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## VLADIMIR HRABAR: THE COSMOPOLITAN INTERNATIONAL LAWYER

*«Many of the achievements of the European civilization have been sacrificed in the war by this or another warring party light-heartedly, in order to achieve short-term gains. A lot of contemporary international law has been swept away in this global fight. But we do not need to worry about the future. In history, periods of peaceful construction follow periods of destruction. So it will be now too.»<sup>1</sup>*

Vladimir Hrabar, in March 1917

### 1. Life

In 1952, an old distinguished scholar Vladimir Emmanuilovich Hrabar arrived with his wife Maria Passek (1893-1975), the daughter of the pre-World War I rector of Iur'ev University, on a Moscow train at the train station in Tartu. There, Hrabar was welcomed by the rector of Tartu State University Fyodor Klement and the then lecturer (later professor) of international law, Abner Uustal. Hrabar's personal notes reveal that he had been very moved by the occasion: he had not seen Tartu since he left the university town in 1918. Many things had changed, especially given the destruction suffered during the Second World War, yet the essence of the old university town had remained unchanged. Later Hrabar remarked in his memoirs:

*«I am more than 87 years old. 25 of those years I have lived in Tartu. The time spent there was the happiest in my life and the most fruitful one in my scholarly activity. Today, I remember it with gratitude.»<sup>2</sup>*

Hrabar was born on 10(22) January 1865, in Vienna, in an intellectually active Carpatho-Rusyn family<sup>3</sup>. Hrabar's father Emmanuil, a lawyer who sympathised with the revolutionary movement in the Austria-Hungarian Empire, was elected to Parliament in 1869 by the Magyar-Russian constituency in Maramures County. Because of his political activities, Vladimir's father came into conflict with the Austrian authorities and was obliged to emigrate in 1871. He moved the family first to Italy and then to Paris and eventually found themselves in Russia in 1876.

<sup>1</sup> Hrabar, foreword to Liszt, p. IV.

<sup>2</sup> Vladimir Grabar, Veerand sajandit Tartu (Derpti, Jurjevi) ülikoolis, in: Sergei Issakov (ed.) Mälestusi Tartu Ülikoolist (17.-19. sajand), Tallinn: Eesti Raamat, 1986, p. 402.

<sup>3</sup> See the following: W. E. Butler's foreword to V. E. Grabar, The History of International Law in Russia, 1647-1917. A Bio-Bibliographical Study, Oxford: Clarendon Press, 1990, p. XXXV et seq.

Vladimir's father later found employment as a teacher of modern languages in Egor'evsk, in the Riazan' Province, at Izmail on the Danube, and finally in 1895, a few years after the appointment of his son Vladimir, at Iur'ev where he became an aide to the vice President of the university. It is therefore worth noting that Hrabar's family were political refugees.

In 1881, Hrabar's mother Olga and her father Adolph von Dobrianski were tried for treason in L'viv, together with several other Galician Russophiles. The chief prosecutor in their trial was Kalman Tisza, the minister-president of Hungary. Vladimir Hrabar's mother and grandfather were acquitted due to lack of evidence, but Dobrianski was now not allowed to live in localities with a Russian or Slavic populace.

Hrabar's family background, origin and national identity are thus somewhat more complex than in the case of the other professors considered in this study. (According to a faculty legend, he was Jewish.) *Nomen est omen*: puzzles begin with his family name. William E. Butler, the distinguished British specialist on Hrabar, has adopted the Russian transcription of the scholar's family name (Grabar). The same is true, e. g., of Tartu University's library archives. However, since in the Russian language an «h» beginning a non-Russian name is transformed into «g» («Heinrich Heine» becomes «Geinrih Geine»), so it was the case with Hrabar. What should count in my opinion is the author's own preference, which seems to be reflected in the fact that he published all his non-Russian works (his works in French, German and Latin) under the name Hrabar.

Vladimir Hrabar spent his childhood years with his uncle in the Ukraine, in the Carpathian mountains near Uzhgorod. Later on, both Vladimir and his brother Igor succeeded in winning scholarships, Vladimir at the Pavel Galagan College in Kiev and Igor at the Moscow Lycée.

After Vladimir graduated in 1884, he continued his studies in the faculty of law at the University of Moscow, from which he graduated in 1888 with a candidate's degree. His candidate's thesis was entitled «About the Status of Foreigners among Ancient Jews»<sup>1</sup>. Vladimir's brother Igor also studied law – in St Petersburg – but later in his career he became a famous artist and director of Tretyakov Gallery in Moscow.

After graduation from Moscow's faculty of law, Hrabar spent a year in Paris, where he attended the lectures of the French international law professor Louis Renault. After his return from Paris, Hrabar worked briefly in the Moscow Commercial Court and then earned his living as teacher. In 1893, he passed his master's examination in Moscow and became *Privat-Dozent* in the faculty of law.

In the same year, Hrabar was appointed assistant professor at Iur'ev. In 1901, Hrabar became extraordinary professor of international law in Iur'ev. There he

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<sup>1</sup> See Hrabar on himself in: G. Levitski (ed.) *Biograficheski slovar professorov i prepodovatelei imperatorskago Iur'evskago, byvshago derptskago, universiteta, za sto let ego sushestvovania (1802-1902)*, pp. 640.

published the work that already earned him international reputation, «Roman Law in the History of International Legal Teachings»<sup>1</sup>.

During his years at Iur'ev, and alongside his professorial activities, Hrabar twice served as dean of the Faculty of Law (1907-1908 and 1915-1916) and served as the director of the University Library from 1910-1915.

In 1918, the German occupation army forced the Russian professors out of Dorpat/Iur'ev/Tartu. Hrabar's doctoral dissertation on the science of international law in pre-Reformation England was lost in a fire during World War I at Iur'ev and only part of it could be published<sup>2</sup>. The Russian Bolsheviks evacuated university personnel, including Hrabar, to Voronezh with the task of setting up a new university there.

After his relatively short stay in Voronezh (1918-1919), Hrabar advised the young Soviet government in matters of foreign commerce<sup>3</sup>. From 1922-1923 he attended the Lausanne conference as a member of the Soviet delegation. On 23 March 1923, he was appointed part-time professor of international law at Moscow State University. In 1926, he was elected a member of the Ukrainian Academy of Sciences. W. E. Butler recounts how an article published in Ukrainian in 1929 accused Hrabar of being a «known reactionary who had carried on Moscovophile policy in Galicia»<sup>4</sup> – a reference to Hrabar's service in the Russian military during World War I in Galicia.

Hrabar retired in 1929 for health reasons and dedicated his time to the writing of a definitive history of international law in Russia. When World War II broke out, he was again appointed a professor at Moscow State University and also served as an associate at the Institute of Law of the Soviet Academy of Sciences.

Vladimir Hrabar died in Moscow on 26 November 1956 at the age of ninety-one.

## 2. Politics in Hrabar's Life

In the 1880s, the Russian tsar Alexander III pursued a policy of assimilation in the Baltic provinces. Since almost all Baltic German scholars rejected this, Russian scholars were offered appointments at the university. One of them was Vladimir Hrabar. While Hrabar had nothing personally to do with Bergbohm's semi-forced departure from Dorpat/Iur'ev, his appointment at the university became possible thanks to imperial policy. When Hrabar arrived at the university, all instruction at

<sup>1</sup> Vladimir Grabar, *Rimskoe pravo v istorii mezhdunarodno-pravovyh uchenii. Elementy mezhdunarodnogo prava v trudah legistov XII-XIV vv*, Iur'ev: K. Mattiesen, 1901.

<sup>2</sup> V. E. Hrabar, *Ponyatie estestvennogo prava i mezhdunarodnogo prava v angliskoi literature XII-XVI vekov*, „Iuridicheski Vestnik«, 1917, No. 1.

<sup>3</sup> Already during World War I, Hrabar had given advise to the Russian government in the question of the historical development of Russia's legal interests in Bosphorus and Dardanel. See Hrabar's archive, *Obozrenye mezhdunarodnykh soglashenii po voprosu o prolivah Bosfore i Dardanellah*, undated.

<sup>4</sup> See W. E. Butler's foreword to V. E. Grabar, *The History of International Law in Russia, 1647-1917. A Bio-Bibliographical Study*, Oxford: Clarendon Press, 1990, p. xlv.

the faculty of law was already being carried out in Russian, though all five chairs at the faculty at this time were still occupied by Baltic German professors<sup>1</sup>. Probably also keeping in mind recent events, Hrabar let the audience of his inaugural lecture know that he held the scholarly achievements of his predecessors Bulmerincq and Bergbohm in high esteem<sup>2</sup>. As a scholar, he chose to emphasise continuity rather than a break in the chair of international law.

