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Review Essay

# *609 INTERNATIONAL LAW AS PUBLIC LAW: ON RECENT AND HISTORICAL GERMAN APPROACHES TO INTERNATIONAL LAW [FN1]

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Hans Wehberg (1885-1962): Die Organisation der Staatengemeinschaft. By Claudia Denfeld. Freiburg: Nomos, 2008. Pp. 292. Index. E78.

Zwischen Machtstaat und Volkerbund: Erich Kaufmann (1880-1972). By Frank Degenhardt. Freiburg: Nomos, 2008. Pp. 244. Index. E54.

Kollektive Nichtanerkennung illegaler Staaten. By Stefan Talmon. Tubingen: Mohr Siebeck, 2006. Pp. xxxix, 1052. Index. E149.

Pluralistische Gesellschaften und Internationales Recht [43 Berichte der Deutschen Gesellschaft fur Volkerrecht]. Heidelberg: Muller, 2008. Pp. viii, 365. E96.00.

Weltinnenrecht: Liber amicorum Jost Delbruck. Edited by Klaus Dicke, Christian Tietje, Andreas Zimmermann, et al. Berlin: Duncker und Humblot, 2005. Pp. 945. E128.

Wege zur Koordinierung volkerrechtlicher Vertrage. By Nele Matz. Heidelberg, Berlin: Springer, 2005. Pp. xxiv, 423. Index. E79.39.

Sozialstandards im Volkerrecht. By Angelika Nussberger. Berlin: Duncker und Humblot, 2005. Pp. 587. Index. E98.

Konstitutionelle Gemeinwohlorientierung im Volkerrecht. By Martin Scheyli. Berlin: Duncker und Humblot, 2008. Pp. 571. Index. E78.

If asked whether the various historical or current German approaches to international law share common characteristics or features, we would not dare answer in the affirmative. Given the extremely diverse German/Austrian international law tradition--which ranges from authors like Heinrich Triepel and Georg Jellinek to Erich Kaufmann, Walter Schucking, Hans Kelsen, Alfred Verdross, and Carl Schmitt, each having their own theoretical approaches and political agendas in their respective cultural and societal environments--common features could hardly be discerned. The same holds true for the current milieu, which is extremely diverse and strongly influenced by intellectual developments in other countries, such as the United States, the United Kingdom, France, and other European countries, as were the historical debates.

Nevertheless, one institutional feature of German international law scholarship may well have left its traces in many emanations of German international law scholarship, both historical and contemporary: international law in Germany forms part of the discipline of public law scholarship. International law has been and continues to be taught by public lawyers who also teach Staatsrecht, or German constitutional law, which arguably has influenced their perception of international law. Inspired by the hypothesis that this public-law lens of German authors has left its mark on German international legal scholarship, we intend in this essay to review a range of recent German publications in the field of international law that have not been translated into English. Part I reviews two new monographs dealing with the history of the discipline of international law in Germany, and part II focuses on recent publications on current international legal positions and debates.

## *610 I. REDISCOVERING THE HISTORY OF THE DISCIPLINE

Numerous books dealing with the history of the discipline of international law in Germany have been published since the beginning of this century. [FN2] A new interest in the history of German and European international law can be observed, focusing on the role of individual scholars or legal debates in their contemporary disciplinary and political contexts. In particular, German international lawyers from the first half of the twentieth century have become the object of historical reflections. Most of the monographs edited in the series "Studien zur Geschichte des Volkerrechts," edited by Michael Stolleis (Max Planck Institute for European Legal History, Frankfurt), Armin von Bogdandy (Max Planck Institute for Comparative Public Law and International Law, Heidelberg), and Wolfgang Graf Vitzthum (University of Tubingen), pursue a history-of-science methodology, according to which historically important scholars and scholarly debates are subject to a contextual reconstruction and interpretation. The specific focus is on how theoretical convictions and debates were influenced by, and played out in, concrete political circumstances. International law is conceptualized as a theoretical endeavor that cannot be fully understood without considering its concrete forms of application in a highly politicized environment.

This "historiographical turn" [FN3] or "turn to history" [FN4] will also affect how current international lawyers perceive their own role in the context of international relations. The past constitutes a reservoir of latent meanings continuously affecting the present (as noted by Walter Benjamin), and through establishing a new discursive relationship with this reservoir, the present also inevitably undergoes a transformation. From this perspective a disciplinary turn to history is likely to have repercussions for international legal scholarship.

We will review in detail two of the more recent German books on the history of international law in Germany and Europe; other recent monographs in German in this area will be mentioned in passing. Both books focus on the works of prominent international lawyers in between and during the two world wars. The first book is by Claudia Denfeld dealing with Hans Wehberg (1885-1962), and the second one is by Frank Degenhardt on Erich Kaufmann (1880-1972).

