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Occasional Paper Series

Homo Humanus: Laws of Humanity and the Obsolete Phrase 'Civilized Nations'

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2023
Torkel Opsahl Academic EPublisher
Brussels

This publication contains the reflections written in tribute to the Albanian Constitutional Court on the occasion of its thirtieth anniversary (1992–2022), which are here, with Judge Greve's consent, published in the Occasional Paper Series of the Torkel Opsahl Academic EPublisher. In order to give maximum effect to the original text by Judge Greve, which was written as a speech and also reads like an essay, TOAEP has exceptionally decided to retain its style and not to burden the text with many footnotes. This is possible in this case because most of the quotations are universally recognizable and accessible sources.

Judge **Hanne Sophie Greve**, Dr. juris, former judge at the European Court of Human Rights, has previously served, *inter alia*, as an Expert in the United Nations ('UN') Commission of Experts for the former Yugoslavia established pursuant to UN Security Council Resolution 780 (1992) (1993–94). In the UN she has, moreover, held office as a UN Office of the High Commissioner for Refugees assistant protection officer (1979–1981, duty station Bangkok) and as a mediator for the UN Transitional Authority in Cambodia (1992–beginning of 1993, duty station Phnom Penh).

Front cover: *The upper section of the page uses an image of doves of peace in flight. It has been there since the start of TOAEP's Occasional Paper Series. From No. 11 onwards in the Series, the lower section of the page shows the ancient wrought ironwork above the entrance of the CILRAP Bottega in Florence, which also serves as the office of TOAEP.*

Back cover: *The image on the back cover shows a segment of the age-old terracotta floor of the CILRAP Bottega in Florence. The Bottega premises have been used for various purposes over the centuries, including as a leather* bottega *for decades.*

ISBN: 978-82-8348-227-0.

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1. On War

With the experience of the Greco–Persian Wars, one of the nine canonical lyric poets of ancient Greece proclaimed,

> War is sweet to those who have no experience of it,
> but the experienced man trembles exceedingly at heart on its approach.
>
> Pindar (c. 518–c. 438 BC)

This is the origin of the Latin adage, *Dulce bellum inexpertis*.

King Numa is credited with having erected the Temple of Ianus on *Forum Romanum* in the seventh century BC. The temple had doors on two sides for the soldiers to pass through on their way to war. In time of peace, the doors were to be closed. Emperor Augustus claimed that for more than half a millennium *before* his imperium the doors had been closed only twice.

Belligerent settlement of disputes was to continue to tear Europe apart. Christianity and schools of enlightened and humanistic thinking did not suffice to end the violence. There was, however, a growing concern not only among the masses suffering the most, but amid political leaders as well that war was not an acceptable course for humanity.

The nineteenth century started with still more than a decennium with carnage in the Napoleonic Wars. The Crimean War (1853–1856) ravaged the lives of huge numbers of men of military age, so did the Second Italian War of Independence with the Battle of Solferino in 1859, and the Franco–Prussian War (1870–1871). Through *The Times* Florence Nightingale – nursing pioneer and prodigious writer – sent a plea to the British government to find a solution to the horrific conditions of the wounded soldiers from the Crimean theatre of war. The Battle of Solferino was to be the last major combat where the armies were under the command of their monarchs – Napoleon III of the French army, Viktor Emmanuel I of the Piedmont-Sardinian army, and Frantz Joseph I of the Austrian army. The Swiss humanitarian, businessman and social activist Jean-Henri Dunant visiting Solferino after the fighting,

was deeply moved by the suffering of the wound soldiers left on the battlefield. He shared his impressions in his book *A Memory of Solferino*. Dunant promoted and co-founded the Red Cross that from 1863 was to ensue protection and assistance for victims of armed conflict and strife. Peace movements gained momentum and recognition.

The nineteenth century had seen enormous changes. Steel and electricity – new sprawling industries; novel modes of transport – railways, automobiles, the rare avatar that crossed the skies, and intercontinental telegraph; academic research and the sciences made huge leaps forward – in medicine not the least. Education for the many was a true thrill despite it creating intergenerational gaps. For the middle-class life improved.

More important than anything else: the lives of the masses as known for hundreds of years were irreversibly changed. Small holders and the less privileged left the countryside and flocked to swelling towns and cities to find wage-earning work. Self-supporting living and barter were becoming history. But industrialization was all about rationalization to increase the profit. Huge groups of people were unemployed. A new class of urban poor increased rapidly. They demanded work, food, decent living conditions – basic rights. The 'cottonpolis', Manchester, had its population augmented by some 600 per cent in about 60 years. It became a 'shock city' of the industrial century. Emile Zola (*Germinal*), George Bernhard Shaw (*Pygmalion*), and Victor Hugo (*Les Misérables*) lamented the plight of the destitute. Karl Marx penned *Manifest der Kommunistischen Partei*. The unscrupulousness of capitalists was denounced. There were mass meetings and strikes. Women wanted their say and rights. Kings and emperors feared a spillover from the French Revolution. The upper class and the aristocracy led lives detached from society at large.

At the Berlin Conference (1884–1885) the main European powers (the Ottoman Empire included) 'partitioned' Africa among them ushering in an era of increased colonial activity. There was no African participation. Both before and after the Conference, there were bilateral agreements providing similarly for European domination. Most existing forms of African autonomy and self-governance were eliminated. Asia – Japan and Siam being the main exceptions – was similarly under European control. By contrast, in South and Latin America new States emerged from some three hundred years of Spanish supremacy.

It was the last decennium of the nineteenth century, *Fin de siècle*. No matter the problems of the proletariat, many among the fortunate felt that

they had lost a sense of purpose and direction – "*Gott ist tot*" Friedrich Nietzsche had declared (*Der tolle Mensch*). There was a world-weariness and unsettled feelings. In Vienna schools of psychotherapy emerged. Those who found life distressfully dull and suffered from a fashionable despair, were treated – but for suicide, they felt they had tried everything. Escapism ran high. To some modernity and decay became interchangeable. Avant-garde literature and music were not accessible to all, nor were Symbolism and Art Nouveau, new directions in the visual arts. In some circles there was a precarious sunset sensibility, an apocalyptic feeling – the end of a phase of civilization?

2. *L'Œuvre de La Haye* – a Starting Point

Czar Nicholas II, despite having made very limited efforts to improve the living conditions of his own people, argued that ever more sophisticated armaments, and the financially excessive burdens that went along with it, had placed an intolerable check on the upward march of humanity and the social and intellectual development of the nations. The letter was met with mixed feelings – some saw it as visionary, others as Utopian. The world peace movements supported it wholeheartedly. A second letter with a more detailed list of subjects followed from Russia's Foreign Minister in January 1899. For fear of partiality, the location of the Conference should not be in the capital of any Great Power. Queen Wilhelmina of the Netherlands (her paternal grandmother, Anna Pavlovna, was the daughter of Czar Paul I) offered The Hague as a venue. Invited to the Conference were the nations accredited to the St. Petersburg Court, as were Luxemburg, Montenegro and Siam. The American and Mexican delegates were to represent the whole of the Western Hemisphere. The legitimacy and independence of the younger States in the continents overseas were identified as questionable.

Opening in May 1899, the First Hague Peace Conference entailed the formal acceptance in the world's leading political circles of the humanitarian concerns of the peace movements. Some one hundred delegates from 26 nations were gathered. Three commissions – their deliberations were secret – were tasked as follows:

1. To consider the limitation of armaments and the humanizing of war.
2. To discuss the adaptation of the principles of the 1864 Geneva Convention to the area of maritime warfare, and the laws and customs of war.
3. To review the maintenance of general peace, good offices and mediation, international commissions of inquiry, and international arbitration.

The Third Commission resulted in the 1899 Hague Convention on the Pacific Settlement of International Disputes that gave birth to the Permanent Court of Arbitration. Arbitration – optional arbitration that is – was felt to be the most efficacious and equitable means of settling disputes. The nations were fearful of surrendering their sovereignty to adjudication. The two first commissions produced remarkable results not only in what they accomplished, but also in what they begun and moved forward.

The Second Hague Peace Conference, in 1907, was an American initiative, although the formal invitation again came from the Russian Czar. Delegates from 44 of the 57 nations claiming sovereignty assembled. Africa was not represented and only four Asian nations were. The aim was to seek progress toward making the practise of civilized nations conform to their peaceful professions. The Germans rejected any idea of compulsory arbitration – a Permanent Court of Arbitral Justice – anxious that the arbitrations would not be impartial. The 1907 Hague Convention for an International Prize Court would remain unratified. Concerning the law of war further progress was made.

As Andrew Carnegie was to express it, there was an urgent need "to hasten the abolition of war, the foulest blot upon our civilization". There was a yearning for the judicial power of humanity – laws that would "assure the perpetuity of the only empire which can show no decadence, the empire of justice, which is the expression of eternal truth".

3. The Permanent Court of International Justice

The First World War scattered the universe of pious wishes. The Great Powers of Europe had engaged in tearing one another to pieces once again. The lives of millions were destroyed – some 8 million died and approximately 20 million were wounded. The thinking on the settlement of international disputes changed. More compulsory mechanisms for settling disagreements were needed. By the passage of time, international aggression and force should be replaced by the rule of law like the rule of law had supplanted arbitrariness and violence within the nations. In the Peace Treaties (Versailles of 28 June 1919, St Germain-en-Laye 10 September 1919, Neuilly-sur-Seine 27 November 1919, and Trianon 4 June 1920) the first international organization on a global scale – the League of Nations – was established and within its framework the Permanent Court of International Justice ('PCIJ'). According to Article 14 of the Covenant of the League of Nations,

> The Council shall formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any disputes of an international character which the parties thereto submit to it. The Court may also give an Advisory Opinion upon any dispute or question referred to it by the Council or the Assembly.

