

## BETWEEN COORDINATION AND CONSTITUTION: INTERNATIONAL LAW AS A GERMAN DISCIPLINE

**Martti Koskenniemi\***

I want to argue here not only that there is a specifically “German” heritage to international law but that in view of its history and its problems, international law is a “German discipline” in a way that it cannot be said to be “French”, “British” or indeed an “American” discipline. Most people accept that international law is a *European* political vocabulary. Its historical links with European diplomacy and the early modern European states-system, its role in supporting and directing colonization, and the basis of its conceptual apparatus in Roman Law, among others, make it an aspect of European political culture. Its claim to universality is no different from the claim of universality made by other aspects of European life – shaking hands when meeting, for example. But I want to argue that when focus is on the contexts where its principal doctrines have emerged, international law will appear to give articulation to a series of specifically German experiences and pursuits. Moreover, it seems to do this many times over, that over again it is *German* lawyers and political thinkers – I mean “German” widely, including Swiss and Austrian German-speakers – have given international problems a *legal* coloration and developed it with the greatest sense of urgency and technical skill. We could put this the other way around: if we were to subtract from international law the contribution by all English, French or American lawyers, we would still have a body of rules and institutions that we

would without difficulty recognize the “same” law that we now have. But we could not deduce the contribution by German lawyers without ending up with something with only the faintest resemblance to what we are accustomed to calling international law.

The point is not to identify some “German” essence in international law. German behaviour in the Wilhelminian and Nazi periods demonstrates well enough German readiness to renounce in practice what tradition has produced in doctrine. The fact remains, however, that German professors, philosophers and other actors have historically played a central role in the development of the concepts and categories of international law and that this has in one way or another reflected their experience as German lawyers and intellectuals, participating in German debates that have often had the identity of “Germany” as their focus. To make that point I will examine four historical moments that have been important in forming what we know as international law: 1) the emergence of natural law as a language of secular statecraft in the 17<sup>th</sup> century; 2) the conceptualization of diplomacy as the administration of European public law in the 18<sup>th</sup> century; 3) the rise of a social-liberal notion of international law at the end of the 19<sup>th</sup> and 4) the laying out of the stakes of cosmopolitan legal modernity between in the 20<sup>th</sup> century. I will end with a few reflections on international law in the Federal Republic and the re-united Germany, a leading member of the European Union. Although it is still possible to speak of a German approach to contemporary international law, that approach is predominantly inspired by products of its earlier creativity. It is uncertain if it will have a global influence to match the intellectual power of those earlier moments.

### **Natural law as secular statecraft: Samuel Pufendorf and the enigma of the German *Reich***

Westphalia was a diplomatic event of quite a bit of pomp. But it did not start modern international law. That began from the debates of lawyers, historians and polymaths at German universities towards the middle of the 17<sup>th</sup> century on the nature of the Holy Roman Empire of the German Nation. As Hermann Conring (1606–1681) wrote his *New Discourse on the Roman-German Emperor* in 1642, some still thought of the empire in theological terms as the last of the four

world monarchies whose disappearance would signify the end of the world.<sup>1</sup> Others agreed with Jean Bodin (1530–1596) who had described the *Reich* in Aristotelian language as an aristocracy in which authority belonged to the estates while emperor was merely “the first and chief person”.<sup>2</sup> But was Germany at all a state – or instead a conglomerate of relatively independent sovereigns? Were the haphazard collection of fundamental laws, capitulations and coronation oaths really a “constitution” or rather a series of agreements between de facto sovereigns? These are questions anxious students of the UN Charter or the WTO dispute settlement system continue to ask today.

For Conring, there was no difficulty about the matter: the four monarchies were pure myth and the translation theory (that Roman law had been “translated” into the law of a Germany by the 12<sup>th</sup> century emperor Lothar III) had no historical support whatever. The Holy Roman Empire of the German Nation did not “continue” Rome but was what it was owing to historical facts, the use of power and the attainment of a pragmatic balance between the Emperor and the imperial estates.<sup>3</sup> Intervening some years later under the pseudonym of Severinus Monzambano, and adopting Conring’s historical perspective on the matter, Samuel Pufendorf (1632–1694) famously qualified that entity as *irregulare aliquod corpus et (tantum non) monstro simile* – as a monster. Realistically speaking – and this was Pufendorf’s voice – the *Reich* was neither monarchy, aristocracy nor “polity” (democracy) but a historically specific, composite form of public power – *civitas composita* – a system of sovereigns that nonetheless constituted a whole.<sup>4</sup> Law, instead of theology or philosophy, provided the framework for explaining the fragments as “Germany”. And “law” would be what rational conclusions had produced out of the search for security and welfare.

Five years later, with his *De jure naturae et gentium* of 1672 Pufendorf extended his analysis from the situation of the empire to the political world at large. In so doing, he provided a naturalist language to speak about European statehood and the relations between European States that would replace the Protestant Aristotelianism that had formed the political vernacular of *ancien régime* universities.<sup>5</sup> Enlightened self-love would heretofore explain legal obligation for the rational egoists Pufendorf saw establish themselves all around Europe.<sup>6</sup> Because humans were weak, they could realise their self-love only by entering into cooperation. Pufendorf achieved in legal theory what

Adam Smith would later do for economics: sovereignty and balance of power as the public law equivalents to private ownership and the invisible hand.

Natural law grounded the science of wise government. "Let the welfare of the people be the supreme law", Pufendorf wrote<sup>7</sup>, and lay out a logic of government under which the sovereign would be both completely free and completely bound at the same time: free to choose any course of action necessary for the protection of citizens and provision of their welfare – but also bound by the very definition of "sovereignty" to do precisely that. He "cannot by right order more things than are consistent with, or are judged to be consistent with, the end for which civil society was instituted"<sup>8</sup>. The same principles of *socialitas* applied to the prince's behaviour in the world outside as to the world inside his realm.<sup>9</sup> In this way, the argument from self-love and weakness gave a realistic portrayal of Europe as a system of egoistic but interdependent sovereigns whose interest was to co-operate, not to fight. If treaties were binding – and they *were* binding – this was because they only laid out what was anyway commanded by natural law, namely to provide for the security and welfare of the nation. Making treaties was also a test of one's trustworthiness; and without trustworthiness, no profitable transactions could be concluded.<sup>10</sup>

The language of natural law and sociability provided eighteenth century lawyers a frame through which to understand State power in normative terms. Here was a first system of international law, autonomous from religion and civil law, a realistic snapshot of the world of European statehood. The law of nations was the law of the Holy Roman Empire of the German Nation, writ large. Nowhere else than in Germany had lawyers been trained to square the circle of independent statehood within an overriding legal order. On the one side, there was the relationship between the Empire and the imperial estates – on the other, international law and European States claiming full sovereignty. The structural homology could not pass unnoticed. These men were not modest about what they were doing. They did not think they had invented the *jus publicum universale*, a general theory of statehood, for nothing.<sup>11</sup> The only problem was – well, it had very little to say about how to go about using the power of the State to which they had just provided a justification. What would it mean for rational egoists to co-operate with each other in the conditions of a Europe constituted of more or less absolutist governments? Pufendorf

had no theory of legislation beyond a call for the ruler to rule wisely.<sup>12</sup> Subsequent German lawyers were uncertain about the relative emphasis on natural law and positive law. But quite uniformly they saw the two as intimately linked. The more firmly established the natural basis of the system, the less need was felt to speculate about it and the more lawyers could elaborate the laws and practices through a technique that was properly theirs.