Claudia Denfeld's book on Hans Wehberg, Die Organisation der Staatengemeinschaft [The Organized Community of States], [FN5] is a highly readable and comprehensive book on one of the main protagonists of "legal pacifism" in German international law during the interwar period. Due to his pacifist convictions, Wehberg could not become a professor at a German university. He was offered a chair for international law at the Graduate Institute of International Studies in Geneva in 1928, which he held until his retirement in 1959. He was a member of the Institut de Droit International and became an honorary member of the American Society of International Law. Denfeld starts the monograph with a biographical part on the family background and career of Wehberg as an international lawyer and activist in the German pacifist movement before and after World War I. Wehberg, like his friend and closest academic collaborator Walter Schucking (1875-1935), came from a liberal, bourgeois family from the Western part of Prussia. Denfeld points to the central role that Walter Schucking, who later became a judge at the Permanent Court of International Justice, played in Wehberg's academic development.

*611 Denfeld argues convincingly that both Wehberg and Schucking were influenced by the writings of the 1911 Nobel laureate Alfred H. Fried (1864 - 1921), who had cofounded the German Peace Society in 1892. Fried believed in the pacifying role of international organization through intensified international cooperation in economic, social, and cultural matters, and founded the journal Die Friedens-Warte, devoted to the scientific exploration of international organization as a means to achieve and maintain peace in international relations. Denfeld explains that both Wehberg and Schucking reframed these ideas from an international legal perspective, endorsing the nineteenth-century liberal notion of the harmony of interests. International law was meant to bring about international institutions designed to further these common economic, social, and cultural interests of states. Schucking and Wehberg became the main advocates of "organized pacifism" in German international law.

Schucking explicity referred to Kant's essay Perpetual Peace (1795) as a basis for concrete proposals on how to create a world federation. The role of the late nineteenth-century revival of the Kantian essay for the pacifist movement remains somewhat unexplored in Denfeld's book. Under the reign of Hegelianism in the early and mid-nineteenth century, Kant's essay had been considered utopian and incompatible with the prevailing notions of state sovereignty. War was often considered a necessary phenomenon of international relations--as the final historical arbiter regarding the strength of a particular nation or as a purifying and vitalizing element that could save nations from infirmity. But in the late nineteenth century, the central assumptions of Kant's Perpetual Peace became more widely accepted. The Kantian paradigm shift from the unregulated jus ad bellum to its restriction through international law became an important intellectual foundation of pacifist international legalism. A further aspect that would have merited attention by Denfeld are the intellectual links between the German and Austrian peace movements and their American and English counterparts, which had started their activities much earlier in the nineteenth century and had become politically influential in the highest U.S. policy circles before and during World War I.

Inspired by the first two Hague Conferences, Schucking and Wehberg believed that new forms of international organization could secure the rule of law in international relations, which had been impeded by a mistaken "absolutist" conception of national sovereignty. A central element of this cosmopolitan project became the move into international adjudication, which originally had been an American "ideology" brought to Europe at the beginning of the twentieth century. [FN6] Denfeld demonstrates that Wehberg's international legal pacifism did not represent the mainstream of international legal scholarship in Germany before World War I even though it was received benevolently by a handful of other German and Austrian internationalists, such as Otfried Nippold, Theodor Niemeyer, and Heinrich Lammasch.

During World War I the emerging pacifist avant-garde was marginalized by the ultranationalist atmosphere and reactionary censorship that had taken hold of the German public in the first years of the war. Denfeld describes how Wehberg, who courageously published an open letter to a colleague in which he held that the German invasion of Belgium in 1914 constituted a violation of international law, had to live under public reprisals by the war authorities and private boycotts from large parts of the German press. He was drafted against his will as a soldier and served for two years in the Prussian army, where--due to his pacifist convictions--he became the object of humiliations and physical harassment by his superiors.

After the war Wehberg--together with Schucking--published the first German commentary on the League Covenant and became the editor in chief of the pacifist journal Friedens-Warte after Fried's death. He continued to advocate progress in international organization, in particular through compulsory adjudication and a monopoly of force on the international level, *612 which Denfeld reconstructs in detail. An astonishing proposal that Wehberg advanced with Schucking was the idea of a world parliament connecting with national public spheres and controlling the executive council of the envisaged world organization, an idea recently revitalized by Jurgen Habermas. The theoretical foundations of Wehberg's legal activism, however, remained somewhat eclectic, combining occasional recourse to natural law principles with a pragmatic and largely functional approach to international law. Even though its intellectual foundations were somewhat shaky, the political project was clear: international law, understood as binding public law of an international community, was supposed to bring about the great transformation from looming interstate violence to peaceful cooperation among states through powerful international institutions enforcing the rule of law.

