York: Harcourt 1994, p. 269-289 (Ch. 9-I); Marco Goldoni & Christopher McCorkindale, eds., *Arendt and Law*, London/New York: Routledge 2017, p. 542.

45 On the effects since 1990, see: R. Kaplan, *Balkan Ghosts: A Journey Through History*, Boston: Macmillan 2005.

4 New paradigm of international law

Then, in 1945, a fundamentally different path was taken: genocide, as the ultimate manifestation of nationalist feelings of superiority, had become an admonition to humanity. In response to the failure to protect national minorities in the interwar period and the fiasco of attempts to provide aid to Jewish residents persecuted in Nazi Germany, a process of reflection started during the Second World War,[46] as demonstrated by the theme chosen by US President Franklin D. Roosevelt for his famous Four Freedoms Speech in early 1941: effective protection of everyone's fundamental rights, everywhere in the world, and protection of freedoms as well as social rights. Thus, freedom from fear and want re-emerged as one of the goals for a better world in the Atlantic Charter of 14 August 1941, with Roosevelt and Winston Churchill committing themselves to focusing the war effort on a world order of peace. This ultimately led to the Charter of the United Nations of 25 June 1945, following on from, among other things, the United Nations Declaration of 1 January 1942 and the Dumbarton Oaks proposals of 1944.

However, cooperation with the Soviet Union came at a high price: at the Yalta Conference in February 1945, the latter was assured of a sphere of influence that for a long time limited the freedom of many other countries. This was also when the *Voting Formula*, which included the power of veto at the Security Council, was agreed.[47] These and other matters agreed at Yalta already showed the ambivalence of the post-war world order, which has persisted to this day, and enables larger states to continue pursuing imperialist ambitions within their spheres of influence.

Nevertheless, the preamble to the UN Charter expressed the new principles of the new international legal order as follows:

> We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of

46 Péter Kovács, The Protection of Minorities under the Auspices of the League of Nations, in: Diana Shelton, *The Oxford Handbook of International Human Rights Law,* Oxford: Oxford University Press 2013, p. 325-341 (p. 341).

47 Alfred Verdross & Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis*, Berlin: Dumcker & Humblot 1984, p. 70-71.

> men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, [...]

In contrast to the collectively asserted rights of Versailles to protect minorities, the victors of 1945 accepted the expulsion of populations and – only after this dirty work had been done – protection of human rights.[48] According to Rianne Letschert in her Tilburg dissertation, the United Nations, which took the place of the League of Nations, 'renounced the notion of group rights and identity and instead chose for the broader category of individual human rights.'[49] The Universal Declaration of Human Rights of 10 December 1948 gave effect to the 'equal and inalienable rights of all members of the human family', which are the 'foundation of freedom, justice and peace in the world'. These were not only well chosen words to mark a new beginning, but also a confirmation of the principle – as the result of a genealogical process of many centuries – that human dignity is inviolable.

The development of international humanitarian law, especially since the nineteenth century, proved to be an important incentive for the international anchoring of human rights.[50] The Geneva Conventions of 1949 are part of the same international legal paradigm shift. This also applies, and by no means least, to the duty enshrined in treaties to act against genocide, torture and other crimes against humanity, and to the associated universal jurisdiction, with the tasks and competences entrusted in the International Criminal Court making it a body for protecting human rights and enforcing international humanitarian law.

This intrinsic relationship between human rights, humanitarian law of war and international criminal law is not always sufficiently understood.[51] The Universal

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48 Tony Judt, *Postwar: A History of Europe since 1945*, New York: Penguin 2005, p. 565: 'territorial regrouping (ethnic cleansing as it would be later known)', after which 'Post-1945 rights talk [...] concentrated on individuals.'

49 Rianne M. Letschert, *The Impact of Minority Rights Mechanisms*, The Hague: T.M.C. Asser Press 2005, p. 12.

50 Gerd Oberleitner, 'Humanitarian Law as a Source of Human Rights Law', in: Diana Shelton, *The Oxford Handbook of International Human Rights Law*, p. 275-294.

51 See Gerry Simpson, 'Atrocity, law, humanity: Punishing human rights violations', in: Conor Gearty & Costas Douzinas, *The Cambridge Companion to Human Rights Law*, New York/Cambridge: Cambridge University Press, p. 114-133.

Declaration was not only a response to the horrors of the Second World War and the Shoah, but also to those of slavery, colonialism and other wars. In addition to Eleanor Roosevelt (the widow of the president who had given the 'Four Freedoms Speech'), the French lawyer René Cassin (a Catholic from a Jewish family), the Lebanese Charles Malik, the Chinese Confucianist Peng-Chun Chang, the Indian Hansa Mehta (to whom the gender-neutral formulation is attributable) and Salvador Allende's Chilean childhood friend, Judge Hernan Santa Cruz, all played a major role in bringing about this declaration, the final wording of which was ultimately accepted in the General Assembly, with abstentions by the Soviet bloc, South Africa and Saudi Arabia.[52]

In the field of international political forces, the system of human rights protection, which has steadily developed over the years, is subject to contradictory characteristics: on the one hand, it entails a principled choice for the protection afforded by humanitarian law, while, on the other hand, the protection of national interests is determined by the actual balance of power, and often by the corrupted positions of ruling groups. According to Hans Joas, human rights have a chance of success only if they 'are supported by institutions and civil society, defended through argument, and incarnated in the practices of everyday life.'[53] These circumstances are therefore conditions for constitutional support of the law as an order of peace. That is precisely why the organizations belonging to the United Nations 'family' and international NGOs should not stop at peace diplomacy, but are also tasked with working to achieve access to education, fight against hunger, ensure healthcare and protect the environment. Over the years, specialized agencies such as UNESCO, UNICEF, the World Bank, IAEA, GATT and later the WTO became the infrastructure of an international legal order with an unprecedented degree of institutionalization and in which compliance with the obligation to keep the peace was no longer determined by the polarity of morality and military power, but was instead stabilized by a genuine interweaving of the fate of humanity, with its common interest in avoiding a world nuclear disaster and ensuring the functioning of the supply of food and raw materials. In this way, the institutionalization of international relations became the most important

[52] Hans Joas, *The Sacredness of the Person – A New Genealogy of Human Rights*, Washington DC: Georgetown University Press 2013, p. 182-191. Original in German: *Die Sakralität der Person - Eine neue Genealogie der Menschenrechte*, Berlin: Suhrkamp 2011, p. 265-281.

[53] *Ib.*, p. 191 (German p. 281).

factor in limiting wars and avoiding a devastating Third World War in the second half of the twentieth century.