### European public law in the 18<sup>th</sup> century: Georg Friedrich von Martens

This was the second grounding of international law – also a German moment. Through the work of Pufendorf’s student and follower, Christian Thomasiaus (1655–1728), natural law became increasingly involved in the activity of the absolutist state and the studies of wise policy that he pushed into German universities gradually developed into a first *Staatswissenschaft*. The new University of Göttingen, filled with the pragmatic spirit of the early enlightenment, established in 1734 a law faculty specifically oriented to historical and empirical studies.<sup>13</sup> Lawyers such as Johann Stephan Pütter (1725–1807) and Gottfried Achenwall (1719–1772) re-imagined natural law as a scientific study of modern government. Their 1750 textbook *Elementa juris naturae* laid out the principles of *ius publicum universale*, and *ius gentium uniuersale*.<sup>14</sup> We have come to know the former as the specifically German discipline of *Allgemeines Staatsrecht*, (elsewhere as public law), the latter as *Droit des gens*, *Völkerrecht* and our international law. According to the *Elementa*, each people (*gens*) had the right to lead its life in search of its own perfection and happiness – preservation of territory, subjects, and its form of government.<sup>15</sup> Violations gave rise to a duty of reparation, ultimately enforceable by war. *Notrecht* applied in exceptional cases.<sup>16</sup> The *Elementa* provided a philosophical foundation to the *ancien regime*, legitimising and rationalising the government of absolutist states by offering “scientific” maxims of human conduct. And it foregrounded a theory of legislative will that suggested the practical predominance of (positive) law in the government of particular states.

The most important international lawyer to emerge from Göttingen was a student of Pütter and Achenwall, Georg Friedrich

von Martens (1756–1821).<sup>17</sup> Martens' own textbook, *Primae lineae juris gentium Europaearum Practici in usum auditorum adumbratae* came to be known all over Europe in its French and German versions; it was even translated into English in 1795 at the request of the United States government.<sup>18</sup> This was the first handbook on the practices of European nations, written in a legal idiom, meant to teach diplomats and State officials on European public law. Its notion of law was that of a technical craft at the service of European sovereigns. Martens taught this in practical exercises twice a week from 1783 to 1808 in what became something like a Europe-wide diplomatic academy to which even King George of England (as the Elector of Braunschweig-Lüneburg and later of Hanover) sent his Crown princes. Martens also compiled over the years the legal sources that other lawyers could then use to pursue their interpretative and systematic studies. These ended up as the *Recueil de Traités*<sup>19</sup> – the single most important collection of treaties, declarations and other international acts that began publication in 1791 and continued after Martens' death, so that by 1944, when its publication ended, the total number of volumes in five series rose up to 126.<sup>20</sup>

It may be hard to say what a legal system is. But at least it is something imagined and operated by lawyers. After Martens, it was possible for legal minds to point to treaties and de facto practices of European diplomacy as evidence of the workings of a legal system – the “Public Law of Europe”.<sup>21</sup> True, there was no single treaty that would work as a European constitution – and as Martens himself presciently noted, there will probably never be one.<sup>22</sup> But the practices of European nations still converged so that it was possible to speak of a practical and a positive European international law.<sup>23</sup> It was this law he taught at his lectures and his practical exercises during his quarter-century in Göttingen.

For Martens, international law was an effect of European statehood, especially the will of European states. Each of them was a “moral person”, set up by its people seeking to escape the state of nature. He writes, “...a people thus have the same rights to claim and the same duties to observe that exist between individuals in the state of nature”.<sup>24</sup> Although most of the law consisted of treaties and customs, it followed from the natural independence and equality of nations that each was entitled to form its own view on how to interpret those. And in case of alleged violation – well, it was up to each

State to decide whether such wrong was present and what to do about it.<sup>25</sup>

It is by collecting these principles – he wrote – especially from the practices by the Great powers of Europe either in particular treaties, express or tacit, uniform or similar or from usages of the same kind, from which one forms, by abstraction, a theory of international law of Europe, a theory that is general, positive, modern and practical.<sup>26</sup>

An optimistic teleology underlay Martens' text. The practices that he describes reflected "the progress of the human spirit." Of course, enlightenment was not complete. One could see problems for example in the *Declaration de droit des gens* discussed by the French *Assemblée nationale* during 1792 and 1793. Martens completely rejected the revolutionary abstractions put forward in that document. Fortunately, a pragmatic spirit had been emerging more recently so that in administering the law today, he writes, "it is less principles of abstract theory than circumstances of the moment that determine how the hazards of the war are terminated."<sup>27</sup> Reflecting back on the Napoleonic years in the 1820/1858 edition of his work he commented:

It is very fortunate to see that Europe, after having thrown away the yoke that oppressed her, has not returned to the principles that preceded this epoch, without rejecting the modifications that the progress of enlightenment may have made to seem desirable.<sup>28</sup>

### **The social concept of international law: from Bluntschli to Jellinek**

Martens' textbook remained the most authoritative treatment of modern international law until the 1860s.<sup>29</sup> It was so owing to its practical orientation, its fruitful – if conservative – alignment with the Vienna system and the powerful didactic message of its structure. This was no coincidence – Martens had been Hannover's representative at the Congress of Vienna. But for the new liberal spirit that was emerging in the 1860s and 1870s his law was decidedly old-fashioned, even reactionary. The post-1848 generation did not feel it needed annotated lists of treaties between Great Powers but a *social law*, a law in tune with the progress of European civilization and the lives of European

peoples. A third founding of international law took place in Ghent, Belgium, on 8 September 1873. Again, the Germans – or German-speakers – took the centre stage.

This took place with the establishment of the *Institut de droit international*, the first professional association of international lawyers, conceived (in its statute) as “the juridical conscience of civilized nations.”<sup>30</sup> The language of “conscience” and “civilization” came from the pen of the Swiss Johann Caspar Bluntschli (1808–1881), a leading representative of the codification movement who had produced a still today well regarded text of the civil law of his native Zurich. Owing to his liberal views, he had had to flee from Switzerland, and had since taken Pufendorf’s old chair at Heidelberg. Bluntschli was a liberal activist who wanted to set up a law beyond the formal treaties and negotiations between Great Powers. This would have to reach deeper into the modernising spirit of Europe – a spirit he, together with his colleagues, associated with Protestantism.<sup>31</sup> An active participant in the *Kulturkampf*, he would become a founder, an active member and eventually the president of a body of internationalists who sought to harmonise liberal legislation in Europe and through codification create a common law for Europe and a project of civilization for the rest of the world.

