

# A WORLD OF PEACE UNDER THE RULE OF LAW: THE VIEW FROM EUROPE

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We convene in St. Louis at Washington University School of Law, and specifically at the Whitney R. Harris Institute for Global Legal Studies to commemorate the remarkable event of the judgment against twenty-two major Nazi war criminals before the International Military Tribunal in Nürnberg,<sup>1</sup> which came to an end after a 218-day court session sixty years ago, by reflecting upon the effects it has upon us today. The topic which has been entrusted to me, *A World of Peace Under the Rule of Law—The View from Europe*, carries quite a heavy burden. It seems rather ironic to ask someone who possesses the same nationality as those responsible for the greatest humanitarian catastrophe on the European continent to speak about “A World of Peace” at a conference remembering their convictions. Sixty years after the end of the Nürnberg Trials, this invitation to discuss a global rule of law demonstrates a substantial amount of trust in the German people, who come from a country where the Nazis had abolished every democratic principle and eliminated all individual liberties by dissolving the separation of power. Although sixty years is a long time in the case of our individual lives, the recent discussion about a German military contribution to the enforcement of Security Council Resolution 1701,<sup>2</sup> and the deployment of German troops to the Middle East region as part of the United Nations Interim Force in Lebanon (UNIFIL) engagement, demonstrates that in the context of international relations, sixty years is but a short moment, like the blink of an eye.<sup>3</sup> Taking all this into account, I will endeavour to reflect on the experiences and lessons learned, or not learned, from the past sixty years from a German’s viewpoint.

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1. I will be using the German spelling of the city of “Nürnberg.” I also see myself in the tradition of Justice Robert H. Jackson, *see, e.g.*, REPORT OF ROBERT H. JACKSON, U.S. REP. TO THE INT’L CONFERENCE ON MILITARY TRIALS: LONDON 1945, *reprinted in* INT’L CONFERENCE ON MILITARY TRIALS, DEP’T OF STATE PUBLICATION 3080 (Government Printing Office) (1949), *available at* <http://www.yale.edu/lawweb/Avalon/imt/Jackson/jack63.htm>.

2. S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

3. The federal government sought extensively to justify the UNIFIL engagement, which demonstrates the immense pressure it found itself under. *See* <http://www.bundesregierung.de/Content/DE/Artikel/2006/09/2006-09-20-bundestag-stimmt-erster-nahost-mission-zu.html>.

## I. THE DREAM OF ETERNAL PEACE

A. *A Human Desire*

Eternal peace is one of the world's oldest dreams. However, it seems to be something unusual, even transcendent, not to be achieved on this earthly side of life. It is not by accident that the report of the birth of Christ mentions the fact that there was peace on earth at the very moment of his birth.<sup>4</sup> Peace is associated with the kingdom of God, with paradise.<sup>5</sup> The human experience of life is quite different. The *status naturalis*, writes Immanuel Kant, is a state of war. Even if there is no permanent armed conflict, there is a permanent threat of a violent outbreak.<sup>6</sup>

Philosophers and lawyers have always attempted to justify wars.<sup>7</sup> In his treatise, *De Jure Belli ac Pacis*, Hugo Grotius states that it would be a natural thing to go to war in order to accomplish one's goals, even in an attempt to achieve peace.<sup>8</sup> If it is "natural" to do something, why does it need a justification? Maybe a "war" is not so natural after all. The general question, whether the human being is naturally peaceful or naturally evil, remains unsolved. Experience shows that human beings are both good and evil at the same time. Whereas each individual has the ability to use his or her fist, he also has the ability to restrain from using violence.<sup>9</sup> He has the urge to harm and even kill his wrongdoer,<sup>10</sup> while at the same time he dreams of a life in peace.

4. The Roman Catholic Martyrology mentions that the announcement of the birth of Christ was: "in the 42nd year of the rule of Octavian Augustus, when the whole world was at peace. . . ." See The Roman Martyrology, <http://www.breviary.net/martyrology/mart12/mart1225.htm>.