5 Incomplete constitutionalization of international law

At this point, we must interrupt our critical exploration of peace and justice to take an intermediate – methodological – step. Constitutional norms constitute state institutions and processes of legitimate, heteronomous decision-making.[54] That is, so to speak, the litmus test of law: does the norm that normalizes a conduct or confers a power have a constitutional basis that makes it a legal norm? In a democracy governed by the rule of law, these norms reflect the constitutional values of giving voice to the members of the judiciary, which is when the recognition of their rights, in particular their fundamental rights, and the required expertise come into view.[55]

Many lawyers have little interest in the constitutional basis of the law they are investigating and struggle, for example, with the question of which restrictions on the freedom of contract should be considered legal, and the role of non-binding practices such as governance codes. The relationship of lawyers to constitutional law is often like that of fish to water: they only notice how essential it is after they have been fished out and are lying on dry ground. Every legal system is constituted by norms that determine the sources and criteria of its validity; in essence, that is the distinction between *primary* and *secondary rules* in the formal legal theory of H.L.A. Hart.[56] That constituent part of the law can be called a 'constitution' if it reaches a high degree of density, specifically as part of a community's legal order, which, in representing the collective unity of a society, regulates the institutions and procedures for legitimate, heteronomous – i.e. binding throughout the community – decision-making. After the natural law foundations had been abandoned in state practice, modern international law became entirely dependent on being accepted and affirmed by its subjects – the states – to which it has to be applied.

Despite all the hypocritical adherence and blatant violations, especially since 1945, the idea has increasingly taken hold that states are not only bound by international law because they accepted this, but are also bound by it

54 See my *Advanced Introduction to Legal Research Methods*, p. 106.

55 Cf. D. Halberstam, 'The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies', p. 147, in: S. Rose-Ackerman, P.L. Lindseth & B. Emerson (red.), *Comparative Administrative Law*, 2nd edition, Cheltenham/Northampton MA: Edward Elgar Publishing 2010, p. 139-158, 147.

56 Hart distinguishes between the (primary) rules of obligation and the (secondary) rules of recognition underlying them (H.L.A. Hart, *The Concept of Law*, 2nd edition, Oxford/New York, Oxford University Press 1994, p. 91-99).

heteronomously, *regardless of* their will. That is why international tribunals were able to punish war crimes and crimes against humanity in 1945 without a prior treaty (this, by the way, still gives rise to discussion).[57] From this broad scope, it now seems only a small step to conclude that international law has become sufficiently independent for us to refer to its 'constitutionalization'.

Viewed in these terms, the 'constitutionalization' of international law has been a topic of scholarship since the early twenty-first century, with a rather fluid discussion of the tendencies that give international law more autonomy over the political process between states. These tendencies indicate intensified institutionalization at various levels and a reduced dependence on nation states; hence this 'constitutional global order' being characterized as 'pluralist' and as 'multi-level governance'.[58]

Since 1945, the claim that the international community has renounced war has been reaffirmed on numerous occasions, including in rulings issued by the International Court of Justice. But if states reject the jurisdiction of this court or the International Criminal Court, or if deviant behaviour is allowed to persist owing to the use of the veto in the Security Council, international law is shown to be inconsistent. This inconsistency does not necessarily concern norms of behaviour: President Putin has forbidden referring to his aggression as war – it is merely a 'special military operation' – thus perversely demonstrating that he is aware of the ban on war. What the inconsistency does relate to is the constitutional basis of the assessment of what is and is not legally prohibited in matters of war and peace. The Charter of the United Nations entrusts this to the Security Council and the International Court of Justice, whereas the Russian Federation claims this as a sovereign competence, confirmed by its right of veto in the Security Council. This view is held not only by Russia: indeed, 'realists' in international relations have never ceased to tell us that, despite any manifestations of idealism, international relations remain a power play. From this we can conclude that what Carl Schmitt wrote is wicked, but in this respect

57 See Marko Milanovic, 'Was Nuremberg a Violation of the Principle of Legality?', *EJIL: Talk!, Blog of the European Journal of International Law*, 18 May 2010, https://www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality/.

58 Jan Klabbers, Anne Peters & Geir Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford: Oxford University Press 2009, p. 21, 24 and 345

accurate. This, however, should not be the final word on the subject; for that, we need to look more closely at how international law is constituted.

International law has acquired its own dynamics thanks to its institutionalization in international organizations and the functioning of international courts. The growing recognition of the role played by persons in international law, about which I spoke in 1995, also points in this direction.[59] Further steps have been taken by holding officials personally responsible in international criminal tribunals, and now also at the International Criminal Court, for crimes committed, and with no exceptions for heads of state. In addition to representing an increasingly important element in international criminal cooperation, the acceptance of the principle of universality in international criminal law has also become a feature of the international legal order as such. The doctrine of *jurisdiction* thus looks very different in 2022 – and more like a theorem of connection than the theorem of separation and division of responsibilities from which it originated. This all ties in with a development in which international law represents a legal order in its own right, and not just – as some Dutch politicians like to phrase it in easily comprehensibly terms – 'what we have agreed with each other internationally'. Yet it would be going too far to see in international law a kind of 'super-constitution' that goes beyond the national constitutions. As Anne Peters rightly put it, 'Rather, we see constitutional fragments, first in different issue areas of law and governance, second in different geographic regions, and third on different "levels" of governance. These fragments interact with each other sometimes converging, but also conflicting.'[60]

Upholding constitutionalized norms against those who do not want to live by them, which is essential in a constitutional system, is nevertheless still the weakest link in international law. That has been made all too obvious by what has been going on in Ukraine since 24 February 2022. We continue to lack safeguards for maintaining peace and justice even in the face of violations of the most serious kind, although widely applied economic sanctions and the criminal investigation procedure initiated by the prosecutor at the International

59 *Wereldburgers: personen in het internationale recht [World Citizens: Persons in International Law]*, Zwolle: W.E.J. Tjeenk Willink 1995; also in: Ernst Hirsch Ballin, *Recht doorgronden – Keuze uit wetenschappelijk werk over publiekrecht, rechtsstaat en beleid 1993-2021*, The Hague; Boom juridisch p. 173-196.

60 Anne Peters, 'Constitutionalization', p. 152, in: Jean d'Aspremont & Sahib Singh, eds., *Concepts for International Law: Contributions to Disciplinary Thought*, p. 141-153.

Criminal Court represent a step in that direction. No authority can oblige the Russian Federation and its head of state to adopt a different policy, as long as decisions to that effect in the Security Council are blocked by the Russian veto and the Russian Federation rejects the jurisdiction of international judges. There are states, of which the Russian Federation is not the only example, that do not consider their own sovereign state powers to be subordinate to a system of norms that places people above the sovereignty of that state. The state of international law thus represents an incomplete and imperfect constitutionalization.