The idea for an organization of international lawyers to advance the cause of liberal reform in Europe had been suggested to Bluntschli by Francis Lieber (1800–1872) from the United States, the drafter of the famous “Lieber Code” for the Union Army in the US Civil War.<sup>32</sup> Lieber was a German-born adventurer who had been compelled to leave Europe owing to his participation in revolutionary activities in Prussia. The substance of the legal ideas of these men is best gleaned in Bluntschli’s textbook *Das moderne Völkerrecht der civilisirten Staten: als Rechtsbuch dargestellt* the first edition of which came out in 1866. This was the first codification of the whole of international law – drafted in the manner analogous to the way national laws had been codified all over Europe. It was also the first international law treatise that contained a theory of fundamental human rights of all peoples as part of a universal code.<sup>33</sup> Bluntschli had been trained in Savigny’s historical school and although he knew the limits of the historical approach he thought that international law had until then been excessively geared in a rationalist direction and that it was high time to import Savigny’s lessons to the international level.<sup>34</sup> This meant founding the law on the

histories of peoples, on ideas of enlightenment and progress which included Protestantism, a free economy, a liberal criminal law, a well-advanced system of social protection and the civilization of the colonies. Through scientific codification, he believed, one could grasp the real needs and interests of the populations.

Bluntschli and his colleagues were neither legal theorists nor representatives of a sociological jurisprudence. The time of Durkheim, Weber and the solidarist movement lay still ahead. They were arm-chair liberals who took the progress of European societies for granted, felt that they could intuitively grasp its direction, turn it to legal texts, and propagate these texts all over Europe. They did not ask jurisprudential questions such as "how could a binding law among sovereigns be possible".<sup>35</sup> But their colleagues in the law faculties and the legal departments of governments needed some response to that question. After all, the latter had been in the habit of dismissing Bluntschli and his international law friends as mere "*littérateures*".

The response to that query – a response to which international lawyers have come over again – was provided by the Austrian Jewish intellectual and public law expert Georg Jellinek (1856–1911), later a professor at Heidelberg and a friend of Max Weber's, the person from whom Weber received the expression of the "ideal-type".<sup>36</sup> To explain how law could be binding on sovereign States Jellinek's developed the *Selbstverpflichtungslehre*, an ingenious combination of legal voluntarism and sociological jurisprudence – an argument to which the whole of the subsequent theoretical discussion on the matter appears as hardly more than a footnote. Like all law, Jellinek wrote, international law was based on the will of the State. It was not a moral utopia but a concrete reflection of the interests of political communities.<sup>37</sup> But how can a will bind itself? In his response, Jellinek had recourse to what Leonard Krieger has instructed us to call a German theory of freedom.<sup>38</sup> A will can and should limit itself because its freedom cannot be realised in a state of pure arbitrariness. A truly free will binds itself to what is reasonable, taking into account its own goals and what it knows of itself. To go by what one happens to "feel like" is not to be free but to be bound by desire. In this way, a truly sovereign will, the will of a State cannot will just whatever it (or its leaders) may happen to desire at any moment. Instead, it looks to the conditions in which the community of which it is a part lives – *Natur der Lebensverhältnisse*.<sup>39</sup> It orients – and should orient – itself by reference

## BETWEEN COORDINATION AND CONSTITUTION...

to its social environment. This is Jellinek's famous "*normative Kraft des Faktischen*" – the normative power of facts.<sup>40</sup> With this, Jellinek was able to turn to his colleagues and say – look here, this is no different from other types of law. International law emerges from State will just like all other law and if it has no coercive system to back it up, nor has constitutional law. It is binding because the State bureaucracies and citizens, indeed the social life of the State is dependent on the kinds of expectations and directives it sustains.

The idea of self-limitation as the basis of the State's being bound was then endorsed in the first case of the first international tribunal, the *Wimbledon* in the Permanent Court of International Justice (PCIJ) in 1923. This had to do with the question of whether Germany was bound by the provisions on the Versailles Peace Treaty that left the Kiel Canal free for international navigation. Germany argued that as a sovereign over the Canal (something that was not disputed), it must be entitled to control traffic in the Canal. The Court rejected this view. Germany was both sovereign and bound at the same time. For, it explained, that a State is bound by its treaties is not an *encroachment* on but an *effect* of its sovereignty. To renounce "sovereign rights" – as Germany had done in the Versailles Treaty – was not to give up "sovereignty" but to realize it in a particular situation. The passage is worth quoting in extenso:

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.<sup>41</sup>

Jellinek's *Selbstoerpflichtungslehre* provided the way to square the circle of how States could be both free and sovereign as well as bound by their engagements. This provides not only the continuing theoretical foundation of international law. It allows European politicians today to affirm their loyalty to the European Union while still celebrating the sovereignty of their States. However much decision-making power has been transferred to Brussels, member States still remain sovereign because, after all, that transfer had been freely chosen in their capitals. The paradoxical character of this doctrine became

evident in the 1933 case concerning the effort to create a customs union between Germany and Austria that the allies feared would unduly expand German influence in Europe. The allies took Austria to the PCIJ claiming that the plan violated Austria's obligations under the Treaty of St. Germain of 1919 and the related Geneva Protocol of 1922 in which it had agreed "not to alienate its independence" by economic or other means. The allies argued that the union would unduly limit Austria's freedom of action. Austria responded predictably that if it were unable to negotiate economic arrangements then it could not be really independent at all.<sup>42</sup> The case raised the awkward issue of whether "sovereignty" also meant full freedom to negotiate treaties – including treaties that would perhaps permanently limit the freedom of operation of the State. In the EU, European politicians have given an affirmative answer this question (though perhaps with crossed fingers behind their backs). Can a sovereign really be able to alienate its sovereignty in a permanent way? The paradox repeats little boys' quarrel over whether God's omnipotence might mean that He is able to create a stone so heavy that He Himself could not lift it up.<sup>43</sup>

### **Laying out the stakes of cosmopolitan modernity in the 20<sup>th</sup> century**

With Bluntschli and Jellinek, international law was founded for the third time on ideas about liberal progress and social factuality, social engineering and the humanist spirit of yesterday's European law schools, a gentle, civilizing spirit. The First World War put an end to all this. It was no longer possible to continue on the basis of the amateurish optimism of the pre-war liberals. At the moment of international law's fourth establishment, the waves of debate flowed highest in Germany where the political contradictions about the League Nations, about binding force of the Versailles Treaty, about reparations and security immediately took a legal form. Everyone remembered the "German problem" at the Hague Peace conference in 1899 – the anti-pacifist diatribes of Baron von Stengel and the technically impeccable but politically ambivalent prevarications of Philipp von Zorn.<sup>44</sup> Between liberal idealism and *Machtpolitik* – was there room for law?<sup>45</sup>

It turned out there would be a fascinating combination of legal technicism and metaphysics, a succession of professional doctrines about the place of international law in the domestic system, accompanied by existential questions about the ideals and the concrete order represented by the profession. How did national laws relate to international law? Heinrich Triepel's (1868–1946) *Landesrecht und Völkerrecht* from 1899 provided a professionally attractive theory of dualism to respond to that very practical question.<sup>46</sup> As legal orders, the national and the international would be in principle separate; but they would communicate by translating the norms of one into the language of the other. The principled response respected the practice in most countries, the incorporation of treaties into domestic law as a condition of their applicability in domestic courts.<sup>47</sup> Moreover, Triepel wrote, treaties did not emerge into or represent any single, unified, cosmopolitan will – just as there was no ideologically homogeneous international community, either. They were simply acts of State policy – coordinating instruments between rational egoists. Not all jurists have used Triepel's language, but most have accepted its basic premise, namely that international law does not automatically fuse states together into some “world community” but coordinates their action for their advancement of their irreducibly separate interests.

