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On the German Approach to International Law

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Abstract

The short article outlines the systemic characteristics of what is identified here as the German approach to international law. Starting from the post-WW II situation of German legal scholarship, the paper describes a holistic approach to international law as a unified legal system which is characterized by both a true commitment to the rule of law and a constructive vision of the International Community based on constitutional form.

Keywords

International law – Germany – doctrine – International Community – constitution – constitutionalization

Taking International Law Seriously[*]

On the German Approach to International Law

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A. Introduction

Writing about the life's work of a single person is already a difficult and challenging responsibility.[1] A human being has many facets and usually changes perspectives more than once during lifetime. Yet we often align a scholar with a single school or tradition which naturally neglects many aspects of his or her thoughts and writings. Aligning all scholars of a country with one national approach is even more presumptuous. Being asked to write on "the German approach" to international law is, therefore, a daring task. Currently there are more than 40 university chairs and at least 10 academic research institutes devoted to international law in Germany. How can one possibly do justice to the sheer number of different scholars and their opinions without either engaging in superficial generalizations or setting focal points that inevitably neglect many of the important nuances and arguments voiced in the German academic discourse? In addition to the factual complexities, it might even seem anachronistic to write about a national approach to international law in times of European integration and globalization. The recently founded *European Society of International Law* suggests a European and multilateral rather than national approach. At the same time, there are strong voices criticizing international law as a universalizing and imperialistic project of Europe and the Occident.[2]

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[*] To be published in the forthcoming Vol. 50 of the German Yearbook of International Law

[1] For a masterful example, see *Hersch Lauterpacht*, The Grotian Tradition in International Law, originally published in BYIL 23 (1946) 1-53, reprinted in: *Elihu Lauterpacht* (ed.), International Law – Being the Collected Papers of Hersch Lauterpacht, vol. 2 (1975), 307-365 where *Elihu Lauterpacht* adds that his father "regarded this article as probably the most important that he ever wrote"; see also the contributions on European international law scholars in the *European Journal of International Law*, namely *Georges Scelle* (1990), *Dionisio Anzilotti* (1992), *Alfred Verdross* (1995), *Hersch Lauterpacht* (1997), *Hans Kelsen* (1998) and *Charles de Visscher* (2000).

[2] See, for example, *Onuma Yasuaki,* A Transcivilizational Perspective on Global Legal Order in the Twenty-first Century, in: *Ronald St. John Macdonald/Douglas M. Johnston* (eds.), Towards World Constitutionalism (2005), 151; *Antony Anghie,* Imperialism, sovereignty and the making of international law (2005).

Despite the long and non-exhaustive list of possible traps and objections the present writer believes that looking at *a* German approach to international law is a fruitful and instructive exercise. I share with many of my colleagues an admiration for German culture. This includes not only the cohort of great German philosophers and musicians but also German scholarship with its refined academic craftsmanship and consistency. The object of this essay is to supply a holistic view of the systemic characteristics of German doctrine in international law in the UN era. The German approach to international law, I am speaking of here, is representative of a systematic and constructive treatment of international law and its inherent problems. Admittedly, the achievement and significance of this approach is subject to controversy as much as everything in academic scholarship. Yet, as we will see, the approach is characterized by an openness, seriousness and visionary perspective that are unique in the international realm.

B. Between Historical Responsibility and Vision

The exceptional historical situation of Germany is in many ways inherently linked to the development of international law after WW II. Maybe with the sole exception of decolonization, the "changing structure of international law" in the UN era is both a consequence and mirror of Germany's position in international relations.

After the end of WW II, the German international law scholarship sought to re-establish itself. Yet looking back at a long tradition of eminent scholars, German science could rely on profound and committed expertise that had survived and often resisted the hideous regime of Nazi Germany. The first post-war issues of the resumed or newly founded journals contained programmatic statements that tell of the future-oriented spirit and high hopes that built on the new international legal order. The first German journal on international law published after the end of the war was the predecessor of the present yearbook, the *Jahrbuch für internationales und ausländisches öffentliches Recht*[3] edited by *Rudolf Laun* and *Hermann von Mangoldt* who wrote the following words to accompany the first issue:

