

## BOOK REVIEWS

Wilhelm Grewe, *The Epochs of International Law*, translated and revised by Michael Byers, Walter de Gruyter, Berlin, New York, 2000, ISBN 3110153394, xxii, 780 pp., \$99.95.

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Martti Koskenniemi opens his review of the translation and new edition of Grewe's *The Epochs of International Law* without equivocation: 'This is a problematic, even disturbing book'.<sup>1</sup> It quickly becomes clear that despite the fact that Koskenniemi 'looked forward to the opportunity to return to a book, parts of which [he] knew in German but which [he] had never read from cover to cover', he found himself among the 'familiar voices from the German interwar scene... Max Weber's and Hans Morgenthau's theories about "power" as the somewhat mystical source of political authority and Friedrich Meinecke's ideas about the reason of state – and statehood – as the centre of social life, national or international, formed much of the book's *ambience*'.<sup>2</sup> Most importantly, however, we find ourselves deeply in a world made by Carl Schmitt and the *Grossraumlehre* he articulated as a Nazi theorist, if no longer the lead figure of National Socialist jurisprudence, a view that would crystallize in his postwar book, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950).

In his extended essay on Grewe's book, Bardo Fassbender places *The Epochs of International Law* directly in the context of the jurisprudence of the Third Reich. His analysis is sensitive – if perhaps a bit too sensitive – about Grewe's two ineffectual efforts at escape: the first was his move from constitutional law and the second, his 'escape to history', come from Grewe's own account of his life published in the 1990s.<sup>3</sup> In his characterization of Grewe, Fassbender talks of Grewe's turn to 'spheres of influence and hegemony', which for Fassbender are significant as 'the buzzwords of the group of *comparatively* moderate internationalists of the "Third Reich"'.<sup>4</sup>

Grewe may not have engaged in racial notions of the international order. In fact, as Fassbender points out, Grewe wrote in an article in 1943: 'Since September

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1. Martti Koskenniemi, 'Review of Wilhelm Grewe, *The Epochs of International Law*', (2002) 51 *International and Comparative Law Quarterly* 746.

2. *Ibid.*, 747.

3. Bardo Fassbender, 'Stories of War and Peace: On the Writing the History of International Law in the "Third Reich" and After', (2002) 13 *EJIL* 479, 490, citing Wilhelm Grewe, 'Ein Leben mit Staats- und Völkerrecht im 20. Jahrhundert', (1992) 118 *Freiburger Universitätsblätter* 25, 30.

4. Fassbender, *supra* note 3, 499 (emphasis in original).

1939 there can be no doubt about the transitional character of this epoch [of Anglo-American world hegemony]... The battle is only about the question of whether we will enter an “American century” – in which control of the world goes to the United States as a great power of Pan-American dimension and backed up by Great Britain, the Soviet Union and China – or whether the reorganization of the world personified by the powers of the Triple Alliance [Germany, Italy, and Japan] will succeed’.<sup>5</sup> This sentence does not confidently herald the ‘Thousand-Year Reich’ but rather suggests a world still in the balance. Nevertheless, there is little getting round the fact that we are not talking about a scholar in the distant reaches of Romance literature but a teacher at the Hochschule für Politik, which was run under the auspices of Josef Goebbels’s Ministry of Propaganda, and was merged into the Auslandswissenschaftliche Fakultät of the University of Berlin, where he was named an *ausserordentlicher* professor. In the second edition of *Epochs* published in 1984 after his distinguished career in the West German foreign service, including stints as ambassador to the United States, Japan, and NATO,<sup>6</sup> Grewe wrote of the first wartime edition, which was never printed, that it ‘had already been a remarkable accomplishment to avoid any alteration of the text by the censor during the Third Reich’ (p. xi). This suggestion of ‘inner exile’ has little authority in the light of Grewe’s position. Detlev Vagts has suggested the possibility of inner exile among international legal academics in Germany’s political universities: ‘A professor of international law could generally survive if he already had tenure by writing little or nothing, or writing only about safe subjects such as the history of international law and diplomatic immunity’.<sup>7</sup> Grewe may, indeed, have turned to history, but what concerned Martti Koskenniemi was that in Grewe’s history – even when Grewe had a chance to alter his text in 1984 – ‘there is no mention of Germany’s destruction of European Jewry’ and that the ‘principal responsibility for the Second World War is laid on the weakness of the League of Nations, the decline of neutrality and the creation of an imperial system of recognition and non-recognition, manipulated by the United States’.<sup>8</sup>

In his debate with H. L. A. Hart, carried on in the pages of the *Harvard Law Review* in 1958, Lon Fuller set out his argument for a ‘causal connection’ between the positivist tendencies in German jurisprudence and the rise of Hitler: ‘in the seventy-five years before the Nazi regime the positivistic philosophy had achieved in Germany a standing such as it enjoyed in no other country’.<sup>9</sup> Fuller was hardly the first or the last to identify intellectual sources for the Third Reich. Ernst Cassirer’s

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5. *Ibid.*, 502–3 citing Wilhelm Grewe, ‘Die Epochen der modernen Völkerrechtsgeschichte’ (1943) 103 *Zeitschrift für die gesamte Staatswissenschaft* 38–66 and 260–94, 283.
  6. Fassbender, *supra* note 3, 493–4, 483. Fassbender also describes how ‘Grewe was included in a small circle of lawyers advising the new government of Chancellor Konrad Adenauer in matters of foreign policy and relations with the three Western Allied Powers’. *Ibid.*, 482–3.
  7. Detlev F. Vagts, ‘International Law in the Third Reich’, (1990) 84 *AJIL* 661, 679.
  8. Martti Koskenniemi, *supra* note 1, 747. Although Grewe does make reference to the destruction of European Jewry, he does so briefly and in a list of the sins on both sides in the Second World War, so that Koskenniemi’s point remains essentially correct. Grewe, *Epochs*, 645.
  9. Lon Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’, (1958) 71 *Harvard Law Review* 630, 658. For a discussion of the Fuller–Hart debate, see Carl Landauer, ‘Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought’, (2000) 12 *Yale Journal of Law and Humanities* 171, 217–23.

*The Myth of the State*, published posthumously in 1946, focuses on the likes of Plato, Machiavelli, Carlyle, Spengler, and Heidegger.<sup>10</sup> I would not suggest that there was no ‘crisis of German constitutional law’ as analysed by Peter C. Caldwell in *Popular Sovereignty and the Crisis of German Constitutional Law*,<sup>11</sup> with its focus on figures like Carl Schmitt, Hans Kelsen, and Herman Heller. It is simply that the sources of the Third Reich as well as the weaknesses of the Weimar Republic should be located in broader social, economic, and ideological developments closer to those traced by George Mosse in *The Crisis of German Ideology* (1981) or Mack Walker’s *German Home Towns* (1998).

All of this is not to make the Carl Schmitt connection underscored by both Koskenniemi and Fassbender innocuous, even in the face of the growing industry in Europe and the United States attempting to resuscitate Schmitt as an insightful critic of liberalism.<sup>12</sup> If Schmitt appears nowhere in the pages of Gerhard Weinberg’s *The Foreign Policy of Hitler’s Germany: Diplomatic Revolution in Europe, 1933–1936* (1994) – as indeed did none of the thirty-six full professors of international law teaching in 1933 listed by Detlev Vagts<sup>13</sup> – Schmitt’s concept of *Grossraum* is closely connected to the ideology of the Third Reich, and, as Fassbender notes, ‘Grewe’s language is partially borrowed from Schmitt’.<sup>14</sup> But as Koskenniemi suggests, there are other voices that seem to resonate from Grewe’s *Epochs*, such as those of Max Weber (despite the fact that Alfred Weber seems to take up more space), Hans Morgenthau, and Friedrich Meinecke; and Fassbender identifies the importance to Grewe of Heinrich Triepel and Wolfgang Windelband – and also quotes from Hans Morgenthau’s article, ‘Positivism, Functionalism and International Law’,<sup>15</sup> to suggest just how close Wilhelm Grewe’s sensibility comes to Morgenthau’s. What I hope to do, then, is to extend Koskenniemi and Fassbender’s suggestion and locate Grewe’s positivism and realism, his statism and his hegemonism in the context of a broad German tradition of discussing state, politics, and culture that includes not only the names prominently mentioned by Koskenniemi and Fassbender but also finds some of its roots in Leopold Ranke and Jakob Burckhardt and extends beyond the war, for example, to Ludwig Dehio’s 1948 *Gleichgewicht oder Hegemonie*. And finally, I should like to place Grewe’s book in the broader German tradition – still quite vibrant today – of *Geistesgeschichte*, the holistic cultural study of specific historic periods.

