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SPECIAL SECTION

War in World Society: Towards a new order of global constitutionalism?

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Abstract

In *world society*, all wars are world wars and so is the present war in Ukraine even if the use of violence is broadly restricted to the Ukrainian area (a restriction imposed clearly imposed by global politics). World society emerged between 1750 and 1850 together with the first *world wars* and *world revolutions* that were fought on all continents and oceans (1). There is no society beyond world society any longer. The world society pushes (but by no means sufficiently) (a) *law and politics* to institutionalise a world constitution and (b) social actors to culturally *symbolise* global mindsets, world views and normativity (2). Yet, only a second wave of world revolutions and world wars between 1900 and 1950 caused the *rise of autonomous world law* that enabled a now interrupted but still lasting global process of fully inclusive democratisation (3). However, the rise of world law in 1945 was followed by its *fall after 1989*, and the present wars in Ukraine and beyond come close to a complete destruction of world law. There is only a small chance to end the use of violence in Ukraine that cannot and should not lead to sufficient victory of one of the warring parties but to a reconstruction and new foundation of world law and the constitutional order of the world. The alternative is not the national state but failed states and anomia (4).

1 | INTRODUCTION: PARADIGMS

In his book on *Conflict, War and Revolution – The problem of politics in international political thought*, Paul Kelly presents a kind of introduction to the history of political ideas from Thucydides to Carl Schmitt which can be used by selected chapters as well as by the whole book for undergraduate as well as graduate and post-graduate classes. This is quite extraordinary, even magnificent, and it fits well with the idea of the modern university, which bases academic education and socialisation not only on constantly evolving scientific research but also facilitates learning processes, especially between students at different advanced stages of their studies, in a specific non-authoritarian and experimental socialisation milieu, not only in a rather hierarchical but ideally non-authoritarian relationship between teachers and students (Parsons & Platt, 1973).¹

This book manages the feat of being of equal interest for freshmen as it is for graduate students and professors. It is not just a book written from a politically neutralised

point-of-nowhere perspective but from the highly selective political perspective of a scientific research program (Lakatos) or *paradigm* (Kuhn) that expresses the author's *post-utopian version of egalitarian liberalism*, inspired by conservative *political anthropology* that is based on the premise that violence is an integral and necessary condition of the political animal (*zoon politikon*).

This premise makes clear why Kelly selects 'ten paradigmatic thinkers' for his endeavour: Thucydides, Augustine, Machiavelli, Hobbes, Locke, Rousseau, Clausewitz, Lenin, Mao and Schmitt (Kelly, 2022, 3f). What unites them is the same political anthropology. Methodologically, Kelly treats them all as contemporaries. He does not take them – as in hermeneutic philosophy (Gadamer) – as representatives of an eternally current classical canon, but (and this is quite plausible from Kelly's point of view) as partisans of his own political anthropology (and this is, I guess, the most promising way to generate any meaningful truth). They all regard violence as indispensable to the concept of the political (and this is arguable).

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I *agree* (first) completely with Kelly's further premise that there is no final meaning, telos, no meaningful origin and no meaningful goal of history. Yet, as it seems, Kelly also rejects the idea that social evolution is just a specific evolutionary formation within a continuum of evolution as is the evolution of organic life. As Marx and Darwin have written nearly at the same time, one can reconstruct former formations of societies or species from the present (modern) point of view and explain the anatomy of the ape or the feudal mode of production by the anatomy of the human being or the bourgeois society of modern capitalism. This – and here I *disagree* completely with Kelly – is true also for the history of ideas (which does not mean that we cannot learn as much or even much more from dead political theorists than from the living).

I *agree* (second) completely with Kelly's Augustinian conclusion that 'violence remains an ineradicable feature of human experience whatever other more benign and favorable goods political life and international politics may bring. Therefore, 'it should not be denied' (Kelly, 2022, 427). This is just a brute and brutal fact of our political life since the earliest days of social evolution. But even if I agree with Kelly's assumption that abstract ethical projects and outlines for a better global order do not make much sense, I *disagree* completely with Kelly's premise that the brute fact of violence is due to the political anthropology of human beings.² Already Rousseau – as I understand him – has shown convincingly that human beings have no anthropological constants at all – different from other animals who have species-specific constants, human beings have *only biological constants*.³ Therefore, democracy as a utopian project is possible, and as such a project it was enabled by the constitutional republican and social revolutions of the 18th and 20th centuries. I assume that the thesis of Dewey, Rorty and Habermas is deeply right, that democracy can only survive as long as it is an *unfinished project* of a society in which the past does not constrict the future and 'experiments with new forms of individual and social life' can be made, through which individual life becomes 'unimaginably diverse and social life unimaginably free', so that the 'promise of all time' – that is, eschatological hope – 'is fulfilled'.⁴ This is not just hopelessly utopian but deeply realistic because it explains to a *certain extent* why America won the World War II. Certainly, *first* because of massive *technological* and *military superiority*, and *second*, because of strong *material interests* of capital and politics in *global imperial hegemony*, but also *third*, due to (with Max Weber setting the course) *ideas* and above all *ideal interests*, not infrequently opposed to the material ones, in the realisation of a socially just, democratic world order (see Roosevelt's 'Freedom from want' address). These were aims to which the UK (under Roosevelt's pressure) committed itself in the *Atlantic Charter*, and which overlapped at least rhetorically with those of the Soviet Union. Not *all* idealistic

