Annex. Is There Reason to Trust in a Future for International Law?

Inaugural lecture, delivered by Robert Regout upon the acceptance of the professorship of international law at the Roman Catholic University of Nijmegen on 28 February 1940[1]

Dear trustees of the Radboud Foundation, Dear curators, professors, lecturers and assistants at this University, Ladies and gentlemen students, And everyone honouring my acceptance of the professorship with his distinguished presence today, Dear audience!

One who was assigned in September 1939 to devote his best efforts to the study of international law, and was asked to arouse the attention of students, that is to say, of a future generation, towards specifically this domain of legal science, will want to reflect on the value of international law in our present time, and on the possibilities for its development.

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In everyday life, the notion of 'international law' has become a subject for much ridicule; and the sceptics, who have predicted long since the futility of any attempts to let justice prevail over power, seem to have won the argument. They point to the blind optimism with which, after the World War, the establishment of the League of Nation was hailed and the era of final and enduring peace proclaimed; they remind us of the series of conferences that over the past years have mainly animated the major European coastal resorts, of the increasing piles of paperwork, of numerous designs and reports and resolutions, of guarantee- and non-aggression pacts behind which technicians could bring their national rearmaments to perfection; and they consider it a proven fact that government officials, who allowed themselves in practical politics to be led by faith in the novel legal developments, have fallen victim to dangerous idealism. There truly is every reason for modesty.

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By way of defence, one may undoubtedly point to the fact that there are vast areas of human society in which international law is being respected: a large and impressive majority of the over 4500 treaties registered in Geneva from May 1920 up to September 1939, are being adhered to, and signify in themselves the existence of a legal order amidst the numerous complex relations pursued on the international plane; however,

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[1] Annex to H. de Waele,"Commemorating Robert Regout (1896-1942). A chapter from the History of Public International Law Revisited". Author's translation of R.H.W. Regout's original Dutch text entitled "Is er grond voor vertrouwen in de toekomst van het volkenrecht?" Nijmegen: Dekker & van de Vegt, 1940.

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the several treaties that have been ripped apart were of such cardinal importance, that their destruction eroded the very foundation of all legal certainty in treaty relations, namely the faith in the word once given.

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People expect from international law to bring about a realm of peace and justice, and to preserve this accomplishment among nations. In this task, international law has failed. Is there, after this experience, any reason left to believe in a future for international law? Our answer is affirmative. When we steer clear of the pressure of current events and, from a distance, take a grand view of the development of international law as it has taken place in the past century especially, one may, in our opinion, conclude that there is not a certainty, but in any case a real possibility, or even a probability, that a more effective legal order among nations will be enacted on short or longer notice. Let us sketch the history of the development of international law in the period behind us in broad contours.

Ever since Christianity's falling apart in the 16th century, and the sharp delineation of national states and the rise of the idea of sovereignty ensuing in its wake, rulers have taken to power and self-interest as their natural guiding principles. War is considered the regular means to settle differences. The system accepted for centuries within states, to have conflicts between citizens resolved through an impartial judiciary, is almost immediately abandoned in international relations. The only thing that Martens has to say in 1821 in his Précis du droit des gens moderne de l'Europe about arbitration is

> "cette … voye, très usitée dans tout le cours du moyen age, n'a pas été entièrement abandonnée jusqu'à ce jour, mais les exemples d'arbitrages offerts et acceptés sont devenus rares de plus en plus par l'expérience des inconvéniens qui semblent être presque inséparables de ce moyen, ordinairement insuffisant, surtout par le défaut d'un pouvoir exécutif" (3e éd., p. 318)

In the course of the 19th century, public opinion in the New and in the Old World, aroused by humanitarian and pacifist groups, starts to take position against war, and starts to ask for a peaceful resolution of international conflict. Though disappointed by actual events time and again – a Crimean War and a War of Secession, a German-Austrian War and a French-German War – visions survive of a golden age of lasting peace in a future global community. However sceptically lawyers originally look down upon these movements, at long last they too would be caught under their spell. From 1873 onwards, the recently established 'International Law Association' and the 'Institut de Droit International', in which the most renowned scholars of international law have taken up office, have studied the problem of international arbitration. The first and second Peace Conferences, convened in 1899 and 1907 at the jubilant enthusiasm and great expectations of the public at large, devoted some lengthy deliberations to the means of peaceful resolution of international conflicts. The conventions that have encapsulated these, are but poor in content; yet they do bring about a strong increase in the number of arbitration treaties and arbitral awards, and the establishment of the Permanent Court of Arbitration.