10. Ernst Cassirer, *The Myth of the State* (New Haven, 1967 [1946]).

11. Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, NC, and London, 1997).

12. See, e.g., Andrea Gattini’s critique of Antony Carty’s attempt to find the valuable in Schmitt, ‘Sense and Quasisense of Schmitt’s *Grossraum* Theory in International Law – A Rejoinder to Carty’s “Carl Schmitt’s Critique of Liberal International Legal Order”’, 15 *Leiden Journal of International Law* 53–68, and she points out that ‘in 1936, when simultaneously with the Nuremberg racial laws, Schmitt organized with an exquisite sense of timing a symposium on the “fight of the German juridical science against the judaic spirit”’. Gattini, *Ibid.*, 56.

13. Vagts, *supra* note 8, App. A.

14. Fassbender, *supra* note 3, 503.

15. Hans Morgenthau, ‘Positivism, Functionalism, and International Law’, (1940) 34 *AJIL* 260, 274–6, cited in Fassbender, *supra* note 3, 507.

## I. 1494 AND ALL THAT

Grewe's history of international law is manifestly not a history of international law doctrine. Grewe does not trace traditional concerns of international legal writers with the sources of international law (the obligatory starting point of international law texts), the status of territory, and the law of treaties – whether in the importance of following a treaty (the doctrine of *pacta sunt servanda*) or the release from treaty obligations through a fundamental change in circumstances (the doctrine of *rebus sic stantibus*). Most of the major principles of international law do make their appearance at some point in *The Epochs of International Law*. In addition, the canonical figures of international legal theory from Grotius, Vitoria, Gentili, Zouche, Vattel, Pufendorf, and Bynkershoek to Wheaton, Westlake, and Lauterpacht all make their appearances. Grewe is indeed quite conscious about the recognized members of the canon, remarking for example that 'At the height of the French Age France did not produce a single author suitable for inclusion in the *Classics of International Law*' (p. 24). But Grewe's narrative is politically driven – or rather driven by the state and the state system. Indeed, the French case exemplifies hegemony with no need for a supremacy of theorists.

In that light, the medieval world represents for Grewe a movement from the universalism of Empire and Church to the early growth of states. His chapter on the Middle Ages opens with a declaration that the 'medieval world had neither States nor a State system in the modern sense of these terms' (p. 37). But Grewe followed others in seeing the medieval world moving from the 'personalized' rule of feudalism and from universalism to the early state. Towards the end of *Der Staat der hohen Mittelalters*, a book Grewe cites repeatedly, Heinrich Mitteis writes: 'Die Staaten beginnen sich ihrer nationalen Eigenart bewusst zu werden und ihr Eigenrecht gegen die Hegemonie des römischen Imperiums und des Papsttums durchzusetzen.'<sup>16</sup> Indeed, medieval universalism had been, for Grewe, exaggerated by scholars: 'At no point in time did the universal powers, Emperor and Pope, exercise a power which extinguished the political autonomy and independence of the temporal holders of particular power' (p. 12). For Mitteis, the Middle Ages between 900 and 1300 represented a transitional move to the modern: 'In dieser Epoche wird der Grund gelegt zur europäischen Staatenwelt, in ihr wird die Bahn bestimmt, in der sich ihre Bildung fast zwangsläufig bis zur Neuzeit bewegen musste'.<sup>17</sup> It should come as no surprise that contemporary scholarship has revised Mitteis's 1940 views considerably, so that Mark Hagger, Robert Bartlett, and others depict a Europe of transregional family connections. But even Grewe referred to the "openness" of the medieval feudal polities' (p. 68).

For Grewe, 1494 represents the watershed for the creation of the modern state system. In this he was following in a tradition. Ranke's first volume, *History of the Latin and Teutonic Nations (1494 to 1514)*, began in 1494 with the invasion of Italy by Charles VIII – setting up European, rather than intra-Italian, rivalries.

16. Heinrich Mitteis, *Der Staat des hohen Mittelalters: Grundlinien einer vergleichenden Verfassungsgeschichte des Lehnzeitalters* (Weimar, 1968 [1940]), 432.

17. Mitteis, *supra* note 19, 1.

Similarly, Wolfgang Windelband's *Die auswärtige Politik der Grossmächte in der Neuzeit von 1494 bis zur Gegenwart* – a book that Grewe recognizes as particularly influential on his own thinking – begins, as its title suggests, in 1494. Here Windelband expressly makes reference to A. L. H. Heeren's 1809 history of the state system, which located the birth of that system in Charles VIII's Italian campaign. In this tradition, which Grewe sees as begun by Bolingbroke in the eighteenth century, he asserts: 'A State system in the sense of such an intensive interrelationship has existed in Europe since 1494 when the battles incited by the invasion of Italy by Charles VIII of France were fought' (p. 13). And Grewe could quote Ludwig Dehio's confidence in locating the moment of change 'in a rather precise blink of an eye, namely the beginning of the Great Power struggle over Italy in the year 1494' (p. 19<sup>18</sup>).

This suggests a symbiosis of state and state system, which in turn depends on a combination of the internal and external development of the state – or, pointing to Eduard Fueter in his 1919 book on the European state system, 'He saw the cause for this development as being that the Great Powers, which towards the end of the fifteenth century had begun to assume a character different from other States because of their internal consolidation and external expansion, consistently focused on one large foreign policy issue: the domination of Italy' (p. 14). In essence, the growth of the state is driven by foreign objectives, or in the Rankean viewpoint that flowed through many authors, including Eduard Fueter and Wolfgang Windelband not to mention Friedrich Meinecke, to Grewe, the primacy of foreign policy. But if foreign policy may be depicted as driving the state's political developments, it is Grewe's core assumption that state politics drives the development of international law doctrine.

In his long discussion of the Spanish Age ranging from 1494 to 1648, Grewe spends a great deal of space on the positioning of international law vis-à-vis claims to the New World. In the context of papal investiture in Spain by Alexander VI of all rights to territories beyond the line drawn from north to south 100 miles west of Azores, the so-called 'Inter caetera edict', Grewe describes the 'political and scholarly opponents of Spanish imperialism, led by Francis I of France, Elizabeth I of England, Hugo Grotius and John Milton' (p. 236). This phrasing is unusual in *The Epochs of International Law* by listing monarchs together with the authors of *De jure belli et pacis* and *Paradise Lost*, but it underscores Grewe's larger point, that international law writing is politically driven. And Grewe will identify legal texts directly with their foreign policy objectives – indeed, many are little more than legal briefs for their state clients. Thus, he will describe Gentili's *Hispanicae Advocacionis Libri duo* as clearly distinguishing high seas and coastal waters as a way to 'provide the Spanish, whom he represented before the English prize courts, with extended neutrality protection against seizure by English warships' (p. 265). And he describes Hugo Grotius' *Mare liberum* as a response to the English proclamation in 1609 regarding fishing rights adversely affecting the Dutch fishing industry.

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18. Quoting Ludwig Dehio, *Gleichgewicht oder Hegemonie* (1948), 24, 46.

Not all of the international legal writers who appear in Grewe's study are reliable mouthpieces for their nations' foreign policy interests. In his discussion of the sixteenth-century writer Ferdinand Vasquez de Manchaca, Grewe writes: 'like Vitoria before him, he did not stop short of questioning the Hispano-Portuguese claims to control of the world's oceans. That he was able to do so attests yet again to the remarkable freedom and independence with which Spanish jurists and theologians of this age were able to advance their own concepts, which were often contrary to the official policy of their sovereign' (pp. 258–9). Nevertheless, Grewe quickly adds: 'However, they always kept Spain's national interest in mind.' This appears as a gratuitous tacked-on sentence with no substantive support. But it attempts to bring the exceptional cases – the errant publicists – back into Grewe's main storyline, the politics propelling international law writing.