interests are imperial hypocrisy, and they were, if not decisive for the war, at least important for the war, and even as hypocrisy, as Jon Elster has shown, of a (not inconsiderably) binding force, especially when they were translated into positive international law.

I *agree* (third) completely with Kelly's apt descriptions and diagnoses of the current world situation since 1989 and his critique of Western (not so much cosmopolitan but imperial) illusions after the fall of the Berlin Wall, and I love the way he develops his diagnosis of present global politics throughout the book, coming back to it in the discussion of historical political thought. But I *disagree* completely that global constitutionalism (as part of the existing global legal system) is also an illusion.

Kelly has a *focus on globalisation* and another *focus on constitutions*, but he oversees how close they belong together in terms of transnational (or global) constitutionalism as a matter of fact and in long-term history (or social evolution).

The three issues, and especially the last are due to very different paradigms of constitutionalism defined as the respective relations between politics and law – relations fixed by law, changed by political action. In this paper, instead of an internal criticism of Kelly's book, I try and develop a blueprint of an *alternative paradigm of an evolutionary sociology of constitutions* (Brunkhorst, 2014; Thornhill, 2011, 2019, 2020, 2021) related to war in the present world society (1989–today) but including in particular an alternative reading of the long-term history of transnational constitutionalism which is now close to being destroyed once and forever – but with no alternative in national politics any longer (which does not mean that national politics still remains deadly important but has only the alternative to go global and post-national or to regress to bloody nationalism, auto-destructive fascism and anomia). The alternative paradigm is based on a different idea of law especially constitutional law. Kelly's basic idea is that law is not only coercion and violence but also political strategy. My basic idea goes back to the strange and highly unlikely combination of Canon Law and Roman Civil Law since the end of the 11th century, and its secular further development especially by Kant's, Fichte's and Hegel's idea that 'law is freedom' (*Dasein des freien Willens*) which means that the evolution of law is driven by the *contradiction of universal and emancipatory law* to the one side, and *instrumental law that functions as an immunity system of the existing relations of domination* to the other side.

I develop a brief outline of this alternative paradigm in three parts. In *world society*, all wars are world wars and so is the present war in Ukraine even if the use of violence is broadly restricted to the Ukrainian area (a restriction imposed clearly imposed by global politics). World society emerged between 1750 and 1850 together with the first *world wars* and *world revolutions* that were fought on all continents and oceans (1). There is no society beyond world society any longer.

The world society pushes, but by no means sufficiently, a. *law and politics* to institutionalise a world constitution and b. social actors to culturally *symbolise* global mindsets, world views and normativity (2). Yet only a second wave of world revolutions and world wars between 1900 and 1950 caused the *rise of autonomous world law* that enabled a now interrupted but still lasting global process of fully inclusive democratisation (3). However, the rise of world law after 1945 was followed by its *fall after 1989*, and the present wars in Ukraine and beyond come close to a complete destruction of world law. There is only a small chance to end of the use of violence in Ukraine that cannot and should not lead to sufficient victory of one of the warring parties but to a reconstruction and new foundation of world law and the constitutional order of the world. The alternative is not the national state but failed states and anomia (4).

2 | EMERGENCE OF WORLD SOCIETY (1750–1850)

Following world historiography, I distinguish the *age of globalisation* (1500–1750) from the *global age* (1850–today).⁵ During the *age of globalisation* only punctual connections between all continents and many still largely independent regional and national societies exist, whereas in the *global age*, all continents are connected in ever denser networks of permanent communication, and only one single society is left: the *world society*. In the course of this development, the focus of social integration inevitably shifts from the many national and regional societies to the one global society.

Early world society is emerging in the first world wars and world revolutions fought on all continents and oceans at the threshold to the global age between 1750 and 1850.