> "Bisher war das positive Völkerrecht im wesentlichen ein Recht zwischen den Staaten, heute tritt das Individuum als völkerrechtliches Pflicht- und Rechtssubjekt dem Staat an die Seite. Neben dem Gehorsam, den die Staaten für ihr positives Recht beanspruchen, fordert die Völkerrechtsgemeinschaft unmittelbaren Gehorsam gegen ein überstaatliches positives Völkerrecht, das mit dem staatlichen Recht in Widerspruch stehen kann. Der Grundsatz der Gleichheit der Völker wird durchbrochen durch ein Sonderrecht, unter dem ein einzelnes Volk jetzt gehalten wird. [...] Deutschland kann einen erfolgverheißenden Weg in die Zukunft nur in engster Zusammenarbeit mit den anderen Völkern der Welt finden. Bei kaum einem anderen Volk wird daher heute der Wille zu dieser und die Einsicht, daß es in einer echten Völkerrechtsgemeinschaft notwendig ist, die

[3] Only the first two volumes appeared under this title (1948 and 1949); after a short interruption, the yearbook was published as *Jahrbuch für internationales Recht* from 1954 until 1975; in 1976, the title changed once more to *German Yearbook of International Law*; apart from a research centre in Hamburg, the journal remained always under the auspices of what had long been know as the "Institut Schücking" in Kiel and became officially the "Walther-Schücking-Institut" in 1995.

> erforderlichen Einschränkungen der eigenen Souveränität zu tragen, größer sein als bei dem deutschen."

The editors of the *Archiv des öffentlichen Rechts* stated in the introduction to the new volume in 1948:

> "[Das 'Archiv des öffentlichen Rechts'] wird allen Autoren offen stehen, die durch den Rang ihrer wissenschaftlichen Leistung qualifiziert sind und die sich dem einen obersten Ziel verpflichtet fühlen, das allerdings für den Geist des 'Archivs' bestimmend sein soll: der Wiederherstellung des Rechtsstaates, der Erneuerung des rechtsstaatlichen Gedankens, der Herrschaft des Rechts nicht nur im Staats- und Verwaltungsleben, sondern auch im zwischenstaatlichen Leben der Völker."[4]

In the same year, the *Archiv des Völkerrechts* was founded and introduced with the following words:

> "Das internationale Recht stellt ein allen Völkern gemeinsames Gut dar, daß auch uns geblieben ist; es ist eine Brücke und die Verbindung zur Außenwelt, von der wir so lange Jahre geschieden waren."[5]

All of this was already paradigmatic for the German approach to international law in several ways: first and foremost, it showed a true belief in international law as an effective, albeit not perfect tool and as the only possible alternative for international peace and security;[6] secondly, it reflected a refreshed commitment towards international institutions and organization and thirdly, it foresaw the new role of Germany as a responsible and constructive member of the international community. Most exemplary in this regard is the work of *Hans Wehberg* in *Die Friedens-Warte*.[7] Tirelessly he devoted his efforts to the idea of securing peace through institutionalization, focusing *inter alia* on the prohibition of war as a legal means, conflict resolution by international

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[4] Archiv des öffentlichen Rechts 35 (1948), 1-2; the editors were *Wilhelm Grewe, Erwin Jacobi, Walter Jellinek, Erich Kaufmann, Hellmuth Loening, Karl Schmid, Rudolf Smend* and *Ernst Walz*.

[5] Introduction of the editors *Walter Schätzel, Hans Wehberg* and *Hans-Jürgen Schlochauer*, Archiv des Völkerrechts 1 (1948/49), VII; see also the, maybe not surprisingly, demure "Prolegomena" of *Carl Bilfinger*, first director of the renamed *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*, ZaöRV 13 (1950-51), 22, 23 who had served as the second director of the *Kaiser-Wilhlem-Institut* from 1943-1946 and had played a perculiar role during the Nazi regime; see further the obituary of *Rudolf Smend*, "Carl Bilfinger †", ZaöRV 20 (1959-60), 1, 3.

[6] The titles and topics of the monographs, reviewed in the first post-war issues, reflect this thinking clearly; see, for example, the 6th ed. of Oppenheim's textbook on international law (the second to be edited by *Hersch Lauterpacht*) (1944/47); *Charles Rousseau,* Principes Généraux du Droit International Public (1944); *Georges Scelle,* Droit International Public (1944); *James L. Brierly,* The outlook for international law (1944, published two years later in German as "Die Zukunft des Völkerrechts"); *Wilhelm Wengler,* Friedenssicherung und Weltordnung (1947); *Hans Kelsen,* Peace through Law (1944); *Philip C. Jessup,* A Modern Law of Nations (1948); *Arthur Nußbaum,* A Concise History of the Law of Nations (1947); *Hans Wehberg,* Der Internationale Gerichtshof (1948).