5. The Roman Catholic philosopher Aurelius Augustinus differentiated between the *pax terrena* (earthly peace) and the *pax aeterna* (eternal peace), which can only be achieved in the heavenly kingdom after life on earth has terminated. AURELIUS AUGUSTINUS, *DE CIVITATE DE*, 426 (P.G. Walsh ed., Oxbow Books 2005).

6. Immanuel Kant, *On Eternal Peace*, in CARL JOACHIM FRIEDRICH, *INEVITABLE PEACE* 249 (Harvard Univ. Press 1948).

7. See generally WILHELM G. GREWE, *EPOCHS OF INTERNATIONAL LAW* 105 (2000).

8. HUGO GROTIUS, *DE JURE BELLI AC PACIS* [on the Law of War and Peace], Bk. 1, Ch. 1, ¶ 1625.

9. For interesting insight into the psychological research regarding the use of force, see HARALD WELZER, *TÄTER: WIE AUS GANZ NORMALEN MENSCHEN MASSENMÖRDER WERDEN* (S. Fischer 2005).

10. The great German nineteenth century criminal law scholar Franz von Liszt called this the human instinct of taking revenge. Franz von Liszt, *Marburger Programm*, 3 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT* 1 (1883).

### *B. Political Solutions*

At a regional level, establishing an executive power to hold a monopoly of force and implement a state structure works fairly well in preventing private wars in the Grotian sense,<sup>11</sup> and in thus upholding peaceful co-existence within a country. In the Kantian sense, the republican constitution of a state,<sup>12</sup> one committed to equality and liberty of the person, is a corollary to the control of aggression. The “Rechtsstaat,” which is the German term for the rule of law, is generally capable of guaranteeing peace and security domestically.

The obvious question then is: can adherence to the rule of law promote global peace as much as it guarantees national peace?

In *On Eternal Peace*, Kant has elaborated on this and proposed two hypotheses. First, any well-ordered democratic society will not start wars, because it would be unreasonable for the citizens to vote in favor of their own corporal and economic suffering. Citizens would not start such an “evil game.”<sup>13</sup> Second, assuming a global state is not desirable, Kant further suggested that nation-states should be incorporated into a “league of nations,” or a “league of peace.” Such a “league” would not have a monopoly of power as does a national democratic state, but it would be based on bilateral and multilateral treaties amongst states of equal power.<sup>14</sup>

This vision is in many respects rather realistic. However, Hypothesis One has proven to be empirically wrong, as democratic states do go to war. Hypothesis Two is realistic because public international law still operates exactly on a Westphalian level and has not succeeded in establishing eternal peace thus far. My hypothesis is that the lack of a mandatory judiciary and an application of an international rule of law is the exact reason for this failure. The vision that reason will prevail, and a democratic structure will prevent wars, is supported by the experiences of nation-states. Appealing to reason alone, however, is too weak; power must be separated and channelled, and its use controlled.

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11. The difference between private and public wars is discussed in GROTIUS, *supra* note 8, Bk. 1, Ch. 3, ¶¶ 1-4.

12. Kant, *supra* note 6. See also CHRISTOPH SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 38 (2001).

13. Kant, *supra* note 6, at 250.

14. *Id.* at 254.

## II. BETWEEN SETBACKS AND ACHIEVEMENTS

The nineteenth and twentieth centuries in Europe can be illustrated by a number of achievements and dramatic setbacks regarding the dream of a world without war. We can observe the attempt to subdue international relations to the rule of law. We can also observe the establishment and development of truly democratic states in Europe. But for a long time, this did not put an end to wars.

### A. *The European Development*

War as a means of politics was perfectly acceptable during the nineteenth century. Acting in accordance with the maxim “expansion is everything” formulated by Cecil Rhodes, European states colonized, suppressed, and exploited nearly the entire hemisphere.<sup>15</sup> These wars took place in far away countries, but even Europe at that time was full of wars. For example, German Unity in 1871 was coerced by military force, first by military occupation of northern Germany by Prussia, then by the German-German war of 1866 (the so-called *Bruderkrieg* or “Brother’s War”), and finally by the Franco-German War of 1870-1871.<sup>16</sup>

Public international law contains a considerable amount of disparity. On the one hand, several world peace conferences held at the turn of the century aimed to prevent harm to the civilian population. The Hague law was crafted during this time, giving substance to the rudimentary bones of *jus in bello*. On the other hand, Europe was en route to a disaster, beginning with the assassination of Crown Prince Franz Ferdinand on June 28, 1914, in Sarajevo. Shortly after the agreements prohibiting the use of gas, and after consent to the Martens Clause<sup>17</sup> outlawing unnecessary suffering in warfare as a principle of humanitarian law, the battlefields in France were spoiled with bodies corroded by mustard gas.