Article 415 of the Treaty of Versailles referred explicitly to the "Permanent Court of International Justice of the League of Nations".

The Protocol of Signature of the League of Nations was ratified by 48 nations. The United States of America ('USA') had signed but did not have the needed two-thirds majority in the Senate and thus did not ratify, nor did the Union of Soviet Socialist Republics initially (first in 1934).

Plans for the Court were prepared by various States, among them the so-called 'Five Neutral Powers' – the Scandinavian nations, the Netherlands and Switzerland, States that had not participated in the war. A Five Powers Conference held in The Hague in February 1920, adopted a *projet* of 55 articles. The draft became a valuable instrument to the Advisory Commission of Jurists appointed by the Council of the League of Nations to prepare plans for the establishment of the PCIJ. The Committee had ten members, five nationals of Great Powers, five of Small Powers (two of whom from the Five Powers). The old world (Europe) and the new world (America) would no more be estranged, "for it is nothing less than humanity as a whole which will form the new world of tomorrow".

Léon Bourgeois, one of the founding fathers of the Court, asserted,

> […] life precedes law. […] Between States it cannot be otherwise. International life tends to develop every day with an intensity which no one a century ago could have foreseen or dared to estimate. The interdependence of matters of every order, political, economic, financial, social, makes felt at the very extremities of the world the repercussion of the needs and activities of everyone. The creation of an international organ through which, in the higher interest of all, the flux and the reflux of all these forces shall be regulated, is indispensable to the peace and prosperity of each and all.

At the Opening Ceremony of the Court, on 15 February 1922, its President Bernard Cornelis Johannes Loder, affirmed,

> The Permanent Court of International Justice is like this precious plant; its gardener is the whole world, which expects from

> it a new era of happiness, when right and justice shall flourish on the earth. But if the roots of this plant are to strike deep, if it is to develop and become a three with solid trunk, with strong, wide-spreading branches with thick foliage beneath which the peoples may find rest, it requires a fertile soil, permeated by long centuries of order and of freedom; freedom of mind and of conscience, freedom of action for all, and order which respects the rights of others, so that this freedom may be no empty form of words but a living reality. […] The establishment of the Permanent Court marks in fact the arrival of a new era in the civilisation of the world. […] Nothing enters this world in a state of perfection, neither man himself nor the institutions which he creates. Evolution, often slow and painful, is the law of the universe.

The advancement towards an international legal order has undeniably been slow and painful in the extreme. When The Hague, the site of the PCIJ, was about to be engulfed in the Second World War, the Court moved to Geneva. In its time (1922–1940), the PCIJ rendered 32 Judgments and delivered 27 Advisory Opinions. Many of the cases related to the Peace Treaties after the First World War. The PCIJ was dissolved on 18 April 1946 by a Resolution of the Assembly of the League of Nations.

4. General Principles of Law Recognized by Civilized Nations

Whilst the Second World War still tormented the world, the Allied Powers agreed to create a new, truly universal, organization based on sovereign equality of all peace-loving States. When it – the United Nations ('UN' or 'Organization') – was established, the decision was made that an International Court of Justice ('ICJ') should be a component part of the UN, the principal judicial organ of the Organization on the same footing as the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat. *The Statute of the Court* became annexed to and *a part of the Charter of the UN*. All members of the Organization are *ipso facto* parties to the Statute of the Court. Before the Second World War, European States had enjoyed political and legal predominance in the international community – that world order was *not* to be maintained. This was not perceived as a hinderance for retaining the Statute of the PCIJ *mutatis mutandis* as a constituent instrument of the ICJ. The very day that the PCIJ was closed, the ICJ was inaugurated.

Non liquet (from the Latin language, 'it is not clear') implies that a competent court fails to decide the merits of an admissible case whatever be the reason – the absence of suitable law, the vagueness or ambiguity of rules, inconsistencies in law, or the injustice of the legal consequences. The court lacking jurisdiction is a different matter. Tribunals are routinely disallowed from declaring a *non liquet*.

As for the sources of law, in addition to treaties and customary international law, Article 38 of the Statute of the PCIJ provided,

> The Court shall apply:
> […]
> 3. The general principles of law recognized by civilized nations;

Likewise, Article 38(1)(c) of the Statute of the International Court of Justice reads,

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> […]
> c. the general principles of law recognized by civilized nations;

The *travaux préparatoires* of Article 38 of the Statute of the PCIJ suggest that the inclusion of "the general principles of law recognized by civilized nations" as a source of international law was intended primarily to avoid findings of *non liquet*. Similarly, Article 38(1)(c) is set to ensure the completeness of law, it is a guide to identify law where law may be sought with difficulty. These general principles – constituting a source of international law, distinct from treaties and customary international law – may be used to fill gaps or lacunae that may exist in treaty law and customary international law. This is consistent with the practice of the ICJ and the intention of the drafters of the Statutes of both Courts. Article 38(1)(c) identifies a source of limited usage. *Per se* it has apparently not caused the ICJ any serious problems.

The *travaux préparatoires* of Article 38 of the Statute of the PCIJ suggest that the inclusion of "the general principles of law recognized by civilized nations" was intended as well to limit judicial discretion in the determination of international law. Other possible functions such as to serve as an interpretative tool, were not excluded. The principles may, moreover, serve as sources of rights and obligations.

The actual wording of Article 38(1)(c) – the reference to 'civilized nations' – has caused misunderstandings, agony, outrage and bewilderment. For these reasons the phraseology ought to be changed. Today the allusion to 'civilized nations' is obsolete. More general thinking and some statements made in judicial decisions by illustrious judges of the ICJ are commanding.

5. Judges of the International Court of Justice on 'Civilized Nations'

The *Corfu Channel* case arose out of the explosions of mines by which some British warships suffered damage while passing through the Corfu Channel in 1946, in a part of the Albanian waters which had been previously swept. The United Kingdom accused Albania of having laid or allowed a third State to lay the mines after mine-clearing operations had been carried out by the Allied naval authorities. In its 1948 judgment in the case the Court relied on certain "general and well recognized principles", among them "elementary considerations of humanity, even more exacting in peace than in war".

It was the understanding of judge Alejandro Alvarez from Chile that a distinct American school of international law had developed from an amalgamation of the sixteenth and seventeenth century Spanish school of Francisco de Vitoria (1486–1546) and Francisco Suárez (1548–1617), the Anglo-Saxon legal system, and the Roman outlook of the Latin-American world. He saw these distinct views as a valuable counterpoint to the then prevailing European legal tradition that was the outcome of centuries of power politics.

In the Individual Opinion by Judge Alvarez in the *Corfu Channel* case he ascertained *inter alia*,

> The cataclysm through which we have just passed opens a new era in the history of civilization; it is of greater importance than all those that preceded it: […] due to the profound changes which have taken place in every sphere of human activity, and above all in international affairs and in international law.
>
> […] a new international law had arisen; it is founded on social interdependence. […] it is the realization of social justice.
>
> […] the present Court has a new mission which was not conferred – at least not expressly – on the Court which preceded it. For the Charter of the United Nations has instructed the General Assembly in Article 13 to "encourage the progressive development of international law and its codification". And, with a view to obtaining these results, the Assembly in its Resolution 171 of 1947 expressed the desire that the International Court of Justice should develop this law, in other words should bring it

> up to date. The Court has thus, at the present moment, three functions:
>
> (a) the former function, which consisted in elucidating the existing law, and in defining and confirming it;
> (b) that of modifying, in conformity with the existing conditions of international relations, provisions which, though in force, have become out of date;
> (c) that of creating and formulating new precepts, both for old problems where no rules exist and also for new problems.
>
> The two latter functions of the Court have their origin in the fact that international life is in a state of constant evolution, and that international law must always be a reflection of that life. […]
>
> Today, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an institution, an international social function of a psychological character, which has to be exercised in accordance with the new international law. […]
>
> The characteristics of an international delinquency are that it is an act contrary to *the sentiments of humanity* [emphasis added].

The *North Sea Continental Shelf* cases addressed the delimitation of the continental shelf of the North Sea as between Denmark and the Federal Republic of Germany, and as between the Netherlands and the Federal Republic. The proceedings were joined in the two cases. The Court delivered its judgment in the cases in 1969.

Judge Fouad Ammoun from Lebanon elaborated frequently on the social and moral connotations of a case. He expressed the opinion that the law must "adapt itself to the imperious needs of an international society which is moving towards universalism". This is necessary "in order to avoid confrontation between peoples, and lest it lose its footing in the upward march of progress towards better justice and the common aspiration towards the ideals of prosperity and peace".

In his Separate Opinion in the *North Sea Continental Shelf* cases judge Ammoun elaborated in part as follows,

> […] the form of words of Article 38, paragraph 1 (c), of the Statute, referring to "the general principles of law recognized by civilized nations", is inapplicable in the form in which it is set down, since the term "civilized nations" is incompatible

with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law.