Even if we dare to claim that, in a certain sense, international law also has a constitution, we must nevertheless recognize that the heteronomy of decisions by, for example, the Security Council, international courts and tribunals, and the panels of the World Trade Organization exists by virtue of national constitutions that recognize this effect of international law.[61] This certainly represents a substantial difference compared with the former criterion of accepting international law in bits and pieces (specifically by concluding and ratifying treaties), given that that state of affairs was still based on absolute self-rule by states. Based on the current state of affairs, it would be more appropriate to refer to the constitutionalization of international law, but only on the condition that national constitutions accept it. The Dutch Constitution does accept it, as evidenced by Articles 90, 93 and 94, which signify that state sovereignty is no longer absolutized – the state as master of itself – but subordinated to the normative idea that law exists for the sake of every human being.

According to Hans Lindahl and Bert van Roermund,[62] constitutions are promulgated on behalf of the collective 'we', the first person plural, of a community. While we lack independent constitutionalization of international law, the preamble to the Charter claims that it is the *peoples* of the United Nations who, represented by their governments, set up the organization. However, international law remained structurally self-binding on states, and thus in the

[61] Although discussions about the constitutionalization of international law sometimes make reference to the European Communities/European Union as an example of such a development, that example is not well chosen, given that it entails a real, albeit partial, transfer of sovereign powers, and thus the creation of a new legal system that is autonomous from the EU perspective and heteronomous from the perspective of the Member States and their citizens.

[62] Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion*, Cambridge/New York: Cambridge University Press, 2018, p. 394; Bert van Roermund, *Law in the First Person Plural: Roots, Concepts, Topics*, Cheltenham/Northampton MA: Edward Elgar 2020, p. 151-152.

grip of the external projection of their internal sovereign powers to interpret them. As a result, states that do not commit to international law can invoke their sovereignty and deny the obligatory nature of norms in international law. This continuing primacy of state sovereignty as an expression of power is also evident from the standards of the doctrine of international recognition: it is not a constitutional legitimation based on democratic principles, but instead the effective control over territory that is decisive for the required 'statehood'.[63]

Despite these limitations, there is a current in the theory of international law that sees in the *legal imagination*[64] of 1945 the starting point of constitutionalization and an international rule of *law*, whereby international law is less dependent on the consent of sovereign states – a characteristic that had given rise to doubts in legal theory as to whether international law was really law.[65] In the wake of this development, and especially in the final decade of the twentieth century and the first decade of the twenty-first century, the *rule-based international order* has been seen as the most important feature of international law, and as an order in which international relations are regulated by an interlacing of treaties and other agreements. According to the United Nations Association of Australia, this order is 'the only alternative to international coercion by competing great powers, spheres of influence, client states and terrorist organisations' and is also indispensable for achieving the sustainable development goals.[66]

Although this understanding of international relations suggests a heteronomy of international law, this heteronomy does not exist as long as the validity and – in the case of the permanent members of the Security Council and their international political protégés – even the enforcement of those rules remain dependent on the consent of the actors to whom the rules are supposed to apply.

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63 Klabbers, *ib.*, p. 79 in conjunction with p. 77.

64 On the power of this, see Gerry Simpson, 'Imagination', in: Jean d'Aspremont & Sahib Singh (eds.), *ib.*, p. 413-421, and the recent great legal-historical work of Martti Koskenniemi, *To the Uttermost Parts of the Earth – Legal Imagination and International Power 1300-1870*, Cambridge/New York: Cambridge University Press 2021.

65 Frédéric Mégret, 'International law as law', in: James Crawford and Martti Koskenniemi, eds., *The Cambridge Companion to International Law*, Cambridge/New York: Cambridge University Press 2012, p. 64-91.

66 *The United Nations and the rule-based international order*, Canberra: The United Nations Association of Australia 2017, https://www.unaa.org.au/wp-content/uploads/2015/07/UNAA_RulesBasedOrder_ARTweb3.pdf#:~:text=The%20rules-based%20international%20order%20can%20generally%20be%20described,arrangements%2C%20trade%20agreements%2C%20immigration%20protocols%2C%20and%20cultural%20arrangements.

This, incidentally, is why the supranational European Union is different and more than just an international organization, even though it is often loosely portrayed as such.

Since 1945, however, the idealistic power and inspiration emanating from international legal development as a humanitarian endeavour – an *imagination* of what international law should stand for – have been confronted with and undermined by the continuation of imperialist ambitions, sometimes partly in other guises. And although the positions of the powers with a veto right in the Security Council have undergone radical changes, partly as a result of decolonization, the decision-making rules have remained unchanged.

The constant reaffirmation of states' sovereignty has continued to circulate as an alibi for deviant behaviour, with the breadth of the international law 'agenda' offering states the opportunity to participate in those aspects of international legal development that suit their political and economic priorities, while disregarding other aspects. The far-reaching economization of international relations has had a huge impact in this respect, especially since the 1980s.[67] Indeed, international law has focused on this in a manner aligning with the political economics of neoliberalism. This then resulted in a political reorientation of the IMF to focus on achieving strict fiscal discipline and cuts in public spending in the Third World.[68] At the intersection of these forces, and after the dissolution of the USSR in 1991, Russia then compensated for its post-imperial weakness by availing itself of the resources served up by the liberal economic world order on a silver platter in the form of huge revenues from sales of Russian gas and oil, along with a willingness to disregard democratic and constitutional principles of the rule of law.

After the end of the Cold War, the United States found itself in a politically exceptional position, which has been described as 'hegemonic' and, in turn, gave rise to a desire to improve the world by military means.[69] At the same time, an incoherent instrumentalization of the institutions of international law was underway, with the increasing use of 'compacts' instead of treaties, and recommendations, standards and codes of conducts produced by the G20 or

67 Akbar Rasulov, 'Imperialism', p. 440-441, in: Jean d'Aspremont & Sahib Singh, *ib.*, p. 422-446.
68 Robert Knox. *ib.*, p. 353-355.
69 Robert Knox, *ib.*, p. 344 and 348.

the Basel Committee on Banking Supervision, all serving to undermine the structures of political and legal accountability.[70]

This certainly applies in the case of human rights.[71] Indeed, the economization of the political sphere went so far as to prompt some writers to claim, with sometimes undisguised cynicism, the collapse of the protection of international human rights.[72] And although the Vienna Declaration on Human Rights, which was adopted in 1993, seemed to bring the lines of development back together,[73] explicitly also with a view to achieving 'peaceful and friendly relations among nations', it has had no lasting effect. Moreover, the renewed orientation towards human rights was discredited by the politicization of enforcement and the selection of members of the international bodies responsible for this. In the European Union, meanwhile, the significance of Hungary's development into a self-professed *illiberal democracy*, along with similar developments elsewhere, particularly in Poland, was underestimated.[74] But not everyone chose to ignore this. Indeed, the resulting disruption of the development of European constitutional law was discussed in breadth and depth at a symposium organized at the initiative of Maurice Adams and Anne Meuwese at Tilburg University in 2014, as well as in the related publications and in a report of the Advisory Council on International Affairs of 2017. These were just some of the many initiatives that

70 Klabbers, *ib.*, p. 356.

71 See my recently published book *Waakzaam burgerschap: Vertrouwen in democratie en rechtsstaat herwinnen [Vigilant citizenship: Regaining confidence in democracy and rule of law]*, Amsterdam: Querido Facto 2022.