[7] Founded on occasion of the Hague Peace Conference in 1899 by *Alfred H. Fried, Die Friedens-Warte* is the oldest interdisciplinary journal on issues of peace and international organization in German; *Hans Wehberg* served as the editor from 1924-1962 while teaching at the *Institut de hautes études internationales* in Geneva which allowed the journal to be published uninterruptedly during the war; after the death of *Wehberg* the journal returned to Germany under the editor *Jost Delbrück* in Kiel and is, today, published under the auspices of *Knut Ipsen, Volker Rittberger* and *Christian Tomuschat*; see generally *Daniel Porsch,* Die Friendens-Warte zwischen Friedensbewegung und Wissenschaft, Die Friedens-Warte 74 (1999), 39.

adjudication and on international organizations, especially the League of Nations and later the United Nations.[8]

German scholars followed closely the development of the United Nations and naturally many of the early published articles and treatise were devoted to the organizational characteristics of the United Nations scrutinizing its membership rules, the right of veto and the role of superpowers as well as the establishment of the International Law Commission and the International Court of Justice. Internally, the analysis focused on the legal status of Germany under occupation and addressed questions of responsibility and liability for war damages. Furthermore, the drafting and adoption of the *Grundgesetz* attracted much attention.[9] Quite logically, the German constitution appears as the central element from which to start for understanding the German vision of law in general and public law in particular. In this respect, it is most interesting to draw comparisons with the situation prevailing in neighboring countries such as France.[10] Germany's constitution with its prominent first part on basic rights and the federal organization of the State together with the strong guardianship of the *Bundesverfassungsgericht* ought to develop an influence that has since went far beyond the national boundaries, serving as an example for many post-totalitarian countries, the European Communities, the Council of Europe and even international law. The German constitution prescribes an active role for Germany in international co-operation and the European integration process (preamble, art. 23 and 24 (1)), it incorporates the general rules of international law (customary international law and general principles) into the domestic legal order with a higher status than organic laws (art. 25) and prohibits acts of aggression on a constitutional level (art. 26) as part of a general imperative of peace. Scholars speak of the openness (*Offenheit*) and friendliness (*Völkerrechtsfreundlichkeit*) of the constitution towards international law.[11]

Art. 1 of the UN Charter proclaims as two of the principal purposes of the United Nations the development of friendly relations between nations and the achievement of

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[8] See, most prominently, the commentary together with *Walther Schücking* on the PCIJ, Die Satzung des Völkerbundes, first published in 1921; during WW II the League, as the primary example for international organization, continued to be of central importance for *Wehberg* whose seminal vision remained unimpaired, see, Ideen und Projekte betr. die Vereinigten Staaten von Europa in den letzten 100 Jahren, Die Friedens-Warte 41 (1941), 49; Die Organisation der Staatengemeinschaft nach dem Kriege, Die Friedens-Warte 44 (1944), 49; see also his early analysis and critique of the UN Charter in, Einführung in die Satzung der Vereinten Nationen, Die Friedens-Warte 45 (1945), 329.

[9] *Hermann von Mangoldt,* director of the Institute in Kiel from 1943-1953, was a member of the *Parlamentarischer Rat* which drafted the *Grundgesetz* and chaired the Committee on Principle Issues and Fundamental Rights.

[10] See, in particular, *Pierre-Marie Dupuy,* Droit, in: *Jacques Leenhardt/Robert Picht* (eds.), Au jardin des malentendus: le commerce franco-allemand des idées (1997).