As Martti Koskenniemi points out, Grewe's *Epochs* is freighted with Schmittian concepts not only about the *Grossraumlehre* – to which we shall return – but also in terms of the 'expansion of the State into "the organising principle of society"'.<sup>19</sup> If Carl Schmitt wrote in *The Concept of the Political* that 'State and politics cannot be exterminated',<sup>20</sup> that Schmittian doctrine about the inescapability of the political, despite liberal effort to create politics without politics in Schmitt's sense, informs the pages of *The Epochs of International Law*. And yet, oddly enough, war itself seems to be missing from Grewe's account. If Fassbender quotes Grewe's 1943 article to the effect that 'Every new age in the history of international law has arisen from such a catastrophe [of war],<sup>21</sup> the major wars of the modern era seem somehow invisible in Grewe's book. We stumble into the French Age in 1648 with no sign of the Thirty Years War, into the British Age in 1815 with a short reference to 'Napoleonic Europe' and the 'Napoleonic Era' but with little sense of the extent of the battle waged over Europe, and into the Interwar Period in 1919 without any evidence of trenches and mustard gas. When we enter the Age of American–Soviet Rivalry, Grewe writes: 'The belligerents ignored fundamental rules of the laws of war. The use of ideology and propaganda in war, the commission of atrocities on an unimaginable scale, such as the extermination of Jews in the Nazi death camps of Eastern Europe, mass deportations, forced labour, carpet bombings of residential areas – all this produced a deeply poisoned climate of hatred world-wide, a strong craving for revenge, and the ruthless defence through force of arms of the positions of power achieved' (p. 645). This short passage – woefully inadequate and morally escapist *pace* Koskenniemi – is meant to set the stage for the 'creation of the new world order with the signature of the United Nations Charter' (p. 645).

The various wars and their bloodshed occur mostly offstage, like a death in an Elizabethan theatre, because they finally represent seams between the grand eras mapped out as the 'epochs' of international law. Early in Grewe's book, he writes: 'In the attempt to organise the wealth of legal historical material extracted

19. Koskenniemi, *supra* note 1, 747.

20. Carl Schmitt, *The Concept of the Political* (1996), 78.

21. Fassbender, *supra* note 3, 510, citing Grewe, *Epochs*, 294.



from this series of questions into coherent systems of legal order, it must not be overlooked that a legal order is not primarily a logical system of precisely interacting rules without gaps and contradictions. It is much more the normative image of a natural state of order. The totality of diverse legal rules deserves to be called a legal order if it deals with the totality of facts needing to be regulated legally in a manner which corresponds to the specific intellectual, cultural, social and political situation in question and which establishes directions for existing in this situation' (p. 32). In this passage, Grewe gives a key to viewing his epochs so that we should underscore 'system' in his reference to state systems and read Grewe as a functionalist.

## 2. HEGEMONY AND ITS DISCONTENTS

In his essay on Grewe, Bardo Fassbender notes that, although Grewe's periodization of a Spanish, a French, and a British age roughly matched those of Wolfgang Windelband's *Die auswärtige Politik der Grossmächte in der Neuzeit von 1494 bis zur Gegenwart*, Windelband chose titles for the Spanish and French period that indicated the 'struggle against Spanish supremacy' and the 'struggle against French supremacy'. For Fassbender, 'what Windelband had styled as a time of struggle against the supremacy of Spain and France, respectively (*der Kampf gegen die Vormachtstellung Spaniens/Frankreichs*), Grewe simply called "the Spanish Age" and "the French Age" – an important shift of emphasis'.<sup>22</sup> But Grewe was every bit as cognizant that each of his 'ages' were also defined also by opposition. Thus, in the introduction to *The Epochs of International Law*, he writes that the 'sixteenth century and the first half of the seventeenth century were characterised by this Spanish predominance and by the wars fought by the French, the Dutch and the English against the establishment of a Spanish universal monarchy' (p. 23). Similarly, the 'battle against the ascendancy of France . . . was led by the Habsburg Empire and Britain, which were themselves great powers' (p. 23). It is difficult to set off Grewe's storyline from that of Windelband or, for that matter, of Heinrich Triepel's *Die Hegemonie: Ein Buch von führenden Staaten* – as much a model for Grewe as Windelband – with its very nuanced notion of hegemony and various '*Einflusskanäle* – influence channels' exerted by hegemonic states on subsidiary states after a lengthy discussion of hegemonic relations within a single society.<sup>23</sup>

Nevertheless, Grewe will make gestures towards what I would call a strong notion of hegemony. 'The stronger the leading position of the particular predominant power', he writes, 'the more that State marked the spiritual vision of the age, the more its ideas and concepts prevailed, the more it conferred general and absolute validity on expressions of its national expansionist ideology' (p. 23). But just as he does this, Grewe will turn around and state that he 'does not intend to say, for instance, that the international legal order of the sixteenth century and the beginning of the seventeenth was merely an instrument of Spanish policy. All the

22. Fassbender, *supra* note 3, 506.

23. Heinrich Triepel, *Die Hegemonie: Ein Buch von führenden Staaten* (Stuttgart, 1938), 232.

terms used were dialectical terms not intended to simplify in any way the complex circumstances to which they refer. The French, the Dutch and the English arguments were no less important to the international legal order of the Spanish Age than the Spanish ones...’ And here, despite his later effort to puncture Grotius’ reputation as the ‘father’ of international law, he will assert that the ‘most famous name in international law in the Spanish Age remains that of the Dutchman Hugo Grotius’. And perhaps more interesting, Grewe goes on to announce that because the French position at the height of the French Age was ‘based extensively on State practice’ rather than theory, the French, as cited earlier, ‘did not produce a single author suitable for inclusion in the *Classics of International Law*’ (p. 24).

Whatever the exact character of the hegemonic power, each of Grewe’s epochs represented a different notion of states and their interrelation, and his ‘examination adopts as its point of departure the working hypothesis of a necessary correlation between the State system and international law; its framework has been predetermined by the epochs of the general history of the State system’ (p. 30). In his introduction Grewe breaks down this analysis into a series of questions: how the geographical scope of the international community is defined, how the participants in the international community are defined, and whether an ‘organized’ international community can be identified.

For Grewe, the state represents a form of rationality, and he quotes Alfred Weber’s *Die Krise des modernen Staatsgedanken in Europa* to the effect that the modern state ‘grew out of a unique socio-historical constellation which arose from the simultaneous emergence of rational political institutions serving the purposes of capitalism, and the great European intellectual change of the period, which originated primarily in Italy’ (p. 165<sup>24</sup>). Grewe, this time citing Max rather than Alfred Weber, depicts the modern state as ‘rational’ and explains that this is ‘in the sense that it is based on a rational system of law, a calculable legal system in which ritual-religious and superstitious elements do not play a role, and which is handled by rationally acting, legally educated professional officials’ (p. 167<sup>25</sup>). Here Grewe separates the form of rationality or *raison d’état* of the Spanish, French, and British periods. In the Spanish Age it was ‘linked with religious elements’, in the French Age it appeared as ‘pure *raison d’état* in the form of naked, absolute power’, and in the British Age it was characterized by ‘ideology’ (p. 167).

In his portrait of the Spanish Age, Grewe asserts that the ‘law of nations in the Spanish Age rested on the solidarity and communitarian spirit of occidental Christendom’ (p. 152). We are, of course, no longer in an age of the unity of the Church, and the Reformation, coming as it did at the beginning of the Spanish Age, represents an important signal for Grewe. Nevertheless, there was a cultural unity to the age: ‘As far as the leading non-Spanish scholars of this period – the Italian Alberico Gentili, living as an emigrant in England, and above all the Dutchman Hugo Grotius – were concerned, they were strongly influenced by the

24. Quoting Alfred Weber, *Die Krise des modernen Staatsgedanken in Europa* (1925), 18.

25. Citing Max Weber, *Wirtschaftsgeschichte* (1924), 289 ff.



Spanish and based the essential points of their teachings on late Spanish scholasticism' (p. 187). In sum, this 'reflected the deep intellectual unity of the age, which lay behind contrasting positions in political, philosophical and legal theory' (p. 187).

When Grewe turns to the French Age, he states that the 'age was marked by the style of French politics and culture even more than the preceding age had been marked by that of Spain' (p. 279). Richelieu is perhaps the central figure, who 'represented perfectly the spirit of pure *raison d'état*, free from all confessional and ideological elements' (p. 279). Grewe, for example, ties the theory of state recognition of the period to the guiding ethos of the age: 'The policy of pure *raison d'état*, which was characteristic of the French Age, gave birth to the modern theory of the recognition of new States, which abstained from examining the circumstances of the new State's coming into being and disregarded its legal and moral aspects. It was satisfied with the actual existence of a sufficiently organised political body with effective authority and an approximately definable territory' (p. 343).