72 Eric A. Posner, *The Twilight of Human Rights Law,* Oxford/New York: Oxford University Press 2014, p. 147-148.

73 World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna, 25 June 1993; United Nations General Assembly, 20 December 1993, A/RES/48/121.

74 See Anne Applebaum's sharp assessment of this, 'There Is No Liberal World Order', The Atlantic Column, 31 March 2022, https://www.anneapplebaum.com/2022/03/31/there-is-no-liberal-world-order/.

had an effect, but it was all too little and too late in a political climate with other priorities.[75]

[75] Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge University Press: Cambridge 2017; see in particular Kim Lane Scheppele's contribution, 'Constitutional Coups in EU Law', p. 446-478; *De wil van het volk? Erosie van de democratische rechtsstaat in Europa*, Advies no. 104 of the Advisory Council on International Affairs (2017), also published in English: *The will of the people? The erosion of democracy under the rule of law in* Europe, The Hague: Advisory Council on International Affairs 2017. See also Maurice Adams, Erosion of the democratic rule of law? (blog 21 September 2017 on our *Netherlands Rule of Law* website), https://www.nederlandrechtsstaat.nl/erosie-van-de-democratische-rechtsstaat/. In the same vein, see Yascha Mounk, *The People vs. Democracy: Why Our Freedom is in Danger and How to Save It*, Cambridge MA/London: Harvard University Press 2018.

6 Russia's constitutional identity

Confronting this starts with a movement from the very foundations of every national legal system. When it comes to the constitutional basis of international law as an order for peace in comparative law, provided that this is less technically conceived, we need to look more closely at the correlation between constitutional law that identifies and delimits a state, and its external functioning as part of the pedigree of international law. My thesis is that the 'inside' and 'outside' of constitutional law determine each other, and this can be explained with regard to the role of the Russian Federation in the development of the international legal order.

As mentioned earlier, the first few years after the Second World War were marked by the momentum generated by attempts to build a new world order based on the recognition of the dignity of every human being. This was very different from the nationalist concept of states favouring their own subjects over foreigners and, as Carl Schmitt described it, regarding each other in war as enemies[76] and citizens of other states as hostile subjects. Dutch and European politics after the Second World War were dominated by this tidal change, as is also evident from the constitutional revision of 1953, which put an end to colonial aspirations. It was in those years, too, that the Council of Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Court of Human Rights were established, all with the primary objective of basing peace in Europe between states and peoples on mutual respect. The work of the Council of Europe, for example, has focused on improving the anchoring of human rights and their impact in various fields, including in nationality law, social rights and rights related to new technologies for registering personal details, and in communications and biotechnology.

Many people saw Russia as being crucial for consolidating a European peace order, with Brendan Simms describing in his European history the bitterness felt in Russia in the 1990s as a result of the new situation and the country's attempts

[76] Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, p. 114.

to regain an influential position in Eastern Europe.[77] However, too little attention was paid to this, and specifically to the fact that a political vacuum had arisen in the immense territory formerly controlled by the Russian empire and the USSR, and that this vacuum, as Karl Schlögel explained in 2009, could be filled with all sorts of political narratives and practices of control.[78] In a hopeful, but – also according to many people at the time – hasty move, it was decided to include the Russian Federation in the Council of Europe in 1996. However, the then peaceful relationship with Russia focused unilaterally on economic interests.

Choosing to focus the relationship on economics resulted in too few connections being made to the ideas of a plural democracy and the functioning of the rule of law. Although the publication of *Comrade Criminal: On the Theft of the Second Russian Revolution*[79] dates back to 1994, such topics attracted little attention at the time. Indeed, and despite various early warnings, the positions of undemocratic oligarchic structures were actually strengthened by the free West, which generated immense revenues for Russia by purchasing the latter's oil and gas, while also providing wide-ranging legal and financial services.

The story of countries that have linked their identity to imperial domination is complicated. Carl Schmitt based his concept of an international order on the notion that a national group – an *ethnos* (ἔθνος) – occupies territory, the *Landnahme*. From this emerges a *Großraumbildung*, i.e. an international and, in his view, legitimate system of establishing *Reiche* or *Großräume* under international law.[80] In doing so, Schmitt substantiates the phenomenon of the hegemony of a select group of states in their sphere of influence, with such hegemony manifesting itself in an entwining of political, military and economic

77 Brendan Simms, *Europe: The Struggle for Supremacy, 1453 to the Present,* London: Allen Lane 2013, p. 496 and 516. In 1999, in the volume presented to Frans Alting von Geusau on the occasion of his retirement from our university, I wrote about the importance, following the tensions triggered by NATO enlargement, of a NATO relationship with Russia 'under the guiding value of the international rule of law' and quoted Henry Kissinger, who stated that 'The Russian Empire has always had a role in the European equilibrium but was never emotionally a part of it.' See 'NATO and International Law: the vocation of a military alliance in an interdependent world', in: Ernst Hirsch Ballin, *Trust Beyond Borders: Selected Papers on the Significance of Human Rights and the Rule of Law,* p. 129-143 (142-143).

78 '"Russischer Raum": Raumbewältigung und Raumproduktion als Problem einer Geschichtsschreibung Russlands', in: Karl Schlögel, *Grenzland Europa, Unterwegs auf einem neuen Kontinent,* Munich: Carl Hanser Verlag 2013.

79 Stephen Handelman (London: Michael Joseph 1994).

80 *Ib.*, p. 25 and 271.

power.[81] By contrast, a state that sees its *demos* (δῆμος) as pluralistic, and not hostile to other *demoi*, does not do so; that, indeed, is the very basis of European 'democracy'.[82]

The economics of war, repression and crime is a topic that I would like to recommend to my colleagues in the economic sciences, in addition to their important work in the field of entrepreneurship and business innovation. But we must also ask ourselves whether we have sufficiently considered the world of thought from which the rejection and exclusion of others arises, and which always leads to violence. Unrestrained conflicts result from a different conception of relations between states that – and this is my key point – goes back to a different conception of the relationships between people in legal and political orders.