The inevitable conclusion from this was drawn in 1911 by the brilliant anti-Kantian legal theorist and legal advisor at the German Foreign Ministry, Erich Kaufmann (1880–1972). All international norms, he wrote, were conditioned by the *rebus sic stantibus* principle. If circumstances change, treaties lapse.<sup>48</sup> There was nothing new in this. What was new was the *force* with which Kaufmann argued his case. Against Stammler and Kantian idealists he retorted that unlike national law, international law did not carry any social ideals. It was weak and fragile, lacking the weight of history and incapable of bearing any emotive association. It was too much just a play of a liberal imagination – logic perhaps, but no life. When Kauffmann wrote that war was the ultimate test of the law, he was employing the old Wilhelminian vocabulary of strength as the measure of things of importance. Significantly, this did not prevent him from being employed as Germany's legal counsel in cases before the Hague Court and the German-Polish negotiations.

On the opposite (left) side to Triepel, Kauffmann and others stood the potent legal imagination developed in Vienna, Prague and

Cologne by the Austrian social-democrat, father of the inter-war Austrian constitution, Hans Kelsen (1881–1973). Can the achievements of the “Vienna circle” be really qualified as part of the “German tradition?” Yes indeed. Kelsen had been Jellinek’s student in Heidelberg, but was disillusioned by what he felt was the latter’s naive legal realism. He worked with German materials and most of his antagonists and supporters came from the German public law tradition. The pure theory of law became – and still is – the zero degree of European jurisprudence. This applies to international law as well.<sup>49</sup>

The pure theory was cosmopolitan: domestic laws were dependent on an overriding international legal system. Kelsen accepted, in *Souveränität und die Theorie des Völkerrechts* from 1920, that the choice of this view over its diametric opposite – Triepel’s and Kauffmann’s *Koordinationslehre* – was a political choice.<sup>50</sup> Somewhat surprisingly, this failed to undermine its attractiveness to formalist lawyers inclined to look for the cause of the political problems in Germany or indeed in the world in “sovereignty”. One of Kelsen’s followers, the Viennese Alfred Verdross (1890–1980) laid out the stakes in his *Die Einheit des rechtlichen Weltbildes* – the unity of the legal world-view as the foundation for the (implicit) constitution of the world. Verdross used the pure theory so as to turn what Kelsen saw as political choice into an article of faith in fundamental values.<sup>51</sup> This was the language of Austrian Catholicism that did little to prevent the country’s descent into Nazism. Yet it had a powerful influence on later theorization about the “constitutionalisation of international law”. During the inter-war era, however, German internationalists received no help from the outside; their legal debates could be won or (eventually) lost only in German terms.

For the allies had decided to leave Germany outside the League of Nations. Ironically, though not surprisingly, the first and by far most impressive legal articulation of the nature of the League and of the Covenant as a kind of international constitution came from the Swiss-German pacifist powerhouse consisting of Hans Wehberg (1885–1962) and Walther Schücking, (1875–1935) *Die Satzung des Völkerbundes*. Schücking had been optimistically looking to the allies in his efforts to arrive at a peace agreement that would lay the basis for a democratic Germany.<sup>52</sup> Despite his subsequent disillusionment, he continued his activities by directing an Institute of International Law at Kiel (though he was reputedly never present there), and in his many writings aiming at an institutionally robust notion of an international community on

pacifist-legalist arguments. He became Judge at the Permanent Court of International Justice and was left stranded in The Hague after 1933. His prolific work and support for internationalist colleagues was very visible – but his legal theories were no match to the power of greater thinkers situated on the other side of the German political chasm.<sup>53</sup>

Of course, the League was also subjected to attacks. Carl Schmitt (1888–1985) interpreted it as an instrument of Anglo-American imperialism designed to establish a permanent control over Germany.<sup>54</sup> This was far from an eccentric view and the Allies did little to show him wrong. Schmitt’s international law writings were dressed with a legal and political theory of exceptional power that, as is well-known, continues to live today, among other places, as part of the realist orthodoxy of the US discipline of “international relations” through the erratic writings of its founder, the Frankfurt *Doktor juris*, Hans Morgenthau (1904–1980).<sup>55</sup> The power and influence of inter-war German debates on international law depends to some degree on their meticulous professionalism and their philosophical depth as well as the sense of urgency that those debates continue to transmit to their contemporary readers. But their perhaps most enduring legacy lies in the legal existentialism that fit so well in the professional environment of Weimar jurists and which was transported across the Atlantic to give legitimacy to the new US-led world in the 1950s and 1960s, a legacy represented by such men as Henry Kissinger and Samuel Huntington.

The German inter-war international law community also produced a huge diaspora. One of the most influential international lawyers in Europe in the 1950s and 1960s, and arguably for the most recent post-war era has been Hersch Lauterpacht (1897–1960), a student of Kelsen’s, Professor at the University of Cambridge, an early émigré from the Austro-Hungarian empire, whose main intellectual work consists of an attack on the German realist tradition, *Koordinationsrecht* and the principle of sovereignty.<sup>56</sup> Lauterpacht is the grandfather of present-day European legal idealism, based in Britain, well-versed in German legal theory but committed to revere a Dutchman. “The Grotian Tradition of International Law” – the title of his famous 1950 article – usefully forgets that none of us would have heard of Grotius had there not been a Pufendorf and a Wolff, and a Kant and a whole German tradition of natural law, legalism, *Koordinationsrecht*, *Stufenbau* and all that. US law schools were filled with German refugees – Columbia, Harvard, NYU as well as many other univer-

sities would not have been what they became without the German refugees. These often Jewish lawyers were usually accompanied by a Kelsenian or a more broadly based internationalism that joined technical skill with an ambivalent belief in international institutions, the United Nations and the human rights system in particular, as paths to a better world.<sup>57</sup> But if one looks for influence outside the profession, the legacy of the interwar legal realists – Triepel, Kauffmann, Schmitt, Morgenthau – probably weighs heavier than the mild internationalism to which it stood often in conscious opposition.

### German International law after 1945

What can be said about German international law after 1945? With such a legacy, expectations can perhaps only be failed. The question about the future of international law scholarship in Germany was posed by the Max Planck *Gesellschaft* in the context of the prospective appointment of a new director to the Max Planck Institute for Comparative Public Law and International Law in Heidelberg in 2007. Responses by the principal candidates were published in the leading German international law journal, the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (“Heidelberg Journal of International Law”).<sup>58</sup> They provide, if not exhaustive, at least indicative material for assessing the state and the self-understanding of the discipline in Germany today. One of the contributions concluded, not incorrectly, that Hans “Morgenthau ist wohl das bedeutendste ‘deutsche Exportprodukt’ der Völkerrechtsdoktrin der Nachkriegszeit”.<sup>59</sup> This is probably true, though paradoxical. Morgenthau was after all an *interwar* product and his message was to give up international law in order to set up “international relations” as a field of academic expertise in the United States. His thinking tapped on the resources of an existentialist realism that had also operated among the ideological and emotive factors that accounted for the German disregard of legal and moral constraints in the foreign policy and the wars of the Wilhelminian and Nazi eras.<sup>60</sup> One must surely greet with ambivalence the fact that it is difficult to find from the last 60 years of German international legal literature anything approaching the power of that specific sensibility.