Denfeld's book is a stimulating read. She writes with obvious admiration for her protagonist, whose political project can retrospectively hardly be disliked. The intellectual critique of international legal pacifism in Germany by eminent international lawyers like Erich Kaufmann and Carl Schmitt, however, deserved more attention by the author and would have helped to explain how the "Versailles trauma" played out in the intellectual undercurrents influencing the conservative mainstream in German public law scholarship.

It is at this point that Frank Degenhardt's elegantly written book Zwischen Machtstaat und Volkerbund: Erich Kaufmann (1880-1972) [Between the Authoritarian State and the League of Nations] comes in. Kaufmann was one of the most influential authors in German public law scholarship in the interwar period. He was a monarchist and a representative figure of the old conservative German elite that could never fully identify with Weimar democracy. An internal report by the U.S. military government in southern Germany after World War II depicted his personality as follows:

> By education and tradition, Kaufmann is a conservative nationalist, which, at times, does not jibe with his Jewish descent. He reportedly tried to serve the Third Reich until 1938 when he was finally dismissed from all his positions .... A man of personal integrity but reportedly unsuited for indoctrination of German youth with the values of democracy for which he never had any use. General characteristics would be: a specimen of the 'Jewish Junker.' (P. 1)

This polemical statement about Kaufmann captures his conservative convictions and his sympathy for the old monarchy but fails to grasp that in the Weimar Republic (and the Federal Republic after the World War II), Kaufmann was a highly respected international lawyer who loyally served the various democratically elected governments as a legal adviser.

Kaufmann's main works on international law were his book Das Wesen des V olkerrechts und die Clausula rebus sic stantibus (1911) and his Hague Academy lectures (1935). [FN7] He was the main legal adviser of the German foreign

office in the interwar period, consulting the German government on the most important minority and reparation issues under the Treaty of Versailles and other bilateral agreements with Germany's new neighbors. Degenhardt's well-structured book not only carefully reconstructs his activities as a legal adviser and German professor for Staatsrecht in Berlin and Bonn, but also focuses on Kaufmann's intellectual approach to the foundations and the essence of international law. Theoretical positions and practical activities are presented first, to be ultimately intertwined in the last part of the book, where Degenhardt shows us how Kaufmann's theoretical convictions played out in concrete cases with which he dealt as a legal adviser.

In 1911, Kaufmann approached international law from a Hegelian and organic concept of the state as the embodiment of a perfect moral (sittliche) community. It was a public law approach but one that ultimately denied international law the full potential of public law because of the central notion of the sovereign state, which can never be fully integrated into a binding legal order superior to itself. Kaufmann developed a flexible theoretical distinction, which he would use through his entire career as an international lawyer. It was the differentiation between a "law of coordination" and a "law of subordination." For him, a law *613 of subordination could emerge only in a legal community, in which a superior will existed, whereas the law of coordination was characterized by the existence of various egalitarian wills shaping the legal order. Kaufmann depicted international law as a law of coordination and national law as a law of subordination. As Degenhardt convincingly argues, the assumption that international law was a horizontal legal order shaped by the wills of sovereigns without a superior will binding the states from above was a common assumption of late nineteenth century German positivism in international law. German international legal positivism, however, had nonetheless struggled for decades to construct international law as binding public law on this basic assumption. [FN8] Of special note in this context is Georg Jellinek, the most influential German international lawyer of the late nineteenth century, who argued that international law could be termed public law because it was structurally similar to constitutional law (Staatsrecht). Both constitutional law and international law could be considered binding public law because the state and its organs willfully bound themselves to legal rules (self-limitation)--in the case of constitutional law, vis a vis internal constituencies, and in the case of international law, vis a vis other states.

By contrast, for Kaufmann the differences between Staatsrecht and international law were of a fundamental nature, and legal positivism had failed to grasp them. After all, the state was the highest embodiment of the law of subordination, represented in its perfect form by the German empire. Within this conception, the ultimate goal of the state was to foster its power through unifying the cultural, moral, and physical forces in order to assert itself in world history. Internally, the aim of the state legal order as a law of subordination was "justice," qualified by Kaufmann as distributive justice. Since international law (as a law of coordination) included no principle of distributive justice, and since states (as the highest embodiment of a legal community) always strived to accumulate more power, war became the "social ideal" of the international legal order. The main "principle" of international law was the maxim "Only those who can, may." [FN9] As Degenhardt points out in the first part of the book, Kaufmann thereby arrived at a cynical synthesis of power and law in international relations. This nationalist tone was perfectly in line with the political aspirations of the German empire trying to assert itself as a world power (Weltmacht) in the first decade of the new century. [FN10]