Then the World War breaks out – despite all predictions, unexpected; long held to be impossible by a generation that had thought itself on a triumphal march towards pros-

perity and happiness. The disappointment cuts deep, much deeper than our generation itself felt in September last year, hardened as we are to the sight of great injustice. The words of Struycken, written in the beginning of October 1914, reflect this duly:

> "In vain then, all our efforts have been in promoting peace and culture. We stand disillusioned, deceived, before the ruin of what we once thought was erected to stand the test of time. A deception we contended ourselves with, as if it was a valuable reality indeed. What seemed to be progress, civilization, was a chimera, was hiding an inner decay. Laboured and toiled we have – for nothing" (Collected Works, II, p. 66).

But the eternal hope of mankind soon reasserts itself. From 1915 to 1919, designs for a new legal order emerge ubiquitously, plans for a global federation that would prevent the curse of war from ever again rearing its head; Schücking and Wehberg draw up a list of the most familiar designs and come to a grand total of 55. (Die Satzung des Völkerbundes, 3e Aufl., I, 6 ff.) After the World War, the construction of a regime of positive law to prevent war develops apace. The Covenant of the League of Nations, the Statute of the Permanent Court of International Justice, the General Act of Geneva, the Kellog Pact, are documents whose realization in 1907 seemed unthinkable. "Since the end of the Word War," Schindler notes, "no other domain of international law has experienced such a strong evolution as the law concerning the peaceful resolution of international conflicts." (Die Schiedsgerichtsbarkeit seit 1914, 1938, Vorwort).

This development we find reflected in the discipline of international law on the whole: where around the 1850s, most attention was devoted to questions on diplomatic privileges and the laws governing the conduct of hostilities, the thrust of our studies presently has become directed towards the law of preserving peace. The ius ad bellum, which from the Middle Ages onwards was extensively being discussed and commented upon, even by Grotius; which had nonetheless receded into the background ever since, is once again the centrepiece of our attention.

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There then we have the rough contours of the most recent developments. What is their significance? Do they hold any promise for the future? The evident response is to point at the violence of the past years, point to the fact of the new war. And the bitter words of Struycken could also be uttered by us: "A deception we contended ourselves with, as if it was a valuable reality indeed. What seemed to be progress, civilization, was a chimera, hiding an inner decay. Laboured and toiled we have – for nothing." That the present, and the future also, is worrisome, asks no further proof. It seems much more useful to indicate some bright spots, that appear to hold the promise of a better future.

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For a peaceful society of nations in our time, two elements are vital: a sincere desire for cooperation, and a regime of positive law regulating international relations. The first is the foundation on which the second should rest. Both elements are of essential value. The failures that lie behind us are mainly due to the weakness of the foundation; yet, the edifice, the legal construct, was far from perfect. No future progress may be attained, unless the foundation is strengthened and the construction perfected.

Now we are of the opinion that the development of international law over the past century signifies important progression as regards the second element: the legal construct. The many months of discussion and debate, the countless reports, all the attention and energy devoted to questions of an international legal order have indubitably deepened the insight into these issues. Where before many problems were disregarded with the blissful optimism of an ignorant, right now one has keenly observed the underlying difficulties – which denotes a step towards their solution. And as in technical science failed experiments are by no means evidence of wasted energy, thus the sad failures that have occurred at the construction of the new legal order are by no means proof of vain endeavours. The failures emphasise the need for prudence, for modesty – they cannot be the reason to cease commitment to activities already undertaken.