The discrimination between civilized nations and uncivilized nations, which was unknown to the founding fathers of international law, the protagonists of a universal law of nations, Vitoria, Suarez, Gentilis, Pufendorf, Vattel, is the legacy of the period, now passed away, of colonialism, and of the time long-past when a limited number of Powers established the rules, of custom or of treaty-law, of a European law applied in relation to the whole community of nations. […] their concept of a family of European and North Atlantic nations is nonetheless beginning to be blurred by the reality of the universal community.

[…] the discrimination condemned by writers is in absolute contradiction with the provisions of the United Nations Charter, stipulating henceforward "the sovereign equality" of all the Member nations, and for their participation both in the elaboration of international law in the organs of the United Nations, […] and in the application, interpretation and to a certain extent the development and evolution of international law, by virtue of Article 9 of the Statute of the Court, according to which "the electors shall bear in mind […] that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured".

Thus it is that certain nations, to whose legal systems allusion was made above, which did not form part of the limited concert of States which did the law-making, up to the first decades of the 20th century, for the whole of the international community, today participate in the determination or elaboration of the general principles of law, contrary to what is improperly stated by Article 38, paragraph 1 (c), of the Court's Statute. The American delegate Root did well to suggest "the universally recognized principles of law". […] under the influence of ideas borrowed from The Hague Conference of 1907, where the jurists of European allegiance were dominant, he substituted for this formula that which was to appear in Article 38, paragraph 1 (c), of the Statute, which has thus been inherited, as it were without *beneficium inventari*, from concepts as anachronistic as they are unjustified. And over and above this, the particularly docile line taken by international decisions, understood by "civilized nations" those composing the "Concert of Europe", from

> whose systems of law alone they avowedly borrowed general principles of law by way of analogy. […]
>
> In view of this contradiction between the fundamental principles of the Charter, and the universality of these principles, on the one hand, and the text of Article 38, paragraph 1 (c), of the Statute of the Court on the other, the latter text cannot be interpreted otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality. The criterion of the distinction between civilized nations and those which are allegedly not so has thus been a political criterion, – power politics, – and anything but an ethical or legal one. The system which it represents has not been without influence on the persistent aloofness of certain new States from the International Court of Justice. […]
>
> To conclude this account, it appears that the Court, when quoting, as necessary, paragraph 1 (c) of Article 38, could omit the adjective referred to, and content itself with the words "the general principles of law recognized by … [the] nations"; or could make use of the form […] "the general principles of law recognized in national legal systems". One might also say, quite simply: "the general principles of law"; […]

In the *Military and Paramilitary Activities in and against Nicaragua* case (Nicaragua v. United States of America) a judgment on the merits was delivered in 1986. The findings of the Court included a rejection of the justification of collective self-defence advanced by the USA concerning the military or paramilitary activities in or against Nicaragua, and a statement that the USA had violated the obligations imposed by customary international law not to intervene in the affairs of another State.

Judge Nagendra Singh from India was instrumental to opening the eyes of Western scholars to the time-honoured Eastern sources of international law. He believed that "the law of international relations grows in strength and scope by a symbiosis of diplomacy and adjudication which nobody can properly appreciate if he or she remains mesmerized by the simplistic notion of politics and law as antipoles".

In his Separate Opinion in the *Military and Paramilitary Activities in and against Nicaragua* case judge Nagendra Singh omitted the words 'recognized by civilized nations' when writing,

> the whole sphere of international law, as defined in Article 38 of the Statute, namely both customary and conventional law as

> well as the general principles of international law (vide Art. 38, paras. (a), (b) and (c) of the Statute).

Leaving out 'recognized by civilized nations' was an option for judge Nagendra Singh. He could not otherwise have changed the wording but for commenting on its reference being defunct.

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Work is in progress to ensure a proper revision of Article 38(1)(c). The International Law Commission ('ILC') is a permanent organ for the coordination of international law, operating under the auspices of the UN. The ILC was established in November 1947 by UN General Assembly ('UNGA') Resolution 174 (II). The UNGA selects the work of the ILC. A Special Rapporteur is appointed for each topic. Special Rapporteur for general principles of law, Marcelo Vázquez-Bermúdez, oversees the amendment of Article 38(1)(c). *One* proposal is to leave out the words 'recognized by civilized nations' and keep 'the general principles of law' only. In my humble opinion there are better options.

It has been asserted that the term 'civilized nations' was "intended to exclude from consideration the legal systems of the countries not considered to be civilized" and that the source of general principles was therefore meant to comprise principles "common to all major Western systems". This, in my opinion, is not the sole possible reading of the term although I remain convinced that Article 38(1)(c) must be changed and the reference to 'civilized nations' taken out.

In Roman law, the phrase *bonus pater familias* referred to a standard of care analogous to that of a reasonable person (the previous reference to a reasonable man has been changed as *passé*) in English law. The reasonable person theory refers to a test whereby a hypothetical person is used as a legal standard. 'The ordinary prudent person' is a legal fiction of an ethereal reference point against which to judge conduct. All members of the community have an obligation to act as an ordinary prudent person in undertaking or avoiding actions that risk to harm others. If the standard is not met, the person fails to meet the duty of care. 'The ordinary prudent person' is an abstract person that sets a standard against which others are compared. The standard is normative.

6. The Rule of Law

The human being – *homo* – is one of the *genus humanum*, one among all human beings that constitute humankind.

Article 1 of the UN Universal Declaration of Human Rights ('UDHR') reads, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". Recognition of the inherent dignity – not to be gained or lost – and of the equal and inalienable rights of all members of the human family is the core of the Charter of the UN.

Human plurality has the dual character of equality and distinction. Human beings are all the same, meaning human; but in such a manner, that nobody is ever the same as anybody else. *I* am both *I* and in relation to everyone else *I* am *the Other – You*. For a human being to understand the reality of life, is to recognize his or her dual character as living as a human being among humans.

A key characteristic of the human condition is its frailty. The human being is vulnerable in every respect. Even the strongest and the brightest individual, is likely to be defeated if outnumbered by people of ill intent. Nature may be no more clement with its many dangers. The human being was placed in the company of others like itself, so that what was wanting in its nature, and beyond its attainment if left to its own resources, it might obtain by association with others.

The individual human being is a party to conditioning the individual's circumstances, and a party to conditioning the circumstances of fellow human beings.

An everlasting bond unites all human beings. The Romans captured the situation well with the words 'to be among people' – to signify life; and 'to cease to be among people' – to mean death.

There is, as explained by Immanuel Kant, *an innate equality belonging to every person* which consists in the individual's right to be independent of being bound by others to anything more than that to which the person may also reciprocally bind them.

In consequence, Kant formulated The Universal Principle of Right – a principle of mutual autonomy. Freedom can only legitimately be constrained by freedom. "Right is therefore the sum of conditions under which the choice of one can be united with the freedom of the other in accordance with a universal law". The right to freedom is thus a right to coerce as well. Without being entitled to avert a wrongful hindrance of personal freedom, the person has no freedom.

Freedom is innate – inherent and not acquired, it cannot be forfeited. It signifies the absence of dominion. The Romans subdivided human beings, speaking of the master – *dominus* – and the slave – *servus*. Over the slave, the master held dominion. The slave could be treated as an object and be subjected to any whim of the master. A free citizen was a *liber* – a person over whom nobody held dominion. Freedom from dominion is distinct from absence of interference. Freedom is absence of dominion; it is not absence of interference. Only if protected by law can the individual be assured of its freedom meaning no dominion.

Asked for a single word that can be a guide to conduct throughout one's life, Confucius replied, "Reciprocity". The Golden Rule is good for self-interest; for general happiness; social order and progress; and it is universal. Act in such a manner that the free exercise of your will may be able to coexist with the freedom of all others, according to a universal law. This imposes obligations upon every individual.

John Rawls placed everyone in 'the original position' – a hypothetical state of nature before being born – to develop his theory of justice. In the original position people are under a 'veil of ignorance' that prevents them from knowing their future place and role in society. Rawls claims that the most reasonable principles of justice – the justice of the society's basic structure – are those everyone would accept and agree to from a fair position where everyone is impartially situated as equals by a hypothetical 'veil of ignorance'. In this situation, everyone would unanimously accept justice as fairness.

'The state of innocence', the imaginary conditions of what the lives of people might have been like before societies came into existence, has been described as 'war of everyone against everyone else'. Already in a state of innocence, a person would be eligible to protect him- or herself against violations of personal integrity.

The foundation of the State is utility. With Aristotle, nature proclaims the necessity of the State to provide means and opportunities empowering the community to live well. Taking recourse to the theory of an imaginary 'social contract' it can be argued that to achieve legal order – foremost security – everyone gives up or rather gives over to the State part of their right to coerce others to respect their freedom. According to Article 5 of the European Convention on Human Rights ('ECHR'), everyone has the right to liberty and security of person. It is not in keeping with the rule of law when people are asked to give up their liberty to achieve security.

Freedom by the rule of law means that law protects from arbitrary power whether this power is exerted by one or more individuals vis-à-vis another person or by the State – any State. Guarding against State power implies, moreover, granting freedom from law, by according to each a personal sphere beyond public reach.

The most significant element of law is its coercive force – in consequence, a violation of the law is punishable. The force of law consists in its authority to impose duties, to confer rights and to sanction certain behaviour. States have gradually developed. Mere curtailment of vengeance has been replaced by the State's monopoly on the legitimate use of violence.