The catastrophic end of the First World War in Europe was followed by several steps meant to prevent future conflicts of this kind. First, Germany was identified as an aggressor in the Treaty of Versailles and

15. See HANNAH ARENDT, *ELEMENTE UND URSPRÜNGE TOTALER HERRSCHAFT* [The Origins of Totalitarianism] 218-19 (1951).

16. See generally GORDON A. CRAIG, *DEUTSCHE GESCHICHTE 1866-1945: VOM NORDDEUTSCHEN BUND BIS ZUM ENDE DES DRITTEN REICHES* (Verlag C.H. Beck 1993).

17. See DOCUMENTS ON THE LAWS OF WAR 36, 43 (Adam Roberts & Richard Gueiff eds., 1982). The “Martens Clause” appears in the preamble to the 1907 Hague Convention Respecting the Laws and Customs of War on Land. See also Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky*, 11 *EURO. J. INT’L L.* 187 (2000) (expressing criticism as to the legal nature of the clause).

restricted by severe armament controls. Second, a criminalization of international law violations was contemplated, but did not materialize. The Emperor was not prosecuted<sup>18</sup> because the principle of immunity for heads of states was considered a hindrance.<sup>19</sup> Nor were other military and political leaders prosecuted on an international level.<sup>20</sup> The national trials Germany was coerced to hold against a handful of its army leaders were nothing more than mock trials. The so-called “Leipziger Prozesse” (Leipzig Trials) were a clear sign that the classical nineteenth century nation-state viewed warfare as a matter of national pride and military honor.<sup>21</sup>

Third, the Kantian idea of an international league was introduced in 1919 by the Treaty of Versailles and the creation of the League of Nations. A new age of international relations was to begin. The rule of law, in a rather reduced form of compulsory arbitration,<sup>22</sup> was to be introduced on an international level through the Permanent Court of Justice as the judicial branch of the Montesquieu-like separation of powers. Despite the fact that U.S. President Woodrow Wilson presented the idea of such an organization,<sup>23</sup> the U.S. did not become a member of the League of Nations, which certainly did not help the organization’s success.

### *B. The German Development in Particular*

In the meantime, Germany attempted to transform itself into a democratic state. With a rather fine and balanced democratic constitution, which was drafted mainly by the renowned scholar Hugo Preuss,<sup>24</sup> the

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18. This is despite the fact that “William II of Hohenzollern, formerly German Emperor” was identified by the Versailles Treaty as one of the persons responsible for the human tragedy caused by World War I; see Treaty of Peace between the Allied and Associated Powers and German art. 227, June 28, 1919, 11 Martens (ser.3) 323, 2 Bevans 43 [hereinafter Treaty of Versailles].

19. Beginning in November of 1918, Wilhelm II of Hohenzollern enjoyed political asylum in the Netherlands; cf. M. Cherif Bassiouni, *World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT’L L. & POL’Y 244, 249 (2002).

20. See Treaty of Versailles, *supra* note 18, art. 228.

21. See Herbert Reginbogin, *Confronting “Crimes Against Humanity,” from Leipzig to the Nuremberg Trials*, in THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945 106 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006); JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982); GERD HANKEL, DIE LEIPZIGER PROZESSE: DEUTSCHE KRIEGSVERBRECHEN UND IHRE STRAFRECHTLICHE VERFOLGUNG NACH DEM ERSTEN WELTKRIEG (2003); Claus Kress, *Versailles—Nürnberg—Den Haag: Deutschland und das Völkerstrafrecht*, 61 JURISTENZEITUNG 981, 982 (2006).

22. The term “compulsory arbitration” encompasses both the successes and the failures of the Permanent International Court of Justice, see GREWE, *supra* note 7, at 611–16.