Nevertheless, the political conflict between the Baltic Germans and the Russians – all this against a backdrop of strengthening Estonian national identity – was fierce at the time of Hrabar's professorship. In 1890, 1111 students from the Baltic provinces (i. e., Germans, Estonians and Latvians) studied at the university, while in 1901 there were only 395 students. As Hrabar recounted, «*the 600 individuals who had left were German students, who had been encouraged to leave the Russified university in protest.*»<sup>3</sup> While most Baltic Germans boycotted the university, the number of the Russian students increased from 89 in 1895 to 1536 in 1907<sup>4</sup>.

One can trace the development of the German-Russian conflict in Hrabar's archive in the Tartu University library. Hrabar carefully preserved excerpts from both Russian and German newspapers of the time that mirror the conflict over the Baltic provinces. For instance, there are contradictory newspaper accounts of the armed clash between the Baltic German militia (*Bürgerwehr*) and the mostly Estonian workers demonstrating on the Great Market Square (now the city hall square) in Iur'ev on 12 December 1905, i. e., during the 1905 revolution<sup>5</sup>. Hrabar's archive also contains complaints published in the Baltic German newspapers about the decision of the Russian authorities to abolish the chair of private law in the Baltic sea provinces<sup>6</sup>.

What was Hrabar's stance on the policy of Russification? Archival documents and Hrabar's own memoirs give testimony to the fact that he was one of the leaders of the liberal opposition within the university. Following the 1905 revolution, he proposed at the university council on 27 March 1906 allowing the teaching of elective subjects in any of the local languages and letting the instructor himself choose the language of instruction. However, the Council asked Hrabar «to explain his proposal further» and postponed its decision. A German newspaper gossiped in 1908 that «liberal professors want, as heard, to elect Professor Grabar, the dean of the Faculty of Law, rector.»<sup>7</sup>

<sup>1</sup> Grabar, Veerand sajandit, p. 408.

<sup>2</sup> V. Grabar, Voina i mezhdunarodno'e pravo, in: Uchenye zapiski imperatorskago Iur'evskago universiteta No. 4, Iur'ev, 1893, pp 23-45 at p. 24-25.

<sup>3</sup> Grabar, Veerand sajandit, p. 411.

<sup>4</sup> Grabar, p. 412.

<sup>5</sup> Grabar archive, F. 38 s. 75, Beilage zur Nordlivländischen Zeitung, 20.12. (2.01.) 1905.

<sup>6</sup> Nordlivländische Zeitung 15 (28) Juli 1908, No. 159, „In Sachen des Katheders für ostseeprovinzielles Privatrecht«.

<sup>7</sup> Nordlivländische Zeitung, 10./ 23.07.1908, No. 155.

In his memoirs, Hrabar explained the tense and complex nationality situation among students and professors at the time. According to Hrabar,

*«Due to differences in upbringing, customs, habits and means, students of different nationalities lived in a segregated fashion and seldom communicated with each other. (...) Especially separated were the German students who closed themselves off from the others and lived in fraternities.» – «Two non-German fraternities – the Russian «Ruthenia» and the Polish «Polonia» – had ceased their activities at the time of my arrival: unionist discipline was not in accordance with the love of liberty characteristic of Slavonic nature. Poles however wished to restore their fraternity and turned to me for advice as the then dean of the faculty of law. Every fraternity had a cup and decorative ribbon in certain colours. The Poles wished to use their national colour, raspberry red, in Polish amarantowy, but were certain of rejection and were afraid to request it, since in Warsaw the police hunted down the bearers of this Polish national emblem. I asked: «Do you want this amarantowy so much? «Yes, we do but we do not even dare to dream about it,» was the response. »Write your wishes down on paper; you overestimate how informed the officials in St Petersburg are; I am certain that your wishes will be granted.» I was right: the approval arrived indeed quite soon. The students were out of their mind because of joy and did not know how to thank me and Y. Passek, the rector of the university, who had sent the application to St Petersburg with his approval. I was invited together with the rector and Professor F. Taranovski, a former student of Warsaw university, to the festive opening of the fraternity. F. Taranovski greeted the students in Polish. We spent in several hours in the fraternity, conversing in a friendly manner and only got home at dawn.»<sup>1</sup>*

The official university policy was nevertheless quite different, especially under the reactionary rector Budilovich. Among Hrabar's newspaper extracts there is also a speech of Budilovich<sup>2</sup>, held in Riga at the farewell ceremony for Archbishop Arseni and printed in an undated Baltic German newspaper (probably published in 1903):

*«Ten years ago traces of the Teutonic Order, of the time of knights, of the Hanseatic League were very alive on this historic soil, only vague legends connected it with the name and legacy of Iaroslav Mudry (the Wise). Now they have resurrected, together with the name of Iur'ev, implying not just a historical memory but also a program for the future. Ten years ago at the dome of Iaroslav Mudry existed an institution that had nothing in common with the old foundations of Russian education and that in its spirit, its tasks and goals did not in almost anything differ from similar institutions in Königsberg, Rostock, and Kiel. Now, however, the university has finally been liberated from the legacy of Gustavus II Adolphus and been directed to the path that corresponds to the scholarly, State and national tasks. As the university now stands at the focal point of Russian cultural work, it had to be connected with other*

<sup>1</sup> Grabar, Veerand sajandit..., p. 412-413.

<sup>2</sup> See on him in T. Karjahärm, Ida ja Lääne vahel. Eesti ja Vene suhted 1850-1917, Tallinn: Eesti Entsüklopeediakirjastus, 1998, p. 169.

*factors of Russian education, especially the Orthodox Church. As an external symbol for this connection, the Russian Orthodox cross has been erected on the top of the main building of the university. (...) The Alexander Nevski Church of the university has been inaugurated.»<sup>1</sup>*

Thus, when Germany and Russia clashed militarily in 1914, it evoked special associations in the Baltic provinces. From 2 August 1914 to 7 May 1915 Hrabar was appointed by the Russian Ministry of Foreign Affairs as a legal adviser to the headquarters («*Stavka*») of the Russian Supreme Command. Hrabar had been selected by Boris Nolde, a high official and Russianized Baltic German international law scholar from St Petersburg<sup>2</sup>. The idea was to combine Hrabar's linguistic, cultural, etc. knowledge on Galicia, his childhood playground, with his qualities as a specialist of international law. Hrabar was stationed with the Russian Supreme Command in Galicia, which the Russians had taken over from the military forces of the Danube monarchy. There, Hrabar was negatively struck by how little knowledge the Russian military commanders had of the situation in Galicia, and in particular by the anti-Semitism that was rife among the Russian military staff. Hrabar had repeated conflicts with Nikolai Ianuskevich, Chief of Staff for the Russian Supreme Commander in Chief, Grand Duke Nikolai Nikolaevich. Ianushkevich wanted Hrabar to denounce more vigorously German violations of The Hague regulations on the laws of war, but Hrabar found Russian accusations exaggerated and wanted them to be balanced with an account of Russia's own atrocities. Finally Ianushkevich dismissed Hrabar over the latter's refusal to write an indictment of German military conduct which did not also mention Russian violations. Officially, his resignation took place «for health reasons». Soon after his dismissal, Hrabar returned to teach in Iur'ev.

But the old order in Russia had already begun to crumble. In the Baltic provinces, previously inflicted attacks now produced angry counter-attacks. One of the first things the German occupation army did when it conquered Dorpat at the end of February 1918, was to take down the Orthodox Cross from the top of the university main building. Lieutenant general Adams, the commander-in-chief of the German troops, issued the following order on 7 March 1918<sup>3</sup>:

1. I hereby proclaim: the university of Dorpat is a German university.
2. Lectures in Russian may take place only so that students will have the opportunity by the following exam period (20th March according to the German calendar) to finish their studies.
3. German professors are entitled to adopt measures so that the university may from now on appear as a German university.

<sup>1</sup> Grabar archive F 38 S. 87 (newspaper excerpts).

<sup>2</sup> In describing this significant episode, I rely on unpublished archival material that has been communicated to me by Peter Holquist. The episode is also briefly outlined by W. E. Butler, op. cit. p. xli and in the correspondence between Sazonov and Hrabar in the Krasnyi arkhiv 27 (1928), p. 15.

<sup>3</sup> Grabar archive F. 38, o. 72.

4. To what extent Russian chairs and students may remain in Dorpat will be decided according to instructions issued by a representation of the German army (Ortskommandatur).