The fact that the intensification of relations with Russia focused unilaterally on economic gains not only created risks for the European position vis-à-vis this immense country, but was also a sign of a lack of attention for Russian citizens who expected protection from the European Court of Human Rights. When the President of the Court, Luzius Wildhaber, visited Moscow in 2007, for example, a metaphorically, and possibly also literally, poisonous welcome awaited him.[83] It was all about 'Wirtschaft, Wirtschaft, Wirtschaft,' as the Ukrainian President Zelenskyy said in his confrontational address to the German Bundestag on 17 March 2022.[84] Was that then caused, yet again, by a lack of vigilance? Much earlier, Emmanuel Levinas wrote critically about the indifference to needs in other countries. In doing so, he claimed, we put ourselves in the same position as those who, in Biblical times, half guilty and half innocent of the deaths of others,

[81] Robert Knox, 'Hegemony', p. 333 and 360, in: Jean d'Aspremont & Sahib Singh, eds., *Concepts for International Law: Contributions to Disciplinary Thought*, p. 328-360.

[82] Scientific Council for Government Policy, *European Variations* (Report 99), The Hague: WRR 2018; E.M.H. Hirsch Ballin, E. Ćerimović, H.O. Dijstelbloem & M. Segers, *European Variations as a Key to Cooperation. Exploring the dimensions of policy content, decision-making and membership*, Heidelberg/ Dordrecht: Springer, 2019.

[83] 'Wurde der höchste europäische Richter Opfer eines Giftanschlags?', *Neue Zürcher Zeitung*, 28 January 2007, https://www.nzz.ch/articleEV28G-ld.394863?reduced=true.

[84] Ansprache des Präsidenten der Ukraine, Wolodymyr Selenskyj, im Deutschen Bundestag, 17 March 2022, *Dokumente Deutscher Bundestag*, https://www.bundestag.de/dokumente/textarchiv/2022/kw11-de-selenskyj-rede-deutsch-884872.

had to retreat to *villes-refuges*.[85] While the current war is clearly the fault of the aggressor, aren't we in Western Europe, once again, half guilty and half innocent if, for decades, we have been providing huge financial resources to a regime such as Putin's – albeit with a kind of side-letters on human rights concerns – in exchange for a favourably priced influx of fossil fuels? That is why Luisa Neubauer, the young advocate of a stricter climate policy that led to the German Constitutional Court's ruling on 24 March 2021,[86] referred to the war unleashed in February this year as a '*fossiler Krieg*'.[87] Step by step, in a strange interplay of self-enrichment by the few, and symbolized by oligarchs' yachts built and moored in Western Europe, and nationalist-cultural resentment, a political structure has developed in Russia that has nothing to do with an international legal order based on personal rights and freedoms.

The way in which a political order has institutionalized itself internally correlates with its external presence as a source of war or peace. Step by step, Russian constitutional identity has shifted the emphasis from reciprocity in international relations to national identity and then to an external mission emerging from this. The revision of the Russian Constitution in 2020 consolidated this process, mainly by further strengthening the position of the president, including his powers regarding the composition of the Constitutional Court, and granting primacy of Russian constitutional law over international law and international jurisprudence such as that of the European Court of Human Rights.[88] The new Article 72(1)(g1) of Russia's revised constitution grants the power to take measures to 'protect family, maternity, paternity and youth' and to 'protect marriage as a union of man and woman'. These changes have been incorporated

[85] The Lithuanian-born French Jewish philosopher Emmanuel Levinas referred to *villes-refuges*, or cities of refuge, in the Bible chapters Numbers 35 and Deuteronomy 4: there, the 'half guilty' who had caused the death of others through a lack of vigilance could seek protection from retribution. Levinas asks what this means for the way we usually hold people accountable, and how humane that is: '*L'imprudence, le défaut d'attention, limite-t-elle notre responsabilité? Sommes-nous assez conscients, assez éveillés, hommes déjà assez hommes?*' ('The negligence, the lack of vigilance, does it limit our responsibility? Are we attentive enough, vigilant enough, people who are already sufficiently people?'). Quotation from Emmanuel Levinas, *L'au-delà du Verset – Lectures et Discours Talmudiques*, Paris: Les Éditions de Minuit 1982, p. 56.

[86] ECLI:DE:BVerfG:2021:rs20210324.1bvr265618.

[87] https://www.zdf.de/nachrichten/video/politik-neubauer-lanz-fossiler-krieg-100.html.

[88] The latter entailed extending greater power to deviate from rulings, which had been claimed since 2015. See Alexander V. Salenko, 'Völkerrechtliche Bezüge der Verfassungsreform 2020', in: Rainer Wedde (ed.), *Die Reform der russischen Verfassung*, Berlin: Berliner Wissenschafts-Verlag 2020, p. 75-85.

rather asystematically in parts other than the first two chapters, such that the protection of fundamental rights and freedoms appears to have been left intact.[89] The general tenor, however, is that an authoritarian presidential system has been amalgamated with a conservative-nationalist value system and a rejection of the primacy of international law. In a cautiously worded but critical commentary, the Council of Europe's Venice Commission responded that it was 'alarmed' by the non-compliance with European Court of Human Rights case law that would be legitimized by this constitutional amendment.[90]

Were these developments omens of what has now unfolded, or perhaps, instead, intermediate steps on the slippery slope that had already been embarked on in 2014? The Russian political theorist and *opinion leader* Alexander Dugin sees Russia as the bearer – by virtue of its identity focused on commonality – of a new, eschatologically significant political movement: that of the Fourth Political Theory, after Liberalism, Bolshevism and National Socialism.[91] This movement, in collaboration with European populist groups, intends to put an end to the decadence of present-day liberalism ('Liberalism 2.0'), with its views on *gender* as a major stone of offence.[92] Dugin foresees a kind of titanic geopolitical battle: the Great Awakening that he positions against the Great Reset proclaimed in Davos in early 2021. What he wants focuses, therefore, on a fundamentally different international order: 'big geopolitics' based on 'big ideas'.[93]

Until recently, and despite his aspirations for 'Greater Russia', Putin seemed to aspire to a revision of the international order, but still as a legal order. In a speech to the Federal Council in April 2021, however, and in accordance with the 2020 Constitutional Revision, he reversed the relationship with international law by placing national sovereignty as a benchmark. He expressed this in ominous terms:

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89 Rainer Wedde, 'Ein Abbild der Realität? Die Version 2020 der russischen Verfassung' p. 17, in: Wedde, *ib.*, p. 11-21.

90 See https://www.coe.int/en/web/moscow/-/venice-commission-adopts-new-opinion-on-2020-constitutional-amendments-and-the-procedure-for-their-adoption-in-the-russian-federation and various other documents on https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)009-e#.

91 Alexander Dugin, *Das Grosse Erwachen gegen den Great Reset*, London: Arktos 2021, p. 45.

92 *Ib.*, p. 13.

93 *Ib.*, p. 113.