Degenhardt demonstrates convincingly that the ingredients of Kaufmann's international law theory were by no means new. The Hegel-inspired concept of war as the final arbiter of a nation's strength and position in the international arena was a notion that had reappeared time and again in German international law writings in the nineteenth century. The jus ad bellum was still considered a recognized right under general international law, even though it increasingly collided with humanitarian sentiments and pacifist ideas promoted by civil society groups. Moreover, Kaufmann could make use of the

well-known structural notions of coordination and subordination to classify the nature of international law. At a time when an emerging pacifist avant-garde identified the maintenance of peace through international organization as the central goal of the international legal order, Kaufmann praised war between nation states as the ultimate "social ideal."

It is one of the many strengths of Degenhardt's book that he shows how Kaufmann's concept of international law evolved in changing political circumstances. For Kaufmann, as for all German and Austrian international lawyers, including progressive liberals like Hans Kelsen, the Versailles settlement was an unjust Diktatfrieden imposed by the allies. In a situation of weakness and humiliation, international law became, for him, a tool to fight against Versailles on the basis of procedural and material equality. Thus, in the interwar period, Kaufmann considerably toned down *614 his praise of war as the teleological principle of international law and, contrary to the position at the center of his 1911 clausula book, came to emphasize the potential of international treaties to further principles of distributive justice in international law. After the defeat of World War I, war--at least for the time being--was no longer an option for Germany. As a legal adviser of the German government in the interwar period, Kaufmann quickly realized how international law could be used to further German interests. [FN11] Be it through petitions to the League of Nations regarding the rights of the German minority in Upper Silesia in Poland or through decisions of the Permanent Court of International Justice in the Chorzow cases, international law could be used as a flexible medium to achieve partial "justice" for Germany in an "unjust" environment.

Degenhardt's detailed analysis of a number of cases in which Kaufmann acted as a legal adviser validates an interesting insight into the relationship between theory and legal practice. While acting as Germany's legal adviser, Kaufmann used theoretical insights in a strategic manner. As Degenhardt shows, Kaufmann sometimes referred to "immanent" principles or the "idea of law" in order to further his argumentation; in other cases, however, he interpreted the law in a narrow, decidedly formalist fashion, depending on whether or not his methodological stance would advance the interests of his client. Theoretical insights served to enlarge the argumentative reservoir of a practicing international lawyer.

Kaufmann was an extremely skilled and internationally highly respected legal practitioner who made creative use of his theoretical background as a public law professor. In the interwar period he devoted most of his energy to these practical endeavors in the service of the German government. All the more he must have suffered from the fact that after the Nazis had come to power in 1933, he was gradually stripped of his functions as a legal adviser and professor at the Berlin law faculty because of his Jewish origins. Kaufmann ultimately emigrated to the Netherlands, survived German occupation in the underground, and could return to Germany only after World War II. He became an influential and highly respected professor for Staatsrecht und Volkerrecht at the University of Munich and reassumed his role as a legal adviser in the German foreign office.

## II. FUNDAMENTAL POSITIONS AND DEBATES ON CURRENT INTERNATIONAL LAW

While much of German international law scholarship is now published in English, this scholarship continues to employ a canon of formats that remains wedded to German as a legal language, allowing the easy transfer of concepts and notions conceived in other more nationally oriented branches of law to international law. These formats are monographs (in particular, Habilitationsschriften and dissertations), the proceedings of the Deutsche Gesellschaft fur Volkerrecht, and often libri amicorum (Festschriften).

This review will limit itself to recent works published in these formats that reflect fundamental positions and debates on international law. Most

German, as well as most European, international lawyers assume the normativity of international law. Fundamental positions therefore focus on the theoretical reconstruction of international law as a normative system, converging around three fundamental theoretical questions and positions: the recognition and enforceability of public values in international law; the capacity of international law for social regulation; and processes that can be interpreted as constitutionalizing international law. A number of recent publications may be identified as attempting to advance the thinking on these positions through analyzing matters currently under debate in international law.