23. President Woodrow Wilson, The Fourteen Points, Address to Congress (Feb. 11, 1918).

24. See generally JAN IMMEL, HUGO PREUSS UND DIE WEIMARER REICHsverFASSUNG (2002);

“Weimarer Republik” was founded.<sup>25</sup> Yet the new constitution, based on the ideal of Pruss’ “Volksstaat” (“state of the people”) was not supported by a majority. It has thus been called a “democracy without democrats.” Indeed, the old national thinking and the dishonor of the military defeat were present in the minds of many Germans. Likewise, the new democracy was not capable of dealing with the political struggle between communists and fascists.<sup>26</sup> The attempts to establish the rule of law both nationally and internationally failed. Both the League of Nations and the Weimarer Republik in Germany were ill-equipped to deal with attacks from within. The finest democratic state is useless if there is no will to support it; an international league is worthless if the people are not willing to give up a piece of their sovereignty. It is rather devastating and depressing that the horrific disaster of the First World War was not disheartening enough to the people of Europe to really change their way of thinking. Thus, power still prevailed over reason.

### *C. The Road to Disaster*

The consequences of this failure were dramatic. Inside Germany the newly elected Führer, Adolf Hitler, abandoned all democratic structure and imposed a fascist totalitarian regime. In September 1939, the Second World War began and resulted in the total destruction of civilization and humanity.

Despite President Franklin Roosevelt’s efforts to keep the U.S. out of the war, the tragedy could not be solved without American help. On May 8, 1945, Europe was an expanse of ruins. The world needed a new order, a new start.

In contrast to the lax prosecution of war criminals following World War I, the allied powers now decided to hold a spectacular trial and show to the entire world that aggression and war crimes would be followed by

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ELMAR MATTHIAS HUCKO, *Zur Erinnerung an Hugo Preuss*, 38 NEUE JURISTISCHE WOCHENSCHRIFT 2309 (1985).

25. A Constitution of the German State [Weimar Constitution] (1919), available at [http://www.zum.de/psm/weimar/weimar\\_vve.php](http://www.zum.de/psm/weimar/weimar_vve.php).

26. See KURT SONTHEIMER, *ANTIDEMOKRATISCHES DENKEN IN DER WEIMARER REPUBLIK: DIE POLITISCHEN IDEEN DES DEUTSCHEN NATIONALISMUS ENISCHEN 1918 UND 1933* (Nymphenburger Verlagshandlung 1968). For a contemporary viewpoint, see GERHARD LEIBHOLZ, *DIE AUFLÖSUNG DER LIBERALEN DEMOKRATIE IN DEUTSCHLAND UND DAS AUTORITÄRE STAATSBILD* (1933). A splendid contemporary non-legal description of the general social situation during the Weimarer Republik is given in SEBASTIAN HAFNER, *GESCHICHTE EINES DEUTSCHEN: DIE ERINNERUNGEN 1914-1933* (Deutsche Verlags-Anstalt 2000).

severe punishment.<sup>27</sup> This was a turning point in European history. Indeed, as Justice Robert H. Jackson said in his opening address, the Nürnberg Trial was “the most significant tribute that power has ever paid to reason.”<sup>28</sup> The Jacksonian trial held at Nürnberg taught Europe that hate and revenge can be channelled by a criminal trial, power can be controlled, and the most heinous crimes can be answered by the rule of law.

Attempts to establish a global institution which would be the basis of a new world order led to the creation of the United Nations (U.N.). It was meant to be an institution for all peace-loving nations;<sup>29</sup> aggression would be ruled out and a collective system of peace and security would be established. The U.N. Charter, on its face, is simply an attempt to establish the rule of law on a global level. It addresses the good will of nations, and attempts to channel the use of violence into a monopoly of power—the U.N. Security Council.<sup>30</sup>

However, political reality frustrated all hopes of a global rule of law as the Cold War began shortly after the end of World War II.<sup>31</sup> Notwithstanding the confirmation of the Nürnberg principles,<sup>32</sup> neither a code of international criminal norms nor a statute creating an international criminal court could be achieved.<sup>33</sup> The Korean War buried all hopes of a monopoly of military power; hundreds of military incidents kept the U.N. deadlocked, due to the fact that the East-West conflict was present from Vietnam to the Middle East, from Central America to Africa.<sup>34</sup>

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27. Robert H. Jackson, Opening Statement for the Prosecution at Nuremberg (Nov. 21, 1945), available at <http://www.yale.edu/lawweb/avalon/imt/proc/11-21-45.htm> [hereinafter Jackson Opening Statement]. See also Reginbogin, *supra* note 21, at 106.