When in 1898 Tsar Nicolas II had made his call for a large conference of the Great Powers, and had raised the limitation of armaments as one of the principal topics, the British Foreign Office had their emissary in St. Petersburg investigate cautiously whether the Russian government had any comprehension of the technical complications attached to this plan. "Should armament," the astute Balfour asks, "be determined on the basis of country, population or wealth, or these three combined? Should any account be taken of the defensive contingencies of a country, and if the reply is in the affirmative, who should be the judge of this? When a country refuses to disarm, should the other countries then resort to war for the sake of peace?" (British Documents on the Origins of War, I, No. 261). Already we notice several of the questions and problems that will dominate the debates on the limitation of armament between 1920 and 1933. The Hague Conferences did not find a solution, neither did the so-called 'Disarmament Conference' of 1932. But when, after the end of the current war, this inevitable issue is raised once again, one will be able to benefit from the insights acquired from the earlier deliberations. If a solution is found, this will not be due to simplistic slogans, but rather through the sceptical, cautious work of pundits.

The same goes for the many other issues that have been raised over the course of time. The vehement discussions concerning mandatory arbitration, the distinction between disputes of law and disputes of interests, the definition of the aggressor, the regulation concerning the application of sanctions, the revision of treaties, and also, the practice of the claims commissions, of the arbitration tribunals and the Permanent Court of International Justice – all that forms precious material, that for now has been left in disarray in the abandoned peace building, but which may in better times be utilised for the construction of the legal order. Not just lawyers, also politicians and diplomats have experienced turbulent years full of hope and disappointment. But why should we suppose people will not learn from experience? The most political leaders that will, now and in the coming years, decide upon the future development of Europe and the world, have been eye witnesses to or partisans in the previous war and the previous peace. This datum has an unmistakeable influence on the policy of warfare; should we not expect that it will be noticeable as well at the more difficult affair of making peace?

More important than the legal construct of the international order is the foundation on which it should rest. It is particularly due to the inner weakness of this foundation that the building of peace collapsed once again. In the future, no true peace, no 'tranquillitas ordinis' may be expected if a different mindset, a different mentality does not

inspire the relations between peoples. With regard to this factor, can it be said that the development of the past century offers any reason for optimism?

It is an historical certainty that at the previous conferences in the past 50 years, the Great Powers and their representatives had (with the odd exception) little or no confidence in the stilted plans for whose realisation they had convened. This holds true for the first and second Hague Conference, and no less for the consultations on the instalment of the League of Nations and the Disarmament Conference of 1932. The national interest remained the leitmotiv at any decisions, the Powers lacked any sincere desire to make significant sacrifices beneficial to the international society. This was bound to entail a paralytic mutual distrust. This egoism and nationalism has grown rather than that is has become any weaker; it remains the looming threat for the future. But here also, the past does provide some faint reasons for hope.

The said Conferences, though most of the time seeking only to keep up appearances and profitably exchange concessions, have in many respects yielded results of true, pragmatic value. The greatly increased number of arbitrations, the many disputes that have been brought before the Court of International Justice, have awarded these legal institutions a place in the customary life of nations. The principles of collective security, of sanctions against the offending state, have aroused ideas that, though apparently not viable for direct realisation, will not dissipate easily from the desire of nations. And an important fact is no doubt that the Great Powers who became a member of the League of Nations, have thereby offered foreign states the right to intervene in their international governmental policy. Whoever thinks back to the sensitivity with which a hundred, and still a thirty years ago, even the slightest encroachment upon the absolute statal sovereignty was rejected, shall have to recognise that despite all setbacks, it is possible to make progress. The League of Nations has made one become accustomed to the idea of a limitation of absolute sovereignty. This is a great step in the right direction. One should not be impatient. A mentality of centuries is impossible to alter within twenty years; the history of nations should not be measured with the short yardstick of a human life. The decline in our days may be a short phase, in a longer process of ascension to a higher ground.