Grewe viewed the British Age as an age of ideology, and saw the British Empire with its far reaches that 'embraced a quarter of the Earth's land surface' (p. 443) as creating a universality and the notion of a universal international law among the 'civilised' countries, and 'identification of the international legal community with the community of civilised nations' (p. 446). And here Grewe delves into traditional German notions of 'Zivilization' (as opposed to 'Kultur'), fully cognizant of the weighted 'polemical confrontation of the two terms' in German cultural politics: (p. 446<sup>26</sup>) 'When this concept is referred to in this and subsequent chapters, "civilisation" is understood as the specifically Anglo-French shaping of the European cultural spirit' (p. 447) with 'its close link with the ideas of progress and development' (p. 448). And he turns to Henry Thomas Buckle's 'intellectual, anti-militarist, technological colouring of the Western European concept of civilisation' (p. 449). Grewe contended that the 'international legal order of the nineteenth century was a precise reflection of this global State system which developed under the dominant influence of British world policy, although it was only one side of the intellectual, political and economic universalism which corresponded to that system. The "droit public de l'Europe" was replaced by a law of nations, the undifferentiated general validity of which was appropriately expressed by the name that was introduced by Jeremy Bentham in 1789 and adopted in the nineteenth century by all eminent Anglo-Saxon jurists: "international law"' (p. 462). As examples of the legal doctrines that reflected the 'British type of economic imperialism', Grewe pointed to the development of 'spheres of influence' located in the penumbra of a European colony, to the creation of the 'open door' policy, which 'went further than any other legal institution of imperialistic penetration' (p. 477), and to the creation of humanitarian intervention (p. 489).

Grewe identifies the period following the First World War as 'post-classical', which was further deepened after the Second World War as a result of 'deep

26. He makes no attempt, for example, to hide the connection to the likes of Oswald Spengler and his *Untergang des Abendlandes*.

structural changes in the State system' (p. 575). Here Grewe is a bit kaleidoscopic. He talks, for example, about the 'increasing inclination to equip human beings with a stronger position in international law', which might be set against the traditional emphasis on the state – although he does not cite the interwar drive by international lawyers like Hersh Lauterpacht and J. L. Brierly to weaken the long-held view of states as the 'subjects' of international law. In describing the 'now-dominant idea of a universal international legal community of mankind', Grewe observes that 'Heterogeneous intellectual and ideological motives merged in this new universalist conception. Those international lawyers whose philosophy was rooted in positivism rejected the link between international law and the idea of civilisation because it would introduce an extra-judicial element into that law' (p. 584). Here he points to Heinrich Triepel, author of *Die Hegemonie*: 'Relying on Heinrich Triepel's sharp separation of international and national law they considered the internal constitutional and social order of States to be irrelevant to international law. On the other hand, the victors of 1919 were inclined to have recourse to the natural law-inspired ideas of the French and American Revolutions in favouring the concept of an international legal community which encompassed all mankind and was based on the equality of all States and nations' (p. 584). Here Grewe turns also to talk about the 'age of mass democracy' and to Ortega y Gasset's *Revolt of the Masses* (pp. 589–90). Grewe argued that the 'modern State, as it had developed in Europe over four centuries to become the sole subject and standard point of departure for the international legal order, transformed itself into a self-organising society during this post-war period of ever-more-apparent mass democracy. The separation of State and economy that had been characteristic of the nineteenth century disappeared' (p. 592).

Grewe's long narrative, with its division into 'ages', is deeply embedded in the strong German *geistesgeschichtliche* tradition, the confidence of a Jakob Burckhardt in the cultural coherence of the civilization of the Renaissance. Despite Grewe's constant contrapuntal moves, such as the constitutional conflict between the Continent and Britain during the British Age, he is insistent on the coherence embodied by his various 'epochs'. And Grewe's narrative attempts as well to ground each of his epochs in the development of the state, which in turn he links – when he makes reference to the two Webers – to economic and social development. It is difficult to think of a more traditional German historical sensibility. If, as I have mentioned, the twentieth century is a bit kaleidoscopic, unconnected variables presented as a single story-line, it is also true that Grewe's entire book does not produce the coherent narrative that is suggested from my quoting some of his most descriptive language about each epoch. Each chapter is sprawling with detailed discussions that are not well moulded to give form to the age. We have a Burckhardian sensibility without a Burckhardt. In part, because Grewe's argument derives from a conception of the development of the state, we could justifiably have expected him to spend a good deal more time on the state's actual development.

Grewe's critique of the traditional doctrinal orientation of international law writing is understandable – William Sumner Maine in the late 1880s criticized the standard mode of international law writing by authors who 'follow one another in

a string, each commenting on his predecessor, and correcting, adding to, or devising new applications for, the propositions he has laid down'.<sup>27</sup> The development of international law doctrine is not merely a scholastic exercise. It needs to be written within the context of politics, economics, and society – if not perhaps in the forced coherences of the German *geistesgeschichtliche* tradition. And yet, international law doctrine does involve the development of particular doctrines and internal dialogue, what Peter Gay has described as the 'imperatives of craft', that is, the internal force of the discipline.<sup>28</sup> At the very least, Grewe could have traced particular international law doctrines as they transformed and were reshaped over the centuries. Grewe's book, with its tremendously rich detail and its large schematic succession of ages, leaves its reader finally without a real sense as to how international law developed in the modern era.

Carl Landauer\*

Ulla Hingst, *Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge*, Berlin, Duncker & Humblot, 2001, ISBN 3428105893, 349 pp., €58.00.

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## 1. A GERMAN SCHOOL?

Martti Koskeniemi suggested recently that after Heidegger, the academic study of international law in Germany had become well-nigh impossible: 'With Heidegger (and with postmodernity) the suggestion of using philosophy to resolve problems of international law and politics came to an end.'<sup>1</sup> Heidegger not only questioned the possibilities of any absolute values, but also set a dubious personal example: his embrace of Nazism in 1933 demonstrated that there is a clear danger for academics who descend from their ivory towers and engage themselves in politics. As some have later argued, it may well be that this danger is most pronounced when it concerns philosophers, whose very job description since Plato includes making uncompromising blueprints for the good life rather than accommodating the plurality of human existence.<sup>2</sup>

In this light, it is perhaps no coincidence that the generation of German international lawyers who had been toddlers, or not even born, when the Nazis took power (i.e. those who were born in the late 1930s or early 1940s), seems to have simply done away with philosophical niceties, and instead embarked on sheer idealism interlaced with a dose of almost intuitive sociology. Representative works (for

27. Henry Sumner Maine, *International Law* (London, 1888), 1–2.

28. Peter Gay, *Art and Act: On Causes in History – Manet, Gropius, Mondrian* (New York, 1976).

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1. M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), 264.

2. See, e.g., D. R. Villa, *Arendt and Heidegger: The Fate of the Political* (1996); B. R. Barber, *The Conquest of Politics: Liberal Philosophy in Democratic Times* (1988).

instance in the form of lectures to the Hague Academy) of Tomuschat,<sup>3</sup> Frowein,<sup>4</sup> Delbrück,<sup>5</sup> and perhaps even the later Simma,<sup>6</sup> are characterized by a clear sense of advocating the right thing, informed by a high measure of technical craftsmanship and an awareness of at least the broad outlines of mainstream international sociology.<sup>7</sup> Those works are not overly theoretical in the strict sense of formulating axioms and hypotheses, but they do have the ambition to rise beyond the doctrinal. The resulting prescriptions, so their authors might hope, help to improve the fate of the world.<sup>8</sup> It is not just a matter of proposing all sorts of rules *de lege ferenda* (as many outside Germany also did immediately after the Second World War) or proposing them even as positive law (as human rights advocacy is often wont to do). On a deeper level, much of what this generation has been doing has been devoted to getting the legal concepts into place, in the realization that rules need to be backed up by concepts and institutions: it is no good having wonderful rules of behaviour if those rules do not bind those who need to be bound the most, and if courts, or other entities, cannot enforce them.