The council of the university of Iur'ev authorised Professor Hrabar to formulate in its name a letter to the German authorities<sup>1</sup>. As his first argument, Hrabar invoked the 1907 Hague regulations. Hrabar argued in the memorandum that the university council was unable to see in such measures «*the legal basis, since however one would understand the legal status of Livonia and Estonia, it is beyond doubt that measures ordered to be taken at the university can be deduced neither from the rights of the Occupying Power on enemy territory nor from the text of the Peace Treaty [of Brest-Litovsk].*» Hrabar went on to point out that in the case of *occupatio bellica*, the occupying power was according to Article 43 of the 1907 Hague regulations obliged to respect the laws of the country, as long as there were no «insurmountable hindrances». The norm was not, Hrabar continued, created in 1907 but reflected an old custom and was, for instance, reconfirmed by a German proclamation of 30 August 1870 in the Franco-German war. «*As this rule was respected in Alsace-Lothringia that Germany intended to annex in 1870, it should be even more respected in the occupied Baltic provinces, since the German Chancellor has declared that Germany has no intention of annexing those provinces.*» Finally, Hrabar quoted from the work of the «well-known Berlin Professor» (in the first draft, «famous Berlin professor») Franz von Liszt, who maintained that university property in an occupied territory must be treated analogously to private property.

Secondly, Hrabar argued that the legal basis for such drastic measures could not be found in the Brest-Litovsk peace treaty between Germany, its allies and «the [Lenin's] government of Petersburg». As this treaty had primarily accorded to Germany as the Occupying Power police authority in the Baltic provinces, such a fundamental reform as the reform of the university of the provinces could not be pursued, especially as «*not only Germans but also the other peoples living in the country, such as the Russians, Poles, Lithuanians, Jews and in the first place, the Estonians and Latvians had an interest in it.*»

Thirdly, Hrabar invoked the argument of «higher German authority». He referred to the words of the German Chancellor Bethmann-Hollweg in a speech he held in the Reichstag: «I emphasise that we are not even thinking of establishing ourselves in Livonia and Estonia.» This had to be interpreted as higher law vis-à-vis the orders of the lieutenant general Adams.

After the legal arguments against the German orders were brought forward, «political» arguments were listed in the second part of the memorandum of the university council. The memorandum noted that the majority of the students were now Estonians and Latvians, most of whom were unable to follow lectures in German without further language instruction. Furthermore, pupils in high

<sup>1</sup> Grabar archive, F. 38 o. 72.

schools had received their education exclusively in the Russian language during the last decades and did not know German «neither practically nor theoretically». Finally, the memorandum again highlighted that the ordered reform was extremely undesirable due to the fact that the future status of Livonia and Estonia still remained open.

However, the Germans took a firm course towards the creation of a Baltic German «independent» State, the *Baltisches Herzogtum*. On May 10, 1918, a response of a sort to the university council's memorandum came to the rector Alekseev from the commander-in-chief of the 8<sup>th</sup> German army, Count Kirchbach<sup>1</sup>:

*«In connection with further political developments, the decision of the land council on 12.04.1918 and the response to it by the German Reich's leadership, the reopening of the University of Dorpat as a Russian university is no longer a question. I therefore order:*

*1. The Russian rector of the university is obliged to cease all official activity. This will be supervised by the head of the police (Stadthauptmann) of Dorpat.*

*2. The rector is prohibited from undertaking any relations with the Russian government. (In German: Ein Verkehr des Rektors mit der russischen Regierung findet nicht statt.)*

*3. I insist that the rector and the Russian professors leave Livonia voluntarily and move to Russia, and look forward to the declaration of the intentions of the gentlemen (Herrn) in that regard.*

Hrabar, together with the other Russian personnel of the university left Dorpat on 18 July 1918 on an evacuation train that had been allowed to come from Soviet Russia.

*«There was nothing to do. (...) I was sorry to leave the town and the university (...) I had to console myself with the thought that we were to create the foundations for the first university established by the young Soviet government.»<sup>2</sup>*

### **3. Politics in Hrabar's International Law Works**

#### **3.1. Inaugural Lecture «War and International Law» (1893)**

Hrabar started his 1893 inaugural lecture at the faculty of law at Iur'ev university, «War and International Law», with respectful remarks about Bulmerincq and Bergbohm, insisting that he intended to follow their footsteps, «if not in method, then in the way of posing questions».<sup>3</sup> He argued that war and international law were since the inception of the latter in conflict with each other and that in time, war would have to heed international law. Nevertheless, Hrabar noted that there were different views on what law's place in war was:

<sup>1</sup> Grabar archive, *ibid.*, p. 22.

<sup>2</sup> Grabar, *Veerand sajandit*, p. 418.

<sup>3</sup> Grabar, *Voina i mezhdunarodno'e pravo*, in: *Uchenye zapiski imperatorskago Iur'evskago universiteta* No. 4, Jur'ev, 1893, pp 23-45 at 23-24.

*«During the war of 1870, the Prussian general Falkenstein claimed: What can one do? In war exists one law that surpasses all others, and that is: the law of force.»<sup>1</sup>*

Also in the international legal scholarship, there was an approach of «military realism», led by Carl Lueder, a professor in Erlangen<sup>2</sup>. The German General Count von Moltke had suggested that everything was allowed in war that could inflict damage on the enemy and thus law had to give way to force, though fortunately not all military leaders of «contemporary civilized nations» shared this view<sup>3</sup>. Hrabar pointed out that it was from amongst the Russian army that Duke Nikolai Leihtenbergski responded critically to the thoughts of Moltke in a letter sent to Professor Friedrich Martens. Unlike von Moltke, Leihtenbergski insisted that one should not inflict damage on civilians; if the army respected human life and property, passions in war would soon calm down<sup>4</sup>. Hrabar concluded:

*«In that way, lawyers standing on the ground of «military realism», demanded the restriction of law and humanism in the name of force; military men embedded in «legal idealism», defend the law against force and from the attacks of those who were meant to defend it – lawyers.»<sup>5</sup>*

Nevertheless, Hrabar maintained that «military realism» as understood by the German scholar Lueder, had no place in State practice. Von Moltke, Rüstow, Hartmann and other Prussian generals together with the lawyers of the «realist» direction remained the only defenders of this misuse of military force<sup>6</sup>.

In time of war, Hrabar continued, States had sometimes attempted to justify their violations of international law with the argument of «military necessity». For instance, during the war of 1870, Germany decided to impose a tax of 25 francs on every French citizen. Hrabar maintained that this «contribution» was exacted in order to turn the French people against the war and stir them to put pressure on their parliamentarians to that effect. *«But such an extortionist contribution is not permitted under the law of war of our time,»* wrote Hrabar.<sup>7</sup> Lueder, representing «his fatherland», had admitted that the Prussian measure had violated the laws of war (*Kriegsmanier*) but still insisted that it was in accordance with military necessity (*Kriegsraison*). Hrabar noted ironically that in Lueder's view, this military necessity consisted of the fact that Germany needed victory and desired an expedient peace<sup>8</sup>.

Another such case in the war of 1870 had been the confiscation of cigarettes and wine by the Prussian army in France. Hrabar admitted that under interna-

<sup>1</sup> Ibid., p. 27.

<sup>2</sup> Ibid., p. 28.

<sup>3</sup> Ibid., p. 29.

<sup>4</sup> Ibid., p. 29.

<sup>5</sup> Ibid., p. 30.

<sup>6</sup> Ibid., p. 30.

<sup>7</sup> Ibid., p. 33-34.

<sup>8</sup> Ibid., p. 34.

tional law, food could be confiscated in wartime but also pointed out sarcastically that neither wine nor cigarettes were items of the first necessity, without which soldiers would not have survived. «*The Prussian soldier managed without them, but only at peacetime, while at home.*»<sup>1</sup> And Lueder had again «in a naïve manner» justified this act with the argument of military necessity. Altogether, in Hrabar's view, Lueder had, instead of offering a straightforward and honest legal theory of force's supremacy over law in time of war, taken the position «of a person sitting between two chairs»<sup>2</sup>:

Hrabar insisted that one had to make a choice between war and international law<sup>3</sup>. «Military realism» as represented by Moltke, idealized war and had a «*metaphysical-idealised understanding of war, created by the fantasy of Hegel.*»<sup>4</sup>

Hrabar also pointed out that some industrial complexes thrived on war: without war, «*the armament industries of Stumm and Krupp, having obtained international acclaim and significantly enriching Germany, could not have acquired their present prestige.*»<sup>5</sup>

Hrabar also opposed the militarist argument that war had a natural uplifting and «purifying» effect on a nation:

«*Victory over the enemy in great measure brings along with it the decline of morality, a cessation of development. This happened in Germany after its glorious victory over France in 1871. The general decline of morality in Germany connected with the decline of science and art is recognised by the Germans themselves. Professors complain about the lack of interest in knowledge, the disappearance of ideals and the prevalence of pragmatism. At the same time, defeat sometimes brings with it the rise of nations. We remember Russia after the Crimean war and France after its defeat by Prussia.*»<sup>6</sup>

Nevertheless, one could not conclude that defeat brought renewal either, since there was no connection between success or defeat in war and the rise of a nation –

«*Russia would have renewed herself even without the Eastern war, France would have embarked on new ways even without blows delivered by Germany, but no war was able to reinvigorate Turkey.*»<sup>7</sup>

Hrabar concluded that international law had to abolish war and instead enable peaceful struggle between nations, since struggle was the «*source of all life, all movement and development*». Struggle «*could be called divine: without beginnings*

<sup>1</sup> Ibid., p. 34.