From the preceding reflections, we think we may conclude that there are serious reasons to believe in a future for international law. We do not possess certainty in this regard. The world has witnessed the unleashing of movements and powers that may quash the entire development, for centuries even. Our modern society, after all, rests on principles of morality and humanity that Christianity has established. When fundamentals of atheism, of the totalitarian state, of the glorification of the own race, of power or the national interest as the ultimate norms for good or evil, when these fundamentals – through force or through inner recruiting force – rise to victory, then the evaporation of international law will be one of the additional calamities we will then experience. If this catastrophe is prevented – every one of us is able to contribute to this – then, in all likelihood, the development will continue evermore towards a legal order between nations.

There is a second reason why the practising of the discipline of international law in our uncertain timeframe remains of value, despite everything, and should be considered a moral obligation. And this reason is valid, whatever lawlessness or chaos the future may have in store for us. It is this one: that what is true and righteous should be pursued

and disseminated, even when no direct result is achieved; that one should always move on in the general direction of the ideal. If a humane society of peoples is only possible when the rule of law, and not the random exercise of violence, controls this society, then all effort should be directed towards establishing that rule of law. Even when noticing that one is continuously pushed farther away from that objective, one must then, if necessary, even be prepared to row against the stream. A generation that gives up the fight and sacrifices the truth to a current of lies and injustice, commits a crime against posterity. The history of international law proves that even activities deployed amidst truly hopeless circumstances, may in the end turn out to be of lasting value. Allow me to offer some examples from ages that, perhaps even more so than our present time, were characterised by lawlessness, war and uncertainty as regards the future.

In the midst of the wars of the French Revolution, and afterwards, during the campaigns of Napoleon, when the bulk of the existing European borders are erased and old dynasties overthrown, Georg Friedrich von Martens is working restlessly and undisturbed on his influential writings on international law, and lays the cornerstone for the Recueil de Traités that still forms an indispensable instrument for anyone presently engaged in the discipline of international law.

Of much wider significance is the work of Hugo de Groot, in one of the most tragic eras of modern history. While the Thirty Years War, an enduring symbol of anarchy and cruelty, reduces the population of the German Empire by one third of its original size, and while Grotius himself experiences persecution and misfortune, he collects the data of previous centuries and expounds his own progressive views in the classic De jure belli ac pacis. Without Grotius's confidence in international law and its future, the rugged influence that this opus has had on the humanisation of warfare, and on the awakening of the idea of law, would not have been.

The most encouraging example for our times though is Augustine, bishop of Hippo. We may mention him here, as he is the first Christian writer who discusses the issue of war and peace to a considerable extent. With his overly sensitive heart and his Hellenistic sophisticated mind, he lives in an age of turmoil and alarm, when the invading barbarians devastate Rome and swiftly lay waste the refulgence of the Roman Empire. "Vastatur mundus, deficit mundus" (Sermo 81, 8; Migne P.L. 38, 504).

Against the timorous shrieks of his contemporaries, Augustine replies with an admonition of faith:

> "Non deficiamus, fratres", "Stand firm, brothers; an end will come to all ephemeral empires. Whether this is the end, God knows … keep the faith in God, desire the eternal, expect the eternal. Thou art Christians, brothers, we are Christians". "Finis erit terrenis omnibus regnis. Nunc si finis est, Deus videt … Figite spem in Deum, aeterna concupiscite, aeterna expectate. Christiani estis, fratres, christiani sumus." (Sermo 105, 11; P.L.38, 623).

The deepest, the ultimate reason for hope lies for Augustine, as it does for us, outside this world. This does not prevent him though from pursuing his scientific interests amidst the turmoil of the 'civitas terrena', and keeping this up until the final days of his life, while the Vandals are besieging his city of Hippo and, before long, destroy it.