Only shielded by the rule of law, can everyone have security The rule of law shall furthermore create a climate conducive to human flourishing and social cohesion.

The telos of the State is the mutual flourishing of its members. There are a variety of things that human reason naturally appreciates as goods and thus as things to be pursued. This is so even when ultimate values may differ. Aristotle considered that what makes it true that something is good, is that it is somehow perfective or completing of the person. All distinct basic goods are not seen as having equal value. The rule of law is crucial to prosperity.

Society is made possible by social bonds between its members. Modern societies must promote such bonds. This by enabling both interdependence and independence. It is for the State to provide for conditions for mutual co-operation necessary for everyone to realize their projects. At the same time, the individual human being shall be allowed an autonomous sphere beyond interference by other people.

Sovereignty gives a State the right to control its affairs; it confers on the State primary responsibility for protecting the people within its borders as well. The law is made by the State and the State by the law. 'The same binding by which it is bound together dissolves everything'. The lack of a legal order makes a State disintegrate. The rule of law is a human right and the one and only alternative to arbitrariness. Among the Sustainable Development Goals of the UN are to: "Promote the rule of law at the national and international levels and ensure equal access to justice for all".

Urbi et Orbi: From the city-State to the nation-State to the international community of sovereign equality of all peace-loving States – the rule of law is the *one and only* alternative to arbitrariness, injustice and violence.

7. *Homo Humanus* – Culture and Civilization

Human beings in their complementarities and reciprocity are living paradoxes. The human being as such combines a gift for wisdom and compassion, with a capacity for irrationality, prejudice and cruelty.

Humanus signifies a system of thought concerned with human affairs in general. In the Classical period *humanus* in the Latin language had two more specific meanings as well – benevolent and learned. The term humane thus implies positive qualities of being concerned or showing sympathy and compassion for other living human beings.

In the archaic Greek myth (as narrated by Aeschylus) the Titan Prometheus, the Fire Bearer, out of his love for humankind (*philanthropos*) – their human potential – decided to bring two gifts to the primitive humans who had neither knowledge nor skills as they lived in dark caves. The offerings were: fire – signifying knowledge, skills, science and arts – and blind hope, that is the optimism needed to improve the human condition by utilizing the fire. The creation of humankind was completed. The Platonic Academy identified *philanthropia* as a state of being productive to the benefit of humans.

In ancient Greece, in the fifth and fourth century BC, a *Sophist* (from *sophia*, meaning wisdom) was a teacher – teaching virtue or excellence. Plato scornfully called them 'merchants of knowledge'. However, *paideia* referred to the education and cultivation of the model member of the Greece State. A young male educated in the liberal arts such as rhetoric and philosophy; arithmetic and medicine as scientific disciplines; combined with physical training; and moral education. In the early third century BC, Zeno of Citium founded the school of Hellenistic philosophy that came to be known as Stoicism. Practicing personal virtue ethics and living in accordance with nature being the way to happiness. The Stoics believed that an individual's philosophy could be asserted by the person's behaviour, and less so by how the person spoke. To lead a good life, it was necessary to understand the rules of the natural order as everything was rooted in nature.

The Greek intellectual universe and Stoicism not in the least made a major impact on Roman thinking and civilization. The concept of *humanitas* goes back to the Greek Sophists who held the use of reason as humankind's distinguishing feature, a belief that was adopted by the Roman Stoics and Marcus Tullius Cicero among them. Cicero used *humanitas* to mean the education of the human being or human excellence. In this he is likely to have

been inspired by Greek Stoicism that associated the word *paideia* with culture and education, and a translation from the Greek language of *philanthropia*. Cicero was an admirer and pupil of the Syrian Stoic philosopher Poseidonius of Apamea. For Cicero, the main distinction was no longer between Romans and Barbarians, but between the opposing classes *homo humanus* and *homo barbarus*. Roman or non-Roman, a human being would by his or her general behaviour place him- or herself within either group. The *homo humanus* had sophisticated manners of an educated person and distinguishes itself by the practice of the traditional Roman virtues. If the standard was not met, the person failed to qualify as *homo humanus*.

"*Genus humanum arte et ratione vivit*" – the human race, the whole of humanity, lives by skill and reason – Thomas Aquinas stated when commenting on Aristotle. According to Aquinas culture is a characteristic of human life as such. The human being is the primordial and fundamental element of culture – the subject of culture, its only object, and its end. Culture is a specific mode of the person's 'being'. It is through culture – or *cultura animi* as Cicero expressed it – that the human being is distinguished and differentiated from everything else and becomes more human. With a sound understanding of one's dual character as *I* and *the Other* an individual will develop empathy and sympathy with fellow human beings and become humane as well. Culture is a matter of *being* and not of having – it can never be a possession. It is living and exhibiting certain qualities. There is a plurality of cultures testifying to the rich creativity of the human mind.

Like for cultures there is a multiplicity of *civilizations* – ancient and past, present and those waiting to flourish – with their origins across the globe. The Cherokee, Creek, Choctaw, Chickasaw and Seminole tribes of (American) Indians are collectively known as the Five Civilized Nations.

Today, a civilized State can be described as having an advanced system of government, culture, and way of life – a State where the people who live there are treated fairly. It is a State functioning according to civilized reasoning – an appropriate understanding of the human being and of the human condition.

As humans we all like to consider ourselves as sophisticated and accomplished – civilized that is. It is an ideal – a shared human archetype towards which we all may strive. Civilized conveys fundamental human values that can serve as a unifying tool. Did the participants at the Peace Conferences know a more suitable, generally understandable and acceptable expression for their ambitious aspirations?

Civilization – not the one and only – but rather an ethereal reference point against which to judge conduct, was, as I permit myself to read the situation in retrospect, the cloak in which The Hague Peace Conferences were shrouded. The scourge of war was still tormenting the peoples and placing an intolerable check on the upward march of humanity and the social and intellectual development of the nations. The ancient commandment 'Thou shalt not kill' was not much respected in the then state of civilization. The nations would need to conform to their peaceful professions and behave in a civilized manner. Civilization, as culture, is a matter of being and not of having – it can never be a possession. It is living and exhibiting certain qualities. Civilization being a normative standard. 'Civilized nations' can accordingly be read as nations that *behave in a civilized manner*. All the efforts in The Hague were aimed at creating a future 'universal' civilization needed to minimize violent conflict resolution and its dreaded consequences. The ambition at the Peace Conferences was *a new era in the civilization of the world*.

'Civilized' may be explained in different ways, but the core of the concept refers to a society – a culture – exhibiting values that supposedly testifies to human progress and a positive evolution in contradistinction to a society being barbaric or inhumane.

8. Social Interdependence

There were no seaman recruit and no ordinary soldier participating directly in developing international humanitarian law in its early days, no unemployed or factory worker formulating the laws of international relations. Women were absent throughout. This does not mean that ordinary people and women – from all walks of life and counting for about one half of the world's population – had not developed an understanding of freedom, justice and humanity at that time and long since. The *vox populi* of the latter groups was despite formal exclusion from legislative fora, having an impact, nonetheless. Life itself and the throughout time omnipresent social interdependence ensured that.

For centuries women's written intellectual reflections were essentially confined to letter writing. Women from the aristocracy opened the gates to social acceptability to the public letter-writing of women. *Fortiter in re, suaviter in modo*. Admonitions and guidance advanced as well the world's intellectual achievements.

The mighty and mystic abbess Hildegard of Bingen (1154–1201) addressed Henry II (crowned king of England the year when she was born) writing,

> To a certain man who holds a certain office, the Lord says, "Yours are the gifts of giving: it is by ruling and defending, protecting and providing, that you may reach heaven". But a bird as black as can be, comes to you from the North and says: "You have the power to do whatever you want. So do this and do that; make this excuse and that excuse. It does not profit you to have regard for Justice; for if you are always attentive to her, you will not be a master but a slave".
>
> […] Shun this, with all your might, beloved son of God, and call upon your Father, since willingly he stretches out his hand to help you. Now live for ever and remain in eternal happiness.

The non-adoption of the 1832 Reform Act (to extend the vote beyond those owning property) prompted the first British mass movement driven by the working class, the Chartist movement. In this context, in 1842, the French-Peruvian socialist, activist and writer, Flora Cléstine Théresè Henriette Tristán y Moscoso (commonly known as Flora Tristan) addressed English workers, thus,

> Through the English example you will see how precarious is the existence of a people whose civil liberties are not guaranteed by political rights and social institutions, established *in the equal interests of all*. You will see how important it is for you to obtain these two guarantees and fit yourself through education to make proper use of them.
>
> Workers, if you would preserve in the study and investigation of these evils and reflect on them calmly, you will need to steel your hearts and summon up all your courage, for you will uncover wounds to deep to heal.

It is astonishing when men who wright indignantly of the discrimination entailed in the reference to 'civilized nations', without hesitation refer to the law of *man*kind and not that of humankind.