<sup>2</sup> Ibid., p. 35.

<sup>3</sup> Ibid., p. 36.

<sup>4</sup> Ibid., p. 37.

<sup>5</sup> Ibid., p. 40.

<sup>6</sup> Ibid., p. 42.

<sup>7</sup> Ibid., p. 42.

*that live in it, nations would be threatened by death.»<sup>1</sup> Hrabar's final remarks were replete with optimism and pathos:*

*«The science of international law is the science of peace. Its task is to strengthen peace on Earth and to eliminate war from inter-State relations. This great task gives to the science of international law a deep philosophical meaning.»<sup>2</sup>*

Hrabar's views on military conflict and international law, as expressed in his inaugural lecture, can be interpreted as progressive and influenced by pacifism. A certain anti-German streak can be traced, but this was based on reasoned principles and concrete examples, not on propagandistic nationalism. The German generals and scholars Hrabar criticised really had said things Hrabar opposed. The humanistic spirit Hrabar expressed anticipated the Hague Peace Conferences of 1899 and 1907 and the first codifications regarding restrictions on the conduct of war.

At the same time, Hrabar's argument was moralistic and – to use Martti Koskenniemi's dichotomy – utopian. The conduct of war had to be restricted for reasons of goodness and righteousness (philosophy) rather than for reasons stemming from legal deduction (positivism) or the State's immediate interests (realism).

### 3.2. Hrabar's Critique of Friedrich Martens regarding the Proper Declaration of War

In his subsequent international law works, Hrabar established himself as one of the great historians of international law of the first part of the 20<sup>th</sup> century.<sup>3</sup> He also became known for his passion for intellectual honesty. When E. Simson, a former student of Carl Bergbohm at Dorpat, published in St Petersburg a treatise entitled «A System of International Law»<sup>4</sup>, Hrabar was quick to point out the clear plagiarisms in Simson's work<sup>5</sup> and thus effectively ended Simson's career as an international law scholar<sup>6</sup>.

But the question of the intellectual honesty of international law scholars emerged even more spectacularly in the debate that Hrabar held with Friedrich

<sup>1</sup> Ibid., p. 43.

<sup>2</sup> Ibid., p. 45.

<sup>3</sup> Wladimir Hrabar, Joh. Wilh. Neumayr von Ramsela. Beitrag zur Geschichte der staatswissenschaftlichen Literatur im Zeitalter des Hugo Groot, Iur'ev: Mattiesen, 1897; Vladimir Hrabar, Un traité de droit d'ambassade : «Ambaxiator brevilogus» de Bernard du Rosier, Revue de droit international et de Législation comparée t. XXXI (1899); Vladimir Hrabar, L'époque de Bartole (1314-1358) dans l'histoire du droit international, Revue general de droit international public 1900; Vladimir E. Hrabar (edited and commented by), De Legatis et Legationibus Tractatus Varii, in : Uchenye zapiski Imperatorsogo Iur'evskogo Universiteta No. 4, Iur'ev: Mattiesen, 1906; Martinus Navarrus (de Azpilcueta) et son traité sur la contrebande de guerre, 43 Revue de Droit international et de Législation comparée 1911.

<sup>4</sup> E. K. Simson, Sistema mezhdunarodnogo prava, Tom I, Osnovnye poniatia, St Petersburg, 1900.

<sup>5</sup> V. E. Hrabar, Neudachnaia popytka natsionalizatsii mezhdunarodnogo prava, Iur'ev: Mattiesen, 1901.

<sup>6</sup> See V. N. Durdenevski, Vladimir Hrabar – jurist i istorik (k 60-letiju nauchnoi dejatel'nosti), «Vestnik Moskovskogo Universiteta», 1949, No. 7.

Martens concerning a letter the latter published in the French newspaper «Le Figaro». The course of events can be traced in Hrabar's treatise «Declaration of War in Contemporary International Law»<sup>1</sup>.

The debate took place against the background of Russo-Japanese war of 1904. In 1898, a part of Manchuria (Port Arthur and Daljanvan), formerly controlled by Japan, was given to Russia on a 25-year «lease» (emphasis by Hrabar). In January 1904 negotiations between Japan and Russia foundered and on the night of 27 January 1904, Japan's navy attacked the Russian fleet at Port Arthur<sup>2</sup>.

When presenting arguments, Hrabar started with his general views on international law and politics. He emphasized the need for a positivist treatment of international law and criticised the tendency to label any acts that violate ideas of justice, fairness and honesty as «illegal»:

*«If a country implements the freedom of action that it is entitled to according to the law and some other country's interests are hurt, it will immediately be accused of a violation of international law. On the basis of such facts, afterwards it will be concluded that international law does not exist at all since its norms can be violated so easily, often and after all without punishment.»<sup>3</sup>*

It was interesting to note, Hrabar went on, that domestic law also allowed the exploitation of some groups by others – in short, was unjust – but nobody considered criticising it on the basis of civil or constitutional law<sup>4</sup>. «*The voices of judgment and accusation could even be sympathetic if only they were sincere.*» This, however, was not the case:

*«Usually voices of protest can only be heard among the representatives of the nation that suffered from such a «violation of law» or, at least, did not gain any advantages from it. The same act would receive a different appraisal if it brought such advantages.»<sup>5</sup>*

Hrabar once again strongly emphasized the need for positivism:

*«If one recognised that any just norm is at the same time a norm of actual law, and its violation is a violation of law, then, inevitably, one must accept the situation that in international relations violations of law appear to be the rule, and respect for the law – the exception. Many imagine current international law to be this way. This can be explained by the influence of the natural law school, which does not distinguish between what is from what ought to be, (...) positive law, quite often unjust, from just law.»<sup>6</sup>*

Hrabar then went on to praise in particular international law scholarship in Germany, where the distinction between valid law and just law had been made

<sup>1</sup> Vladimir Hrabar, *Ob'avlenie voiny v sovremennom mezhdunarodnom prave*, St Petersburg: Senatskaya Tipografia, 1904.

<sup>2</sup> Grabar, *Obavl'enie*, pp. 98-101.

<sup>3</sup> Grabar. *Obavl'enie...*, p. 4.

<sup>4</sup> Apparently, the idea of fundamental constitutional rights was yet alien to Hrabar.

<sup>5</sup> Grabar, p. 4-5.

<sup>6</sup> Grabar, p. 5.

most rigorously. In contrast, international law scholars in France still continued to write in the spirit of natural law<sup>1</sup>.

Hrabar also maintained that making a rigorous distinction between valid law and just law was

*«necessary in the interests of strengthening international law. Law will become less just – but more firm. The future task then is self-evident: one needs to strive for norms corresponding better to the requirements of justice, honesty, and humanity, on the condition that compliance with those norms is safeguarded by real guarantees.»*<sup>2</sup>

Hrabar then turned to the question in international legal doctrine of declaring war, proceeding to demonstrate that together with the development of arms, those voices became dominant in international legal literature that claimed that declarations of war had become less essential and legally no longer required. Of course, there remained the problem of partiality in the literature – when, for example Heffter and Bluntschli modelled their doctrinal views on the wars conducted by the Prussian king Frederick II<sup>3</sup>.

Finally, Hrabar came close to the issue at the heart of his writing: whether or not Japan had violated international law by attacking Russia in 1904 without a prior declaration of war. Hrabar demonstrated that the Anglo-American view which did not consider a declaration of war legally mandatory was rooted in the Japanese literature. Japan's first war after the country's acceptance by the European concert, its war against China, had been triggered without a declaration of war. Japanese international law scholars (e. g., Nagao Ariga) considered the Sino-Japanese war another instance confirming that there was no such requirement<sup>4</sup>.