28. *Id.*

29. U.N. Charter pmb. (signatories agreed “to practice tolerance and live together in peace with one another as good neighbours”).

30. ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT* 140 (3d ed. 1984).

31. In reality, the Cold War commenced after the defeat of the German army in the summer of 1945. The term “Iron Curtain” was crafted by Winston Churchill, not in his famous speech at Westminster College in Fulton, Missouri on March 5, 1948, but in a communication with President Truman as early as June of 1945; see Winston Churchill, *Der Zweite Weltkrieg* [The Second World War] 1079-1083 (3d ed. 2004).

32. International Law Commission, Report of the international Law Commission on the Work of its Second Session (5 June-29 July 1950), U.N. Doc. A/1316.

33. Several attempts towards these ends were attempted: International Law Commission, *Report of the International Law Commission on the Work of its Sixth Session*, U.N. GAOR, 9th Sess., Supp. No. 9 U.N.Doc A/2693 (1954); International Law Commission, *Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. GAOR, 43rd Sess., Supp. No. 10 U.N. Doc. A/49/10 (1994); Draft Code of Crimes against the Peace and Security of Mankind, U.N. Doc. A/CN.4/L.522 (1996).

34. BENEDETTO CONFORTI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* 173 (3d ed. 2005).

The United Nations is not a success story. What is missing for the rule of law to function is a mandatory judiciary. The International Court of Justice (ICJ) is not the kind of institution that could serve as a reliable backbone for a global rule of law. It is too weak, and in many instances it looks more like an arbitration tribunal without mandatory authority. Nevertheless, the U.N. provides a forum for discussion and at least a theoretical structure which, sadly, is only adhered to on a loose, voluntary level, whenever it suits the most powerful players in the global game.

The last century in world history has shown that in international relations, reason does not prevail over power as long as power is not separated and controlled. The hypothesis of Kant—that a democratic state would not go to war—has proven to be unrealistic. Democratic states are not less likely to go to war, but they go to war for different reasons and with different means, as Habermas has observed.<sup>35</sup> War is still the continuation of politics with different means, as Clausewitz stated.<sup>36</sup> And, of course, the justification for war is different; we do not characterize war as a “necessary expansion” or as being in our “economic interests”; rather, we call it “humanitarian intervention” and “state building”. A purely domestic rule of law cannot guarantee international peace and security. Likewise, a “league of nations” that respects the sovereignty of its members to the fullest extent cannot assure peace and security.

### III. WHERE DO WE, THE PEOPLE OF EUROPE, STAND TODAY?

Let me finally reflect on the idea of establishing peace and security that has been followed by Europe. Europe has experienced the most brutal wars imaginable. Animosity, mutual anxieties, and oppressive politics once led to a total collapse of any sense of humanity.

As a solution, Churchill proposed in a speech in Zurich on September 20, 1946:

What is this sovereign remedy? It is to recreate the European fabric, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety, and in freedom. We must

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35. JÜRGEN HABERMAS, FRIEDEN DURCH RECHT 12 (Matthias Lutz-Bachmann & James Bormann eds., 1996).

36. Carl von Clausewitz was an influential Prussian general and military theorist. In his treatise VOM KRIEGE (ON WAR), he stated his well known theory: “Der Krieg ist eine bloße Fortsetzung der Politik mit anderen Mitteln.” (“War is merely a continuation of politics by different means.”) VOM KRIZGE, Book 1, Ch. 1, No. 24, available at [www.clausewitz.com/cwzhome/vomkriege2/onwartoc2.html](http://www.clausewitz.com/cwzhome/vomkriege2/onwartoc2.html); see also ANDREAS HERBERT-ROTHE, DAS RÄTSEL CLAUSEWITZ (2001).