From the late nineteenth century, women were strongly represented in the peace movements. *Une grande dame* among them was Baroness Bertha Sophie Felicitas von Suttner. Born in Prague, she lived most of her time in Vienna. Her book *Die Waffen nieder* (1889) received wide appreciation. Von Suttner was, in 1905, the first female Nobel Peace Prize laureate – "for her

audacity to oppose the horrors of war". In her Nobel Lecture von Suttner emphasised a fundamental deficiency in "the present state of civilisation",

> The stars of eternal truth and right have always shone in the firmament of human understanding. The process of bringing them down to earth, remoulding them into practical forms, imbuing them with vitality, and then making use of them, has been a long one.
>
> One of the eternal truths is that happiness is created and developed in peace, and one of the eternal rights is the individual's right to live. The strongest of all instincts, that of self-preservation, is an assertion of this right, affirmed and sanctified by the ancient commandment 'Thou shalt not kill'.
>
> It is unnecessary for me to point out how little this right and this commandment are respected in the present state of civilisation. Up to the present time, the military organisation of our society has been founded upon a denial of the possibility of peace, a contempt for the value of human life, and an acceptance of the urge to kill.
>
> And because this has been so, as far back as world history records (and how short is the actual time, for what are a few thousand years?), most people believe that it must always remain so. That the world is ever changing and developing is still not generally recognized, since the knowledge of the laws of evolution, which control all life, whether in the geological timespan or in society, belongs to a recent period of scientific development.
>
> It is erroneous to believe that the future will of necessity continue the trends of the past and the present. The past and present move away from us in the stream of time like the passing landscape of the riverbanks, as the vessel carrying mankind is borne inexorably by the current toward new shores.

The last decennium of the nineteenth century, *Fin de siècle*, when Czar Nicholas II sent out his circular letter convoking the nations to an international conference that would concern itself with the problems of world peace and disarmament, impressive and imposing titles were still *haute vogue*. Amidst superlatives and pleasantries, the nobilities and excellencies participating at The Hague Conferences did, however, not hesitate to express disdain as they observed others not living up to their professed standards. The meaning could be crude despite the language being polished.

Every human being lives *in time and place*. The twentieth century approaching, was a time when nations that considered themselves as civilized, still suffered from deficiencies of a most barbaric character. As for slavery, the British Slavery Abolition Act abolished slavery in *most* British colonies only in 1833 (taking effect on 1 August 1834), freeing more than 800,000 enslaved Africans in the Caribbean and South Africa as well as a small number in Canada. Hideous racism was deeply entrenched. Many European nations saw themselves as engaged in a mission of civilization '*des races supérieures*' vis-à-vis '*des races inférieures*', as it was described. An approach convenient to defend colonialism – often accompanied by dehumanizing entire native populations, unspeakable violence and greed.

The African-American journalist George Washington Williams in his 1890 open (published in newspapers around the world), long, detailed and disapproving letter to King Leopold II of Belgium on the Congo concluded in part as follows,

> Against the deceit, fraud, robberies, arson, murder, slave-trading, and general policy of cruelty of your Majesty's Government to the natives, stands their record of unexampled patience, long-suffering and forgiving spirit, which put the boasted civilisation and professed religion of your Majesty's Government to the blush. […]
>
> All the crimes perpetrated in the Congo have been done in your name, and you must answer at the bar of Public Sentiment for the misgovernment of a people, whose lives and fortunes were entrusted to you by the august Conference of Berlin, 1884–1885.

Nevertheless, the nations gathered for the Peace Conferences in The Hague were there to address *some major humanitarian concerns of the peace movements*: to consider the humanizing of war; and to review the maintenance of general peace, good offices and mediation, international commissions of inquiry, and international arbitration. Ambitions worthy of the civilized that were. Every delegate saw himself as representing a 'civilized nation'. Similarly with the representatives gathered to administering the peace settlements after the First World War.

9. The Permanent Court of International Justice 1920 Advisory Committee of Jurists

Following Article 14 of the Covenant of the League of Nations an Advisory Committee of Jurists was appointed for the purpose of preparing plans for

the establishment of the PCIJ. Elected President of the Committee, Baron Edouard Descamps from Belgium, asserted "we are called upon to organise international justice, now that *all civilised States have agreed* to adopt a co-ordinated system based on principles of justice in international affairs, in place of the inevitably unreliable system of the balance of power" [emphasis added]. 'Civilized' was almost a shorthand for the values purportedly represented by all the nations gathered to find a way forward. The PCIJ started, furthermore, off as an agreement *inter partes – all* the agreeing States *were* (for that purpose at least) identified as *civilized*.

The Advisory Committee addressed the issue of civilizations as a matter of representation. The Analytical Index (found in the *Procès-Verbaux*) listed "Civilisation (forms of, see Representation)". As for "Representation" it was subdivided as follows:

- "of the forms of civilisation";
- "of the Great and Small Powers";
- "of the permanent Members of the Council";
- "of the legal systems"; and
- "geographical".

Save for Elihu Root, the representative from the USA, all the members of the Advisory Committee spoke in the French language. In consequence the English text of the *Procès-Verbaux* represents a translation except for the speeches and remarks of Root.

At the time of the Second Hague Peace Conference in 1907, the idea of international adjudication was still widely resisted. The question of how to elect judges to the proposed Permanent Court of Arbitral Justice had posed an almost insoluble problem. The work to establish the International Prize Court had as well encountered major difficulties in finding an acceptable method by which the judges should be elected. The political demands of some Great Powers to exercise a predominant influence on the composition of the Courts could not easily be reconciled with the juridical principle of the equality of States, *Magna Carta* of the Small Powers.

The Advisory Committee was agreed that the Court had to be a juridical organization, and that it was needed to find the most effective means to protect that character. There was no room for the customary reservations for independence, honour, and vital interests. The distinction between the political and juridical point of view was seen as fundamental; grounds employed in support of divergent opinions should be of a juridical nature only. The

British representative Lord Phillimore had hesitated – it would be impossible for him to consider himself bound by decisions which would give rise to dissatisfaction in his own country. The compromise was depolitization and quality assurance. In the latter respect Phillimore emphasized that a judge ought to have many other qualities than legal skills, such as loyalty, probity, a certain breadth of vision, patience and courage. Thus, it ought to be possible to choose judges also, for example, from among administrators. A firm legal schooling was, nevertheless, seen as a *sine qua non* for a judge – the first requirement.

The question of the composition of the Court was the most difficult problem for the Committee. "According to the regrettable terminology introduced in diplomatic language", as the Brazilian representative Raoul Fernandes described it, the contracting nations were partitioned into Great and Small Powers. Equality between States did not exist in fact, but all sovereign States are equal in law. Legally speaking, the method of nomination of judges relates to the principle of equality of States. The equality of States regarding the nomination of judges is the consequence of this principle.

It was not considered that the PCIJ would have one judge from every Member State. The creation of a relatively small Court was seen as a condition of its authority and its permanence. Thus, many States would not be able to have their subjects elected. Consequently, the issue of how to elect the judges became intertwined with the question of the number of judges.

Phillimore was adamant that his Great Power had to be represented on the Bench. If there were no English judge on the Court, no Englishman would like to see his country submit to a given sentence. The French representative Albert de Lapradelle called it a political argument and added that behind it rose the conception of the right to let public opinion correct the judgments of the Court.

Phillimore argued, moreover, that the character of Great and Small Powers was not fixed; and that inequality between States was already recognized by international law. He mentioned the provisions of the Covenant of the League of Nations, according to which States had generally only one vote, whilst Great Britain had seven. Among the founding members of the League of Nations were the British Empire with separate membership for the United Kingdom, Australia, Canada, India, New Zealand and South Africa. The Dutch representative Loder reminded Phillimore that according to Article 1 of the Covenant every State had but one vote and Great Britain was no ex-

ception. The five British Dominions were politically independent and, therefore, had a right to be considered as separate States. A precedent later invoked by the Union of Soviet Socialist Republics ('USSR') in the UN where in addition to the USSR, the Ukrainian Soviet Socialist Republic and the Byelorussian Soviet Socialist Republic had separate status and voting rights; cf. Articles 13 and 17 of the 1936 Constitution of the USSR.

Phillimore added that comparatively speaking, Great Britain had suffered most from the First World War. Never had that State been convulsed by such a disturbance as now had shaken the very foundations of the entire country. Neither the Belgian nor the French representative commented.

The Japanese representative Adachi Mineichirō said that, though he respected the principle of equality of States, as well as the fact that the development of humanity tended to the realization of this principle, realities had to be faced. States such as Japan, far from the centre of European activity, had to be considered. The Japanese, whose civilization was several thousand years old, but who had entered into definite relation with foreign Powers only 70 years ago and until recently had been under the regime of extra-territoriality, nevertheless were very impressionable. If Japan had no representative at the Court, he feared that the Japanese people would never consent to submit to its jurisdiction. All different kinds of civilization should be considered, among them the civilization of the Far East, of which Japan was perhaps the principal representative.

Fernandes emphasized – in line with the thinking of the remaining members of the Advisory Committee – that the majority of Members of the League of Nations were immutably opposed to any rule involving disregard for the principle of the equality of States. If the Great Powers desired a Court that should judge only their disputes, they were on the good road. But if, on the contrary, they desired a Court whose competence covered a number of States equal to that which formed the League of Nations, it would be necessary for them to adjust their legitimate interests with the frank application of the principle of equality of all sovereign States. More justice and less force were required, as de Lapradelle asserted.