> The meaning and purpose of Russia's policy in the international arena – I will just say a few words about this to conclude my address – is to ensure peace and security for the well-being of our citizens, for the stable development of our country. Russia certainly has its own interests we defend and will continue to defend within the framework of international law, as all other states do. And if someone refuses to understand this obvious thing or does not want to conduct a dialogue and chooses a selfish and arrogant tone with us, Russia will always find a way to defend its stance.[94]

In his latest book, published in September 2021, Dugin portrayed Putin on the one hand as a pragmatist, but on the other hand also as a carrier of the idea of 'a great continental project' and 'a Russian-Chinese Eurasian alliance'.[95] The vision of international relations outlined by Putin in April 2021 was linked in October to an attack on liberalism and, two months later, to explicit military threats.[96] In July 2021, Putin published an article with a historicizing narrative that denied the legitimacy of the Ukrainian state.[97] Dugin may well see the war unleashed in February 2022 as the fulfilment of his secular prophecies: the enemy lives and thinks wrongly, and is therefore only this: the enemy. This haunting imperialist view sees war as the state of nature between people and peoples. What is called peace, in that view, is the silence of arms after the enemy has been defeated. The outcome, then, is not a legal order of equality and reciprocity, but an order, in the language of law, with which the Leviathan of the moment consolidates the power relations that have arisen.

94 http://en.kremlin.ru/events/president/news/65418.

95 *Ib.*, p. 85, p. 113.

96 October 2021: see https://www.newstatesman.com/world/2021/11/the-meaning-of-vladimir-putins-attack-on-liberalism; December 2021: see https://www.theguardian.com/world/2021/dec/21/putin-warns-of-possible-military-response-to-aggressive-nato-russia.

97 Peter Dickinson, 'Putin's new Ukraine essay reveals imperial ambitions', in: *The Atlantic Council, Ukraine Alert*, 15 July 2021, https://www.atlanticcouncil.org/blogs/ukrainealert/putins-new-ukraine-essay-reflects-imperial-ambitions/.

7 Inside and outside

Although we lack the time and space here for an illustration of statal practices, I assume that comparative constitutional research will further confirm this correlation between the internal and external dimensions of constitutions. What is now being wrought by Russia is in any event a horrific, negative confirmation of this, just like the ultimate consequences of dismantling the German Constitution of Weimar proved to be.[98]

The constitutionalization of international law as an order of peace dates back to the paradigm shift I referred to earlier, when the paradigm of state sovereignty was supplanted by the paradigm of humanitarian law and the protection of human rights. But states' acceptance of the primacy of international law works only if they approach it from within: in other words, a 'constitution' of international law exists by grace of the constitutionalization of states not only as an inward-looking national legal order, but also as a bearer of the international legal order.

There are states that have indeed constituted themselves in this way, and states that reject this, with the 2020 constitutional revision by the Russian Federation representing a clear example of the latter. This is the central point of what I want to draw attention to at this decisive intersection of international and constitutional law. As important as elections and provisions for subsistence needs are, it all starts with the recognition of people – and that means every human being, without distinction – as a human being in his or her personal dignity.

The Dutch constitutional mandate (in Article 90) to promote the development of the international legal order is exceptional in that it represents the legal embodiment of a conception of the state that does not seek national identity through internal or external polarization with 'others', but that is inclusive in its foundations – as the Universal Declaration of Human Rights envisages as the basis for world peace. But there are also states that base themselves on ethnic, ideological or racial demarcation from others, whether internally and externally, and there are also political groups in the Netherlands that want exactly this, too. Such a state ideology contributes nothing to the constitutional solidification of international law as an order of peace; that is precisely why the threat of nuclear

98 Udo Di Fabio, *Die Weimarer Verfassung: Aufbruch und Scheitern: Eine verfassungshistorische Analyse*, Munich: C.H. Beck 2018.

armament from North Korea and Iran must be taken seriously. The same applies to the Russian Federation; Russia, however, is a special case in European history, and one that has not been given enough attention from a constitutional point of view.

Anyone who thinks that a state's oppressing of its own population is, as far as outsiders are concerned, an irrelevant internal matter of that state is deceiving themselves. Those who become interested in democracy and the rule of law only when war has started will be too late. The history of the Second World War in Europe did not begin with the military operations on 1 September 1939, but in 1933, if not earlier, as my father told me from his own experience in 1932, when the *Preußenschlag*, a coup d'état from above, set in motion the constitutional breakdown of the democratic rule of law.[99] Similarly, the history of the current war in Ukraine does not begin on 24 February 2022, but in 2014, if not before.[100] That was when a simulated choice to 'join' Russia was put to the population in Crimea, and a civil aircraft departing from the Netherlands was shot down, with 298 people on board, including our Willem, Lidwien and Marit Witteveen. They have been deeply mourned, the facts have been investigated and the suspects are being prosecuted, but have we also sufficiently understood that this was not a time of peace? Were we vigilant enough when the next lucrative deal with Russia presented itself? Has the urgency of increasing defence spending to 2% of GDP, as recommended by the Scientific Council for Government Policy, among other parties, been sufficiently recognized?[101]

It should not be forgotten that serious risks exist for the parts of the Kingdom of the Netherlands in the Caribbean. The Scientific Council for Government Policy specifically addressed this issue in the same report. This is important because of the way in which internal stability in the region is being undermined by narco-business and -finance and the proximity of a large country – Venezuela – where

99 In what is referred to as the *Preußenschlag*, or Prussian Coup, the legitimate government of Prussia was set aside on 20 July 1932 by the government of the *Reich* through two emergency ordinances, and fundamental rights were also restricted. See Di Fabio, *ib.*, p. 224.

100 Philipp Ther, *Das andere Ende der Geschichte: Über die Große Transformation*, Berlin: Suhrkamp 2019, p. 149-164.

101 Scientific Council for Government Policy, *Security in a world of connections. A strategic vision on defence policy* (Report 98), The Hague: WRR 2017; E.M.H. Hirsch Ballin, H.O. Dijstelbloem & P.J.M. de Goede (eds.), *Security in an Interconnected World: A Strategic Vision for Defence Policy*, Cham: Springer Open 2020. In its response, the government said this advice was 'welcomed', but postponed any further decision-making (*Parliamentary Papers II* 2017/18, 33763, no. 141, p. 5).

democracy and the rule of law are clearly malfunctioning. However, this aspect was completely ignored in the government's reaction to the report.

The extent to which international law is constitutionalized depends on the way in which nation states have constitutionalized themselves. Their relationship with the international legal order varies and is also, therefore, inconsistent in terms of effect. But we can derive hope from the growing presence of an international community that is willing to speak out: through United Nations bodies; through sustainable non-governmental organizations such as Caritas Internationalis, of which our Cordaid is a part; through Amnesty International, Human Rights Watch, PAX and Fridays for Future, and through the voices of the religious leaders who have gathered together from time to time in Assisi since 1986.