build a kind of United States of Europe. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth living. The process is simple. All that is needed is the resolve of hundreds of millions of men and women to do right instead of wrong and to gain as their reward blessing instead of cursing.<sup>37</sup>

And Europe indeed embarked on this mission. To heal their wounds and prevent a similar outbreak in the future, the main European powers decided to establish a network of contracts and to create a system of mutual dependency.<sup>38</sup> This was done in a twofold way: first economically by the foundation of the European Communities (EC),<sup>39</sup> and second, with regards to human rights, by the foundation of the Council of Europe<sup>40</sup> and the ratification of the European Convention<sup>41</sup> on Human Rights.<sup>42</sup>

The success of the EC, which was later founded as the European Union,<sup>43</sup> is, in my estimation, due to two factors: first, the general will of the member states to grow together while giving no preference to state sovereignty, and second, the mandatory judiciary. The first President of the European Commission, Walter Hallstein, expressed this sentiment when emphasising the role of the rule of law as the basis for European integration.<sup>44</sup> The European Union has thus been called a “Rechtsgemeinschaft,” or a “legal community.”<sup>45</sup> The European Court of Justice rather quickly turned into the driving force for European

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37. Winston Churchill, U.K. Prime Minister, Address at the University of Zurich (Sept. 19, 1945), available at [http://www.coe.int/T/E/Com/About\\_Coe/DiscoursChurchill.asp](http://www.coe.int/T/E/Com/About_Coe/DiscoursChurchill.asp).

38. “The aim of the Council of Europe is to achieve a greater unity between its members.” Statute of the Council of Europe art. 1, May 5, 1949, 87 U.N.T.S. 103 [hereinafter Statute of the Council of Europe].

39. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167; Treaty Establishing the European Economic Community Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EC Treaty].

40. The treaty establishing the Council of Europe was signed by ten states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. See Statute of the Council of Europe, *supra* note 38. Germany became the fourteenth member state to the Council of Europe on July 13, 1950.

41. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. This was the first international legal instrument safeguarding human rights.

42. Neither institution counted the U.K. as a member of the European states.

43. Treaty of European Union, Feb. 7, 1992, 2002 O.J. (C325) [hereinafter EU Treaty].

44. “Nicht Gewalt, nicht Unterwerfung ist als Mittel eingesetzt, sondern eine geistige, eine kulturelle Kraft: das Recht.” WALTER HALLSTEIN, DIE EUROPÄISCHEN GEMEINSCHAFTEN 53 (1973).

45. ARMIN VON BOGDANDY, SUPRANATIONALER FÖDERALISMUS ALS WIRKLICHKEIT UND IDEE EINER NEUEN HERRSCHAFTSFORM 53 (1999).

integration.<sup>46</sup> It took the role of watchdog, enforcing and fulfilling the obligations of the member states. The Court is one of the most important European institutions, and the most progressive in terms of its innovativeness and anticipation of the political will.<sup>47</sup> This engine of integration,<sup>48</sup> however, is dependent on the restrictions of state sovereignty tolerated by the member states. Such restrictions are the oil without which the engine would soon stop functioning.

A similar story can be told of the Council of Europe; the European Court of Human Rights (ECHR) is integrated into a supra-national system of cooperation and supervision for the protection of human rights. The ECHR hands down judgments which are accepted as legally binding on member states. Considering the importance and the quantity of its cases, the ECHR has turned into an “ordinary” constitutional court.<sup>49</sup> Again, we can observe a judiciary that is accepted as binding on member states and thus cuts back the sovereignty of the nation state. Without this, the recognition and success of the ECHR would not have been achieved.

The European Union, which has already formally established one Union citizenship,<sup>50</sup> was initially eager to create one political entity, one United States of Europe, as it were. However, the dream of one state under one constitution has come to a halt. The European train, which seemed to be at full speed, suddenly met a red signal when it came time to ratify the Draft Constitution,<sup>51</sup> which failed to be approved by several member states.<sup>52</sup> The European Union had to accept that the political will to tie the member states closer together has not yet reached a majority within Europe.<sup>53</sup> At the same time, the Federal Constitutional Court in Germany, among other courts in Europe, declared the European arrest warrant

46. See ULRICH HALTERN, *EUROPARECHT: DOGMATIK IM KONTEXT* 150-51 (2005).

47. “The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.” See EC Treaty, *supra* note 39, art. 220. Nevertheless, development of the law is generally accepted as one of the main aims of European jurisprudence.