Perhaps it is the spirit of Radbruch which hovers over much German international legal scholarship: law ought to be a matter not just of formal validity, but also of moral content. This Radbruchian spirit has had two occasions in recent German history on which forcefully to present itself: not just after the Second World War, but also in the early 1990s after German unification, when Germany had to come to terms with the activities of former East German officials.<sup>9</sup> Perhaps as a result of Radbruch's influence, there is probably not a country in the world where the concept of *erga omnes* obligations has received such a warm welcome as precisely in Germany; there is hardly a country in the world more jubilant about the *jus cogens* concept than Germany; and there is not a country in the world where the UN Charter is so steadfastly and seriously regarded as a constitution for the international community

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3. See C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', (1993) 241 (IV) *Receuil des Cours* 195.
  4. See J. A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', (1994) 248 (IV) *Receuil des Cours* 345.
  5. Delbrück, as far as I am aware, never taught at the Hague Academy, but insights into his thoughts can be gleaned from his 'Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization', (2001) 11 *Schweizerische Zeitschrift für internationales und europäisches Recht* 1.
  6. The younger Simma seemed first and foremost concerned with how the world works. See B. Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law', (1970) 20 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 5; B. Simma, *Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts* (1970). His later work, however, suggests a more overtly idealist position. See, e.g., B. Simma, 'From Bilateralism to Community Interest in International Law', (1994) 250 (VI) *Receuil des Cours* 221.
  7. The phrase 'international sociology' seems more apt than the perhaps more usual 'international relations theory', if only because the former would include some of the works of Giddens or Beck, which any strict definition of the latter would exclude.
  8. Rüdiger Wolfrum, to me, constitutes a partial exception, in that his idealism is more strictly of the *de lege ferenda* kind. Something similar applies to Michael Bothe, who, moreover, seems to have aligned himself with the self-reflexive theories of Luhman and Teubner, thus focusing on the inner consistency of the international legal system rather than its moral fibre. See, e.g., M. Bothe and A. Fischer-Lescano, 'Protego et Obligo. Afghanistan and the Paradox of Sovereignty', (2002) 3 *German Law Journal*, available at <http://www.germanlawjournal.com/print.php?id=187> (last visited 27 Sept. 2002).
  9. See e.g. the recent decision of the European Court of Human Rights in the border guards case, *Case of Streletz, Kessler and Krenz v. Germany* (applications nos 34044/96, 35532/97 and 44801/98), judgment of the Grand Chamber, 22 March 2001.

as Germany.<sup>10</sup> Indeed, it is more than likely that only a German scholar could dedicate a general course at the Hague Academy to the very survival of mankind and continue to be taken seriously.<sup>11</sup> The same words from an Anglo-American scholar would have sounded incredulous and superficial; the French are deemed too cynical even to think in such terms; and coming from a Third World scholar it would have sounded naive at best.

## 2. LAW OF TREATIES?

Against this background, Ulla Hingst's recent doctoral dissertation comes across as a perfectly respectable example of postwar German international legal scholarship. Hingst aims to sketch the consequences of globalization on the law of treaties, and does so by devoting half her book to a discussion of globalization and its discontents, after which the second half predominantly focuses on the reach of international law. While the book (as its title suggests) is presented as addressing the effects of globalization on the law of treaties generally, most of the analysis concentrates on the *pacta tertiis* rule, in a curious way: her analysis of the third party problem is, in fact, a discussion of whether treaties can be binding on states without their consent.

In itself, there is something inappropriate (but telling) about this approach: the burning political issue of international legislation becomes, through the *pacta tertiis* prism, a mere technical law-of-treaties issue. A highly contentious political issue (is international law binding for all states even against their will?) is recast in innocuous sounding technical terms; therewith the issue is depoliticized. Moreover, the political dimension to the *pacta tertiis* maxim itself and to possible exceptions thereto is completely overlooked by Hingst: Chinkin's observation, made almost a decade ago, that powerful states are often able to dictate things and circumvent the *pacta tertiis* maxim in the name of the public interest, is in no way reflected in Hingst's work.<sup>12</sup> This is hardly a coincidence, given the absence in her bibliography of Chinkin's *Third Parties in International Law*.<sup>13</sup>

The way in which Hingst narrows down her topic is a bit curious, not just given the depoliticization entailed by her focus on the *pacta tertiis* rule, but also because there are many points where the law of treaties, at least potentially, is affected by globalization and its effects or accompaniments. Thus, before the European Union's courts, companies have started to rely (and successfully so, in part) on the obligation not to defeat the object and purpose of a treaty prior to its entry into force,

10. See generally (making slightly different, but similar enough distinctions) B. Fassbender, 'The United Nations Charter as Constitution of the International Community', (1998) 36 *Columbia Journal of Transnational Law* 529.

11. See C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', (1999) 281 *Receuil des Cours* 9. It is also hardly a coincidence that Germany is among the main proponents of the International Criminal Court.

12. See C. Chinkin, *Third Parties in International Law* (1993), 143.

13. *Ibid.* The other classic on the third party rule is also missing: R. F. Roxburgh, *International Conventions and Third States: A Monograph* (1917).

suggesting therewith that treaties no longer are deemed solely to create obligations on the intergovernmental level.<sup>14</sup> Likewise, a German trader argued a few years ago before the European Court of Justice that the EC Council's suspension of a treaty was illegal under international law, therewith effectively relying on the *pacta sunt servanda* norm, something that earlier only states were supposed to do.<sup>15</sup> The topic of reservations to treaties is in considerable disarray precisely because of the possible impact of reservations on the legal situation of individuals, illustrating problems associated with the rise of new actors which in itself may be a consequence of globalization.<sup>16</sup> The growing interdependence also results in increasing numbers of treaties being concluded, thus potentially (and probably actually) giving rise to an increasing number of treaty conflicts. And the Vienna Convention's regime on material breach itself was already innovative when it encompassed solidarity in the form of granting some relief to treaty partners not directly injured by a material breach. In short, there are numerous issues where one could at least hypothetically expect globalization, however precisely defined, to affect the law of treaties. It is of course Hingst's prerogative to pick and choose her own topic, but at the very least, given her focus on the third party problem, the title of her study does not quite cover its contents. Hingst's curious focus on the *pacta tertiis* rule also means that works on the law of treaties are somewhat underrepresented, in spite of the promise suggested by the book's title. There is no reference to Rosenne (at least not on treaties),<sup>17</sup> nor to Vierdag,<sup>18</sup> nor Aust,<sup>19</sup> not even Hutchinson's piece on material breach,<sup>20</sup> dealing with the legal interests of parties not directly victimized by a breach, is referred to.<sup>21</sup> And neither are recent attempts by Bleckmann<sup>22</sup> or Craven<sup>23</sup> to come to terms with the changing structure of the law of treaties. Of the recognized law-of-treaties writers, only Simma's work has been consulted with some degree of consistency, and while

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14. See case T-115/94 *Opel Austria v. Council*, [1997] ECR II-39; case C-27/96 *Danisco Sugar v. Allmänna Ombudet*, [1997] ECR I-6653. For further details, see J. Klabbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent', (2001) 34 *Vanderbilt Journal of Transnational Law* 283.
  15. Case C-162/96, *Racke v. Hauptzollamt Mainz*, [1998] ECR I-3655. See also J. Klabbers, 'Re-inventing the Law of Treaties: The Contribution of the EC Courts', (1999) 30 *Netherlands Yearbook of International Law* 45.
  16. To be sure, this particular topic is addressed by Hingst, but somehow as related to the *pacta tertiis* discussion. See also below.
  17. One would have expected at least S. Rosenne, *Breach of Treaty* (1985) and his *Developments in the Law of Treaties 1945-1986* (1989), as well as a handful of articles. Indeed, it is arguable that Rosenne's classic paper 'Bilateralism and Community Interest in the Codified Law of Treaties', in W. Friedmann, L. Henkin and O. Lissitzyn (eds.), *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup* (1972), 202, which is also missing, provides much of the impetus to the 'German school'.
  18. One would have expected at least E. W. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions', (1988) 59 *British Yearbook of International Law* 75, and his 'Some Remarks about Special Features of Human Rights Treaties', (1994) 25 *Netherlands Yearbook of International Law* 119.
  19. See A. Aust, *Modern Treaty Law and Practice* (2000).
  20. See D. N. Hutchinson, 'Solidarity and Breaches of Multilateral Treaties', (1988) 59 *British Yearbook of International Law* 151.
  21. And indeed, no Klabbers either (as the reader may have guessed), but this at least is excusable in that those of my writings which could have had some possible relevance to the effects of globalization on the law of treaties started to get published only when Hingst must have been finalizing her manuscript.
  22. See A. Bleckmann, 'Zur Wandlung der Strukturen der Völkerrechtsverträge', (1996) 34 *Archiv des Völkerrechts* 218.
  23. See M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', (2000) 11 *EJIL* 489.



Simma's work on the law of treaties is outstanding, one cannot just ignore other writings.