From day one, constitutional fever spreads like a pandemic, accelerated by the rapid development of ever cheaper dissemination media, which had already improved greatly in the 18th century. News, soldiers, slaves, weapons, goods of all kinds, constitutional blueprints and revolutionary manifestos are fed into the communications networks ever more rapidly, in ever larger print runs, along ever more densely interconnected transport routes (Colley, 2021, 115–154; Osterhammel, 2010). The highest profit rates are made in slave trade, intensify exploitation rates, accelerate the spread of modern chattel slavery.

However, constitutional progress was never a one-sided Western business but an *interregional* and *mutual* process of copy and paste, pick and mix, melt and combine (Colley, 2021, 136f, 412). The first constitutional drafts and assemblies did not come from the white male bourgeois classes in Philadelphia and Paris, but from the European periphery in Corsica 1755, the *Constituzione* of Pasquale Paoli, a soldier

and legislator, as many later revolutionaries a man of the gun and the pen. The next move of constitutional progress comes from Eurasian Russia 1767, the *Nakaz*, Catherine II's *Great Instruction*, drafted by a commission that was almost as socially, nationally, racially, and sexually diverse as the streets of Paris or Philadelphia are today (Colley, 2021, 16–25, 57–81).

Together with the productive forces of communication the destructive forces grow, in particular through the new hybrid warfare, the combination of land and sea operations, invented by the British but copied, adapted and accommodated immediately all over the world (Colley, 2021, 25–41; Sivasundaram, 2020), due to the beginning of the age of world wars, penetrating all zones of the globe and transforming faster than ever living soldiers into dead bodies. The numbers of military and civil casualties increase exponentially. First the *Seven Years War* (1756–1763) with 550,000 military casualties, then the *Napoleonic Wars* (1798–1815) fought by revolutionary and counterrevolutionary forces on changing sides, with 3.5 million military and civil casualties. The latter finally turns the three *Atlantic revolutions* (Caribbean, France, America) into the *first world revolutions*, spreading through the Pacific and South America at the same time through *mutual* copy and paste, pick and mix, melt and combine.

From now on, the global arms trade flourishes. The media, newspapers, soldiers, revolutionaries, scientists, pirates, and traders ensure the global spread of terror simultaneously with the global spread of moral resentment over belligerent and colonial violations of rights at ever shorter intervals, observed already by Kant in 1795: 'The steadily increasing intercourse between the nations of the earth, has *now* extended so enormously that a violation of right in one part of the world is felt all over it' (Eberl & Niesen, 2011; Kant, 1977b, 216). Kant himself observes here that practical reason has a time index.

Wars trigger revolutions and revolutions trigger wars (Colley, 2021; Osterhammel, 2010). Above all, the French Revolution (1789–1814), in its Napoleonic period (1799–1814), made revolution and constitution – and, as Marx aptly adds, the state of siege – travel around the world. Constitutional and revolutionary fever took the route via Spain and its resistance to French imperialism, first to the entire European South, especially to Portugal, Greece, Italy and Sicily, and then to South America and the Pacific region (Isabella, 2023). The trigger was the first transnational, formally highly inclusive *Constitution of Cadiz* from 1812, which guaranteed equal rights to all inhabitants of the declining but still vast Spanish Empire, *and* the binding of the Empire to the 'Catholic Apostolic Roman Religion' (Art. 12 and Art. 173). The constitution was valid for only 2 years, but it was highly influential, probably the most influential constitutional text of the entire age, translated even into indigenous languages. Because of its exclusively

catholic and primarily monarchic orientation, it fitted nicely with revolutionary *and* counter-revolutionary endeavours of constitutionalisation in the entire catholic world (Isabella, 2023). The *Constitution of Cadiz* was printed in London. By 1810, London was the first global city, harbour and printing house of the world, centre of the global counterrevolution *and* the global exile for revolutionaries, meeting in the British Library, shipping subversive manifestos, radical essays, constitutional textbooks and themselves all over the world.

The contagious fever was intensified by the defeat of Napoleon's revolutionary army at Waterloo. Thousands of militarily, politically and constitutionally experienced officers became unemployed, went overseas and found jobs in the many new armies and the administrations of rapidly emerging new constitutional regimes. Constitutional experimentalism made its way from the Global North to the Global South but then returned to the North with new Oriental, Asian, African and Ocean variants (Colley, 2021; Sivasundaram, 2020). The first universal female suffrage was established in the *Democratic Republic of Pitcairn*, a small island in the Northern Pacific Ocean. It lasted from 1838 to 1930, with indigenous people as citizens and barely a handful of Europeans who had migrated from Britain (Colley, 2021, 253–260). Female suffrage made its way from Pitcairn to New Zealand and from there to Europe and America. Not accidentally the age of constitutional world revolutions ended with the Japanese constitution of 1889 and the first liberation strike against Western colonialism, the Japanese-Russian War, in which Japan, to the applause of all of Asia, crushed a major European power for the first time. All this was well known to contemporaries, but nationalist historiography became hegemonial and repressed memory first in the North, then everywhere.