48. See RUDOLF STREINZ, *EUROPARECHT* 494 (6th ed. 2003).

49. MARK JANIS, ET AL., *EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS* (2d ed. 2000); see also KAI AMBOS, *INTERNATIONALES STRAFRECHT* (2006).

50. The concept of Union citizenship was introduced in 1992. See STEFAN KADELBACH, *Die Unionsbürgerrechte*, in *EUROPÄISCHE GRUNDRECHTE UND GRUNDFREIHEITEN* 467 (Dirk Ehlers ed., 2002).

51. See Draft Treaty Establishing & Constitution for Europe, Oct. 2004, 2004 O.J. (C 310), available at <http://europa.eu.int/eur-lex/lex/sohtml.do?vri=oj:c:2004:310:som:en:html>.

52. As of January 12, 2007, eighteen of twenty-seven member states had ratified the Draft Convention. See Peter Krauer, *What Will Become of the European Constitution?*, EUROTOPICS, May 3, 2007, [www.eurotopics.net/en/magazin/eu\\_verfassung\\_2007\\_02/apu2-verfassungsverlayl2](http://www.eurotopics.net/en/magazin/eu_verfassung_2007_02/apu2-verfassungsverlayl2).

53. The difficulties with the European Unity have been described in ETIENNE BALIBAR, *SIND WIR BÜRGER EUROPAS?* 253–90 (2003).

unconstitutional and void, finding that it disregards national tradition and legal culture.<sup>54</sup> The European unification process has been too quick, too un-democratic, and has thus lost contact with the sentiment of its citizens. “Time-out for a unified Europe,” one might say. Yet, this pause provides precious time to reflect and stabilize the process as it is.<sup>55</sup>

Germany has always been one of the driving forces for European unification, especially after Germany’s own miraculous unification in 1990. German unity can only be lived to its fullest within a strong European Union that is committed to the promotion of basic and human rights<sup>56</sup> and that controls nation states by restricting their sovereignty.

The entire process of European integration, from the 1950s to today, proves the fact that adherence to the rule of law guarantees peace amongst states. Europe as a society, which for centuries fought one war after the other, has experienced sixty years of peace because it has learned that the nation state with full sovereignty can turn into an aggressor against its own people and against its neighboring states. Cooperation with a strict supranational controlling body is a model that has worked well as a basis for peace and security.

I do not want to say that these are all lessons learned from Nürnberg, although much of them are. But the legacy of Nürnberg fits well into the objectives of the European process. Therefore, it does not surprise me that most European member states,<sup>57</sup> and indeed the European Union itself,<sup>58</sup> favor the establishment of the International Criminal Court. International criminal law breaks with the principle of ultimate sovereignty and brushes away the myth of immunity.<sup>59</sup>

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54. Bundesverfassungsgericht [BVerfGe] [Federal Constitutional Court] July 18, 2005, 2 BvR 2236/04 [English translation available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718\\_2bvr223604en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html)]; see also Simone Mölders, *European Arrest Warrant is Void*, 7 GERMAN L.J. 45 (2006). As for the situation in Poland, see Krystyna Kowalik-Bańczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, 6 GERMAN L.J. 1355 (2005).

55. The German Presidency of the European Union has put the ratification process back on the agenda. See Press Release, European Union, *Moving Europe Forward* (Jan. 9, 2007), available at [http://www.eu2007.de/en/News/Press\\_Releases/January/0109\\_CHBK.html](http://www.eu2007.de/en/News/Press_Releases/January/0109_CHBK.html).

56. EU Treaty, *supra* note 43, pmbl.

57. For the ratification status of the Rome Statute of the International Criminal Court, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>.

58. See Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, ICC-PRES/01-01-06 (Apr. 10, 2006), available at [http://www.icc-cpi.int/library/about/officialjournal/ICC-PRES-01-01-06\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/ICC-PRES-01-01-06_English.pdf); see also Alexandra Kemmerer, *Like Ancient Beacons: The European Union and the International Criminal Court—Reflections from afar on a Chapter of European Foreign Policy*, 5 GERMAN L.J. 1449 (2004).