Public Values in International Law

Public values and their enforcement in international law are the core interest of Kollektive Nichtanerkennung [Collective Nonrecognition of Illegal States] by Stefan Talmon, who is now a professor *615 in the University of Oxford. The volume--in which he takes on the recognition of states, a longstanding problem in international that continues to have practical significance--was Talmon's Habilitationsschrift at the University of Tubingen. The study focuses on three issues: statehood, standards of legality of statehood, and the nonrecognition of "illegal states," including the obligation not to recognize states. Basing his analysis on state practice as the ultimate source of normativity in general international law, Talmon focuses his study on the case of the Turkish Republic of North Cyprus. After arguing that statehood remains a matter of fact, Talmon discusses possible standards of legality for the foundation of a state (identifying primarily the use of force) and conceptualizes these legality standards as the move of international law from quasi-contractual (rechts-geschaftlich) to public and objective, and also as a move from positivism (in the sense of strict adherence to the practice of states) to a normative, value-based order. Kollektive Nichtanerkennung then interprets the nonrecognition of illegally founded states by other states in terms of the (customary) law of state responsibility--in particular, as a countermeasure to the violation of an erga omnes norm in line with Articles 40 and 41 of the International Law Commission's Articles on State Responsibility, so that states have a duty not to recognize any situation created through the violation of peremptory norms of international law. Talmon sees such countermeasures as a decentralized mechanism for sanctioning norm violations, a mechanism that the United Nations may urge states to employ. The collective nonrecognition of an illegal state would then result in its having an adversely affected status in a number of areas.

Kollektive Nichtanerkennung is an important contribution to the debate on the law of statehood and recognition of states. It contains a careful analysis of state practice and, on a deeper level, furthers the position that international law increasingly enshrines elements of a value-based public order. Expression of this paradigmatic change in international law is often found in the emergence of the concepts of erga omnes and jus cogens, which arguably encompass values such as the right to self-determination of peoples, peaceful settlement of conflicts with the concomitant prohibition of the use of force, and the territorial integrity and sovereign equality of states. If one follows Talmon in his assumption that international law is built upon such public values, then it is one of the central challenges for scholarship to integrate these values into the received notions and concepts of general international law, which were originally developed under the auspices of the so-called international legal order of coexistence, with its Westphalian roots. Kollektive Nichtanerkennung undertakes to reconstruct central notions and institutions of traditional international law in order to take account of the new public order aspects, allowing the international community not just to formulate its fundamental values, but also to enforce them in a decentralized fashion. This structural idea is reminiscent of Hans Kelsen's public international law theory, in which the constraining force of international law--in the absence of a centralized executive--was based on enforcement of international law by states. [FN12]

The book's fundamental proposition that existing states can nevertheless

be unlawful as measured against international law standards may sound radical enough, in particular because rendering a state outside the law (hors de la loi) could also--as Carl Schmitt famously held--be abused as a strategy to justify the use of excessive violence and otherwise illegal acts against such a state. Moreover, rethinking the matter in the way that Talmon suggests leads to further hard questions: Should international law embrace a more comprehensive legal framework for the legality of new states that puts self-determination at its heart and that then asks whether its exercise is consistent with applicable standards such as the territorial integrity of existing states, fundamental human rights, and so on? What would be the value judgments upon which such a balancing would took place; which values would ultimately prevail; and for what reason? The International Court of Justice may have to engage with such questions in its pending advisory *616 opinion on the legality of Kosovo's declaration of independence.

Social Regulation Through International Law

Shared values may form the basis for social regulation through an international law of cooperation based on certain organizing or fundamental principles. The 2006 biannual conference of the venerable Deutsche Gesellschaft fur Volkerrecht centered on the theme "Pluralistic Societies and International Law," tackling the broad question whether international law fosters cultural pluralism as a value and as a fundamental normative principle on the three relevant levels of governance: the international, the regional (in this case, the European), and, with international law providing the impetus, the national. The individual contributions to the society's proceedings, Pluralistische Gesellschaften und Internationales Recht, [FN13] explore the implications of the overarching theme of pluralism for each level of governance. Georg Nolte (Humboldt University Berlin) engages in a critical, social science-informed conceptual analysis of cultural pluralism or diversity before proceeding to the doctrinal reconstruction of the relevant international level. Basing his analysis on the UNESCO Convention on the Protection of Cultural Diversity, he argues that the normative locus for achieving that convention's objectives will primarily be international human rights--which he sees a matter for the relevant treaty bodies. Armin von Bogdandy (Max Planck Institute of Comparative Public Law and International Law) discusses the extent to which the European Union furthers cultural diversity and pluralism within and among its member states, demonstrating that an organization of regional integration such as the European Union, within its remit, may be conceptualized as a self-defined regional executive of value judgments made at the universal level. His views integrate insights from the literature on international governance phenomena. Helen Keller (University of Zurich) explores the notion of pluralism in national law, including the requirement of a homogeneous people as a contested traditional tenet of statehood and the law of citizenship. Christian Walter (University of Munster) approaches the aspect of religiously pluralistic societies from the perspective of comparative law, juxtaposing the law of self-declared secularized and nonsecularized states. He demonstrates the epistemological usefulness of comparative law within an analytical framework that derives its parameters from international law. Heinz-Peter Mansel (University of Cologne) and Andrea Buchler (University of Zurich) analyze the extent to which private international law (choice of law) accommodates the cultural identity of individuals.