A compromise to settle the riddle was reached taking inspiration from the composition of the League of Nations – by analogy with the solution found in the distribution of seats in the Council and Assembly. The Council started with four Permanent Members (the USA could have been the fifth) being 'Representatives of the Principal Allied and Associated Powers' – the United Kingdom, France, Italy and Japan. It was, that is, decided to base the

Bench of the PCIJ on inequality to a certain extent. The four Permanent Members of the Council were to have one judge each. The other Member States were to have an indirect representation by means of the election of a certain number of judges by the Assembly of the League. One State could not have more than one of its subjects on the Bench. With this distribution the 'other Member States' could not agree to fewer than eleven judges. The original Statute of the Court provided for eleven judges plus four deputy-judges (once the Court's jurisdiction had been extended, the numbers could become 15 plus 6). The scheme with deputy-judges was ended in 1929.

The election rules were supplemented by the requirement in the Statute of the Court that there should be representation on the Bench of the main forms of civilization and the principal legal systems of the world – of the world's prevailing cultural and legal traditions, that is. De Lapradelle had thought it superfluous to mention civilization because law implies civilization. The number of judges was large enough to represent the various systems of legal thought.

In addition to judges from the Permanent Members of the Council (the United Kingdom, France, Italy and Japan), the judges on the first Bench of the PCIJ came from: Brazil, Cuba, Denmark, the Netherlands, Spain, Switzerland and the USA. The geographical distribution was not too bad.

The requirement that there should be representation on the Bench of *the main forms of civilization* was an acknowledgement that there existed more than one civilization relevant to the work of the Court. As underscored by Adachi, the Japanese civilization was already several thousand years old. All different kinds of civilization must be taken into account, among them the civilization of the Far East, of which Japan was perhaps the principal representative, he added. The Norwegian representative Francis Hagerup understood that Adachi, in accordance with the modern evolutionary theory had said that it was the strongest who would survive. From the standpoint of moral development, this was truer of the one best adapted to civilization. According to the modern conception, the Small Powers were indispensable elements in the development of right and civilization. Hagerup asserted that there exists in all civilized countries – in Norway as well as in Japan – a civilization national in origin, on which there has been grafted a civilization general in character, and more or less common to all countries. Descamps wanted the Advisory Committee to recognize that the conception of justice and injustice is indelibly written on the hearts of civilized peoples – an indispensable complement to the application of law, and as such essential to

the judge in the performance of the great task entrusted to him. The only one to grade civilization was the Spanish representative Rafael Altamira when addressing the issue of election of judges. He argued that the Great Powers, as they had a more developed civilization, would have *ipso facto* a larger minority of intellectual men. Consequently, they would always be sufficiently represented on the Court, if the simple principle of choosing the best men was adhered to.

Phillimore considered the idea that no stipulation should be made of rules to be applied by the Court. He proposed that instead there should be inserted in the form of the oath taken by the judges all that might be considered necessary concerning the law to be applied, and that no other mention of the rules should be made in the Convention.

The sources of law to be applied by the PCIJ became listed as treaties, customary international law, and "the general principles of law recognized by civilized nations". The latter gave the judges a broad gap-filling power.

The Advisory Committee discussed if it was possible to trust such vague concepts.

Root believed that a Great Power could never agree to a system, which would lay it open to having its disputes settled by the application of a rule which had not been approved by it; or, which would be more serious, of a rule whose legality it had systematically contested at all times. Fernandes thought that Root might say the same thing of any State whatever, and perhaps with even more reason of those not provided with military power.

If the judge delivered judgment against the plaintiff in a case in which no law existed, it followed that where there is no law, the strong make the law. In what case the task of the Court would be limited to registering the acts of the powerful – becoming in many cases a registry for the high-handed acts of the strong against the weak. In a case where a perfectly just solution is possible, it is revolting to say to the judge, 'You must take a course amounting to refusal of justice' merely because there is no definite convention or custom. The question is how to make unerring rules for the judge's guidance.

It was postulated that the Court should not act as a legislator. In the words of Loder, relevant were rules which were not yet of the nature of positive law, but it was the Court's duty to develop law, to 'ripen' customs and principles universally recognized, and to crystallize them into positive rules.

Fernandes recalled that in national courts the judge can frequently not find a rule intended to deal with a specific question and finds it necessary to pass sentence on a rule derived from the general principles which guide and give life to national law. In such cases the judge has not acted as a legislator, but merely brought to light a latent rule. Such a rule is legitimate because it is logically contained in a principle already recognized by the nation concerned. Similar procedures cannot be illegal in international affairs, where, moreover, legislation is lacking and customary law is being formed very slowly, so that the practical necessity of recognizing the application of such principles is much greater. In the absence of any conventional or customary law, there is a need to base sentences on those principles of international law which, before the dispute, were not rejected by the legal traditions of one of the Stares involved in the dispute.

Descamps drew attention to "the rules of international law as recognised by the legal conscience of civilised nations". It is correct that many rules of secondary importance vary from country to country. But this is no longer true when it concerns the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations. This had already been approved by unanimous declarations of the assembly of civilized States, with reference both to peace and war. The solemn declaration of the Powers, placed in the Preamble to the Convention on the Laws and Customs of War on Land reads,

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. [The Martens clause first proposed by Fyodor Fyodorovich Martens.]

Descamps was convinced that the assembly of all the States did not and could not intend, in dealing with the state of peace, to abjure principles clearly intended to be applied in war.

10. League of Nations Mandates

Article 22 of the Covenant of the League of Nations addressed the fate of the colonies and territories that following the First World War had ceased to be

under the sovereignty of the States that formerly governed them, and "which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world". The principle should be applied that the "well-being and development of such peoples form a sacred trust of civilisation". Securities for the performance of this trust should be embodied in the Covenant. Article 22 paragraph 2 reads,

> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The mandate would differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances.

Three distinct groups of mandates were listed based on the level of development each population had achieved at the time, thus:

> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.
>
> Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory. The Mandatory was, furthermore, to secure equal opportunities for the trade and commerce of other Members of the League. These territories were the former German colonies in West and Central Africa.
>
> There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to

> the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

A mandate was a legal status for a territory thus transferred from the control of one country to another. There was to be no annexation of the territories. The degree of authority, control, or administration to be exercised by the Mandatory should be explicitly defined in each case by the Council – if not previously agreed upon by the Members of the League. *De facto* the administration was not all that different from colonial administration.

No mandate was identified with reference to an uncivilized nation. The issue was the degree of development – "peoples not yet able to stand by themselves under the strenuous conditions of the modern world". Certain territories were owing to "their remoteness from the centres of civilisation" considered best administered under the laws of the Mandatory. The tutelage should be entrusted to "advanced nations who by reason of their resources, their experience or their geographical position" could best undertake this responsibility. No mention of civilization was made in this respect. The principle should be applied, however, that the "well-being and development of such peoples form a *sacred trust of civilisation*" [emphasis added]. Civilization being invoked as the sublime quality that would serve as a guarantee for the well-being and development of the natives.

11. The European Convention on Human Rights

The Registry of the European Court of Human Rights prepared in 1974 a document entitled "References to the notion of the 'general principles of law recognized by civilised nations' in the *travaux préparatoires* of the Convention [ECHR]" – CDH (74) 37, 16 pages. Some main reflections are as follows.

Under the terms of Article 38 of the PCIJ "general principles of law recognized by civilized nations" constitute one of the bases of *ius gentium*. The general principles of law recognized by civilized nations are a kind of *Magna Carta* of the UDHR, and form part of the common heritage of European civilization.

The object of the collective guarantee in the ECHR is to ensure that the laws of each State in which are embodied the guaranteed rights and freedoms as well as the application of those laws, are in conformity with the general principles of law recognized by civilized nations. These are the principles

and legal rules that, since they are formulated and sanctioned by the *internal law* of all civilized nations at any given moment, can be regarded as constituting a principle of general common law, applicable throughout the whole of the international society. It is possible to deduce that, in each internal law, there is the expression of a principle valid for the whole of international society.

From the legal point of view the European Convention is based on the understanding that the affirmation of protected rights and freedoms corresponds to the general principles of law recognized by civilized nations, to one of the sources of positive international law. The European Court shall base its judgments on the Convention itself and these general principles of law. The Court was not intended to create new law *ex cathedra*.

When the ECHR was drafted, two alternatives were contemplated: either to provide *precise definitions* or a *simple enumeration* of the recognized rights and freedoms. Definitions were considered dangerous if they were to be taken as restrictive. It is extremely difficult to list all the possibilities contained in a single freedom and all those excluded therefrom. The format with *precise definitions* would contain no reference to the notion of general principles of law recognized by civilized nations, but the definitions proposed should be interpreted in the light of these general principles. If a *simple enumeration* was chosen, the intention was on the question of positive and practical content to refer to the general principles of law recognized by civilized nations. Whatever obscurities and lacuna might subsist in the definitions would thus be removed by the simple fact of this supplementary note on the interpretation.

However, while recognizing the importance of the proposal that the European Court should act on the general principles of law recognized by civilized nations as set out in Article 38 of the PCIJ, the lawmakers trusted that the insertion of a specific clause to this effect was unnecessary. It was anticipated that the European Court would necessarily apply such principles in coming to any decision.

> We did not include a specific provision that the ECHR should apply fundamental principles of international law as recognized by civilized nations, for one reason only. We on the Committee *could not contemplate the ECHR or the machinery doing anything else*. If they are going to work they must apply these principles and it is in this spirit that we have made no suggestion for a specific inclusion. [Emphasis added.]