59. See Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003).

## IV. TOWARDS A GLOBAL PEACE

Global peace is still a dream; hopes that the end of the East-West conflict would also end wars turned out to be fallacious. Ethnic and religious conflicts continue to rise, and a new form of violence, terrorism, has shown the world its ugly face. I do not have a straight answer to the problem. However, a European view, as I have tried to argue, would be based on three pillars: first, human rights are at the center of democracy; second, state sovereignty is subsidiary to the respect for human and other basic rights; and third, power needs to be controlled by a supra-national judiciary that is generally accepted as capable of issuing binding decisions.

The Nürnberg trial, which we commemorate at this hour, fulfilled all three requirements. Germany was coerced to accept the judgment; the vanquished did not have any other option. And it was hard for the German people to accept the Nürnberg verdict.<sup>60</sup> Public opinion in Germany as early as the 1950s disapproved of the prosecution of German nationals by the allied powers.<sup>61</sup> Also, for a long time, the German government was cautious not to accept the Nürnberg judgments as “good law,” and it maintained the stance that they constituted a breach of the non-retroactivity principle by issuing a reservation against Article 7, Section 2 of the ECHR – the so-called Nürnberg clause.<sup>62</sup> It was only through the red-green coalition under Chancellor Gerhard Schroeder and Secretary of State Joschka Fischer that there was a modification of this policy. This change can be observed in the notorious *Tadic* decision of the International Criminal Tribunal for Yugoslavia (ICTY),<sup>63</sup> the enormous input at the Rome Conference, the drafting of a modern Code of International Crimes,<sup>64</sup> and the rescission of the previous reservation to Article 7, Section 2 of the ECHR.<sup>65</sup>

60. For a rather thoughtful critique from the viewpoint of a German defense Counselor at the Nuremberg trial, see OTTO KRANZBÜHLER, *RÜCKBLICK AUF NÜRNBERG* (1949).

61. See Albin Eser, *The International Military Tribunal at Nuremberg from a German Perspective*, in *THE NUREMBERG TRIALS*, *supra* note 21, at 50.

62. See AMBOS, *supra* note 49.

63. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (July 15, 1999); see Claus Kress, *Germany and International Criminal Law; Continuity or Change?*, in *THE NUREMBERG TRIALS*, *supra* note 21, at 210 (arguing that the acceptance of the “second generation” of international criminal law equals an acceptance of the Nürnberg trial).

64. The “Völkerstrafgesetzbuch” (Code of International Criminal Law) entered into force on June 26, 2002. Christoph J. M. Safferling, *Report—German Public Law Legislation—2001/2002: Das Völkerstrafgesetzbuch*, in *ANNUAL OF GERMAN AND EUROPEAN LAW* 366 (Russell A. Miller & Peer C. Zumbansen eds., 2003).

65. See generally AMBOS, *supra* note 49; Andreas Zimmermann, *The Judicial Legacy of Nuremberg—The Statute of the International Limitary Tribunal of Nuremberg and the International*

The German people have learned that it is a dictate of reason for the nation state to subdue itself to the rule of law and to accept supra-national control and intervention. In that, Immanuel Kant was mistaken, because he thought sovereignty was an unalterable principle in international law. Quite the contrary is true: the nation state only discovers the full enjoyment of sovereignty and liberty if it is ready to voluntarily give up a piece of sovereignty for the betterment of the international community as a whole—just as in the words of Justice Udo Di Fabio of the Federal Constitutional Court: “The modern human being conceives him/herself as a sovereign, born as a free individual but conscious to the necessity of voluntary bonding and to the joy in social commitment.”<sup>66</sup>

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*Criminal Court*, in THE NUREMBERG TRIALS, *supra* note 21, at 247; see also ANNE PETER, EINFÜHRUNG IN DIE EUROPÄISCHEN MENSCHENRECHTSKONVENTION 6 (2003).

66. UDO DI FABIO, DIE KULTUR DER FREIHEIT 276 (2005).