This volume of proceedings reflects an understanding of cultural pluralism as a principle at the foundation of the international law of cooperation, rather than as a factual assessment of the current state of the world in the age of globalization. The contributions show that many Germanspeaking international lawyers are ready to interpret international legal texts as generating and reflecting foundational principles, which are held normatively necessary to sustain a community of states and to shape and overarch specific obligations to cooperate, such as the common, but differentiated, responsibility in environmental law. [FN14] Solidarity among states pursuant to which they individually or collectively support other states in need of support is increasingly identified as the basis for certain international law regimes. These proceedings probe the potential of pluralism

to become such a foundational international legal principle. The volume explores ways how international law--though largely lacking central organs to legislate, execute, and adjudicate--can harness states and international organizations to advance emerging political and legal concerns and principles. While impressive both in its scope and in the depth of its individual contributions, the volume does not, of course, exhaust the implications or areas of application of pluralism, such as squaring *617 group rights for minorities and indigenous peoples with the individual rights of the group members. [FN15]

The liber amicorum (Festschrift) for Jost Delbruck demonstrates the host of regulatory matters that come within the ambit of law-backed international cooperation. The Festschrift's title, Weltinnenrecht, refers to the view of Delbruck--former director of the Walther-Schucking Institute for International Law at the University of Kiel--that international law increasingly functions as the domestic law of the age of globalization. While this viewpoint is not shared by all the authors who contributed to the Festschrift, most do embrace the potential of international law for social regulation on a global scale, ultimately centered on the interests of the human person. The volume's inductive approach mostly places current developments of international law into an analytical framework and uses them as illustrations of structural changes in international law. It is this underlying theme that makes the Festschrift as a whole a stimulating read that is representative of the cross-currents in legal scholarship today. [FN16] On collective security, Rudiger Wolfrum (Max Planck Institute of Comparative Public Law and International Law) presents a doctrinal analysis of the UN Security Council's lawmaking powers, using the example of Resolution 1540 on the proliferation of weapons of mass destruction. Christoph Schreuer and Christina Binder (University of Vienna) analyze the respective roles of the UN General Assembly and Security Council in maintaining international peace. Rudolf Bernhardt identifies instances amounting to structural violation of the international human rights standard achieved. In separate essays Christian Tietje (University of Halle) and Ulrich Beyerlin (Max Planck Institute of Comparative Public Law and International Law) show how international economic law and the law of sustainable development, respectively, have the capacity to provide rules that are considered to be "in the interest of man," not primarily of states.

Certain consequences of this dynamic growth and development of international law are tackled in Nele Matz's dissertation, Wege zur Koordinierung volkerrechtlicher Vertrage [Means to Coordinate International Treaties]. A senior research fellow at the Max Planck Institute, Matz provides theoretical and practical approaches to solving contradictions and conflicts between various multilateral lawmaking treaties and regimes. She takes seriously the lawmaking capacity of these instruments--their "objective" or "regime" quality, which can hardly be dealt with adequately within the confines of the Vienna Convention on the Law of Treaties. From this angle, the book distinguishes true normative legal conflicts between regimes from mere policy conflicts between regimes, in the sense that the policy rationales of several regimes may come to bear on a single issue. As to the current and potential role of treaty clauses in solving legal conflicts between multilateral treaties, the book takes a very skeptical approach. Matz advances, instead, the principle of harmonizing interpretation--which may be seen as a general principle within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice--to ensure the effectiveness of each regime in protecting its own, important community interests when policy conflicts arise between regimes. But Matz also emphasizes the limits of such a legal approach. She advocates the responsibility and potential of institutions created by modern lawmaking treaties to resolve such conflicts. Although her analysis draws mostly on international environmental law, the usefulness of the proposed coordination strategies is not necessarily limited to that area of law.

Angelika Nussberger's Habilitationsschrift, Sozialstandards im Volkerrecht [International Social Standards], examines the field of social standards and the normative conflicts and inconsistencies arising out of the dynamic, yet uncoordinated, lawmaking and law-interpreting activity at several levels of governance. Nussberger (University of *618 Cologne) identifies "relative

normativity" as characteristic of social standards, advocating that such standards be seen as subject to an experimental and discursive process in which their viability is constantly tested and challenged.