The contributions in the *Zeitschrift* of 2007 agree that German international lawyers have succeeded in becoming largely indistinguish-

able from their Western European colleagues, directing new work in such generally interesting but innocuous international themes as the institutions and the law of the United Nations, the formalization of human rights law, and the strengthening of the law of the European communities and the EU. In each area, they have done what German lawyers nowadays do best. They have interpreted and systematized and thereby supported the law of the UN, the European Human rights system as well as European law as robust structures of international government. But they have not produced striking re-interpretations of the legal world in the manner of their predecessors.

In the immediate post-war years German lawyers in the West concentrated on the pragmatic tasks faced by the new *Bundesregierung* in its efforts to integrate in the European system.<sup>61</sup> Issues of statehood, occupation, sovereignty, and succession were treated in a formal-dogmatic fashion, taking the presence and continuation of an international legal system for granted. Perhaps, in view of Germany's internal chaos, there was great need to imagine a stable outside world. Of course, Carl Schmitt wrote his *Nomos der Erde*, but avoided the vocabulary of *Grossraum*.<sup>62</sup> His anti-universalism had no open influence in the German international law community, however, even as intellectual traffic continued between Berlin and his home at Plettenberg.<sup>63</sup> The *Kaiser-Wilhelm Institut* in Berlin was transformed into the *Max Planck Institut für Völkerrecht und ausländisches öffentliches Recht* and moved to Heidelberg where it has continued to represent the German academic international law at a respectable international level. That its first director was a member of the Nazi Party, Carl Bilfinger, (1870–1958), says something of the limits of the normalising process in those years. In fact, and as Detlev Vagts has discussed in more detail, the German international law community never really addressed its complicity in the Hitler-regime.<sup>64</sup> The immediate past was treated with silence – just like the German international law profession had half a century earlier glossed over German atrocities in its imperial possessions in Africa.<sup>65</sup> Perhaps the most striking denial was written into Wilhelm Grewe's widely read history of international legal "epochs" (that was translated into English in 2000) that never mentioned the Holocaust or the Nazi war crimes (though it did argue that the Nuremberg trials were "legally contestable") and continued the German inter-war legend about maritime blockade and economic warfare as the worst sins in 20<sup>th</sup> century European wars.<sup>66</sup>

From the 1960s to mid-1980s the Federal Republic took its place in the Western alliance and streamlined its legal attitudes with the latter. As the two Germanies were accepted as UN members in 1973 lawyers at the Universities of the FRG had already become known of the technical skill they employed to interpret the UN Charter. The Commentary on the UN Charter edited by Bruno Simma with a large crowd of German internationalists has remained the English-language *Standardwerk* since its first publication in 1995. The sophisticated article by article commentaries therein “work[...] to create an international organization in the image of the sovereign”.<sup>67</sup> German lawyers also wrote enthusiastically on the law of international organizations and the codification of international law. The leading figure became undoubtedly Hermann Mosler (1912–2001), 26 years the director of the Heidelberg Institute (1954–1980), the spiritual father of today’s German international law scholarship. Mosler became the first post-war German judge at the International Court of Justice and his courses at the Hague Academy of International Law spoke of the international world as a *Rechtsgemeinschaft* without much theoretical ballast.<sup>68</sup> His pragmatism could have come from any European lawyer but he epitomises post-war German scholarship by the *gemeinschaftlich* orientation of the work that has served as the basis for the most significant present theme of contemporary German international law, the “constitutionalization of international law”.<sup>69</sup>

In these years, the Federal Republic began to take part in all legal activities of the UN. A new generation of specialists emerged. German activism in the law of the sea was supported by the activities of the Kiel Institute – now renamed the Walther Schücking Institute. Activism was great also in the environmental law and human rights fields. Unlike the Japanese, Germans refrained from pushing the issue of removing the so-called “enemy clauses” from the UN Charter. Why awaken the sleeping dogs? The Germans had anyway proven that they could behave in international contexts as loyal members of the West. A great part of internationalist activity was directed to the interpretation and systematization of human rights and humanitarian law. German law journals devoted increasing space to dogmatic analyses of the case-law of the European Court of Human Rights in Strasbourg, inspired by a no doubt genuine wish to integrate German society ever more deeply in the Western ideological world.

After reunification (1990), the ideological atmosphere of German international law has been summarised in terms of its universalism,

its public law orientation, its attachment to human rights, and its tendency to foreground ethical arguments.<sup>70</sup> Germans have stood up as defenders of the idea of an international legal community ruled by abstract notions such as *jus cogens*, and obligations *erga omnes* and permeated by a liberal ethic of individual rights. They have also been staunch defenders of the (interwar) idea of collective security.<sup>71</sup> The bombing of Belgrade in 1999 raised the question of the relationship between formal legality and substantive legitimacy – and while much of the German legal community engaged in this debate, it did so largely in the vocabulary of Anglo-American political philosophy. German lawyers held the war against Iraq (2003–2006) as illegal and supported an absolute prohibition of torture. They have been critical of the “hegemonic” nature of US international behaviour especially under the Bush regime and have often contrasted this with their own legalism.<sup>72</sup> This can be associated with their unwillingness to address the issue of whether the Iraqi war would have been all right had there only been the Security Council’s blessing or to put forward an alternative receipt for action with respect to the Saddam regime. Like European lawyers in general, the Germans have been more interested in the EU constitutional process than ruling the world.

But German lawyers have also embraced such new topics as democracy and international law, including questions of legitimacy, accountability and transparency of international institutions. Themes of public law and accountable government have been applied to the control of the fluid processes of globalization.<sup>73</sup> The jurisprudence of the German *Bundesverfassungsgericht* in the *Maastricht*, *Lissabon* and other high-profile cases have raised foundational questions: is there an international *Demos* so that it would be possible to speak of an international democracy?<sup>74</sup> In legal method, traditionally a strength in the German academy<sup>75</sup>, part of the lawyers have followed events in the United States legal academy with the effect that there has been “einem gewissen ‘rapprochement’ von international law and international relations”.<sup>76</sup> Among the few recent methodological interventions of German origin, Guenther Teubner and his colleagues have used Niklas Luhmann’s systems theory to discuss the question of the “fragmentation of international law”. Even if the normative impact of systems theory remains ambiguous, there has been no more powerful sociological vocabulary to address the fate of global law today.<sup>77</sup>

## Persistent themes

Is there anything general to be said about the heritage of German thought in international law, any overarching theme that could be abstracted from the historical analysis? Looking for continuity, three themes suggest themselves. One is “*System-denken*”. From 17<sup>th</sup> century natural law to the *Recueil* of Martens, to the many-volume *Handbuch des Völkerrechts* edited by Bluntschli’s collaborator Franz von Holtzendorff in the 1880s, to the *Stufenbaulehre* in Hans Kelsen and from Walther Schücking’s *Satzung des Völkerrechts*, to the UN Charter Commentary by Bruno Simma; from the *Wörterbuch des Völkerrechts* by Karl Strupp to its present-day follow-up *Max Planck Encyclopaedia of Public International Law* – the German vocabulary of international law is the vocabulary of system.<sup>78</sup> There is no dearth of German international lawyers lamenting the lack of systematicity of international law, nor of German projects trying to remedy that lack. This is one of the reasons for the prominence of “constitutionalization” today. The massive Frankfurt-based project of “Normative Orders” is a palpable illustration of present German concerns and priorities.