### 3. THE REACH OF INTERNATIONAL LAW?

Globalization is a notoriously elusive topic, and one can hardly blame Hingst for not coming up with the definitive study of what it entails. Yet, at times her approach is too simplistic to be of much use. The leading example hereof is surely the discussion of the idea, first launched by her supervisor Jost Delbrück, that only things which contribute to the common good of mankind may legitimately be regarded as instances of globalization. Whatever the merits of the idea as such (and those would appear to be rather limited), Hingst's discussion is not very informed by any standards. Thus she discusses armament in two or three sentences and concludes that it is generally bad for mankind, without so much as showing an awareness of the proposition, spelled out in considerable depth before the International Court of Justice (ICJ) a few years ago, that deterrence through arms may actually help keep the peace and thus could possibly be interpreted as being good for mankind.<sup>24</sup> Conversely, the increase in international courts, and increasing possibilities for access by individuals, are regarded as a good thing; there is not a word on the communitarian point that a world in which we communicate only through our lawyers is perhaps not the most desirable of worlds.<sup>25</sup> In short, philosophically (or theoretically perhaps) Hingst's discussion is rather straightforward: she takes a short cut to the good life without appearing to realize that the good life is itself controversial. While her short cut is a popular short cut (others have gone there as well), at least some of those others do so with much more subtlety and understanding.

However, the work improves noticeably (although not immediately perhaps) when she finally, halfway through the book, gets to her proper topic:<sup>26</sup> the impact of globalization on the law of treaties, and the effects of globalization on the third party rule in particular. After discussing attempts by Charney, Tomuschat, Ziemer (a colleague at the University of Kiel), and Delbrück to come to terms with the changing structure of international law, she engages in a lengthy analysis of several regimes which, at first sight at least, seem to make some inroads into the *pacta tertiis* rule. These nitty-gritty discussions demonstrate that Hingst is a fine lawyer, capable of separating the sensible from the nonsensical, and able to construct a reasoning which carefully leads to conclusions which, within the four corners of her argument, carry substantial plausibility. Technical craftsmanship is present in abundance, and in the process she also manages to be highly informative.

24. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 226.

25. A useful introduction to the debate is S. Avineri and A. de-Shalit (eds.), *Communitarianism and Individualism* (1992).

26. It is a telltale sign that on p. 137 she finally gets around to stating the purpose of her research.

Thus the study contains a brief but sound analysis of third party approaches when it comes to protection of the environment, and a more lengthy, useful analysis of the international drugs regime, in which some conventions seem to expect that non-parties will also adhere to them. Likewise, there is a fine discussion of the regime on port state jurisdiction laid down in the 1982 United Nations Convention on the Law of the Sea (which also looks set to grant port states jurisdiction over ships from states not parties to the Convention) and an equally fine analysis of the deep seabed regime. Moreover, Hingst devotes considerable time and attention to third party effects emanating from the 1995 Fish Stocks Agreement, and ends with a discussion of the notorious third party problem in connection with the Statute of the International Criminal Court (ICC). While the latter discussion does not reach beyond the familiar arguments, it does represent these admirably. Incidentally, the remarkable thing about all these examples is that she concludes that strictly speaking the *pacta tertiis* rule has hardly (perhaps not at all) been set aside: in many cases, the effects on third states can be explained by other factors, such as, in the case of the ICC, the possibility of universal jurisdiction.<sup>27</sup>

The only (slightly) dissonant note in this more empirical part of the study is her discussion of reservations to treaties, if only because it is difficult to conceive of reservations as having anything much to do with the *pacta tertiis problematique*, as Hingst indeed acknowledges. Moreover, here the discussion is a bit too facile, all too easily slipping into the comfortable position that some reservations are against the common interest without even bothering to consider Alain Pellet's sustained opinion that states remain free to create their own rules on reservations whenever they negotiate a treaty.<sup>28</sup> Surely, states' reluctance to do so suggests that fundamental agreement on the desirability of reservations generally and acceptability of some reservations in particular remains largely out of reach, and if that is so, then it is simply too easy to adopt a moralist approach and chide the law for not living up to it.

In the end Hingst concludes that an absolute insistence on the *pacta tertiis* maxim may come to obstruct the general interest but, fortunately, that the structure of international law and the law of treaties are undergoing change, at least for those willing to see it.<sup>29</sup> Clearly, she has a point, although the limited scope of her own study does not allow such a broad conclusion: at best, she would be entitled to claim that the *pacta tertiis* maxim is not as rigid as it perhaps once was; and even that is debatable in light of her own research.

27. This could, and perhaps should, have inspired a discussion on the relationship between the *pacta tertiis* rule and those other factors, but nothing of the sort is undertaken.

28. See, e.g., the report of the International Law Commission on its 48th session, GAOR Doc. A/51/10, para. 125. For a brief discussion, see J. Klabbers, 'Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties', (2000) 69 *Nordic Journal of International Law* 179.

29. Her closing sentence is worth quoting for its intellectual honesty: 'Die Gesamtheit der Entwicklungen ergibt jedoch ein Mosaik, welches die Konturen einer veränderten Struktur des internationalen Systems und des Völkervertragsrechts als Bestandteil dieses Systems erkennbar werden lässt – vorausgesetzt man ist bereit, diese zu sehen' (p. 306).

#### 4. GLOBALIZATION AND INTERNATIONAL LAW?

There is a book to be written about the changing law of treaties in the face of globalization, increased interdependence, the emergence (or recognition, perhaps more accurately) of new actors, and the increasing transparency of the state. Hingst's book is not that book just yet, although in particular the empirical part contains useful hints and references and a handful of intelligent discussions.

There is also a book to be written about whether international law allows for the creation of obligations on states against their will, preferably a book more overtly recognizing the political nature of the topic instead of tucking it into the folds of a seemingly technical law-of-treaties issue. More particularly, such a work might address the question how the imposition of norms can possibly be justified in a system still characterized by sovereignty, however nominal the notion of sovereignty itself may be.<sup>30</sup> Article-length attempts to ground *omnium* obligations (to use Tasioulas's term<sup>31</sup>) in coherent philosophical terms have so far been less than convincing. The main argument used by Jonathan Charney, for instance, is that necessity demands international legislation,<sup>32</sup> but that is way too simple, ignoring as it does the circumstance that we don't usually agree on what's necessary and even when we do, we bicker about distributing the costs and benefits. And in the absence of agreement on the good life, any attempt to legislate for others amounts to imposing values on those others.<sup>33</sup>

Hingst has written neither of these books, but her work might provide useful information and insights on both topics. More generally, the postwar German international law school has produced some fine writings on both topics, albeit without confronting the theoretical or philosophical issues head-on. But that was perhaps to be expected: in the wake of Heidegger any attempt to ground philosophically any set of universal values might be well-nigh impossible, not just for Germans, but also for the rest of us.<sup>34</sup>

Jan Klabbers\*

Nikolaos K. Tsagourias, *Jurisprudence of International Law. The Humanitarian Dimension*, Melland Schill Studies in International Law, Manchester, Manchester University Press, New York, Juris, 2000, 137 pp. ISBN: 0719054656, £45.00.

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The Kosovo crisis at the turning of the millennium triggered a renewed discussion in legal circles on the legality of humanitarian intervention. Much of this

30. For a fine study see J. Bartelson, *A Genealogy of Sovereignty* (1995).

31. See J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', (1996) 16 *Oxford Journal of Legal Studies* 85. Incidentally, this work too is missing from Hingst's bibliography.

32. See J. I. Charney, 'Universal International Law', (1993) 87 *AJIL* 529.

33. See, e.g., J. Petman, 'Fighting the Evil with International Sanctions', (1999) 10 *Finnish Yearbook of International Law* 209.

34. But see A. Paulus, 'International Law After Postmodernism: Towards Renewal or Decline of International Law?' (2001) 14 *LJIL* 727.

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discussion concentrates on the question of whether intervention for humanitarian reasons can be seen as a new (or maybe even inherent) exception to the ban on the use of inter-state force. As always, the presented arguments are fuelled by the authors' (at many times implicit) theoretical positions, which results in a legal debate reflecting a cacophony of insights and, hence, not too uniform conclusions.