However, despite the successful globalisation of the constitutional mindset – Kant's *revolutionäre Denkungsart* – throughout the 19th century and the first half of the 20th century 'the process of national-democratic institutionalization failed' (Thornhill, 2011, 2020, 202).

After the constitutional revolutions had made constitutionalism unavoidable – 'an event that could not be forgotten' (Kant, 1977a, 361) – the solution for both revolutionary and counter-revolutionary regimes was *constitutionalisation through militarisation of society* by coupling universal male *suffrage* to universal *conscription*, filling this way the empty revolutionary signifiers of public and private law (subjective rights) with the until then *unfree male population*. By 5–10 years of military service, the white male population was transformed into disciplined, loyal, misogynic, homophobic, nationalistic and more than less racist citizens. This way universal conscription, born in the heroic revolutionary wars as the *soldat-citoyen*, with one stroke solves all problems the Ancient Regimes and its revolutionary heirs

everywhere on earth had left for the post-revolutionary period: (1) the problem of *internal and external security* (civil wars, etc.) through conscription armies, (2) the *legitimation problem* through universal male suffrage, (3) the structural fiscal crises through universal taxes, (4) the problem of satisfying the ravenous appetite of free labour markets for well-disciplined free labour, and (5) the problem of modern states' greed for an imperial reserve army with well-disciplined and racist colonial civil servants, soldiers, farmers, slave holders and slave traders.

When, after the World War and the Russian Revolution of 1918 or later in a similar constellation after 1989, a wave of democratisation does occur, the new constitution immediately comes under pressure from the fragmented and independent core elements of the old society: authoritarian administration, reactionary judiciary, private armies, corporately organised class interests, upstart oligarchs, breakaway regions, mafia-structures, free-floating militarism, machismo, racism and so on. No wonder that after the revolutionary turmoil of 1918 nearly everywhere democracy turned over into at best: constitutionalism with ever more authoritarian characteristics as in the UK or Japan, or at worst: fascism as in Italy or Germany (Thornhill, 2020, 135–153).

After 1918 and 1989, nationalism is back in its most odious form of right-wing radicalism, and no working national state is any longer available, to solve the growing problems, which *all* are now products and problems of a single world society. Already in 1918, not to talk about today, the problem-solving capacity of national states was dramatically shrinking due to the growth of functional differentiation and the pressure of functional imperatives. *Functional imperatives cannot wait*. They immediately start to swerve to other ways, searching for *functional equivalents* within and beyond the national boundaries, but in any case, beyond the reach of the national state. Already in response to the loss of agency in the age of finance-driven global capitalism with 'market-embedded states' (Streeck, 2011) in the 20th as well as in the early 21st century, the state itself has become a tightly interconnected organisation within a global network of segmentally differentiated state *and* non-state political organisations, causing major problems for democracy (Mair, 2013; Pistor, 2019).

Nearly a year after the outbreak of the war between Russia and Ukraine and the full-bodied declarations of the imminent end of global supply chains in February 2022: if you drive from Flensburg on the Danish border to Hamburg between 3 and 4 a.m., you will pass a never-ending continuous chain of trucks, one after the other on the right lane, stuck tightly together, all packed with the same size containers for Hamburg's, Bremen's and Bremerhaven's overseas ports – and by far the largest part of the cargo comes from tiny Denmark, which, like other countries, can only reproduce

its wealth if it transforms itself into a globally operating conglomerate.

3 | INSTITUTIONALISATION AND SYMBOLIZATION IN THE FORM OF WORLD SOCIETY – FROM KANT TO LUHMANN

We just live in a society – and this is the decisive point – whose ‘unity’ can be established ‘only in the form of the world society’ (Luhmann, 1975, 60). Because there is only *one* society left, the geopolitical ‘territorial principle (*Raumprinzip*)’ becomes ‘unfit (untauglich)’ for the definition of ‘boundaries of society (*Gesellschaftsgrenzen*)’ (Luhmann, 1975, 61). Thus, whether we like it or not, only the form of world society remains to ‘institutionalise’ law and politics (Luhmann, 1975, 61) – and that means to *constitutionalise* world law and world politics. But this can only happen together with a cultural push of inspiring ‘symbolisations’ (Luhmann, 1975, 62) of *solidarity*, defined as the ‘still cohesive differentiation and diversity’ (Luhmann, 1981, 25), which is necessary to increase the problem-solving capacity of all people (and peoples/social groups) of the world, that is, everywhere in this world. Otherwise, the variety pool of world society would dry up.