Matz's and Nussberger's studies tackle the fundamental problem that arises in a legal order that is produced dynamically-- often on an ad hoc basis--in an institutionally decentralized environment. The studies are representative of the strand of German international law scholarship that undertakes to think through the implications of international regulation in times of fragmentation but that also seeks to conceptualize law as a coherent system of legal rules. In taking such an approach, this functionalist line of scholarship is methodologically open to building upon the insights of the social sciences, including institutional analysis and international relations.

## Constitutionalizing International Law

Conceptualizing international law through the lens and the instruments of constitutional law--beyond a less controversial referral to the rules on international lawmaking as constitutional in nature--has energized German international law scholarship for a number of years. [FN17] Martin Scheyli's Konstitutionelle Gemeinwohlorientierung [Constitutional Public Interest Orientation in International Law] is a recent effort (2008) to revisit the debate. Scheyli, who is with the Swiss Federal Administrative Court, thoroughly peruses the literature, concluding that a wholesale transposition of constitutionalism to the international level will run into fundamental problems, not least of which is the lack of a general normative hierarchy. A specifically international law concept of constitutionalism therefore had to be articulated, one focused on the legal protection of the bonum commune. Scheyli thus seeks to identify a framework that helps identify elements that would provide effective legal protection of the public interest. Constitutionalism, he argues, contains constitutionalizing legal principles and guiding concepts that provide a template not just for domestic, but also for international, law. Applying this framework to international environmental law and particularly to the law of climate change, Scheyli concludes that existing instruments display a certain realization of legal principles and concepts of a constitutionalizing quality--such as sustainable development and common, but differentiated, responsibility--but that, all in all, the relevant treaties still reflect the particularist concerns of states.

Of special note is that Scheyli undertakes to develop a concept of constitutionalism sufficiently specific to international law, yet related closely enough to the domestic concept, that concepts and ideas from the latter can be used in analyzing and elaborating the former. Another point of note is Scheyli's effort to move the discussion on constitutionalization into new territory (such as environmental law) without overreaching. Finally, his normative (lex ferenda) proposition to consider the erga omnes effect of principles and concepts embodying the bonum commune is a consistent elaboration of his constitutionalist framework. This approach may require, however, more of a change in the structure of international law than seems achievable, and it downplays the diverging interests and antagonistic public and private political agendas in the environmental field. An alternative to Scheyli's constitutionalism, which may be termed a "thin" constitutionalist approach, would instead emphasize that the continuous search for the common good in climate change (and other matters of global concern) needs to involve open political processes embedded in a *619 procedural and institutional framework conducive to the elaboration of, and agreement on, drastic reduction targets. His concept of "open sovereignty," or the "open state," will also presumably play a role in future international regulation in this and other strategic fields of international concern--not as alien to national law, but as part and parcel of the legal order in force within a state, while respecting autonomy and acknowledging the potential for conflict.

## III. CONCLUSION: INTERNATIONAL LAW AS PUBLIC LAW

Since the mid-nineteenth century, many German international lawyers have undertaken to conceptualize international law as public law, often trying to integrate it into their general and often systematic approach to public law. International law became offentliches Recht (Georg Jellinek) or the Verfassung of the international community (Alfred Verdross). Private law analogies had to be overcome or complemented by public law concepts in constructing a coherent system of legal rules. [FN18] In this construction the state concept long remained the central intellectual reference point of international lawyers, who either worshipped its alleged absolute sovereignty (Erich Kaufmann) or projected some of its functions to the global level (Hans Wehberg), on the one hand, or did away with it altogether through defining the state as a partial legal order delegated and superseded by international law in a monist legal universe (Hans Kelsen), on the other. These intellectual predispositions and frames of reference--even though in a more pragmatic fashion than before--continue to inform the general themes and internal dynamics of many works on international law. The idea and methodology underlying much German international law scholarship remains wedded to the conceptual distinction between the state and civil society (Staat und Gesellschaft), which is reflected at the national level in the distinction between public and private law, and at the international level, between public international law and what might be referred to as transnational private law (and, of course, private international law). In a more pragmatic sense, many authors continue to see the concept of international law as genuinely public in character, often understood as involving the pursuit of public interests through collectively binding law. As such, international law scholarship is receptive to the aspirations, specific methodology, institutions, and doctrines peculiar to public law, often including a constitutional sensibility. It is within this overarching frame, defined by the concepts of the state and civil society, that German international law scholarship has historically oscillated on major debates, moving between positive emanations of the will of states and an international public order based on shared values and fundamental principles, or, in institutional terms, between the sovereign, independent states and institutionalized cooperation on a global scale.