Nikolaos Tsagourias's book is a revised version of his thesis defended in 1997 at the University of Nottingham. It is written in an impressive academic style (your reviewer has learned at least fifty new words) and explicitly notes the dilemma of having to choose between normatively contrasting theses and a compulsion to singularize the trail of argument in order to reach an objective result. Legal professionals tend to make a distinction between doctrine and theory ('the extra-legal environment') in order to save the objectivity of their arguments. We need doctrinal arguments to make the legal system workable, but doctrinal outcomes are often controversial and unsatisfying. Thus, according to Tsagourias, the situation becomes circular. 'Legal theory uses abstractions which are avoided by relying exclusively on doctrine. However, the latter produces problems of definition which can be resolved by appealing to theory. Because this cannot produce clarity, we need to disentangle the debate. This is achieved by explicating the moulding of the doctrinal discourse by theoretical dispositions and their dialectical interplay.' In other words, we need to look behind the doctrine to discover which extra-legal elements (in Tsagourias's terms: 'theory') form its origin. This is what needs to be done with respect to the debate on humanitarian intervention as well. Tsagourias therefore purports to demonstrate 'how legal discourse appertaining to humanitarian intervention is informed by theoretical explorations, and illustrate how activity in this field emulates these legal and theoretical constructions' (p. 2). The presentation of doctrine as being formed by 'values' rather than being 'objective' or 'neutral' is of course not new and Tsagourias claims that this is particularly evident with regard to the doctrine on humanitarian intervention.

A key concept in his approach is 'human dignity' – described as both a value and an instrument – which underlies and redirects our action 'by acknowledging and appreciating our finitude, fears, hopes and dreams to construct a meaningful life'. At first sight the book therefore seems to be written in the natural law tradition, albeit that theistic notions are replaced by parameters stemming from 'humanity'. At the same time, however, it seems to address more the relationship between facts and values, whereby the study places itself in the tradition that looks for a synthesis between natural law and positivism. At other moments, the reader may be convinced that the book is just another 'critical' study, of the kind that is telling us that what we have done so far doesn't make any sense. There is no doubt that the author would dislike these qualifications as he aims for a complete redescription of the debate on the basis of these approaches: just as in the ancient Greek play *Antigone*, psyche needs to be reconciled with reason, justice with order.

Indeed, this is quite an objective for a Ph.D. thesis, and despite the fact that the reader must work hard to grasp the innovative dimension of Tsagourias's approach,

the book is written with great scholarship which makes it stand out when compared with many of the more doctrinal studies on humanitarian intervention. In fact, the book is not so much on humanitarian intervention, but rather on the role of 'human dignity' in legal argumentation. And the title suggest an even wider scope: *jurisprudence of international law*. Since so many before him have failed, the question is whether Tsagourias succeeds in building a bridge between order and justice.

The argument put forward by the author is based on a description of the different perspectives, ideals, and arguments of the legal as well as the theoretical tradition. Thus various chapters in the book deal with the approaches to humanitarian intervention in the traditions of natural law, positivism, the policy-oriented school, and critical theory, while two 'doctrinal' chapters address the prohibition on the use of force and the protection of nationals as humanitarian action. The chapters provide both a refreshing introduction to the theoretical approaches and a presentation of the views of some of their proponents on the concept of humanitarian intervention. It may come as no surprise that these views differ even between people within one school of thought, which complicates the picture even more. The shared perceptions within one school (thereby distinguishing it as a 'school') could have been given some more attention in the different chapters. Yes, the natural law tradition lays a 'continuous emphasis on humanity and human solidarity', and positivism sees international law as 'rules extrapolated from or prognosticated by the practice of sovereignty'. But by using these standard characteristics as starting points, the chapters on the different theoretical approaches remain rather descriptive. At the same time the discussion between natural law and positivism is presented as being of the same nature as the more meta-judicial contributions of the policy-oriented school or the critical school. Of course, the author is aware of this distinction (as well as of some shared perspectives among the different schools), but the structure of the book seems to imply the existence of four possible ways to approach law and to build legal arguments. The chapters on the ban on the use of force and the protection of nationals following these four analyses are used to make the point that theoretical and legal positions intermingle, that there is an uneasy truce between these arguments, and that the 'humanitarian element' should not be overlooked even if self-defence seems to be the central argument.

Irrespective of the interesting analyses they present, the first chapters were written for one purpose only. They serve as building blocks to construct the final argument: humanitarian intervention as a discursive model of human dignity. The promising remarks made by the author in this respect deserve to be quoted in full: 'Moving away from compartmentalized legal arguments raises the prospect of capturing the essence of the problem. Otherwise the capacity of understanding is forfeited. Humanitarian actions should not be impersonal, insouciant debates on their effects on rules. We need to see their essentiality, the human tragedy and its effects on human dignity which would eventually redirect our thinking and action. Concerning legal argumentation, its insularity is transgressed and its dialectic enhanced. The debater can now imagine a revisionary programme and

stimulate transformation and revision of legal concepts. By abandoning foundational theories, the prospects for introspection of the character of our life and our world loom' (p. 96). Wow, isn't this what we always wanted? And yet, why is it so difficult to follow Tsagourias's argumentation? The bottom line of his model is that there is an element of 'human dignity' in many (all?) cases of intervention. The author teaches us that a situation involving a human tragedy puts pressure on the norms which lose their rigidity and thus grow cracks in their interpretative orthodoxy. We should not argue human dignity away in defending our actions, but realize the essence of any humanitarian action as such rather than as a legal proposition which evades reality.

While it may be true that states and international organizations present actions which are essentially 'humanity-driven' in terms that fit the existing legal doctrine best, it still seems the only workable way, since the rules of the (international legal) game seem to demand this. In that respect Tsagourias should be pleased that, *even* when other arguments are sometimes put forward, many international actions contain a strong element of humanity. And, as he showed, sometimes this element is recognized even when it is not mentioned in official statements. It is up to the (hopefully many) readers of this book to decide whether the explicit acceptance of 'human dignity' as the guiding principle of all international actions is of any help in maintaining international order, and whether it simultaneously promotes justice in the long run. After all, the author does not seem to have solved the main (classic) problems regarding the relationship between extra-legal values and legal norms. Indeed, his analysis clearly reveals this relationship – which is, by the way, accepted by all the schools he discussed – but it fails to provide an answer to other obvious questions: does human dignity serve as a source of valid legal norms and if so how do we prevent it being used for reasons that are less human? And what solutions does the model offer for the problem that different conceptions of humanity exist? Maybe the *Leiden Journal* could invite the author to elaborate on these issues in a separate article. This thought-provoking book certainly deserves it.

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Dieter Fleck (ed.), *The Handbook of The Law of Visiting Forces*, Oxford, Oxford University Press, 2001, ISBN 0198268947, 625 pp., £65.00.

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The presence of foreign armed forces on the territory of another state may occur either as a result of armed conflict or by consent. In the former situation the rules concerning belligerent or military occupation apply. The latter situation offers a variety of grounds ranging from ad hoc consent to framework agreements as the

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legal bases for the presence of troops in another state. This presence may amount simply to the passage of foreign armed forces in transit, their participation in military exercises or their permanent stationing in established military bases, either on the basis of bilateral arrangement or under the framework of a military alliance. Foreign troops may also be introduced in another state as part of a UN or regional peace-keeping operation or enforcement action.

The presence of visiting forces by consent in principle raises questions of exercise of jurisdiction over them, and, in particular, constitutes a discussion of the conflicting claims to the exercise of such jurisdiction by the sending and receiving states. This issue is also linked with the granting of privileges to visiting forces, their dependents, and auxiliary personnel in other technical matters extending beyond the scope of criminal and civil jurisdiction – for instance, logistics, host state taxation, customs, and immigration policy. Traditionally, discussion has focused on criminal jurisdiction and as a matter of customary and treaty law absolute immunity of the visiting forces from host state jurisdiction has been the rule, save for the express waiver of the exclusive jurisdiction of the sending state. This rule persists to a great extent, for instance, with respect to warships and other government vessels, in ports or exercising the right of innocent passage or on the high seas, as is evidenced by the relevant provisions of the UN Law of the Sea Convention of 1982. On the other hand, it is a rule of *jus dispositivum* and as such has been greatly modified by treaty practice, resulting in the introduction of concurrent jurisdiction of the sending and host states with respect to visiting forces in the aftermath of the Second World War. Whether this trend in state practice has resulted in a change of customary law on the subject, to the extent that absolute immunity is no longer the rule, is a matter of controversy. For what emerges from this practice is a scale of sending-state jurisdiction ranging from exclusive jurisdiction and absolute immunity to concurrent jurisdiction with the host state, largely on the basis of treaty making in relation to particular instances of the presence of visiting forces in another state. Moreover, the subject of visiting forces may raise issues of protection of human rights vis-à-vis both the sending and the host states. Furthermore, the presence of visiting forces may give rise to questions of exercising jurisdiction both on the domestic and international planes with respect to the commission of war crimes by members of these forces, as well as their competence to apprehend other war criminals so that they can be subjected to the jurisdiction of an international tribunal.