Mankind no longer is an empty signifier. Contrary, Mankind is a real, unfinished and forward-living *project of democracy* with

1. ever more *egalitarian inclusion* (Thornhill, 2020) of
 - a. all social strata or classes,
 - b. all sexes (genders) and sexual orientations,
 - c. all nationalities, cultures, ‘races’ and comprehensive world views;
2. ever more *self-legislation* (Kant) or *self-representation* (Rousseau) by transformation of subjective into *rights of overcoming relations of domination* (Welsch, 2021; Wihl, 2019) and
3. a *post-traditional* and *post-conventional mindset* or, as Kant has called it: *eine revolutionäre Denkungsart* (Kant, 1977c).

As mentioned briefly above, Kant already observed, due to the revolutionary role of the new *dissemination media* end of the 18th century (fast frigates, newspapers, global mail traffic) ‘only now (1795) the idea of a *world civil law*: a *Weltbürgerrecht* no longer is a fantastic and extravagant conception of law’ but a first kind of *global constitutional law*: the first step on the long track towards *institutionalisation of law and politics* in the form of world society. The meaning of Kant’s ‘unwritten code, both of state law and of international law to the public human right in general (*öffentliche Menschenrechte überhaupt*)’ (Kant, 1977b, 216) in

the legal terminology of today clearly is that of the (already existing) written code of *global constitutional law* (UN Charter, etc.) that implemented on both levels of *global political (governmental) organisations* (as the UN) and *the national law of all states* (as Art. 25 GG). Moreover, Kant also states that *only now* an injustice can cause and cause global moral outrage and resentment (Reichold, 2021). For Kant, this moral resentment is a ‘disinterested (*uneigennützig*)’ sentiment: the ‘good with affect’ (Kant, 1977a, 359) or in Luhmann’s terms *symbolisation of morality* in the form of world society.

What was unwritten, incomplete and nearly unknown by 1795 when Kant wrote about it, and anticipated it, latest since 1945 is written, to a considerable extent complete, and ever more well known that nowadays, all *armed conflicts* between subjects of international law and civil war parties are *world wars*.

This is true for the war fought in Ukraine after the Russian attack:

Whether the warring parties confronted with each other at gunpoint and those who support them directly, want it or not, this war in Ukraine *is* a world war and a proxy war between global actors and parties. Moreover, it is one of many at least equally cruel wars, whose careful observation and sometimes cautious, sometimes massive influencing by the few world powers is repressed, at least by the mass media which are bypassing their audience. The effect is massive manipulation sometimes with, sometimes without intention. We all, the entire world society is involved in this war, if we are aware of it or not, if it is reported by global media (there are no others any longer) or not.

4 | RISE OF WORLD LAW AND DEMOCRACY (1945–1989)

World Law emerged for the first time in history after the end of the global civil war (WW II) in 1945, and it declined rapidly since 1989.

There was a sustainable stability of world society during the Cold War period which we now have lost, due to the development of the constitutional *institutionalisation* of world society. The stability of the Cold War period was not just a result of *Realpolitik* (Spector, 2022) but a result primarily of the ‘rise of *world law*’ (Thornhill, 2020, 181; von Bogdandy et al., 2017) after the revolutionary transformations of 1945.

The probably most horrible – on the German side genocidal, on the Japanese side democidal – war ever (Cohen, 2000) ended with the greatest defeat of the Global Right ever: the unconditional surrender of Germany and Japan, the simultaneous foundation of a completely new order of *International Public Law* (von Bogdandy et al., 2017) – from the *UN Charter* and the *London and Tokyo Charters* of the International Military

Tribunals (1945/46) over the *Human Rights Covenants* (1966) and the *Vienna Convention of the Law of the Treaties* to the *Helsinki Final Act* (1975) and the *ASEAN Intergovernmental Commission on Human Rights* (2009) – which transformed all public law already at the beginning in one blow into autonomous world law, constituting legally all national, regional (continental) and world public authority anew.

Moreover, the new autonomous world law did not make but *enabled* the finalisation of anticolonial national liberation (even if it did not get rid of post-colonialism), and for the first time in history, the realisation of democracy defined as full participative inclusion of *all social classes, all genders and sexual orientations, all nationalities, colours, races*, etc. in ever more national states and regional organisations all over the globe, at least as law in the books (Thornhill, 2019, 2020: 153–202, 2021).