Has the work of St. Augustine been of any use? The succeeding generation will not have asked itself this question. The ancient civilization, upon its collapse, covered Au-

gustine's writings and ideas in dust, and all that managed to survive is overwhelmed by the wilderness of Islam. It is only after seven or eight centuries that the seed is caught by sunlight and starts to grow. And it is on this Christian trunk, coalesced with that other life aroused in the 12th century that is Roman Law, that the development towards modern international law has taken place, through Thomas Aquinas and the medieval legists and canonists, through the Spanish theologians of the 16th century, through Grotius and Bynkershoek and many others. Ideas need time before they can mature; efforts which seem fruitless, may well yield precious assets for mankind in the future. Even on the ruins of destroyed civilizations, new generations have time and time again managed to build themselves a safer home. The duty of our days will be clear, even to one looking with anxiety at what lies ahead: to work with full dedication, striving to establish an order of truth and justice in this world.

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It is time to redirect our attention from distant horizons, towards the direct task that lies ahead of us. If, when this war will be over, we are offered the opportunity for constructive labour, in which direction should the development proceed? Within the scope of this lecture, only a few consideration may be put forward.

A first question is this: should one persevere with double vigour towards a legal order of collective security, of mandatory adjudication, of substituting neutrality for the promise of cooperative law enforcement; should disarmament take place and should one insist on trusting in once made promises? Or will the failure of the League of Nations-experiment and the dangers endured due to untimely disarmament, have to lead away from the old politics of the balance of power, towards confining oneself into strongholds of neutrality? Undoubtedly good arguments may be advanced for either position. The valiance in striving for a higher ideal has led to great results, but also to abysmal failure; and he who chooses the safe, levelled road of a slow development, simultaneously acquiesces for a long time in the lawlessness and fortuity that has characterised the life of nations in past centuries. Initiative and prudence both have their value: the idealism of a Van Vollenhoven has stirred up a burning desire for a sense of a legal order in the relations between states; and the realist that was Struycken has toned down illusions, and prevented overly rash actions.

Our duty is bifold: one may never loose sight of the finality, the apex of the international legal order; yet, during the difficult ascent of the high mountain, the sturdiness of the ground should be tested on every step.

Between the legal norms that regulate the life of a community, and the conviction that that should form the basis of these norms, a certain distance, a certain tension may exist; the legal norms may be ahead of the sense of law and justice, and haul it along; however, when this distance would become too large, the mutual contact is lost and the legal construct collapses. The history of the previous century has confirmed this truth once again; this should be a lesson for the future. At the construction of the legal order, we should continuously take care not to erect a more grandiose edifice than the ground underneath it may bear.

It is in these two elements, foundation and legal construct, that the improvement must be sought. To each a short final observation may be devoted.

Reinforcement of the foundations of the international legal order will be the most essential and the most difficult task. "No external means may bring forth the welfare

of nations", states Pope Pius XII in his encyclical 'Summi Pontificatus', 20 October 1939, "from within, from the spirit should the forces originate, that need renew the face of the earth." Public international law finds its root in Christianity; therefore, it may find its vitality there only. The principle of unity of nations and the submission of statal sovereignty to a higher law finds no sturdy footing but in the recognition and reverence to God.

Repairing the moral and religious forces in society is not a specific task for the discipline of international law – and this then is not the appropriate time to dwell on this any further; here lies an obligation for every human being, and for us who may call ourselves Christians in the first place. On this crucial spiritual bedrock the legal construction should be erected or perfected.

We are of the opinion that the ideas that have been worked out in the past twenty years, and have been enshrined in the Pact of the League of Nations, are essentially correct. The failure of the League of Nations, it may be repeated once more, was not so much due to its internal flaws as it was due to the egoism that mistreated this instrument designed for a spirit of cooperation. One thus is able to proceed on the road already taken, creating a legal order of a league of nations. Many questions of a principal and technical nature require a solution though. Merely mentioning these would already lead us astray. However, there is a question that, we think, towers above them because of its importance, and may be considered the actual essence of many others. It is the question of how the stability of the law may be reconciled with its evolution, the question of the adaptation of the law to changing circumstances. Nations do not expire, like humans do; they evolve, each in their own way. Through increase or decrease of the birth rate, through augmentation or decline of inner strength, through greater or lesser technical progress, boundaries and relations established earlier will no longer meet new demands. In the period behind us, war has been the vehicle for compelling change in international relations, and preponderance of force has been decisive at almost every instance; if war is to be prevented in the future, then changes should be made possible through peaceful, legally circumscribed means.