General principles of law recognized by civilized nations may frequently be relevant to *interpret* other rules in cases of obscurities or serious gaps. It is perhaps less likely that the European Court is facing an absolute legal emptiness – rather a situation in which the rule came into existence without the kind of special circumstances of a concrete case having ever been considered.

There is one exception to the above general thinking found in Article 7 paragraph 2 of the ECHR concerning "No punishment without law". It reads,

> This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

The provision was included to ensure that there was no doubt about the validity of the prosecutions after the Second World War in respect of the crimes committed during that war.

In its Grand Chamber judgment in *Kononov v. Latvia*, 17 May 2010, the European Court noted the original and exceptional purpose of the paragraph. The Court *inter alia* ruled as follows,

> 186. Lastly, the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (see […]). Having regard to the subject matter of the case and the reliance on the laws and customs of war as applied before and during the Second World War, the Court considers it relevant to observe that the *travaux préparatoires* to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws (see […]). In any event, the Court further notes that the definition of war crimes included in Article 6 (b) of the Charter of the IMT Nuremberg was found to be declaratory of international laws and customs of war as understood in 1939 (see […]).
>
> 238. […] The Court considers that, having regard to the flagrantly unlawful nature of the ill-treatment and killing of the nine villagers in the established circumstances of the operation on 27 May 1944 (see […]), even the most cursory reflection by the applicant would have indicated that, at the very least, the impugned acts risked being counter to the laws and customs of

> war as understood at that time and, notably, risked constituting war crimes for which, as commander, he could be held individually and criminally accountable.

12. International Humanitarian Law

International humanitarian law seeks for humanitarian reasons to impose limits on the destruction and suffering caused by armed conflict. Two types of arguments are evoked:

- elementary considerations of humanity – the need to stop unnecessary and disproportionate suffering of people; and
- the requirements of civilization – obvious obligations entailed in being civilized, necessary means to reach the ends.

To illustrate the content of the demands a reference to the dictates of the public conscience is utilized.

In the following expose emphasis has been added to highlight the protective references.

The St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight of 29 November (11 December) 1868 – addressed *war between civilized nations*. It fixed the technical limits at which the necessities of war ought to yield to *the requirements of humanity*. *The progress of civilization* should have the effect of alleviating as much as possible the calamities of war. The employment of certain arms that uselessly aggravate the suffering *contrary to the laws of humanity* should be prohibited.

According to the Preamble to Hague Convention IV Respecting the Laws and Customs of War on Land of 18 October 1907, the parties were animated by the desire to serve *the interests of humanity* and the ever-progressive *needs of civilization*. The aspiration was to diminish the evils of war, as far as military requirements permit. Until a more complete code of the laws of war had been issued, the Martens clause was to ensure that the inhabitants and the belligerents alike would remain under the protection and the rule of the principles of the law of nations, as they result from *the usages established among civilized peoples*, from the *laws of humanity*, and the *dictates of the public conscience*. Hague Convention IV substituted for Hague Convention II of 29 July 1899 that had addressed the same topics and that had a similar Preamble. In Article 4 paragraph 2 of the Regulations concerning the Laws and Customs of War on Land attached to Hague Convention IV it is stated that prisoners of war must be *humanely treated*.

Article 12 of Hague Convention V of 18 October 1907 on Rights and Duties of Neutral Powers and Persons in Case of War on Land obliges the Neutral Power to supply the interned with the food, clothing and relief *required by humanity*.

On 24 May 1915, France, Great Britain and Russia issued a Declaration condemning the massacre of Armenians in Turkey by Ottoman authorities as "*crimes against humanity and civilization* for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres". The USA objected to such crimes being included in the Treaty of Versailles. The Treaty of Sèvres – Treaty of Peace between the Allied Powers and Turkey – contained provisions requiring the prosecution of persons accused of "*crimes against the laws of humanity*". The Treaty was never ratified and following the Greek–Turkish War, replaced by the Treaty of Lausanne of 1923.

During the Second World War, the need for justice after the war was first articulated in the St. James Declaration of January 1942. Article 6(2)(c) of the Charter of the International Military Tribunal ('IMT') of 8 August 1945 provided,

> *CRIMES AGAINST HUMANITY*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The Nuremberg Indictment Count Four (pertaining to *crimes against humanity*) referred broadly to "violations of international conventions, of internal penal laws, [and] of the general principles of criminal law as derived from *the criminal law of all civilized nations*" (emphasis added). Neither in London where the Charter of the IMT was drafted, nor in the Nuremberg Judgment is more said about the sources of crimes against humanity.

Interesting in the context are the words of François de Menthon, Chief Prosecutor for the Republic of France. In his opening address to the IMT de Menthon *inter alia* stated,

> I propose today to prove to you that all this organized and vast criminality springs from what I may be allowed to call a crime against the spirit. I mean a doctrine which, denying all spiritual, rational, and moral values by which the nations have tried, for

> thousands of years, to improve human conditions, aims to plunge humanity back into barbarism, no longer the natural and spontaneous barbarism of primitive nations, but into a diabolical barbarism, conscious of itself and utilizing for its ends all material means put at the disposal of mankind by contemporary science. This sin against the spirit is the original sin of National Socialism from which all crimes spring. […]
>
> National Socialism ends in the absorption of the personality of the citizen into that of the State and in the denial of any intrinsic value of the human person.
>
> We are brought back […] to the most primitive idea of the savage tribes. All the values of civilization accumulated in the course of centuries are rejected, all traditional ideas of morality, justice, and law give way to the primacy of race, its instincts, its needs and interests. The individual, his liberty, his rights, and aspirations, no longer have any real existence of their own.

As for 'no punishment without law' Article 15(2) of the International Covenant on Civil and Political Rights of 16 December 1966 states,

> Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law *recognized by the community of nations*. [Emphasis added.]

The Geneva conventions of 12 August 1949 for the protection of victims of war *all* comprise the Martens clause – Article 63 of Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Article 62 of Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Article 142 of Geneva Convention III Relative to the Treatment of Prisoners of War; and Article 158 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. Common Article 3(1)(d) of the four 1949 Geneva Conventions refers to "all the judicial guarantees which are *recognized as indispensable by civilized peoples*".

The Martens clause appears in a slightly different version in the 1997 Additional Protocols to the 1949 Conventions – Article 1(2) of Protocol I Relating to the Protection of Victims of International Armed Conflict; and Preamble paragraph 4 of Protocol II Relating to the Protection of Victims of Non-International Armed Conflict. The wording is, "*Recalling* that, in cases

not covered by the law in force, *the human person* remains under the protection of the *principles of humanity* and the *dictates of public conscience*". In Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980 (Preamble, paragraph 5) the phrasing is, "the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the *principles of humanity* and from the *dictates of public conscience*".

13. Dual Protection – Humanity and Civilization

The principal substantive questions in ethics relates to:

(i) goodness – what ends we, as fully rational human beings, ought to choose and pursue; and

(ii) right action – what moral principles should govern our choices and pursuits.

What ends we ought to pursue is classically treated as a question of the components of a good life, either agent-relative or agent-neutral; *or* as a question about what sorts of things are good in themselves. It can be assumed that human beings seek a good life – *eudaimonia*, happiness or human flourishing, as Greek philosophy identified it. Human well-being may be considered as a matter of feeling well, or as doing well (excelling at things worth doing). The two alternatives are frequently interconnected, and human misery and suffering are obstacles to both. As for intrinsic values, no postulation about human nature is made. Whatever is good in itself is worth choosing or pursuing.

> Human beings are members of a whole,
> In creation of one essence and soul.
> If one member is afflicted with pain,
> Other members uneasy will remain.
> If you have no sympathy for human pain,
> The name of human you cannot retain.
>
> Abú-Múḥammad Múshrif al-Dín Múṣliḥ bin ʻÁbdálláh bin Múshrif al-Shírází, penname Sa'adi
> *Gulistán* (*The Rose Garden*) 1258

As accentuated in Article 1 of the UDHR, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". It is

reasonable to argue that 'humanity' constitutes the basic norm – *Grundnorm* – in the world community's legal system as established by the UN. Humanity thus being the norm, the ultimate norm, that determines the legal validity of all other norms. The validity of the basic norm for any given legal system must, it is held, be presupposed by the validity of the norms that it legitimates as law.

With the international desire to prevent or limit armed conflict in order to reduce unnecessary and disproportionate human suffering comes the answers that the absence of human suffering is an undisputable component of a good life, agent-neutral that is; and that peace (as something more than the absence of armed conflict) is good in itself.

The absence of suffering being identified as the constituent of a good life, other good things may be instrumentally good in securing and being sources of this overall end.

Practical reason helps discerning means–ends relations whereby our objectives may be attained. Right action affects principles of right and wrong that govern our choices and pursuits. At the centre is a theory of duty describing the moral code that defines our duties and *its justification* that establishes the authority of the principles and consequently validates the code.

A traditional understanding is that the fundamental principles of right and wrong are authoritative in virtue of being self-evident truths – seen immediately upon reflection. Modern scepticism about anything being self-evidence has undermined the construction. At present, two other methods of justification are more accepted. One reasoning takes advantage of the jural conception of the code's principles. Here the principles are interpreted as expressions of a legislative will and their authority derives from the sovereignty of the lawgiver whose will they are taken to express. According to Kant moral principles are laws that issue from reason. Another approach represents a teleological conception of the code. The principles are justified because the ends they serve are the right ones to promote, and the actions they prescribe are the best ways to promote them. The principles are authoritative due to being prudent recommendations. No unnecessary and disproportionate human suffering is utilitarianism based on the ideal of rational benevolence.