Not a single national state before 1945 was a fully inclusive representative democracy. Differently from 1918 (after WW I) the functioning of parliamentary democracy was no longer blocked by constitutionally legitimated corporatism, patriarchalism, militarism and imperialism (Thornhill, 2011).

On contrary after 1945 the new, transnationally constituted national constitutional regimes *enabled* the successful public fight of social movements and parties for the transformation of subjective rights of possessive individualism (McPherson) into rights to overcome (*Aufhebungsrechte*) all relations of domination between social classes, sociobiological sexes, nationalities, skin colours, etc. (Wihl, 2019).

It is very important to see that the founders of autonomous world law were not very democratic: neither the Stalinist USSR nor China represented by Chiang Kai-Shek, nor the less repressive USA and UK which at best were white male upper-class ‘democracies’, deeply embedded in the basic structure of modern capitalism and imperialism.

Yet, the outcome of this rhetorically democratic but in fact undemocratic alliance was democratic, and it was more democratic than anything ever before.

Why? Because after 1945 ‘national states were increasingly obliged to recognize human rights norms as inviolable sources of legitimacy for domestic law’ and defining ‘their legitimacy through reference to human rights law, they became increasingly porous to global norms’ (Thornhill, 2020, 181f). This process *enabled* the rapid development of *social or socialist welfare states*, strengthened and then driven forward by the massive and global *expansion of the educational system* (Meyer et al., 1992; Parsons & Platt, 1973).

In both cases, UN norms and programs played a decisive role. UNESCO shaped the development of copy and paste, pick and mix through a kind of global action

research in which the results of empirical surveys are fed back to the world of states in the form of globally received tables and soft-law recommendations. The development of social welfare states indirectly was steered and shaped by the strongly welfare state-oriented interpretation of human dignity and human rights in the legally non-binding Charter of 1948.

The democratisation of suffrage in the UK in 1948 is a paradigmatic case (and not at all a curious exception). British labour government urged Indian Brahmins during independence negotiations to accept Art. 21, III UDHR, which prescribes universal and equal elections. This finally broke the Tories’ resistance to the abolition of ‘multiple voting and multiple suffrage’ for academics (two votes for two constituencies = 7% of eligible voters) and wealthy constituencies (two MPs instead of one for the poor) in the *Representation of the People Act* of 1948 (Meisel, 2011; Thornhill, 2020, 165, 167, 194, 328f), which was the first big step to fully representative democracy. The first big step towards fully inclusive democracy in the United States followed nearly 20 years later with the Civil Rights Act of 1964.

The process of first-time successful democratisation after 1945, enabled by the revolutionary advances of autonomous world law, enabled in turn the progress from *International Law* as a kind of coordinative private law between states to *International Public Law* as a kind of global constitutional rule of law (comparable with the still weak efficiency of constitutions between 1750 and 1950). Not the strategic balance of terror shaped the relations between the superpowers of the Cold War but the *UN Charter* and the *Declarations and Covenants of Human Rights* (1966) – from the doctrine of *peaceful coexistence* over the *détente politics* to the *Helsinki process*. Not the ‘police’ of the Security Council that, acting united, can threaten the entire world with atomic nihilation, fortunately was blocked by antidemocratic, anti-peace and anti-human-rights veto-power.⁶ But the ‘temple’ of the General Assembly formed an important focus of the global public sphere (Koskeniemi, 2001) that became successively a legally working *normative constraint* of strategic particularism (Brunckhorst, 2014). In comparison, imperial realists as well as anticommunist moralists were wrong to describe the global situation either as normatively neutralised power politics or as an endgame between democracy and totalitarianism (a category Arendt rightly restricted to the Stalin era). The sociologist Talcott Parsons (who opposed both the Atlantic Realists and reality-blind moralists) was right when he already in 1961 described the legally organised political competition between USA and USSR as a kind of emerging global democracy in an alienated but existing representative form (Parsons, 1961), enabled by the contradictory norms of the UN Charter.⁷