[11] See, for example, *Walter Rudolf*, Völkerrecht und deutsches Recht (1967); *Albert Bleckmann,* Grundgesetz und Völkerrecht (1975); *id.,* Die Völkerrechtsfreundlichkeit der deutschen Rechtsordnung, Die öffentliche Verwaltung 32 (1979), 309; *Christian Tomuschat,* Die staatliche Entscheidung für die internationale Offenheit, in: *Josef Isensee/Paul Kirchhof* (eds.), Handbuch des Staatsrechts, Vol. VII (1992), § 172, at 483 *et seq.; Karl Doehring,* Das Friedensgebot des Grundgesetzes, in: *ibid.,* § 178, at 687 *et seq.; Philip Kunig,* Völkerrecht und staatliches Recht, in: *Wolfgang Graf Vitzthum* (ed.), Völkerrecht, 4th ed. (2007) 86 *et seq.* and *Bardo Fassbender,* Der offene Bundesstaat (2007).

international co-operation.[12] Five years after the UN Charter had been adopted, the idea of openness and co-operation became also the basis for the declaration of *Robert Schuman* on 9 May 1950 which marked the birth of the European Coal and Steel Community.[13] For Germany, this spirit of co-operation has not only materialized in many personal friendships between scholars of formerly opposed nations but meant also a genuine commitment to international organizations and their organs.[14]

Germany has played a central role both as a cause for international initiative and as an active participant in international affairs. Consider, for example, the importance of the Nuremberg trials and the adoption of the Genocide Convention for modern international criminal law notwithstanding the active contribution of German experts in the International Law Commission to the Draft Code of Crimes against the Peace and Security of Mankind (1996)[15] and later at the Rome Conference.[16] Germany does take international law seriously and contributes to what another eminent jurist of German origin and culture once described as the "changing structure of international law":

> "The recognition that the structure of international society has undergone some basic changes, and that, correspondingly, international law is now developing on several levels, one continuing the traditional international law of diplomatic coexistence, and the other two implementing the quest for both universal and regional international co-operation and organisation must lead to a far-reaching reorientation in our conceptions of the science and study of contemporary international law."[17]

Due to the central role of Germany after WW II, during the cold war and in the process of European integration, the German approach to international law is an example of how we think and use international law today. This is not only about historical responsibility but also about the fulfillment of a vision for international society that is based on strong conviction. What has been dubbed "new" or "modern international law" after WW II describes the making of the legal order of an organized international community.

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[12] See also *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,* GA Res. 2625 (XXV) of 24 October 1970, UNYB 24 (1970), 788.

[13] Treaty Establishing the European Coal and Steel Community, Paris 18 April 1951.

[14] Germany has usually sent committed and eminent scholars to international institutions, e.g. ICJ: *Hermann Mosler* (1976-1985), *Carl-August Fleischhauer* (1994-2003) and now *Bruno Simma* (2003-); ILC: *Christian Tomuschat* (1985-1996); *Bernhard Graefrath* (1987-1991 for GDR/FRG); *Bruno Simma* (1997-2002) and *Georg Nolte* (2007-); HRCe under the ICCPR: *Christian Tomuschat* (1977-1986), *Eckart Klein* (1995-2002); ECnHR: *Jochen Abr. Frowein* (1973-1993), *Georg Ress* (1994-1998); ECtHR: *Hermann Mosler* (1959-1980), *Rudolf Bernhardt* (1981-1998), *Georg Ress* (1998-2004); *Renate Jaeger* (2004-); International Tribunal for the Law of the Sea: *Rüdiger Wolfrum* (1996-).

[15] *Draft Code of Crimes Against the Peace and Security of Mankind (Part II) - including the draft Statute for an international criminal court,* YILC (1996), vol. II (Part Two), 17 *et seq.*

[16] *Hans-Peter Kaul* (head of the German delegation at the Rome Conference and now judge in the pre-trial division of the ICC), Der Internationale Strafgerichtshof: das Vermächtnis von Nürnberg, in: *Andreas Zimmermann/Ursula E. Heinz* (eds.), Deutschland und die internationale Gerichtsbarkeit (2004), 71; *Gerhard Werle*, Von der Ablehnung zur Mitgestaltung: Deutschland und das Völkerstrafrecht, in: *Pierre-Marie Dupuy/Bardo Fassbender/Malcolm N. Shaw/Karl-Peter Sommermann* (eds.), Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat (2006), 655.

[17] *Wolfgang Friedmann*, The Changing Structure of International Law (1964), 60-71, here at 64.