Then Hrabar turned to the views expressed by Russian international law scholars. It appeared that the real impetus for Hrabar's account was given not so much by the confusion between «valid» and just law in the particular case but the fact that Fyodor Martens had expressed «inconsequent» and ultimately dishonest views. In his much-acclaimed textbook on international law, Martens had written that declarations of war had become «useless»:

*«All recent wars have started without a prior declaration. Sometimes, however, States considered it necessary to inform the enemy of the beginning of hostilities. In our time, it is hardly possible to defend the necessity of a festive declaration of war or even some sort of prior diplomatic notice. At the current development of telegraphic connections, it is always possible to know earlier what the relations between the States are, and to foresee the final break.»*<sup>5</sup>

Hrabar pointed out that the reading of this passage left no doubt that Martens embraced the Anglo-American view «in its most extreme form» – namely,

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<sup>1</sup> Grabar, p. 6.

<sup>2</sup> Grabar, p. 6.

<sup>3</sup> Grabar, p. 33.

<sup>4</sup> Grabar, p. 8.

<sup>5</sup> F. Martens, *Sovremennoe mezhdunarodnoe pravo*, Tom II, 4th ed., St. Peterburg, 1900, p. 524.

not only that such a declaration was not made mandatory by law but that it had also become superfluous<sup>1</sup>.

However, Hrabar went on to recount how on 8 (21) February 1904, Martens had written a letter to the French newspaper «Le Figaro», in which a change of his views became apparent and «which so much surprised everybody.»<sup>2</sup> Hrabar added a humorous comment: namely, that he could not attribute this sudden change of mind on Martens' side to anything other than his subsequent «reading of French authors» (who had held, as Hrabar explained, a minority view to the effect that a diplomatic notice was required before the outbreak of hostilities.)<sup>3</sup>

Martens claimed in his letter to «*Le Figaro*» that «*now, just as thirty years ago, I remain convinced that a formal or festive declaration of war is in our time not required.*» However, he also added that it was «*unconditionally necessary that both adversaries on the basis of positive facts be convinced that a state of war exists between them and that hostile activities are imminent. Briefly, it is absolutely necessary that both enemies be informed that war is about to break out.*»<sup>4</sup>.

A debate between the titans of Russian international law scholarship ensued. A former student of Martens and his later successor to the chair of international law, A. A. Pilenko, published an article «*Yasnoë obnaruzhenie namereni*» («Clear expression of intentions») in which he expressed his surprise about the change in Martens' position: «*I as a long-time disciple of Professor Martens, support the view that was taught to me by my teacher*» [to the effect that neither a festive declaration of war nor diplomatic notice was necessary – LM].<sup>5</sup>

Martens responded in *Novoe Vremya* 1904, No. 10056, that he considered the outbreak of hostilities without the declaration of war legal but not «bona fide» (*dobrosovestno*). He also declared that he intended to enter in the next edition of his textbook on international law that «*civilized nations always have to remember that Asian nations attack their enemies by surprise and in a cowardly manner, with the pretext that there is no duty to declare war.*»<sup>6</sup> Hrabar's comment on Martens' remark was laconically sarcastic: *sapienti sat*<sup>7</sup>.

After having carefully examined the views expressed in legal writings, Hrabar turned to the examination of State practice. He pointed out that just as Napoleon did not declare war against Russia in 1812, Russia herself did not declare war against Sweden in the war of 1808-1809, and this notwithstanding the fact that hostilities came as surprise to Sweden<sup>8</sup>. Hrabar argued that in fact this war, initiated by Russia, had been highly informative because of the similarity of

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<sup>1</sup> Grabar, p. 41-42.

<sup>2</sup> Grabar, p. 42.

<sup>3</sup> Grabar, p. 42.

<sup>4</sup> Martens, *Le Figaro*, 8 (21) February 1904. Russian translation in *Novoe Vremya* 1904, No. 10056.

<sup>5</sup> A. A. Pilenko, Letter to the Editor, *Novoe Vremya* No. 10053, 4th March 1904.

<sup>6</sup> Martens, letter, *Novoe Vremya*, 1904 No. 10058.

<sup>7</sup> Grabar, p. 43.

<sup>8</sup> Grabar, p. 53.

circumstances to those of the Russo-Japanese war. The same was true in the Russo-Turkish war (1806-1812) in which Russia seized Moldavia and Walachia, and Turkey was taken by surprise. The Russo-Turkish war of 1878 was another fascinating case in Hrabar's view. Russia declared war with a diplomatic note but by the time the note was received, the Russian forces had already crossed the border into Romania<sup>1</sup>. This episode was significant also in that it had given rise Martens' view on the declaration of war, the view he had kept for twenty five years<sup>2</sup>. In his book, Martens had considered nonsensical the accusation that Russia started the war against Turkey without formally declaring it. Martens maintained that most writers considered such a declaration a mere formality, the more so that no war could be started *deus ex machina*. Martens insisted that even during the 18<sup>th</sup> century outstanding lawyers demonstrated the superfluousness of a declaration of war. (Hrabar: «*It is difficult to say it in a more categorical form.*»<sup>3</sup>) Martens had also mused on the Turkish Porta in this regard: «Porta should not forget that we live at the end of the 19<sup>th</sup> century when between really civilized nations different views on 'international customs and rules' were established». Hrabar's comment (note again the sarcasm): «*It would be interesting to know whether Martens considers those customs still to be in use at the beginning of the 20<sup>th</sup> century.*»<sup>4</sup>

It was strange then, Hrabar pointed out, that regarding Russia's war against Turkey, Martens had claimed that a «*really civilized nation*»<sup>5</sup> had the right to attack another country without a proper declaration of war<sup>6</sup>. In his «Le Figaro» letter Martens had even criticised Japan for not wanting to conduct a so-called *bonne guerre* «in the sense it was led by European nations in the Middle Ages.»<sup>7</sup> Hrabar:

«*This demand to return to the Middle Ages is especially strange to hear from the mouth of Professor Martens, after his historical teachings on Turkey regarding the customs of really civilized nations.*»<sup>8</sup>

Thus, Hrabar concluded that Japan had by no means violated international law by attacking Russia without diplomatic notice. Hrabar expressed his surprise that not only Martens but also the Russian Ministry of Foreign Affairs had argued the opposite, namely that Japan's act amounted to a violation of international law.

«*True, the ministry may have been misled by its collaborator, Professor Martens, (...) but this cannot be a sufficient excuse for the ministry. If for a theoretician it is normal and excusable to be surpassed by life, then for a ministry, in contrast, it*

<sup>1</sup> Grabar, pp. 74-76.

<sup>2</sup> Martens, *Vostochnaya voyna i Brjusselskaja konferentsia 1874-1878*, Sankt Petersburg: Tipografiya Ministerstva Putey Soobcheniya (A. Benke), 1879.

<sup>3</sup> Grabar, p. 76.

<sup>4</sup> Grabar, p. 77.

<sup>5</sup> The emphasis was by Martens in „*Vestnik prava*“, 1904, pp. 181-184.

<sup>6</sup> Grabar, p. 111.

<sup>7</sup> Martens letter „*Le Figaro*“, 8 (21) February 1904, in Russian „*Novoe Vremja*“ 3 March 1904 (No. 10056).

<sup>8</sup> Grabar, p. 111.

*is impossible not to observe changes in real life. (...) Undoubtedly, our ministry had not heard of a number of the most recent wars. (...)»<sup>1</sup>*

Hrabar finally noted that Martens still owed an explanation for his sudden change of views «both to the Russian literary public and the science of international law.»<sup>2</sup>

At the end of the polemic piece, Hrabar reathed an almost audible sigh and confessed that his article had turned out «much longer than initially planned»<sup>3</sup>. And the reader understood why. Hrabar's long and passionate involvement with Martens' fluctuating views demonstrated that for him, the very credibility of international law and international legal arguments was at stake. Hrabar was far from questioning the intellect of Martens, but he questioned his moral judgment, accusing the latter of favouring the momentary needs of Russian foreign policy, and probably his personal career and position as the leading international lawyer in Russia over «positive international law».

In addition, Hrabar had also been angered by the «civilized nations» argument, while it had been overexploited by Martens and in the tsarist foreign policy rhetoric<sup>4</sup>.

This was *par excellence* a debate between an international lawyer-legal adviser and an international lawyer-legal theoretician. In the eyes of other scholars of international law, Hrabar probably came out as the moral victor in the debate with Martens, but the latter probably led a more rewarding life in terms of political recognition, representation and glamour.

### 3.3. Hrabar's Theory of the Inequality of States

In his international law lectures at Iur'ev, Hrabar painted a progressivist, pro-democratic picture of the development of international law, maintaining around 1904 that the era was being lived under the banner of the ideas of the French revolution of 1789<sup>5</sup>. He argued that the self-determination of nations had gained more and more ground and the inner structure of States had begun to play an increasingly greater role, while the will of the people gained in importance (thus pointing to the republican ideal)<sup>6</sup>. Finally, the first limits on the outbreak of war had been established in international law. Nevertheless, talking about the literature of international law, Hrabar divided it into «Russian», «German», «Italian» branches, etc, according to nationalities<sup>7</sup>.