[FN1]. The Journal hopes occasionally to publish review essays bringing to our readers' attention significant international law scholarship appearing in major languages and legal traditions outside the ambit of the United States and England. This is first effort to do so.

[FN2]. In the context of the Max Planck research project on the history of German international law in the twentieth century, headed by Michael Stolleis, a number of recent monographs have been published in German--inter alia, BERNHARD ROSCHER, DER BRIAND-KELLOGG-PAKT VON 1928: DER "VERZICHT AUF DEN KRIEG ALS MITTEL NATIONALER POLITIK" IM VoLKER-RECHTLICHEN DENKEN DER ZWISCHENKRIEGSZEIT (2004), AND STEFANIE STEINLE, VoLKERRECHT UND MACHTPOLITIK: GEORG SCHWARZENBERGER (1908-1991) (2002).

[FN3]. George Rodrigo Bandeira Galindo, Martti Koskenniemi and the Historiographical Turn in International Law, 16 EUR. J. INT'L L. 539 (2005).

[FN4]. Alexandra Kemmerer, The Turning Aside: On International Law and Its History, in PROGRESS IN INTERNATIONAL LAW 71 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

[FN5]. Throughout this essay, translations are by the reviewers.

[FN6]. See Martti Koskenniemi, The Ideology of International Adjudication and the 1907 Hague Conference, in TOPICALITY OF THE 1907 HAGUE CONFERENCE, THE SECOND PEACE CONFERENCE 127 (Yves Daudet ed., 2008).

[FN7]. Regles generales du droit de la paix, 54 RECUEIL DES COURS 309 (1936 IV)).

[FN8]. JOCHEN VON BERNSTORFF, HANS KELSEN'S INTERNATIONAL LAW THEORY: BELIEVING IN UNIVERSAL LAW, ch. 1 (forthcoming 2009).

[FN9]. ERICH KAUFMANN, DAS WESEN DES VoLKER-RECHTS UND DIE CLAUSULA REBUS SIC STANTIBUS: RECHTSPHILOSOPHISCHE STUDIE ZUM RECHTS-, STAATS- UND VERTRAGSBEGRIFFE 151, 231 (1911).

[FN10]. Manfred Friedrich, Erich Kaufmannn (1880-1972): Jurist in der Zeit und jenseits der Zeiten, in DEUTSCHE JURISTEN JuDISCHER HERKUNFT 693, 696 (Helmut Heinrichs et al. eds., 1993).

[FN11]. On the political flexibility of Kaufmann's theoretical approach, see MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960, at 256-61 (2002).

[FN12]. On law and enforcement, see HANS KELSEN, UNRECHT UND UNRECHTSFOLGE (1932). On this aspect of Kelsen's international law theory, see VON BERNSTORFF, supra note 8, ch. 3.

[FN13]. Each of the essays in this volume includes an English summary.

[FN14]. See CHRISTOPHER VERLAGE, RESPONSIBILITY TO PROTECT: EIN NEUER ANSATZ IM VoLKERRECHT ZUR VERHINDERUNG VON VoLKERMORD, KRIEGSVERBRECHEN UND VERBRECHEN GEGEN DIE MENSCHLICHKEIT (2009).

[FN15]. See NICOLA WENZEL, DAS SPANNUNGSVER-HaLTNIS ZWISCHEN GRUPPENSCHUTZ UND INDIVIDUALSCHUTZ IM VoLKERRECHT (2008) (with English summary) (conceptualizing the dichotomy between group rights and individual rights in international law as a matter of liberal individualism's struggle to give adequate weight to the identity-shaping quality of group membership).

[FN16]. For reasons of space, only a selection of the German language articles assembled can be presented in this review; numerous contributions to the Festschrift are written in English.

[FN17]. See Jochen Abr. Frowein, Konstitutionalisierung des V olkerrechts, 39 BERICHTE DER DEUTSCHEN GESELL-SCHAFT FuR VoLKERRECHT 427 (1999); Armin von Bogdandy, Constitutionalism in International Law: Comment on a Proposal from Germany, 74HARV. INT'L L.J. 223 (2006); Christian Walter, International Law in a Process of Constitutionalization, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 191 (Janne E. Nijman & Andre Nollkaemper eds., 2007); Stefan Kadelbach & Thomas Kleinlein, International Law: A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles, 2007 GERMAN Y.B. INT'L L. 303. The constitutionalization thesis starts from the observation that in certain, albeit limited, areas, international law has achieved a maturity or density that reveal structural parallels to a constitutional system.

[FN18]. Eyal Benvenisti, The Conception of International law as a Legal System, 2007 GERMAN Y.B. INT'L L. 393.

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