C. International law as a unified legal system

The German approach to international law construes and thinks international law as a unified legal order. This claim is twofold as it implies first the character of international law as a legal system and secondly assumes the unity of this legal order.[18] The legal character of international law has long been disputed and continues to be challenged.[19] Yet German scholarship unwaveringly holds the view that international law is a binding normative regime.[20] In addition, the various areas and aspects of international law are brought together to a single albeit not homogeneous legal order. The numerous article-by-article commentaries, encyclopedias and dictionaries are evidence of the systematic mapping of an entire discipline.[21]

The unity, however, goes beyond the classic dualist-monist disputation between, for example, *Heinrich Triepel*, *Hans Kelsen* and *Alfred Verdross*. It means first of all a holistic understanding of international law which deploys not only a legal but also a historical[22], sociological[23] and tentatively international relations[24] perspective. Today, there is no chair at a public university in Germany that deals exclusively with public international law. Usually the *venia legendi* includes German public law and European law. International law is, therefore, not understood as a "self-contained" and closed legal system; the different legal orders are viewed as interrelated and mutually supportive.[25]

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[18] See, generally, *Pierre-Marie Dupuy*, L'unité de l'ordre juridique international, RdC 297 (2002), 9.

[19] See already *Hans Morgenthau*, Die internationale Rechtspflege, ihr Wesen und ihre Grenzen (1929); *id.,* Politics among Nations, 7th ed. (2005, first published 1948); *Edward Hallett Carr*, The twenty years' crisis 1919-1939, 2nd ed. (1949) and more recently *Jack L. Goldsmith/Eric A. Posner*, The limits of international law (2005).

[20] See *Hermann Mosler*, Völkerrecht als Rechtsordnung, ZaöRV 36 (1976), 6 and the other contributions to a symposium of the MPI in the same issue; see also *Karl Doehring*, Völkerrecht, 2nd ed. (2004), 3-11; *Theodor Schweisfurth*, Völkerrecht (2006) 625-639.

[21] See, for example, *Rudolf Bernhardt* (ed.), Encyclopedia of Public International Law, 5 volumes (1992-2003) [2nd ed. forthcoming as *Rüdiger Wolfrum* (ed.), Max Planck Encyclopedia of Public International Law]; *R. Wolfrum et al.* (eds.), United Nations: law, policies and practice (1995); *Ignaz Seidl-Hohenveldern*, Lexikon des Rechts - Völkerrecht (2001); *Bruno Simma et al.* (eds.), The Charter of the United Nations: a commentary, 2nd ed., 2 volumes (2002); *Helmut Volger* (ed.), A Concise Encyclopedia of the United Nations (2002); *S. von Schorlemer* (ed.), Praxis-Handbuch UNO (2002); *Andreas Zimmermann/Christian Tomuschat/Karin Oellers-Frahm* (eds.), The Statute of the International Court of Justice: a commentary (2006).

[22] *Wilhelm Grewe*, Epochen der Völkerrechtsgeschichte (1984); *id.,* Fontes Historiae Iuris Gentium, 3 volumes (1988-1995); *Karl-Heinz Ziegler*, Völkerrechtsgeschichte, 2nd ed. (2007); see also *Bardo Fassbender*, Stories of War and Peace: On Writing the History of International Law in the 'Third Reich' and After, EJIL 13 (2002), 479.

[23] See already *Max Huber*, Die soziologischen Grundlagen des Völkerrechts (1928), and the contributions to a symposium in EJIL 18 (2007), 69 *et seq.*, especially *Jost Delbrück*, Max Huber's Sociological Approach to International Law Revisited, EJIL 18 (2007), 97.

[24] *Georg Nolte,* The limits of the Security Council's powers and its functions in the international legal system – some reflections, in: *Michael Byers* (ed.), The role of law in international politics (2000), 315; *Andreas L. Paulus,* The International Lawyer as Agent of Global Governance, in: *Markus Lederer/Philipp S. Müller* (eds.), Criticizing global governance (2005), 195.

[25] See, already, *Alfred Verdross*, Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung (1923), 134-135.