Another way to organise a system is through historiography. German lawyers have always had the keenest interest in the history of their craft. The work of Wilhelm Grewe and Karl-Heinz Ziegler has been in the *Machtpolitik* and diplomatic history tradition that takes its roots from the 19<sup>th</sup> century.<sup>79</sup> Ernst Reibstein and Wolfgang Preiser wrote their histories in a more *geistesgeschichtlich* vein.<sup>80</sup> Perhaps the most significant scholarly project in the field of the history of international law anywhere in the world has been carried out through a series of PhD works and other studies at the Max Planck Institute for legal history in Frankfurt under the guidance of the formidable Michael Stolleis.<sup>81</sup> Quite appropriately, the *Journal of International Legal History* today finds its editorial office in Heidelberg.

A second unifying theme, already referred to, consists in an understanding of international law in public law terms. This was once developed as a mixture of *jus publicum universale* and *jus gentium universale* as well as through the *Droit public de l’Europe* that von Martens taught in Göttingen in practical lessons for aspiring diplomats from all over Europe. In the 19<sup>th</sup> century it was manifested in the contribution of Wilhelminian public law to international themes such as the *Selbstverpflichtungslehre* and the debates on monism and dualism.

Today it is present in the continuing articulation of international law in constitutional law terms. It may be useful to note that there is still just one chair devoted only to international law in Germany – in Munich. All the rest are chairs of international law and public/constitutional law. The academic tradition of teaching international law in connection with public law explains and keeps alive the concern for the constitutional and administrative law implications of the work of international institutions, for example.<sup>82</sup> Thus, German lawyers read treaties not as contracts but as laws. Their interpretative horizon is given not by rational action but a view of the international world as a *Rechtsgemeinschaft*. From Leibniz to Kant, from Bluntschli to Schücking, Kelsen's Pure Theory of Law and Verdross' "*Universelles Völkerrecht*" all the way to present-day projects at the Max Planck Institute in Heidelberg on *Konstitutionalisierung* and governance, German lawyers continue to debate international problems by assuming that they take place within a "legal system" that can be articulated through the vocabularies of public law and the constitution.<sup>83</sup> One aspect of this is the absence of a "political questions doctrine" in the German *Bundesverfassungsgericht*. The Court can and does discuss the legality of important foreign and security policy problems such as the participation by Germany in international military operations without any sense of inappropriateness. The most impressive doctrinal formulation of this type of judicial activism in terms of the jurisprudential position of the completeness of the legal system has come from Lauterpacht whose *The Function of Law in the International Community* of 1933 remains the most influential offspring of *System-Denken* and public law in the Anglo-American world.<sup>84</sup>

The third overriding theme consists of the constant interventions by German philosophy and philosophers in international law. Pufendorf, Leibniz, Wolff, Kant, Hegel all felt they had to say something about international law as well. Neo-Kantians did that all the time at the beginning of the 20<sup>th</sup> century. Kauffmann, Schmitt and Kelsen were completely indebted to the legacy of 19<sup>th</sup> and early 20<sup>th</sup> century German philosophy. Today, Jürgen Habermas not only intervenes occasionally in international law debates but cooperates with the Heidelberg institute and publishes essays on such international law topics as "*Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*" (Is the constitutionalization of international law still possible?).<sup>85</sup> His contributions are welcomed and discussed within the profession owing to

the persistent sense in Germany that international law problems are also philosophical ones, that problems of international legality have their roots in or at least cannot be resolved without engagement in philosophical conundrums regarding for example voluntarism and rationalism, formalism and realism, *Gemeinschaft* and *Gesellschaft*. In their many permutations, such dichotomies continue to receive articulation in contemporary German international law as well.

\*\*\*\*\*

But German international law in the 21<sup>st</sup> century is not comparable to what it was in 1648, 1815, 1873, or 1920. Something about its innovative, even radical spirit has gone with its integration as part of the Western legal world. The themes treated and the ideological and jurisprudential perspectives taken by Germans are usually indistinguishable from those discussed elsewhere in Europe – though stress on constitutionalization and a certain bias for “legalism” (a difficult word, no sense of naïveté is necessarily involved) do give German scholarship a tenor of its own. With few exceptions (Luhmann and Teubner, some of the “older” Habermas), theoretical debate is usually waged in the more conservative idioms learned from Anglo-American debates: democracy, legitimacy, accountability, individual rights and occasional recourse to “international relations”-inspired compliance study. This orientation reflects the hegemony (to put it no stronger) of Anglo-American academic culture, as adapted into the generally conservative outlook of the German law faculty. Owing to the latter feature, postcolonial or feminist approaches have, however, received practically no hearing. The themes of “continental philosophy” are occasionally debated but have so far failed to have an appreciable effect on legal culture – perhaps because they have a reputation for obscurity and for being unhelpful for professional analyses of rules and institutions. On the other hand, the debates on constitutionalization and fragmentation allow some room for employing the rich heritage of public law and to manifest “Habermasian” social-democratic ideals that push towards strengthening international institutions and keeping rule of law concerns and human rights on the agenda. No doubt Kant and Weber, though rarely read with much sense of complexity, continue to provide inspiration. But even as those texts emerge

from German experiences, they have been today integrated as part of Western political and legal traditions so that engagement with them can hardly be understood as engagement with anything specifically “German”.

## NOTES

\* Professor of International Law, University of Helsinki. This paper was first given as a keynote at the Conference on “Old Europe, New Orders: Post-1945 German Thought on War, Peace, and International Law” at the University of Indiana in March 2009. I thank William Scheuerman and William Rasch for the invitation and for the exceptionally interesting conversations.

### Abbreviations:

EJIL = *European Journal of International Law*

ZaÖRV = *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht*

1. See e.g. Hanns Gross, *Empire and Sovereignty. A History of the Public Law Literature in the Holy Roman Empire* (University of Chicago Press 1973), 88–96; Constantin Fasolt, *The Limits of History* (University of Chicago Press 2004), 18–19.

2. Jean Bodin, *On Sovereignty* (J. Franklin ed., Cambridge University Press, 1992 [1583]), 114.

3. Hermann Conring, *New Discourse on the Roman-German Emperor* (C. Fasolt, ed. & transl. Tempe, Arizona Center for Medieval and Renaissance Studies 2005), 74–79.

4. Samuel Pufendorf, “Severinus de Monzambano Veronese de Statu Imperii germanici ad Laelium Fratrem, Dominum Trezolani,” *Liber unum – Über die Verfassung des Deutschen Reiches*, tr. H. Bresslau, (Berlin: Hobbing, 1922), Ch VI, § 9. For the English text, see now Samuel Pufendorf, *The Present State of Germany* (ed. & intr. By M.J. Seidl, Indianapolis, Liberty Fund 2007), 176–177. For a discussion, see Peter Schröder, “The Constitution of the Holy Roman Empire after 1648: Samuel Pufendorf’s Assessment in his Monzambano,” 42 *The Historical Journal* (1999), 961–983.

5. See, e.g., Horst Dreitzel, “Reason of State and the Crisis of Political Aristotelianism: An Essay in 17<sup>th</sup> Century Political Philosophy,” 28 *History of European Ideas* (2002), 163–187.

6. Samuel Pufendorf, *On the Law of Nature and Nations (De jure naturae et gentium libri octo, 1688)*, tr. C.H. and W.A. Oldfather, 2 Volumes (Oxford: Oxford University Press, 1934), Bk. II Ch. III § 14, 205–207.