This voluminous book, edited by Dieter Fleck, basically focuses on the consensual presence of foreign armed forces. The essays contributed by an impressive number of experts in the field of military law consider the main issues involved, namely the jurisdiction of the host state and the extent of immunities enjoyed by the foreign troops, from the perspective of both substantive law and practice. However, the book appears to deal with subjects broader than foreign military presence by consent by including a chapter on the presence in another state of International Committee of the Red Cross (ICRC) staff and an entire part on military operations.

The book is divided into four parts and also contains an annex. Part I (chapters 1–3) consists of a general presentation of the issues arising from the presence of

forces in another state, the historical evolution of the relevant body of law, and an overview of legal questions arising from the multinational forces that, at present, constitute the bulk of foreign military presence in another state by consent. In the first chapter, on the issues arising from the presence of visiting forces, the author merely raises the subject of the controversy over the present status of customary law on jurisdiction over visiting forces and the matter is then left to rest. This is unfortunate, for one would expect that in a book as comprehensive as the subject of the present review, there would be an attempt at outlining the customary law on the matter. Instead, it lies with each reader to assess for him- or herself what this customary law is after perusing the extensive reference to practice found in the subsequent parts. Moreover, the second chapter in Part I constitutes the only instance in the entire book where the issue of human rights protection is dealt with. This is equally unfortunate, for it would be expected that this very important issue might be the subject of an individual contribution. The third chapter, on the subject of multinational forces, focuses on practice in Europe, which has been prolific in the years following the end of the Cold War and seems to break new ground in the topic of visiting forces. Perhaps this European contribution in the field could be better understood by comparing it with the practice of the United Nations or the Economic Community of West African States (ECOWAS) in Africa, also involving multinational forces.

Part II deals with the rules provided in current Status of Forces Agreements (SOFA) (chapter 4, sections 1–14) and the status of international military headquarters (chapter 5). In particular, the sections of chapter 4 deal either mainly or exclusively with the NATO SOFA of 1951. This is understandable in view of the groundbreaking nature of this multilateral treaty in the field of visiting forces. All the essays in chapter 4 constitute, taken as a whole, a thorough study of issues concerning the substantive law on jurisdiction, immunities, security, the receiving-state legislation, personnel, dependents, claims, dispute settlement, and logistics with respect to visiting forces. Still, with few exceptions the NATO SOFA rules are not compared with those contained in other SOFAs, and even the exceptions constitute cursory references rather than a detailed comparative study; however, this is largely remedied in Part III. By contrast, the essays in chapter 5 on international military headquarters constitute a more balanced whole.

The subject of Part III (chapters 6–8) is practice, and it includes a number of representative case studies illustrating the application of substantive law in concrete situations, ranging from bilateral arrangements to UN peacekeeping. A feature of this part worth noting is that it is not strictly confined to military presence. Chapter 10 deals with the legal status and headquarters agreements of the ICRC, hardly a military institution. Moreover, the practice of the United Nations constitutes the subject of just one essay, compared with the whole of chapter 4 being dedicated mainly to the NATO SOFA, though the practice of the United Nations has been equally important in the field of visiting forces. Perhaps this option reflects certain realities in state practice that originated in the Cold War and still persist, namely that military co-operation is better achieved either on a bilateral basis or under the umbrella of military alliances manifesting community of interests, like NATO, rather

than global collective security mechanisms. Furthermore, there is no reference to the practice of regional organizations outside Europe, although an examination of the military missions under the authority of ECOWAS would be an important contribution to a more thorough picture of the practice concerning visiting forces.

Part IV addresses the question of visiting armed forces in the context of military operations under mandates of peace enforcement. This is a particularly interesting part of the book, for it deals with complex organizational, jurisdictional, and security issues arising out of the deployment of armed forces under the auspices of the United Nations or NATO, often without the consent of the territorial sovereign or in countries where there is no effective central political authority due to civil strife. As many contingencies as possible are covered, but this is achieved at the expense of an analytical examination of these situations, which raise important issues. Part IV deals mainly with situations where there is the consent of the host state, and apart from the UN model SOFA and the post-Dayton SOFAs dealt with in other parts of the *Handbook*, little is mentioned of other cases, notably the pre-Desert Storm status of coalition forces in Saudi Arabia and other Gulf states. The presence of a large number of Western Christian or Jewish troops, among whom are a number of women, in a country such as Saudi Arabia whose Islamic beliefs are so strongly fundamentalist, merit a more detailed examination and would have constituted one of the highlights of the *Handbook*. This is particularly because ad hoc military co-operation between states of different religious and cultural backgrounds may have political repercussions in their relations with other states as well as with respect to domestic constituencies, as was manifested in the case of the US–Pakistan co-operation in the military operation against al-Qaida and the Taliban regime in Afghanistan. Moreover, the lack of host-state consent in principle negates the possibility of the conclusion of a SOFA, save in the case of a UN enforcement action military operation under Chapter VII of the Charter. The United Nations does not possess a standing army of its own, since the agreements envisaged in Article 43 of the Charter never materialized. Hence any Chapter VII military action is entrusted to ‘coalitions of the willing’ under a Security Council mandate and authorization. In this case it appears that issues concerning the presence of foreign armed forces in another state must be premised on the relevant rules of the law of armed conflict. Furthermore, the ever increasing tendency in the practice of some states to expand the instances of unilateral resort to force by asserting a ‘self-executing’, that is without further authorization, effect of SC resolutions, renders discussion of the operational deployment of armed forces under this alleged justification even more important. Last but not least, the *Handbook* does not discuss at all the issue of jurisdiction, whether domestic or international, over members of the visiting forces accused of committing war crimes. The issue appears to have been dealt with in the case of UN peacekeeping in the context of the criminal jurisdiction of the sending state of a national contingent, as was the case with certain members of UNOSOM II who allegedly committed war crimes against the local population in Somalia. However, the establishment of the International Criminal Court (ICC) has put the whole question in a different perspective. It is now possible for the host state, provided

that it is a party to the ICC Statute or by way of ad hoc declaration, or the Security Council to seize the ICC with respect to war crimes committed by members of a visiting force, even though the sending state is not a party to the Statute of the Court. This possibility has prompted the US government to adopt a totally negative stance towards the ICC that has amounted to complete rejection of the Court. The US government has taken it upon itself to ensure the non-prosecution of US personnel that participate in operations abroad whether under a mandate of an international organization or under the authority of the United States. In order to achieve this aim it has embarked upon a practice of concluding bilateral SOFAs whereby the host state waives its right to seize the ICC in the event of US personnel committing war crimes while operating on its territory. Such agreements have already been signed with East Timor and Romania, and their ratification is under consideration. We are, therefore, faced with a new kind of SOFA, by virtue of which it is not simply the host state's national criminal jurisdiction with respect to war crimes that is waived, in itself an act of sovereignty according to the *Lotus* case, but a right or even an obligation (according to a body of opinion) for parties to the ICC Statute to subject war criminals to the Court's jurisdiction, in the event of the sending or host state being unable or unwilling to prosecute war criminals before its own courts. In simple terms, under the SOFAs advanced by the United States the other contracting party undertakes the obligation to disregard its obligations under the Rome Statute. The omission of discussion of this issue in the *Handbook* is indeed regrettable.

Finally, the Annex includes the texts of a number of agreements concerning the presence of foreign troops in another state concluded under the auspices of the United Nations and NATO.

The *Handbook* is an exposition of the contemporary law of visiting armed forces. It covers, mainly, the practice of NATO and, to a considerable extent, the United Nations as the main institutional frameworks that shaped the state of the law as it stands at present. Moreover, it deals with the principal bilateral arrangements relating to the post-1945 presence of foreign armed forces in another state (Germany, Japan, Korea and the area of the former USSR), and offers a brief exposition of the legal issues of deployment of visiting forces in an operational context. Although the inclusion of a chapter on the ICRC constitutes something of an oddity, the *Handbook* is an important work of reference that is indispensable basic reading for practitioners and researchers in the area of military law, as well as anyone interested in this field.

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