I would now like to return to the humanitarian paradigm shift in the international legal order in 1945. The institutional and potentially constitutional allegiance of states to international law set in motion at the time had an idealistic basis. It was evoked by historical experiences, and specifically the insight that the dignity of every human being is a greater good than the sovereign power of 'national' states to prove themselves right by using military force. That is the basis of international law as an order for peace. This paradigm shift had as its point of reference the polarity of 'inclusion' and 'exclusion': in other words, the inclusion of everyone in a democratic constitutional state versus the exclusion that discriminates against and subjugates people on the basis of group characteristics. This is exactly what the experiences of those persecuted between 1933 and 1945 related to. Just like the experiences of today's refugees. Concentration camps confined people in order to exclude them from society. Boundaries served as just one of the administrative techniques used to administer otherness.[102] Those seeking exclusion through the workings of a legal system can use words that follow the grammar of law. Nationality law, for example, is a possible legal vehicle of exclusion,[103] with full legal protection then being reserved for the members of one's own national group.

[102] Steffen Mau, *Sortiermaschinen – Die Neuerfindung der Grenze im 21. Jahrhundert*, Munich: C.H. Beck 2021.

[103] See my critique of the conception of nationality in *Citizens' Rights and the Right to Be a Citizen*, Leiden/Boston: Brill Nijhoff 2013.

This does not detract from the meaningful relevance of how human beings identify with and among each other. By articulating distinctive, yet also general human experiences, people can make connections with each other. Aleida Assmann refers to a '*Wiedererfindung der Nation*', in which national narratives no longer serve as 'proof' of one's own superiority (sometimes in the form of a moral superiority that requires reparations), but instead as an invitation to others to tell their story.[104] Hence the importance of being vigilant towards politicians who, as predecessors in evil, use words to turn others into strangers, or even enemies to be banished.[105] Identifying narratives invite us to feel empathy and foster a culture of human rights, and are a useful building block for an orthopedagogy of law, for which there must be a place at a university with an open, Catholic identity such as ours. To the extent that international law seeks to promote democracy, it will have to go beyond merely promoting its formal characteristics and to focus also on ensuring socially just relations in society.[106]

Inclusion and exclusion of people in the state's rule of law is the pivotal point of trust in the law. I am now choosing words that I had not yet found when I gave my inaugural address here on 'Trust in the law' forty years ago. My address then was mainly about the responsibility of the legislator. At the time, however, I did not yet see clearly enough that often hidden legal distinctions favour and disadvantage some people over others, or divide them into groups from which they can no longer free themselves administratively, socially or economically. What Carl Schmitt described as the hallmark of politics, namely grouping people into friends and enemies, begins with words. But that is not where it ends. '*Jeder religiöse, moralische, ökonomische, ethnische oder andere Gegensatz verwandelt sich in einem politischen Gegensatz, wenn er stark genug ist, die Menschen nach Freund und Feind effektiv zu gruppieren,*' Schmitt wrote in 1932.[107] We now know what that meant in practice. That is why I have consistently tried to avoid implicitly or explicitly determining how people should be treated based on group characteristics, rather than on what you can hold them accountable for; hence

[104] Aleida Assmann, *Die Wiedererfindung der Nation: Warum wir sie fürchten und warum wir sie brauchen*, Munich: C.H. Beck 2020, p. 291-296.
[105] Ernst Hirsch Ballin, *Waakzaam burgerschap*, p. 179.
[106] Martti Koskenniemi, 'Whose intolerance, which democracy?', in: Gregory H. Fox & Brad R. Roth, *Democratic Governance and International* Law, Cambridge: Cambridge University Press 2000, p. 436-440.
[107] Carl Schmitt, *Der Begriff des Politischen, Text von 1932 mit einem Vorwort und drei Corollarien*, Berlin: Duncker und Humblot, 8th edition 2009, p. 35.

the importance, in my view, of the warning given against this by the Scientific Council for Government Policy in its *Big data in a free and secure society* report[108] – a warning, however, that, until the childcare benefit affair in the Netherlands came to light, did nothing to prevent such practices.

[108] Wetenschappelijke Raad voor het Regeringsbeleid, *Big data in een vrije en veilige samenleving [Big data in a free and secure society]*, Report no. 95, Amsterdam: Amsterdam University Press 2016.

8 Promoting the international legal order

I will now summarize my findings. The legal obligation to keep the peace is more than a new but unfinished phase of development in international law. This obligation, which links peace and justice, marks a re-establishing of international law, the strength of which is demonstrated by the current resistance in international politics and public opinion to the heinous crimes being committed during the war in Ukraine.

The impetus for the constitutionalization of international law as an order of peace has remained precarious. If a regime does not care about the international legal order, and is covered by the veto right of a permanent member of the Security Council, enforcement will for the time being be ineffective. While such vetoes do not remove the criminality of crimes against international law, the victims of such crimes remain deprived of protection for as long as military power impedes arrest and trial. Similarly, military self-defence and assisting in such defence are legitimate, but cannot prevent innocent people from being exposed to violence, possibly even with prohibited weaponry. What remains, then, is the pressure of sanctions and international public opinion.

This intolerable situation for people in war zones cannot be reversed by rephrasing the words in which international law is recorded. Justice only brings peace if it is carried by conviction. This also applies to those who decide on right and wrong, and peace and war, on behalf of a state. The imperfect constitutional state of affairs in international legal development must be complemented by an inner commitment in nation states to an international legal order that is both peace-making and protective of human rights. In the case of the Russian Federation, achieving such a change may currently seem a far-distant prospect, while as in other complex systems it can come about abruptly. The reverse, however, is also the case. If the storming of the Capitol in Washington DC on 6 January 2021 had ended differently, it would not only have permanently disrupted the United States, but also made the future prospects of all countries participating in alliances with the United States highly uncertain. Democracy and the rule of law are still at risk in the United States, and there is no guarantee that, in addition to Hungary and Poland, no other Member States of the European Union will experience these constitutional principles being eroded. Ensuring peace and justice begins and ends with ourselves, and is therefore not only a legal but also a moral question.

Feeling indignant about the crimes of others, no matter how many reasons there are for this indignation, is consequently not enough. The fact that it has come this far should teach us, once again, that evil starts with small things, including in politics. That is why we have to remain vigilant regarding the ethos of the democratic rule of law in our own political system.[109] And why the current war should not be seen as a reason to justify being less vigilant in the face of attacks on the democratic rule of law in the European Union and its Member States from within.