7. Pufendorf, *On the Law of Nature and Nations*, Bk. VII, Ch 9 §3, 1118.

8. Pufendorf, *On the Law of Nature and Nations*, Bk. VII, Ch 2 §11, 980.

9. Simone Goyard-Fabre, *Samuel Pufendorf et le droit naturel* (Paris: PUF, 1994), 207.

10. Pufendorf, *On the Law of Nature and Nations*, Bk VIII, Ch. 9, 1329–1341. See also the discussion of the keeping of “pacts” in the natural state, which is also that of the international world, in Bk VII, Ch 1 §9, 963–4.

11. See briefly, Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band 1600–1800* (Munich, Beck, 1988), 291–297.

12. This is the gist of the critique in Leonard Krieger, *The Politics of Discretion. Pufendorf and the Acceptance of Natural Law* (University of Chicago Press 1965).

13. For a recent overview of international law teaching in Göttingen, see José Martínez and Florian Prill, “Geschichte der Völkerrechtsforschung und -lehre an der Georg-August-Universität Göttingen,” in Christian Calliess, Georg Nolte, and Peter-Tobias Stoll, eds., *Von der Diplomatie zum kodifizierten Völkerrecht: 75 Jahre Institut für Völkerrecht der Universität Göttingen 1930–2005* (Köln: Heymanns, 2006), 51–67; see also Stolleis, *Geschichte I*, 308–316.
14. Gottfried Achenwall and Johann Stephan Pütter, *Anfangsgründe des Naturrechts (Elementa juris naturae)* Jan Schröder, ed., (Frankfurt: Insel, 1995).
15. *Ibid.* §916–917, 305.
16. *Ibid.* §911, 303.
17. See further my ‘Into Positivism: Georg Friedrich von Martens and Modern International Law’, 15 *Constellations* (2008), 189–207 on which the following section is based. See also Walter Habenicht, Georg Friedrich von Martens: *Eine Biografische und völkerrechtliche Studie* (Göttingen: Vandenhoeck & Ruprecht, 1934).
18. For detail on Martens’ publications, see Habenicht, *Georg Friedrich von Martens*, 58–59.
19. *Recueil des principaux traités d’Alliance, de Paix, de Trêve, de neutralité, de commerce, de limites, d’échange etc. conclus par les puissances de l’Europe tant entre elles qu’avec les Puissances et États dans d’autres parties du monde depuis 1761 jusqu’à présent. Tiré des copies publiées par autorité, des meilleurs collections particulières de traités, et des auteurs les plus estimés* (Göttingue 1791). The title is very informative of the contents of the collection and shows nicely the “inductive” method at work.
20. Habenicht, *Georg Friedrich von Martens*, 62–66. See also Ferdinand Martiz, ‘Der Recueil Martens’, 40 *Archiv des öffentlichen Rechts* (1921), 22–72.
21. For this notion, see e.g. Hermann Meyer-Lindenberg, ‘Völkerrecht. Europäisches’, in Karl Strupp & Hans-Jürgen Schlochauer, *Wörterbuch des Völkerrechts. Dritter Band* (Berlin, de Gruyter 1962), 635–640.
22. Georg Friedrich von Martens, *Précis du droit des gens moderne de l’Europe fondé sur les traits et l’usage* (Göttingue, Diederich 1801), 9, 42.
23. *Ibid.*, 9.
24. *Ibid.*, 3.
25. *Ibid.*, 374, 387, 388n.
26. *Ibid.* 12.
27. *Ibid.*, 484.
28. Martens, *Précis du droit des gens moderne de l’europé* (Nouvelle édition, entièrement revue par Ch. Vergé ed. Paris, Guillaumin, 1858), §10 (59).
29. Its only competitor was Emer de Vattel’s *Droit des gens ou principes de la loi naturelle appliquées à la conduite et aux affaires des souverains* (London, 1758), also inspired by German sources, namely Christian Wolff’s *Jus gentium* of 1749.
30. See especially my *The Gentle Civilizer of Nations. the Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001), 11–97.
31. For Bluntschli’s career and views generally, see Michael Stolleis. *Geschichte des öffentlichen Rechts in Deutschland. Zweiter Band 1800–1914* (Munich, Beck, 1992), 430–433 and my *Gentle Civilizer*, 42–47 and 90–91 and the notes referred to there. For Bluntschli’s views about the Institute see e.g. Johann Caspar Bluntschli, *Denkwürdiges aus meinem Leben*, (3 vols, Nördlingen, Beck 1884), III.
32. Betsy Roeben, *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861–1881* (Baden-Baden, Nomos 2003).
33. Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staten : als Rechtsbuch dargestellt* (2<sup>nd</sup>. Nördlingen, Beck 1872), 61–64.

## BETWEEN COORDINATION AND CONSTITUTION...

34. Bluntschli, *Denkwürdiges III*, 196–201; Röben, *Bluntschli & Lieber*, 92–103.
35. See my *Gentle Civilizer*, 88–97.
36. For Jellinek's position on 19<sup>th</sup> century German public law, see especially Olivier Jouanjan, *Une histoire de la pensée juridique allemande (1800–1918). Idéalisme et conceptualisme chez les juristes allemands du XIXe siècle*, (Paris, PUF 2005), 283–337. The notion of “ideal-type” came from Jellinek's study on federations where that notion was used to mark the fact that federal constitutions existed in such a bewildering variety that in order to speak of them at all, one needed to simplify. Georg Jellinek, *Die Lehre von Staatenverbindungen* (Vienna, Hölder 1882).
37. Georg Jellinek, *Die rechtliche Natur der Staatenverträge. Ein Beitrag zur juristischen Konstruktion des Völkerrechts* (Vienna, Hölder 1880). See further Jochen von Bernstorff, ‘Völkerrecht als modernes öffentliches Recht im fin-de-siècle’, in Stanley Paulson & Martin Schulte, *Georg Jellinek. Beiträge zum Leben und Werk* (Tübingen, Mohr 2000), 183–208.
38. Leonard Krieger, *The German Idea of Freedom. History of a Political Tradition* (Boston, Beacon 1975).
39. Jellinek, *Rechtliche Natur*, 48–50.
40. See further, Georg Jellinek. *Allgemeine Staatslehre* (2<sup>nd</sup> edn. Berlin, Häring 1905), 329–336.
41. *Case of the S.S. Wimbledon*, PCIJ Ser A. 1 (1923), 25. See also Jan Klabbers, ‘Clinching the Concept of Sovereignty: Wimbledon Redux’, 3 *Austrian Review of International and European Law* (1998) 345.
42. *Austro-German Customs Union case*, PCIJ Ser A/B 41 (1931).
43. See further Martti Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument* (reprint with a new epilogue, Cambridge University Press 2005), 240–245.
44. For the “arbitration crisis” at the First Hague Conference, see Arthur Eyffinger, *The 1899 Hague Peace Conference. ‘The Parliament of Man, the Federation of the World’* (The Hague, Kluwer, 1999) 374–379 and for the protagonists' own words, see Karl von Stengel, *Weltstaat und Friedensproblem* (Reichl, Berlin 1909) and Philipp Zorn, *Das deutsche Reich und die internationale Schiedsgerichtbarkeit* (Berlin, Rothschild, 1911).
45. For some of this section, see also my *Gentle Civilizer*, 179–265.
46. Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld 1899).
47. That such “dualism” still is one predominant way for European States to think about the relations of international treaties in their domestic law, but that the solutions tend to be complex see Pierre Eisemann (ed.), *The Integration of International and European Community Law into the National Legal Order* (The Hague, Kluwer, 1996), 11–25 and passim.
48. Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (Tübingen, Mohr 1911).
49. See now the useful Jochen von Bernstorff, *The Public Law Theory of Hans Kelsen. Believing in Universal Law* (Cambridge University Press 2010). More elaborately, see Alfred Rub, *Hans Kelsens Völkerrechtslehre. Versuch einer Würdigung* (Zürich, Schultess 1995).
50. Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (2<sup>nd</sup> ed., Tübingen, Mohr, 1928).
51. Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (Tübingen, Mohr 1923); *Die Verfassung der Völkerrechtsgemeinschaft* (Wien, Springer 1926).
52. Walther Schücking & Hans Wehberg, *Die Satzung des Völkerbundes* (Berlin, Vahlen 1921).