5 | FALL OF WORLD LAW AND DEMOCRACY AFTER 1989

But then the police came back. In 1989, the police of the Security Council lifted their self-blockade, occupied the temple and expelled the priests. The West, no longer the democratic avantgarde of the world but ever more neoliberal, celebrated the final victory of capitalism with ever less democratic features. François Furet and Francis Fukuyama were the intellectuals of the hour. Democracy as a global project that can cure its ailments (according to Dewey, Rorty or Habermas) only through more democracy was replaced in Germany by Angela Merkel's 'market-conform democracy'. German Greens and Social Democrats followed her when they replaced Willy Brandt's progressive: "*Mehr Demokratie wagen* (Dare more Democracy)" from 1969 in 2021 with the most depressing of all slogans of change ever: '*Mehr Fortschritt wagen* (Dare more progress)'. That's what we have, a democracy embedded in a structure of capitalism that 'is clearly not working for the many', an economy 'of a powerful elite, insulated from hardship, poverty and ill fortune' (Mann, 2023, 33f). Recently the NYT reported that this year the number of U.S. centenarians exceeded 1 million people for the first time ever, whereas in a couple of years, the average life expectation of the entire population has been shrinking for the first time in decades. That's all you must know about the social structure of so-called 'social market economies' (Ludwig Ehrhard).

Instead of taking in 1989 the chance of constitutionalizing the absolute power of the police, abolishing the veto, implementing mechanisms of legislative and legal control etc. – the *UN rules were openly violated*. Four of five permanent members of the police, USA, the Russia, UK, and France eight times broke the highest international norm: the prohibition of aggressive war. The only exception so far is China (see Milanovic, 2022). International Public Law now is close to its end, and not a single visionary idea beyond the status quo is in sight. The 1940s were full of them, intellectually, on the streets, on the battlefield, and in world politics (Brunkhorst, 2014).

Moreover, the quickly declining United States lost their high prestige, moral authority and shaping power as an indispensable *mediator* of peace negotiations. To be an honest broker was central to America in particular after the Cold War: 1978 Camp David, 1993, Oslo Accords, 1998 Good Friday Agreement etc. Yet, over the years, America switched from *imperialism plus legal peace-making* at the price of some justice to *imperialism pure plus moral partisanship* in the cosmic battle between good and evil, democracy and dictatorship latest since 2000.

Ever less peace by compromise was substituted by peace "out of total victory." Giving up democracy as an

unfinished and utopian project means giving up democracy at all. America in the Ukraine crisis – where (very different from 1941 when America joined the Allies) total victory and the unconditional surrender of Russia is completely illusory – was immensely effective in mobilising the *past of democracy*: the global West "but hopelessly clueless in inspiring the global south" that embodies the *future of democracy* (if democracy has any) because the south "was looking for leadership to bring peace to Ukraine" (Parsi, 2023). When Beijing, who had successfully brokered peace between Iran and the Saudis, offered earlier to mediate between Ukraine and Russia, Washington quickly dismissed the offer "even though Zelensky welcomed the condition that Russian troops would withdraw from Ukrainian territory" (Parsi, 2023).

However, this chance is over. We are back to 1918 when democratisation failed not only in Germany and Italy but everywhere (Thornhill, 2011). The longer the Russian war of aggression and crimes against humanity in Ukraine lasts, the more nationalism, imperialism, militarism will trump, and not only in Russia but also in Ukraine, and the result will be a global disaster. Then the *Ukrainian Defence Council* will push aside the liberal president, and do everything to realise its plan (complementary to Putin's ethno-fascism) to make Russia disappear as a state: 'The real victory of Ukraine is a disintegration of Russia, its disappearance as a coherent subject of history and politics (*Russia* written with a lower case "r" – HB)' – reads one of the 12 points of the *Ukrainian Defence Council's* plan for the reconquest of Crimea, written by the Secretary of the *Council*, Olexi Danilov (Clasen, 2023). The writer Eugen Ruge in the *Frankfurter Allgemeine Zeitung* on November 3, 2022, rightly warned of the danger of reciprocating the hatred of nations that resounds against Ukraine from the Russian mass media, which have been brought into line by brute force (Ruge, 2023). In the future, if at all, the paths to peace are more likely to lead via Beijing, New Delhi, and Brazil than via Washington and Europe – unless Europe corrects the two mistakes of 1989 – first, the Eastward Enlargement of the EU without a state, and the creation of a Central Bank without a state, ruling 19 states without a Central Bank. The UN system with a pseudo-democratic Assembly and an almighty Security Council beyond any parliamentary or legal control unintentionally has been copied by the European Union with a semi-democratic but real parliament and an almighty executive body of the technocrats, the ECB.