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<sup>1</sup> Grabar, p. 142.

<sup>2</sup> Grabar, p. 145. See also Prof. Martens *sostoit v dolgu pered naukoju mezhdunarodnogo prava*, *Vestnik prava*, December 1904.

<sup>3</sup> Grabar, p. 147.

<sup>4</sup> See also Eric Myles, „Humanity“, „Civilization“ and the „International Community“ in the Late Imperial Russian Mirror: Three Ideas „Topical for Our Days“, 4 *Journal of the History of International Law* 2002, pp. 310-334.

<sup>5</sup> Hrabar's international law lectures, students transcript in the university archive, p. 129.

<sup>6</sup> P. 130-131.

<sup>7</sup> P. 131.

In 1912, Hrabar published a work entitled «The Principle of the Equality of States in Contemporary International Law»<sup>1</sup>. In this short book, Hrabar advanced the theory of inequality and legal hierarchies between States.

Hrabar's 1912 book on the equality of States was primarily inspired by the second Hague Peace Conference of 1907, more precisely, by its failure. At this conference, the Great Powers had suggested the creation of the Permanent International Court of Arbitration and had insisted that the principle of the equality of States had to be abandoned for the undertaking to succeed. Moreover, eight of the fifteen judges of the International Prize Chamber were to be appointed by the Great Powers.

Hrabar's main argument was that it was necessary to recognise not only the actual but also the legal inequality of States. He recounted how the six Great Powers had led European politics since the fall of Napoleon and how at the end of the 19<sup>th</sup> century, the interests of the Great Powers and small States clashed at international conferences. Hrabar argued that the behaviour of small States in preventing the creation of the international permanent adjudicatory body at the 1907 Hague conference had been tantamount to obstruction. He then turned to the literature on the issue of equality and pointed out that recent treatises against the erosion of equality in international law had been written by Belgian, Swiss and Greek scholars, i. e., authors who came from small States. Hrabar's own sympathy lay with the Scottish lawyer James Lorimer's argument that international law, if it wanted to be respected, had to be respectful of the power of the Great Powers and integrate it.

Hrabar went on to construct a classical apologetic argument in which he argued that the law must take State practice more into account and that legal doctrine should come closer to actual facts. International law had to recognise some sort of aristocratic supremacy of the Great Powers. There was no danger that this aristocracy would turn into oligarchy since the interests of the competing Great Powers were too different. Recognising the leading role of the Great Powers both in politics and in law would also be in the interests of «civilized» small States, since they would be able to serve as brokers between and provide meeting places for the Great Powers, as experience with Brussels, Geneva and The Hague had already demonstrated. Hrabar maintained that the formal recognition of the principle of juridical inequality was needed, since the Great Powers had to be rewarded for taking the small States at all on board in international decision-making. The politics of law could not wait for the moment when the Great Powers would be willing to abandon law altogether.

In any case, the Great Powers were adopting international legislation, like the London Declaration of 1909, that was formally binding only on its participating Great Powers but became *de facto* generally applicable law. Small States were also *de facto* unable to utilise several institutes of international law – such as re-

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<sup>1</sup> V. Grabar, *Nachalo ravenstva gosudarstv v sovremennom mezhdunarodnom prave*, St. Petersburg: Kirschbaum, 1912.

prisals in the law of State responsibility. As a case in point, Hrabar described how Serbia had initially protested against the annexation of Bosnia and Herzegovina by Austria but had then been pushed by the latter to declare that it intended to give up its «protesting and opposing attitude» and to live from then on with Austria on «good neighbourly terms». Could one in that case, Hrabar asked rhetorically, speak of equality?

Hrabar finally took a «positivist» position, maintaining that more «*political than legal elements*» existed in the arguments of the supporters of the principle of the equality of States. As if «law» would have so clearly been on his side and «politics», on the other! Hrabar further argued that the talk of juridical equality was simply a kind of protest against the activities of the Great Powers and maintained that from a theoretical point of view, the equality of States was a miscarriage of the Vattelian analogy that conceptualised States abstractly as autonomous entities, comparable to human beings under domestic law. This resulted in «State fetishism» and in the recognition of the «absolute value of statehood». It was simply wrong to argue, Hrabar concluded, that the equality of States was the only possible foundation for the edifice of international law. Instead, the 1907 Hague conference accepted three ranks between States: great, middle and small States. Hrabar maintained that generally, in every single issue of international law and order, different powers could have different statuses, depending on their influence. But he also made a strong case for legitimacy, namely by arguing that instead of the «fictive equality» of nominally equal States, a «real equality» was needed, i. e., based on how many people lived in a country. In other words, a major basis for the inequality of States was the inequality of their populations. «*Instead of the equality of States, the equality of populations*» had to arise. Although Hrabar had earlier pointed out that the defenders of the equality of States mostly came from small countries, he finally concluded that it would be unfair if Russia and the Great Britain were legally equal to Luxembourg or Panama.

Hrabar's theory of the inequality of States, written in 1912, sounds surprisingly modern and realist even today – not only because Hrabar counted *eight* Great Powers (cf. G8). Hrabar's predictions and doctrinal suggestions both came and did not come true in the 20<sup>th</sup> century. *De facto*, inequality of States was legally recognised and *de iure*, it was rejected. The UN Charter of 1945 constitutes a *complexio oppositorum* in this sense: although it recognises the privileged role of the UN Security Council, especially the veto right-possessing permanent members, at the same time it upholds the equality of sovereign States.

Hrabar's theory of the inequality of States, expressed in 1912, was a reaction to a crisis in international relations. Something – Sarajevo perhaps – was already in the air. Suggestively, the French translation of Hrabar's booklet was published in 1914<sup>1</sup>. In the context of its time, Hrabar's argument for legal inequality was not so

<sup>1</sup> V. Hrabar, *La crise actuelle du principe de l'égalité juridique des états*, Catania : Stab. Tip. Di Mattei & C., 1914.

unique. Some pre-World War I British and American scholars held similar views<sup>1</sup>. Hrabar's views were also shared and discussed by a former student of his, the Russian scholar Baron Sergey Aleksandrovich Korff (1876-1924)<sup>2</sup>, who defended his doctoral thesis at Iur'ev in 1910.

When arguing in favour of the legal inequality of States, Hrabar's claim was not so much driven by *his* imperialism but by the imperialism of his *time*. Hrabar's goal and ideal was to make international law relevant, to bring it «closer to the facts».

Quite importantly, Hrabar characterised his own viewpoint as legally more sound, while making it clear that his opponents on the issue were pursuing politics rather than legal analysis. But as an answer to his argument that supporters of the equality principle came from small States it should be noted that Hrabar himself was a professor in the largest continental Empire. In contrast to his utopian inaugural lecture of 1893, Hrabar theorised in 1912 in a much more realist and down-to-earth manner. Here Hrabar clearly argued as a «modern» (to again use Koskenniemi's term), mixing realist arguments such as power (Great Power status should be legally recognised) with idealism (democracy matters; it is important to make international law more relevant).

#### 3.4. Optimism about the Future of International Law in 1917

Did the Great War of 1914-1918 somehow change Hrabar's views on the equality of States? In 1917, Hrabar published another edition of his own meticulous Russian translation of the leading international law textbook by Franz von Liszt (1851-1919)<sup>3</sup>. Hrabar's foreword is dated March 1917, i. e., immediately after the February revolution in Russia. Hrabar had remained faithful to his earlier idealistic view that war had simply been an expression of politics, which was not able to undermine the validity of international law. Note the impressive impartiality of his words when he invoked history in support of his view:

*«Many of the achievements of European civilization have been light-heartedly sacrificed in war by this or another warring party in order to achieve short-term gains. A lot of contemporary international law has been washed away in this global fight. But we do not need to worry about the future. In history, periods of peaceful construction follow periods of destruction. So it will be now too.»<sup>4</sup>*

<sup>1</sup> See G. Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order*, Cambridge University Press, 2004.

<sup>2</sup> S. A. Korff, *Printsip ravenstva gosudarstv v sovremennom mezhdunarodnom prave – Izvestia Ministerstva Inostrannyh Del*, 1914, kn. 1, pp. 139-147. See also D. B. Levin, *Nauka mezhdunardodnogo prava v Rossii v kontse XIX i nachale XX v*, Moscow: Nauka, 1982, p. 170 et seq.

<sup>3</sup> Hrabar discovered in Liszt's work a number of substantive mistakes that he communicated to the autor of the textbook and that were corrected in later editions. Franz von Liszt, *Mezhdunardonoe pravo v sistematicheskom izlozhenii*, 4e russkoe izdanie, perevod s shestogo nemetskogo izdania pod redaktsiei i s dopolnieniem prof. V. E. Grabarja, Iur'ev: 1917.