Constitutional systems that make people either vulnerable or protect them, according to collective characteristics, do not create peace, but instead mobilize groups as adversaries of other groups and other countries.That remains the explanation of the war-generating effect of nationalism. Autocrats hate those who are different. It cannot be a coincidence that, in this century, it is precisely the cities where people with different languages and beliefs have lived together for centuries that have become the battleground of national expansion, often to the detriment of their diversity: Jerusalem, Damascus, Aleppo, Sarajevo and, in the case of Ukraine, Kyiv, Chernivtsi, Mariupol, and the capital of Galicia, now called Lviv, in Polish and Russian Lwów or Львов, and in Yiddish and German לעמבערג and Lemberg, respectively.[110] None of those cities was in the same state at the beginning of the twentieth century as it was at the end of it. In cities such as these, people have for centuries lived together, quarrelled, traded, and prayed in all kinds of rites to the One with many names. It is these cities, with biographies dating back centuries, that have themselves remained the same, while they and their surroundings were incorporated into different states.[111]

Such cities are a source of annoyance for leaders who hate pluriformity. Within their range of power, identity becomes unequivocally national through the destruction or expulsion of those who were at home but were turned into strangers. When war is waged around these cities in the horrific way that we

[109] In my book *Vigilant Citizenship*, p. 75, I described this ethos in the sense that citizens of a political commonwealth assume responsibility not only for themselves, but also for others and for their common future.

[110] Martin Pollack, *Galizien: Eine Reise durch die verschwundene Welt Ostgaliziens und der Bukowina*, Frankfurt am Main/Leipzig: Insel Verlag 2001. Philippe Sands' impressive book, *East West Street – On the Origins of 'Genocide' and 'Crimes Against Humanity'*, New York: Alfred A. Knopf 2016, has the city of Lviv as its narrative reference point.

[111] Simon Sebag Montefiore, *Jerusalem: The Biography*, New York: Vintage Books 2011.

are now seeing in Ukraine, and previously saw in Syria, the signs of what does bring about peace light up in a paradoxical way: the acceptance of people without categorizing them, and thus without turning their home into a grim bastion of unity. Living together is bigger and richer than national identification. This is where the inner constitution of international law as an order of peace begins. Promoting it therefore requires vigilance against all divisive ideologies. The hope of achieving this did not disappear on 24 February 2022. Instead, many people's desire for this has since increased rapidly, even if they were not particularly concerned about it beforehand. Nevertheless, the international legal order is one of the complex systems whose collapse can come about both abruptly and unexpectedly.[112] That is why the question now is whether we are really being vigilant enough. And realizing that this is the question we are facing marks the start of a new day.

[112] Ugo Bardi, *Before the Collapse: A Guide to the Other Side of Growth*, Cham: Springer 2020.

9 Progress in legal research

Rector Magnificus, ladies and gentlemen,

My farewell speech has been about peace and justice, but, despite the change in the subject, also about the meaning of legal education and research. Law – the object of our academic work – is not an instrument that can be used for any purpose we may choose. Instead, it is constituted by sources of legitimacy that refer back to the people themselves, and its standards serve the peaceful coexistence of people in the unstable collectivity of 'the world'. These norms must therefore be based on an understanding of what it means to live together, of how we meet people's needs, and of the workings of the human mind, both individually and socially. If the law is comprehended theoretically, legal research lends itself to – and, in fact, requires – interdisciplinary connections.[113]

This university can contribute even more to this than it already does. Interdisciplinarity and studies of international relations can certainly develop in this respect. The harsh experience of violence and injustice can be explored from different scientific viewpoints and disciplines, with behavioural sciences investigating the motives leading to deviant behaviour, economists examining what war means for the prosperity of corporations and individuals in both the short and long term, and a new branch of legal psychology clarifying the international governance effects of phenomena such as paranoia. Unlike utilitarian schemes of thought, which situate costs and benefits within the same time horizon, theologically grounded ethical considerations may anticipate a world one *hopes* to achieve. That is – by way of example – the approach adopted to climate policy in the papal encyclical *Laudato sí*. If we dare to use the words 'political theology' again, they will have to have a radically different meaning from the infamous reactionary views of a century ago.[114] Think, for example, of the actualizing theology of J.B. Metz, who prioritizes suffering and takes

[113] See Marietta Auer, 'What is legal theory?', in: *Rechtsgeschichte* [*Legal History*], vol. 29 (2021), p. 30-39: 'It is a fundamentally philosophical insight that legal scholarship cannot restrict itself to doctrinal jurisprudence or mere "law and..." studies in classic foundational fields such as legal history, legal philosophy, or law and economics. The landscape of legal scholarship can and should be mapped onto the entire landscape of the sciences and humanities. [...] This is finally where legal theory can be reframed as a philosophical theory of multidisciplinary jurisprudence' (p. 37-38).

[114] John P. McCormick, 'The Political Theology of Carl Schmitt', in: Jens Meierhenrich & Oliver Simons, *The Oxford Handbook of Carl Schmitt,* Oxford/New York, Oxford University Press 2016, p. 245-268.

postcolonial experiences into account.[115] The field of political theology also encompasses the work of the Greek Orthodox theologian Christos Yannaras, who in a recent book reassessed the concept of human rights as an important theme for a constitutional foundation of the international legal order involving orthodox believers.[116] After all, the rejection of human rights promoted by Dugin, and as implemented in the war in Ukraine, is partly legitimized by the Russian Orthodox Patriarch of Moscow's rejection of individual human rights – one of the themes in Dugin's and Putin's merciless confrontation with 'the West'. Connecting justice and peace can be seen as a manifestation of the *iustitia Dei*, the merciful '*Menschenfreundlichkeit von Gottes Gerechtigkeit*' in the words of Karl-Wilhelm Merks.[117] This opens the way to introducing theological perspectives into interdisciplinary research on human rights.

The foundation for true interdisciplinarity is present in our university, providing we realize that this is conditional on methodological clarity in the disciplines. If you look closely, you will see new shoots growing on the trunk of the tree of knowledge. That is why, this afternoon, I wanted to talk – not only with concern but also with hope – about how justice and peace are linked, and how damage to the earth and humanity can be averted if we demonstrate greater vigilance. That is what I wanted to look forward to, with hope, and with my deepest gratitude to you for all that I can now look back on in the long and eventful years since I accepted my professorship at our university four decades ago.

I have spoken.

[115] F. Schüssler Fiorenza, K. Tanner & M. Welker (eds.) *Politische Theologie: Neuere Geschichte und Potenziale*, Neukirchen-Vluyn: Neukirchener Verlagsgesellschaft 2011.
[116] Christos Yannaras, *The Inhumanity of Right*, London: James Clarke 2022.
[117] Karl-Wilhelm Merks, *Theologische Fundamentalethik*, Freiburg/Basel/Vienna: Herder 2020, p. 440, with reference to Thomas Aquinas, *Summa Theologiae*, I 21, 3 ad 2 and 4c.