Hence it should come as no surprise that we find many analogies to domestic law and federal organization in German international law scholarship, permeated by a hierarchical vision which in many respects makes me think of the *Kelsenian* pyramid. Yet *Kelsen* might be considered as remaining quite far from the contemporary German perception of international law because according to the predominant German academic perception the unity of the international legal order comprises also considerations of morality and justice. When *Hans Kelsen* famously stated, "[d]aher kann jeder beliebige Inhalt Recht sein,"[26] he tried to confine legal analysis to formal lawfulness and social efficiency. Law was regarded as value free (*wertfrei*) in the formal sense. Maybe nowhere is the move away from a pure positivism more palpable than in the legal philosophy of *Gustav Radbruch*. In his positivistic legal philosophy he had long hold legal certainty as the highest good but contended after WW II:

> "Der Positivismus hat in der Tat mit seiner Überzeugung 'Gesetz ist Gesetz' den deutschen Juristenstand wehrlos gemacht gegen Gesetze willkürlichen und verbrecherischen Inhalts."[27]

For him legal certainty was no longer the only or decisive purpose of law. Law also had to serve the public good (*Gemeinwohl*) and, most importantly, had to respond to the demands of justice.[28] His solution to the problem of a possible conflict between legal certainty and the demands of justice became known as the *Radbruch formula*:

> "Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als 'unrichtiges Recht' der Gerechtigkeit zu weichen hat."[29]

Considerations of justice may, therefore, substitute or complement positive law if the technical application of statutory law would amount to manifest injustice.[30] The German constitutional system does not share the exaggerated fear of total legal arbitrariness as soon as moral considerations are invoked. Faced with questions of punishment of border security personal of the former GDR the highest criminal Court relied in its reasoning for justifying punishment repeatedly on the *Radbruch formula* in addition to the obligations stemming from international law, especially, the ICCPR.[31] The judgments

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[26] *Hans Kelsen*, Reine Rechtslehre (1992), 201.

[27] "Positivism with its conviction 'law is law' has indeed made the German legal profession defenceless against laws of arbitrary and felonious content", *Gustav Radbruch*, Gesetzliches Unrecht und übergesetzliches Recht, Süddeutsche Juristen-Zeitung 1 (1946), 105, 107.

[28] See also *Bardo Fassbender*, Zwischen Staatsräson und Gemeinschaftsbindung. Zur Gemeinwohl-orientierung des Völkerrechts der Gegenwart, in: *Herfried Münkler/Karsten Fischer* (eds.), Gemeinwohl und Gemeinsinn im Recht (2002), 231.

[29] See *supra,* note 27.

[30] *Robert Alexy*, Begriff und Geltung des Rechts (2002), 17.

[31] See, for example, BGHSt 39, 1; BGHSt 39, 168; BGHSt 41, 101; see also *Uta Dupuy Hulshoff,* La "Aufarbeitung" du passif juridique de la République Démocratique Allemande par un Etat de droit (1998).

were upheld by the *Bundesverfassungsgericht* and with regard to the sentencing of former political leaders of the GDR also by the *European Court of Human Rights*.[32]

This, of course, is not an exclusively German phenomenon. Already the *Permanent Court of Arbitration* and both the *Permanent Court of International Justice* and the *International Court of Justice* have relied on *notions de justice* and *la bonne foi*, *equity* and *elementary considerations of humanity*.[33] Yet the ICJ has so far refrained from elaborating on the specific content of the latter humanitarian considerations. They have repeatedly been mentioned but never in an isolated manner. Instead, they complemented other principles enshrined in treaties or were used as a confirmation of the fundamental humanitarian character of the conventions in question. However, reading the judgments it seems that the Court wanted to emphasize that these "considerations of humanity" have a special character and status in international law. They are "elementary", that is, they are "more exacting in peace than in war" or, maybe in clearer wording, they "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".[34] The jurisprudence of the court suggests that these considerations create obligations which have to be observed by all States – they are obligations *erga omnes*.[35] If they are, however, able to create such obligations they have effectively the same character as (positive) law.[36]

Neither in domestic nor international matters does German scholarship instinctively shy away from consideration of morality and justice.[37] Understanding international law as a unified legal system requires also thinking about situations where the substantive content of a norm is deemed contrary to fundamental considerations of justice or where the law appears to be "incomplete" or equivocal.[38] We are required to give specific content and meaning to these considerations which are understood as the "sittlichen Grundlagen" of international law. In this sense, *Alfred Verdross* spoke of the "wesensgemäße Verbindung des Völkerrechts mit der Moral."[39]

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[32] BVerfGE 95, 96; ECtHR, *Streletz, Kessler and Krenz v. Germany* and *K.-H. W. v. Germany*, both judgments of 22 March 2001.