<sup>4</sup> Hrabar, foreword to Liszt, p. IV. Note also that from 2 August 1914 to 7 May 1915 Hrabar was seconded as legal adviser in the diplomatic chancellery attached to the headquarters of the Supreme

This kind of idealistic old-European spirit expressed by Hrabar and reminiscent of Stefan Zweig's «The World of Yesterday» did not survive in the discipline after the Second World War and the rejection of international law by disappointed émigré scholars such as Hans Morgenthau. Hrabar's words would have sounded naïve, and in 1945, the failures and deficiencies of «legalistic-moralistic» (George Kennan) constructions of international law were too tangible. Martti Koskenniemi, however, argues that the credibility of professional doctrines, especially those related to the procedures for preventing war, was lost after World War I<sup>1</sup>.

Hrabar's foreword to von Liszt's textbook also contained something new and significant that somewhat departed from his earlier legal inequality argument and at the same time captured the new direction of both international law and the development of the Russian Empire. Namely, Hrabar argued that the February revolution in Russia had immediately «given a meaning» to the Great War<sup>2</sup>. –

*«The great nation no longer sought conquests and Constantinople, instead it now had a dream of remaking the old world».*<sup>3</sup>

From the February revolution of 1917 on, Hrabar continued, the slogans of «justice, freedom and national self-determination» were «no longer only words». Against the power of those ideas as represented by the new Russia, any «*physical force was powerless and had to lay down its arms*»<sup>4</sup>. Thus, the right to self-determination had arrived in international law and according to Hrabar, its pursuit gave to new Russia a completely new legitimacy, a legitimacy that was much stronger than the one stemming from military might. Again, this was a very 'idealistic' view but, it is also worth noting that it had a legitimising function, giving – from the perspective of international law – new messianic meaning and identity to republican Russia. In the words of Pierre Bourdieu:

*«In science, art, or politics, the creative power of representation never manifests itself more clearly than in periods of revolutionary crisis. Nonetheless, the will to transform the world for naming it, by producing new categories of perception and judgment, and by dictating a new vision of social divisions and distributions, can only succeed if the resulting prophecies, or creative evocations, are also, at least in part, well-founded pre-visions, anticipatory descriptions.»*<sup>5</sup>

With his 1917 foreword to von Liszt's textbook, Hrabar envisaged post-1917 Russia and a future world.

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Command. There Hrabar pointed out instances of breaches by Russian forces as well as by the Germans. This antagonized a Russian general and led to Hrabar's withdrawal for 'reasons of health'. See Butler, foreword to Grabar, p. xli.

<sup>1</sup> Koskenniemi, *From Apology to Utopia*, 1989, p. 123.

<sup>2</sup> *Ibid.*, p. V.

<sup>3</sup> *Ibid.*, p. V.

<sup>4</sup> *Ibid.*, p. V.

<sup>5</sup> Bourdieu, *The Force of Law*, p. 839.

### 3.5. Hrabar's Writings while an International Lawyer in Communist Russia

The year 1917 signified a break, not only in Dorpat/Iur'ev/Tartu, but in the whole world. Europe started to be marked increasingly by ideological divisions between liberal democracy and its two challengers, Communism and Nazism/Fascism<sup>1</sup>.

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<sup>1</sup> There is a significant biographical side- and afterstory to Hrabar's activities as an international law professor at Iur'ev. Among the students in his international law class in 1900-1901 was Alexander (Axel) August Gustav Johann Baron Freiherr von Freytagh-Loringhoven (1878-1942), a member of a family belonging to the Baltic German nobility and coming from Arensburg (Kuressare) on the largest Estonian island Saaremaa (Ösel). (See Tartu University Archive in the Estonian History Archive in Tartu, F 402/1/27784.) In 1907, Freytagh-Loringhoven passed his examinations at Iur'ev for the masters degree while Hrabar was the dean of the faculty of law. However, Freytagh-Loringhoven defended his masters thesis in 1910 at St Petersburg University. On 23 May 1911, Freytagh-Loringhoven was appointed extraordinary professor of Roman law at Iur'ev. He defended his doctoral degree at Harkov University in 1915 and became ordinary professor of Roman law at Iur'ev in 1916. At the outbreak of World War I, Freytagh-Loringhoven was the dean of the law faculty – a position from which he stepped down in November 1914, “taking into account the situation at the faculty”. (See *Ibid.*, F 402/3/1781 and F 402/3/1783). Very likely, the immediate reasons were questions of loyalty and tensions in the background of the war between Germany and Russia. (For the anti-German sentiment cultivated in the Russian Empire at that time, see T. Karjahärm, *Ida ja lääne vahel. Eesti-Vene suhted 1850-1917*, Tallinn: Eesti Entsüklopeediakirjastus, 1998, p. 199 et seq.) In July 1917, Freytagh-Loringhoven requested his release from the position of the professor of Roman law, a wish that was granted with retroactive effect in September 1917. After the end of World War I, Freytagh-Loringhoven moved to Germany. He became professor in Breslau (Wrocław) and was actively involved in Weimar Republic politics. He represented national conservative views and was elected member of the Prussian State Council and the German Reichstag. In terms of scholarship, Freytagh-Loringhoven moved from his previous field of Roman law to international law, becoming one of the most influential international law figures in Nazi Germany. (See Peter K. Steck, *Zwischen Volk und Staat. Das Völkerrechtssubjekt in der deutschen Völkerrechtslehre (1933-1941)*, Baden-Baden: Nomos, 2003, pp. 46-53.) He was active in the German Society for Questions Regarding the League of Nations (*Deutsche Gesellschaft für Völkerbundfragen*), the editor-in-chief of the magazine “*Völkerbund und Völkerrecht*” (*The League of Nations and International Law*) and a member of the Permanent Arbitral Court in The Hague. Freytagh-Loringhoven's politics of international law was directed towards the legitimisation of Germany's increasing appetite for power and the revision of the “humiliation” of the Treaty of Versailles. (See Freiherr von Freytagh-Loringhoven, *Der Widerruf des Kriegsschuldbekenntnisses*, in: *3 Völkerbund und Völkerrecht 1936/1937*, pp. 725-731. See also his *Rückkehr zum europäischen Gleichgewicht?*, *ibid.*, pp. 507-513.) He argued that the League of Nations had failed but suggested not to identify international law with the League of Nations. (See Freiherr von Freytagh-Loringhoven, *Rechtfertigung des Völkerrechts*, in: *3 Völkerbund und Völkerrecht 1936 (Juni)*, pp. 161-166.) His journal defended the rights of the ethnic Germans outside of Germany, for example complaining about their discrimination and unjust treatment (*Volkstumsunrecht*) in Latvia. (See *2 Völkerbund und Völkerrecht 1936*, pp. 653-711.) Particularly interesting from the point of view of this study is Freytagh-Loringhoven's harsh criticism of the decision of the Council of the League of Nations to admit the USSR to the organisation. In Freytagh-Loringhoven's views, the old Baltic German concept of Ostwall against the Russian influence merged together with the National Socialist rhetoric of the civilizational otherness of the Bolshevik regime. Freytagh-Loringhoven argued that the times when international law could remain neutral towards the form of government of its constituent members, States, had ended. There were conditions for that in the 19th century but not any longer in the 1930s since “a State (had) emerged that denied all foundations of the moral, cultural and economic order, and that

After the Communists came to power in Russia in 1917, Hrabar essentially turned towards to history of international law in Russia – the final result being the publication of his famous «Materials on the History of International Law in Russia» in 1958. Hrabar's only theoretical article of his post-Iur'ev period was a critique of Soviet scholar Evgeni Aleksandrovich Korovin's (1892-1964) work «International Law of the Intermediary Period»<sup>1</sup>, published in «Zeitschrift für Völkerrecht» in 1927.<sup>2</sup> In this critical review, Hrabar defended the unity of international law against emerging tendencies in Soviet scholarship and in particular criticized Korovin's theoretical attempt to separate the international law of socialist States from that of bourgeois States. Hrabar characterised Korovin's theories as outdated and was dismissive of the latter's attempt to create a unique Soviet approach to international law.