53. Dee Detlev Acker, *Walther Schücking* (Münster, Aschendorff 1970) and now also Monica Garcia-Salmones, 'Walter Schücking and the Pacifist Traditions in International Law', 21 *EJIL* (2011, forthcoming).
54. See Carl Schmitt, *Kernfrage des Völkerbundes* (Berlin, Dümmler 1926) and the essays in *Positionen und Begriffe im Kampf mit Weimar - Genf - Versailles 1923-1939* (Berlin, Duncker & Humblot 1988 [1940]).
55. Koskenniemi, *Gentle Civilizer*, 413-494 and now also Oliver Jütersonke, *Morgenthau, Law and Realism* (Cambridge University Press 2010) as well as William Scheuerman, *Morgenthau. Realism and Beyond* (Cambridge, Polity 2009), 32-50.
56. I provide an intellectual biography in 'Hersch Lauterpacht 1897-1960', in Jack Beatson & Reihard Zimmermann, *Jurists Uprooted. German-Speaking Emigré Lawyers in Twentieth-Century Britain* (Oxford University Press, 2004), 601-662. Interesting is now also Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge University Press 2010).
57. For the epitome of this, see Wolfgang Friedmann, *The Changing Structure of International Law* (London, Stevens 1963). For a useful discussion of the post-war US scene in international law, see also David Kennedy, 'When Renewal Repeats: Thinking Against the Box', 32 *NYUJ of Il&Pol'y* (2000), 379-388 and 'Tom Franck and the Manhattan School', 35 *NYUJ of Il & Pol'y* (2003), 397-435.
58. 67 *ZaöRV* (2007), No. 3, 583-824.
59. Helen Keller, 'Die Zukunft der Völkerrechtswissenschaft in Deutschland', 67 *ZaöRV* (2007), 624.
60. For the large literature on this, see Isabel Hull, *Absolute Destruction. Military Culture and the Practices of War in Imperial Germany* (Cornell University Press, 2005). It is a shame that in standard readings of Morgenthau, his careful delineation of a specific role to law in diplomacy and his advocacy of something like a world state tend to be forgotten.
61. Stefan Kadelbach, 'Völkerrecht als Verfassungsordnung? Zur Völkerrechtswissenschaft in Deutschland', 67 *ZaöRV* (2007), 606; Georg Nolte 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland', *ibid.* 658-659.
62. See Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin, Duncker & Humblot 1988 [1950]).
63. See Jan-Werner Müller, *A Dangerous Mind. Carl Schmitt in Post-War European Thought* (Yale University Press, 2003).
64. Detlev A. Vagts, 'International Law in the Third Reich', *American Journal of International Law* (1990), 661-699.
65. Koskenniemi, *Gentle Civilizer*, 167.
66. Wilhelm Grewe, *The Epochs of International Law* (Berlin De Gruyter, 2000), 624, 634-636. I have discussed Grewe's denial e.g. book reviews in 51 *International and Comparative Law Quarterly* (2002), 496-501, and in *Kritische Justiz* (2002), 277-281.
67. Bruno Simma et al (ed.), *Commentary of the United Nations Charter* (Oxford University Press, 1st edn. 1995). The quote is from Anne Orford, 'The Gift of Formalism', 15 *EJIL* (2004), 181, see further *id.* 179-195.
68. Hermann Mosler, *The International Society as a Legal Community* (Aalphen an den Rijn, Nijhoff 1980).
69. See Armin von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany', 47 *Harvard International Law Journal* (2006), 223-242. This is a topic on whose importance which all German writers agree. See e.g. Andreas Paulus, 'Die Zukunft der Völkerrechtswissenschaft'. 67 *ZaöRV* (2007), 699-707.
70. Keller, 'Die Zukunft', 625.
71. See e.g. Georg Nolte et al (ed), *Coalitions of the Willing: Avantgarde or Threat?* (Cologne, Heymanns, 2007).

## BETWEEN COORDINATION AND CONSTITUTION...

72. For German and non-German contributions on this theme, see Michael Byers & Georg Nolte, *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003).
73. See e.g. Armin von Bogdandy et al (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Heidelberg, Springer 2009).
74. See e.g. Dieter Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin University press 2009), 108–123.
75. Thilo Marauhn, 'Plädoyer für eine grundlagenorientierte und zugleich anwendungsbezogene Völkerrechtswissenschaft,' 67 *ZaöRV* (2007), 643.
76. Nolte, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland' 67 *ZaöRV* (2007), 672.
77. See e.g. Gunther Teubner & Andreas Fischer-Lescano, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts* (Frankfurt, Suhrkamp 2006).
78. For the sources not mentioned above, see See Franz Holtzendorff, *Handbuch des Völkerrechts, auf Grundlage europäischer Staatenpraxis* (4 vols., Berlin, Habel et al., 1885); Karl Strupp & Hans-Jürgen Scholchauer, *Wörterbuch des Völkerrechts* (3 vols, De Gruyter 1962); *Max Planck Encyclopaedia of International Law* (<http://www.mpepil.com>).
79. Grewe, *Epochs*; Karl-Heinz Ziegler, *Völkerrechtsgeschichte* (Munich, Beck, 1994).
80. See e.g. Ernst Reibstein, *Die Anfänge des neueren Natur- und Völkerrechts: Studien zu den 'Controuersiae illustres' des Fernandus Vasquius (1559)* (Bern, Haupt, 1949); Wolfgang Preiser, *Macht und Norm in der Völkerrechtsgeschichte* (Baden-Baden, Nomos 1978).
81. *Studien zur Geschichte des Völkerrechts*, Baden-Baden, Nomos. The series now has 22 titles.
82. See e.g. Bogdandy, *The Exercise of Public Authority*.
83. For a recent discussion, see Mehrdad Payandeh, *Internationales Gemeinschaftsrecht. Zur Herausbildung gemeinschaftlicher Strukturen im Völkerrecht der Globalisierung* (Dordrecht, Springer 2010).
84. Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon 1933). See also my assessment of the importance of this work in 'The Function of Law in the International Community: 75 years Later', 79 *British Year Book of International Law* (2008), 353–366.
85. Jürgen Habermas, *Der gespaltene Westen* (Frankfurt, Suhrkamp 2004), 113–193.