When it comes to prevent or limit armed conflict in order to reduce unnecessary and disproportionate human suffering, no sharp distinction can be drawn between morality and law.

L'Œuvre de La Haye – The Hague Peace Conferences of 1899 and 1907 – had, with their shared overall exalted ambitions, their work divided between the humanizing of war and the maintenance of general peace. Efforts that spurred both the creation of international humanitarian law as a discipline and the adoption of international justice. Regardless of the common global motivation, drafting laws to reduce human suffering in war and to set up an international court are very disparate legislative work.

International humanitarian law represents legal codes that define the duties of those involved in armed conflict. Being human implies knowledge of what one does not want to happen to oneself – a negative reading of the Golden Rule. A reminder of the dictates of the public conscience as to what is required in relation to behaviour having an impact on fellow human beings is appropriate. The specific obligations in the codes are enhanced with minimum standards to be respected at all events: considerations of humanity and requirements of civilization. Both ends and means are addressed that is – either in preambles to each code or in general provisions. Considerations of humanity and requirements of civilization represents a dual protection, a two-fold guarantee against and in the catastrophe of armed conflict.

To provide a Statute for an international court is a completely different matter, primarily organizational in character. The Statute of the ICJ has no Preamble save for stating that the Court is "established by the Charter of the United Nations as the principal judicial organ of the United Nations". Within the 'value barren' – as concerns protection against the scourge of armed conflict – framework of the Statute of the ICJ appears Article 38(1)(c) that, in addition to treaties and customary international law, lists "the general principles of law recognized by civilized nations" as a source for the Court's decision-making.

The UN, in contradistinction, is a world organization built on values and principles – the shorthand for everything the UN seeks to represent and promote is *humanity*. The Preamble to the UN Charter lists the ends and the aims of the world body, Chapter I (Articles 1 and 2) its "Purposes and principles". Every Member State of the UN have accepted the Charter and are *ipso facto* parties to the Statute of the Court.

Civilization may, with Prosecutor de Menthon, be described as "all spiritual, rational and moral values by which the nations have tried, for thousands of years, to improve human conditions". 'Civilized' can, still with words borrowed from de Menthon, be understood as representing all the values accumulated in the course of centuries, all traditional ideas of morality,

justice and law. It is possible to read the different references to civilization and civilized prior to and resulting from *L'Œuvre de La Haye* as expressions of appropriate State behaviour – a legal fiction of an ethereal reference point against which to judge State conduct. Principles recognized under the hallmark of civilization would thus grant some protection, a foreseeable direction in keeping with the aims and ambitions of the historic events in which the terms appeared. 'The general principles of law' are without any specific value orientation.

Given its history, "the general principles of law recognized by civilized nations" could today be read as 'the general principles of law recognized by *Member States of the UN*'. There are valid arguments for keeping the protection entailed in the obsolete term 'civilized nations'.

14. Concluding Remarks

The eleventh emergency special session of the UNGA (the first since 1997) deplored Russia's invasion of Ukraine and adopted, on 2 March 2022, a resolution defending the principles of the UN Charter (A/ES-11/L.1) with 141 votes in favour, 5 against (with Russia: Belarus, Syria, North Korea and Eritrea), and 35 abstentions. The resolution *inter alia*:

> *Reaffirmed* the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations, […]
>
> *Recalling* also the obligation under Article 2(2) of the Charter, that Members, in order to ensure all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the Charter, […]
>
> *Recalling* also its resolution 2625 (XXV) of 24 October 1970, in which it approved the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; […]
>
> *Endorsing* the Secretary-General's statement of 24 February 2022 in which he recalled that the use of force by one country against another is the repudiation of the principles that every country has committed to uphold and that the present military offensive of the Russian Federation is against the Charter, […]

The ICJ is an instrument of the UN and ought to be utilized as such in full. It is never too late to make a better world. *Now* is the time!

With words of Pindar once again, there is reason to have a resilient faith in what human beings may achieve,

> Creatures of a day! What is anyone?
> What is anyone not? A dream of a shadow
> Is our mortal being. But when there comes to men
> A gleam of splendour given of heaven,
> Then rests on them a light of glory
> And blessed are their days.

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Occasional Paper Series No. 15 (2023):

Homo Humanus: Laws of Humanity and the Obsolete Phrase 'Civilized Nations'

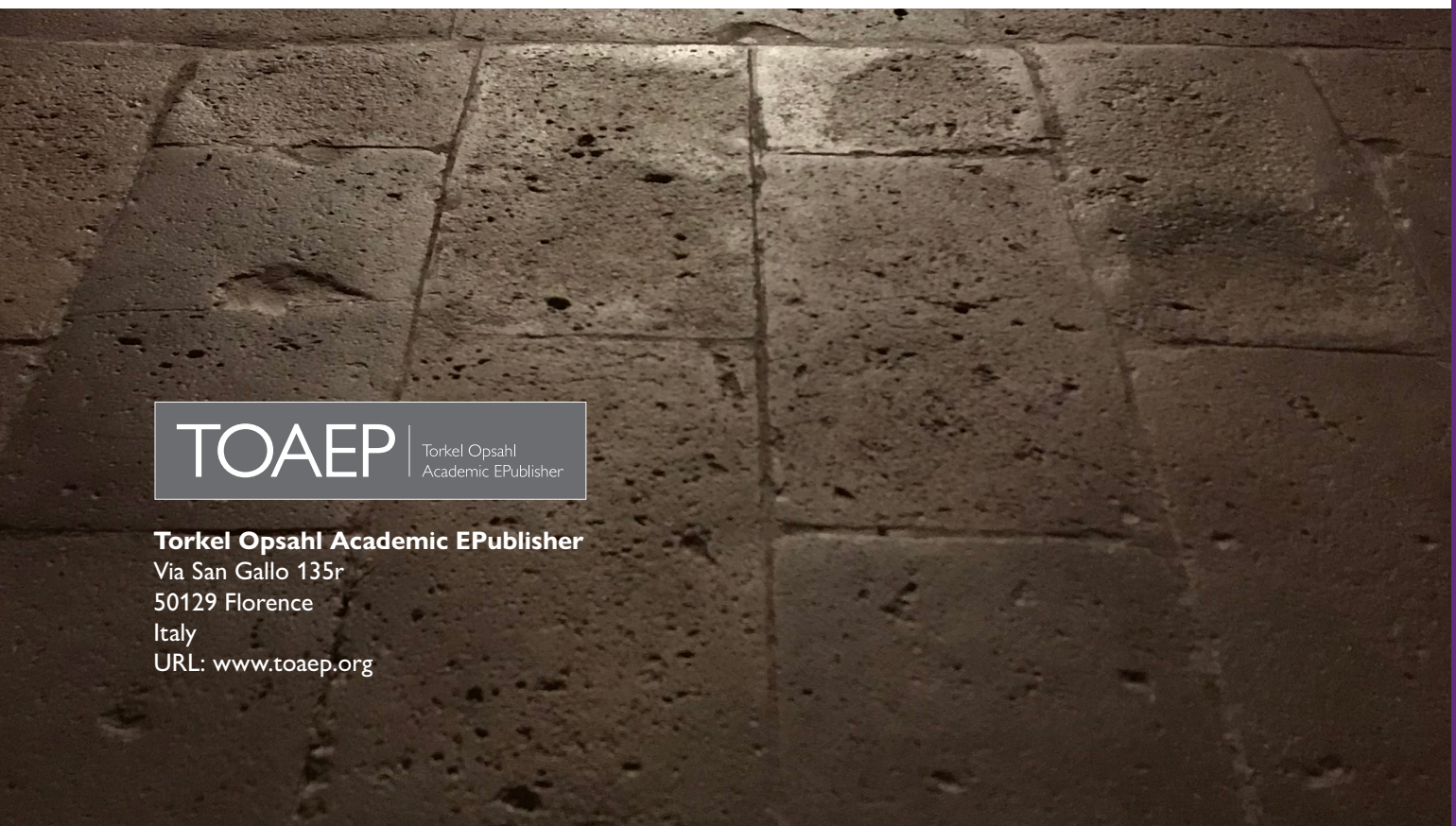
Hanne Sophie Greve

In the nineteenth century, belligerent settlement of disputes was continued to tear Europe apart. There was, however, a growing concern not only among the masses suffering the most, but amid political leaders as well, that war was not an acceptable course for humankind. The century concluded with The Hague Peace Conferences, though World War I soon scattered the universe of pious wishes.

Thus, the thinking on the settlement of international disputes changed. More compulsory mechanisms for settling disagreements were needed, upholding the rule of law rather than international aggression and force. With this context and spirit, a reference to the "general principles of law recognized by civilized nations" was included in Article 38 of the Statute of the Permanent Court for International Justice, later echoed in the Statute of the International Court of Justice and in decades of legal and ethical thinking.

This Occasional Paper offers Judge Greve's reflections written in tribute to the Albanian Constitutional Court on the occasion of its thirtieth anniversary (1992–2022), focusing on the expression 'civilized nations', its origins, implications for ethics and law, and relevant authoritative opinions, justifications and critiques. The text's form as a speech and an essay has been preserved in respect to the distinguished author.

ISBN: 978-82-8348-227-0.



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