A question that immediately comes to mind is how could such an article have been at all published in 1927, i. e., when «enemies of people» were already sought and found in Soviet Russia? The editor of «Zeitschrift für Völkerrecht», Max Fleischmann, noted in his brief comment that Hrabar's article was a message from an otherwise isolated country, and this explained why Hrabar had been unable to compare Korovin's views with his Western counterparts.<sup>3</sup> One explanation for this article was the immediate backdrop of the Rapallo treaty, which sought to normalise relations between Germany and Soviet Russia in 1923. Stalin's purges had not yet started; the USSR was yet living in the relative economic freedom of

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simultaneously declared it its highest goal, to make this negation victorious in the whole world. A State like that excluded itself from the international community, and when it was nevertheless permitted access to the international community, this symbolized the denial of any instinct for self-preservation. (...) Facts that prove the magnitude of the Bolshevist danger are innumerable. (...) The denial of international law stands in the beginning of the Soviet Union." (See Freiherr von Freytagh-Loringhoven, *Sowjetrußland und das Völkerrecht*, in: 3 *Völkerbund und Völkerrecht 1936/1937*, pp. 365-370 at 367. See also his earlier account *Sowjetrußland im Völkerbund*, in: 1 *Völkerbund und Völkerrecht 1934/1935*, pp. 307-312.) He concluded that "history will once form a judgment" about those who did not realize the need for unity against the Bolshevist danger, and had admitted the USSR to the international community." (Ibid., p. 370. For the arguments that international law had to be used against the Bolsheviks, see also E. H. Bockhoff, *Völker-Recht gegen Bolschewismus*, Berlin: Nibelungen-Verlag, 1937.) Freytagh-Loringhoven's viewpoint becomes more easily understandable when one thinks of his student and professorship years at Iur'ev, the tensions between the Baltic German nobility and the Russian Empire, the violence of the Russian revolutions of 1905 and 1917, the expropriation of the Baltic German properties in 1919. In the 1930s, Freytagh-Loringhoven was on different sides of cordon sanitaire with his own former professor of international law and colleague, Vladimir Hrabar. But Freytagh-Loringhoven did not seem to make much secret of the fact that for him, international law was no more than a means of foreign policy. (Therefore, his activism and publications in the field of international law coincide with his rise in German politics.) In particular, in comparison with Freytagh-Loringhoven's writings, Hrabar's silence on questions of contemporary theory and his remaining in more silent trenches of the history of international law in the 1930s start to speak loud.

<sup>1</sup> E. Korovin, *Mezhdunarodnoe pravo perehodnogo vremeni*, Moscow, 1923.

<sup>2</sup> V. Hrabar, *Das heutige Völkerrecht vom Standpunkte eines Sowjetjuristen*, XIV *Zeitschrift für Völkerrecht* 1927, pp. 188-214.

<sup>3</sup> Ibid., p. 188.

New Economic Policy. It seems that Hrabar hoped (too optimistically) that Soviet Russia would eventually «normalise» ideologically.<sup>1</sup> Therefore, Hrabar was eager to play down the ideological idiosyncrasy of the Soviet concept of international law as represented by Korovin. In Hrabar's reading of Korovin, there seems to have been some wishful thinking – or hoping – that eventually everything was going to be «normal». In any case, in approach, language and conclusions, Hrabar's article could not be distinguished from non-Marxist «bourgeois» scholars' works of the same time. He did not criticise Korovin in an endangering way, from a power position – as another influential Soviet lawyer of that period, Yevgeni B. Pashukanis (1891-1937), had done. Instead, Hrabar insisted on the unity of international law in a time of conflicting ideological divisions.

It was clear that under Stalin's reign such independent thinking was not going to be tolerated much longer. In the 1930s-1940s, the only original Soviet works published on international law were those zealously in the service of Soviet official ideology – and Hrabar was not among their authors. This is quite a significant fact. During the Soviet period, Hrabar never published anything that would have been in complete discordance with the ideas that he had expressed before 1917. In the Soviet textbook of international law, written by a group of authors and published in 1947, the part co-authored by Hrabar – on the history of the law of nations – was a relatively neutral and, as usual, very erudite piece. It was a well-balanced ray of scholarly light in an otherwise ideologically overcharged propagandistic textbook<sup>2</sup>. (For example, the last chapter of the book was entitled «The Struggle of the USSR for Peace»). Most of the chapter written by Hrabar would also have well suited any leading «bourgeois» textbook on the history of international law, while the rest of the book could be very easily distinguished in both style and content from its Western counterparts.

#### Conclusion. Advancing International Law as the Politics of Vladimir Hrabar

Hrabar's politics of international law was international law itself – its progressive development and its justification. In a time when so many used the history to legitimise their respective Empires and nation States, Hrabar used the history to legitimise international law. In Hrabar's works, international law was everywhere – in the Middle Ages, in the works of glossators and post-glossators, in post-Reformation England. It only needed to be found and brought to light. Surely no maleficent World War could endanger such a historical phenomenon as international law!

Hrabar's vision of international law was 'idealistic'. He chose to be a cosmopolitan defender of the objectivity of international law, even against the propagandistic interests of his own nation State (the Martens case). At the same time, his

<sup>1</sup> See e.g. pp. 194-195 where Hrabar insisted that all "abnormal" behaviour of the Soviet State belonged to the past.

<sup>2</sup> V. Durdenevski and S. Krylov (eds.), *Mezhdunarodnoe pravo*, Moscow: Iur'idicheskoe izdatel'stvo ministerstva iustitsii SSSR, 1947.

international law was 'realistic'. He recommended making international law more relevant and abandoning too rigid interpretations of the principle of the equality of States. In skilfully combining idealism and realism, Hrabar was a true representative of the «moderns» in international law scholarship.

He was also a successful survivor. He was probably the only international law scholar in Russia who was able to continue to work in the field of international law even after the 1917 Communist October revolution – and at the same time not actively writing «in the new way». However, what seems most important about his survival is not simply the fact itself but that at the same time he was able to maintain his principles. He never started to write in the «true Communist spirit» and his wife even continued to exchange greeting cards annually with his closest friends on the name day of Tsar Nicholas II<sup>1</sup>. Taking into account how the Soviet State «liquidated» its own leading international law voices (Pashukanis in 1937), Hrabar's survival is significant.

Since Hrabar was the only «imported» professor among the internationalists holding the chair, he seemed to have less academic and political interest in the Baltic situation. In local ethno-political struggles, he played the role of a liberal balancer between Russia's interests and local ethnic groups.

Of the university's five international law professors, Hrabar probably came closest to the ideal of an independent international law professor, capable of speaking the truth to those in power. At least this is true of Hrabar during the Tsarist period. He publicly criticised the Russian *Kronjurist* Martens for his lack of scientific integrity. In the service of the Tsarist Russian army during the First World War, he took issue with the war crimes committed by the Russians as well as those committed by the German army (and was ultimately fired for this lack of partiality). In several publications, he tried to rectify the injustice which his predecessor at the international law chair had suffered – while Bergbohm had been dismissed not because he was not qualified but because his politics were 'wrong' (not for valid «legal» reasons but for «political» ones)<sup>2</sup>.

Never has belief in international law been bigger than when Hrabar wrote in March 1917 that there were all reasons to remain optimistic about the future of international law. He believed that the significance of the First World War and in particular the 1917 Russian revolution lay in the creation of a new, better international law. But peace based on a new international law proved illusionary, and 1917/1918 just signified a milestone in the chain of conflicts that some historians later started to call the «European Civil War» (1914-1918, 1939-1945).

In Hrabar's experience, encounters with international law in State practice turned out to be frustrating. States only wanted to talk about international law when it seemed useful to them Hrabar's carefully drafted protest against the liqui-

<sup>1</sup> Interview with Liidia Uustal, April 2005.

<sup>2</sup> See especially Hrabar's account on Bergbohm in G.V. Levitski (ed.) *Biograficheski slovar professorov i prepodovatelei Imperatorskogo Iur'evskogo, byvshego Derptskego Universiteta*, Iur'ev: Matiesen, 1902, p. 633.

dation of the Russian university at Iur'ev, based on arguments of international law, did not make much of a difference in the outcome – the Germans treated it as just another moralistic «scrap of paper». Nevertheless, Hrabar personified the professional belief that even when international law was gravely violated, it continued to be out there. The task of the international lawyer was to speak law to those in power. And when those in power had gone mad and true international law was suppressed, one had to wait patiently in one's apartment near 'Park Kultury' metro station and study the history of international law the way the way a believer in an anti-religious or otherwise intolerant society would keep reading old religious texts and waiting for Messiah. (*«But we do not need to worry about the future»*, 1917.)

In terms of the development of positivist concept of international law, Hrabar brought it skilfully to a new level of sophistication. For example, he managed to neutralise a most political question – what should be the relative power of small States vis-à-vis Great Powers – with the amazing argument that «law had to be close to the facts». Yet generally, his valve for regulating positivist claim of separation of law from politics was cosmopolitan humanism. Most likely, Hrabar simply postulated that Great Powers were the most stable guarantors of humanity.