Taking this as indicating a tendency of powerful transnational organisations towards a new kind of transnational authoritarian and/or technocratic regime, two steps are at stake to reconstruct and improve the deeply demolished order of world law. *First of all*, the distinction in International Law between *wars* and *armed conflicts* is par excellence *constitutive* of

the new international law that emerged after 1945, created already in the course of the world civil war (WW II) that began in China in 1935 and ended in Japan in 1945. Before any question of *criminal justice that is legal* according to the UN Charter, Chap. VII and the law of the International Criminal Court can be posed and strived for, an *end of the armed conflict* is politically needed *and* (even more importantly) legally mandatory according to the law of the *Additional Protocol of the Geneva Convention* of 12 August 1949.⁸ An important implication is to end an armed conflict does neither need a *morally just peace* (Annalena Baerbock) nor a fair compromise (that is impossible after all the Russian atrocities). It only needs a *modus vivendi* that guarantees both sides sufficient security – philosophically speaking ‘self-preservation’ – but not the restoration of pre-war borders.

Only because the Allies were able to enforce unconditional surrender in 1945, they were able to arrest and charge the war criminals immediately. This unprecedented act was legitimised by the simultaneous, almost complete, that is, revolutionary re-establishment of the international legal order, which made the rise of world law possible. The regulatory law, the law of public order (i.e. an absolutely indispensable minimum of, in the best case, democratically legitimised rule of law), aimed at the *future* peace of law, must precede the criminal law-oriented at the healing of *past* violations because criminal law without regulatory law is arbitrary justice. Only the regulatory termination of armed conflicts (which is neutral to the question of guilt and atonement) can guarantee and enable the right of retrospective avenging violence and bind it within the limits of the law (which, by the way, was the original biblical meaning of the principle of talion).

If this is reached, *second*, a total reform of the quasi-absolutist structure of transnational executive bodies such as the ECB and the SC, hence a new foundation of world law that equals not less than a constitutional world revolution.

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CONFLICT OF INTEREST STATEMENT

No conflict of interest.

DATA AVAILABILITY STATEMENT

Data sharing not applicable to this article as no datasets were generated or analysed during the current study.

ENDNOTES

¹ Unfortunately, this milieu is now under stress since the latest wave of technocratic reforms, motivated by neoconservative neoliberalism and a specific kind of neoliberal educational project.

² For Augustin, this is no problem, but only because he believes that violence is due to the *original sin* of Adam eating from the tree of knowledge and then of Cain killing Abel. But also in Augustin's work, there is a way out of violence and war because man can do a lot to be worthy and to strive in this life for a world worth of the saving justice (*rettende Gerechtigkeit*) of God at Judgement Day (see *Graham Maddox*, *Religion and the Rise of Democracy*, London: Routledge, 1996).

³ This is the premise of the *Second Discourse* that makes the entire argument work, see Paul Geyer, *Die Entdeckung des modernen Subjekts. Anthropologie von Descartes bis Rousseau*. Tübingen: Niemeyer, 1997, p. 210.

⁴ Richard Rorty, *Achieving our Country-Leftist thought in 20th century America*, pp. 18–27, 74f, 84.

⁵ Osterhammel/Petersson 2007, Bright/Geyer 2012.

⁶ This means that the existence of the security council is the proof that the transference of full state power to the global level is possible and that it precedes its subsumption to the rule of law and democratic legitimization – as so-called ‘absolutism’ preceded the rule of law and democracy in the evolution of the modern national state. I have to thank the blind reviewer for a controversial discussion of this point.

⁷ As correct as the functionalist constitutional sociology and history, which Chris Thornhill has created in a whole series of pioneering studies in the last 20 years – as correct and plausible as this sociology has analysed and assessed the enormous civilising role of the autonomous world legal system – the *gentle civilizer of nations*, it underestimates the role of ‘forward living’ (Kierkegaard) ‘revolutionary practice’ (Marx). Without the revolutionary will and the tremendous force of the constitutional revolutions of all continents, the entire democratic development since 1750 would have been impossible. Without the Russian and Chinese revolutions, without national liberation movements and liberation wars, without the conscious planning and implementation of not only material but also ideal interests and without utopian, even eschatological goals, the World Civil War (WW II) would not have produced autonomous world law. Without the permanent transformation of subjective rights into rights of sublation or *Aufhebungsrechte* (Wahl, 2019) and of heteronomous representation *Fremdrepräsentation* into autonomous ‘self-representation’ (Welsch, 2021) by the global movements and struggles of the working class, the women's movement, the sexual liberation movements, the emancipation struggles of People of Colour and their globalisation since the student rebellions of the 1960s, the *participatory full inclusion* made possible by world law *would not have been realised anywhere*. This revolutionary element is underestimated by functionalist constitutional sociology.

⁸ For this argument and the following deliberation, I have to thank Ulrich Preuss for the insight into an unpublished manuscript.

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