This question has attracted strong and mostly worrying attention over the past years; the contrast between a static and a dynamic approach towards international law has been brought within the domain of Realpolitik; with claims on the rights-to-life of brisk nations, exclusively subjective considerations have been elevated towards the rank of legal norms, and the gates have been thrown wide open to allow the entrance of injustice and arbitrariness; and the word "peaceful change" has been repeated so often, that it threatens to become a slogan that offers salvation of its own motion.

All this calls for great caution. Yet, it does not change the fact that we face a problem here which can not be ignored. The reproach is justified, or so we feel, that the discipline of international law has paid too much attention to consolidation of the existing relations, to preservation of the 'status quo'. Only in the past years the idea has been sharply put forward that the concept of 'legal certainty' and the concept of 'change' do not exclude but complement one another, that flexibility in the revision of the legal order is a necessary condition for the effective enforcement of that order. Among the requirements for lasting peace that Pius XII lists in his Christmas address of 1939 is "the constitution of legal institutions that serve to guarantee the loyal and faithful observance of agreements, and in cases of recognized immediacy, to revise

and ameliorate these". Upon a practical application of these ideas, multiple questions of cardinal importance will be taken into view: to which extent the national state in its own right has to adapt or yield to the international community? Or whether the league of nations can be attributed the competence to enact secession of territory in the general interest, against the wishes of a sovereign state? Or whether overpopulated states can lay claim to unexploited regions resting under foreign sovereignty?

These and other questions belong to the realm of international ethics; nonetheless, insight into these problems is indispensable for one willing to contribute to the development of international law. Here, apart from the study of the scarce resources of positive international law, a vast area is open to scientific inquiry. Precisely because the Christian principles of a humane society should offer vital instruction here, our Catholic University has a very personal task to perform in this area.

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Dear trustees of the Radboud Foundation, With pleasure I express my special gratitude for the position that you have entrusted me with as an extraordinary professor of international law at this University. With God's help, I hope to perform the task entrusted to me to the best of my abilities.

Dear members of the Curatorium, It is you who nominated me for an appointment as a professor. The faith evidenced by this, stirs up sincere gratitude, a gratitude that originates from the fact that through your nomination, the opportunity has been presented to me to devote myself more than before to a scientific discipline that I am greatly fond of.

Dear Professors, When a few years ago I came into contact with you as a moderator of this university, the friendly treatment that I experienced from you has grown into a firm support. It will be no surprise to you that I ascend to your ranks at this very moment with the greatest pleasure. And especially between us, dear colleagues of the Law Faculty, a common assignment exists. I know I may call upon your wisdom and experience at any time; I will try to contribute my share to the common endeavour.

Professor Bellefroid, The versatility of your mind has encompassed domains of the law, the study of which is entrusted to more than one person upon your retirement. The simplicity and strength that characterises you both as a human being and as a scholar will remain an enlightening remembrance not only to your students, but also to me.

Professor Van Eysinga, Upon preparing this lecture, I have rejoiced in the hope that you would approve of the choice of subject and the optimistic tone that I – despite everything – considered I had to entertain. It is from your teachings that I have to thank my interest in international law and my confidence in its future. Your presence here is a new sign of the cordial sympathy that I was honoured to enjoy repeatedly in previous years already.

And in you, Professor Telders, I may thank the University of Leyden for the education it gave me. I am delighted to be able to admit to you openly how much your pragmatic, constructive criticism, and your cordial comradeship have been a driving force behind my scientific efforts.

Ladies and Gentlemen students, We are no strangers to one another. The confidence with which I was greeted over two years ago, has been a great and cheerful surprise. The prospect of working together with you on the scientific front generates sincere enjoyment. Public international law is still in its infancy. May many of the students here

attending endeavour with passion to one day construct a legal order among nations as a manifestation of the divine Justice in this world.

I have spoken.