[33] *Pierre-Marie Dupuy*, Les "considérations élémentaires d'humanité" dans la jurisprudence de la cour internationale de justice, in: René-Jean Dupuy (ed.), Droit et justice, Mélanges en l'honneur de Nicolas Valticos (1999), 117; see only ICJ, *Corfu Channel* (United Kingdom *v.* Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 22; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996-II), 257; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports (2004), para. 154-160.

[34] See *Legality of the Threat or Use of Nuclear Weapons* (note 33).

[35] See already *Corfu Channel* (note 33) and – explicitly – the Advisory Opinion on the *Construction of a Wall in the Occupied Palestinian Territory* (note 33), para. 157.

[36] *P.-M. Dupuy* (note 33), 125.

[37] See *Ulrich Scheuner,* Naturrechtliche Strömungen im heutigen Völkerrecht, ZaöRV 13 (1950/51), 556; *Ulrich Fastenrath,* Relative Normativity, EJIL 4 (1993), 305; *Christian Tomuschat*, Ethos, Ethics and Morality in International Relations, EPIL II (1995) 120; *Stefan Kadelbach,* Ethik des Völkerrechts unter Bedingungen der Globalisierung, ZaöRV 64 (2004), 1; see also *Fritz Münch*, Die Martens'sche Klausel und die Grundlagen des Völkerrechts, ZaöRV 36 (1976), 347; *Rhea Schircks*, Die Martens'sche Klausel: Rezeption und Rechtsqualität (2002).

[38] See, for the latter, *Ulrich Fastenrath*, Lücken im Völkerrecht (1991).

[39] *Alfred Verdross,* Völkerrecht, 2nd ed. (1950), 23 *et seq.*

D. Constitutionalization of the International Community

The quote of *Laun* and *von Mangoldt* given at the beginning of this article ended with the observation that for a member of a genuine international legal community it was necessary to bear with the limitations of its sovereignty. German scholarship has long claimed that the former iron shield of sovereignty has become somewhat more permeable. This coincides with a notable re-thinking of the State as the central institution in international relations. In "modern" doctrine, State sovereignty seems fading away towards the international and the regional or even the individual. The rise of new actors and organizations beside and possibly also above the State has promoted an inventive re-thinking of State sovereignty. Central to this re-conceptualization is the importance of human rights and the protection of the individual as a pivotal concern (and subject) of international law.[40] Within the unified international legal system, human rights are understood as pertaining in all areas of international law, including humanitarian law, international organizations and international economic law.[41]

In the light of human rights and pressing problems of world-dimension, it is submitted that States have been deprived of certain formerly sovereign rights which are now vested with international organizations. Legal obligations, especially regarding the protection of human rights, may arise "without or against the will" of States.[42] Yet this erosion of State sovereignty is thought to be compensated by new international powers and rights for different purposes on a different level. State sovereignty, therefore, is conceptualized not anymore as a supreme authority defining international law but as being defined by international law.[43]

Beside the immense amount of models employed in international law and international relations today which include manifold concepts like fairness, networks, processes and system,[44] a predominantly German-Austrian-French school has furthered the idea of co-

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[40] *Jochen Abr. Frowein*, Übernationale Menschenrechtsgewährleistungen und nationale Staatsgewalt, in: *Isensee/Kirchhof* (note 11), § 180, 731 *et seq;* see also the strong affirmation of *Jugde Bruno Simma*, ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of Congo *v.* Rwanda), Jurisdiction, Judgment of 3 February 2006, Separate Opinion of Judge *Simma*, para. 38-41.

[41] *Michael Bothe*, Humanitäres Völkerrecht und Schutz der Menschenrechte: auf der Suche nach Synergien und Schutzlücken, in: *Dupuy et al.* (note 16), 63; from the many articles on the topic by *Ernst-Ulrich Petersmann*, see, for example, Welthandelsrecht als Freiheits- und Verfassungsordnung, ZaöRV 65 (2005) 543; *id.,* Constitutionalism and international organizations, Northwestern journal of international law & business 17 (1997), 398.

[42] *Christian Tomuschat*, Obligations Arising for States Without or Against Their Will, RdC 241 (1993-IV), 195; *Eckart Klein* (ed.), The duty to protect and to ensure human rights (2000).

[43] *Verdross* (note 25), 35: "Denn 'Souveränität' ist gerade die besondere Kompetenz, die die 'Staaten' *auf Grund des Völkerrechts* besitzen" (empasis in the original); *Georges Scelle*, Précis de droit des gens, reprint (1984) première partie, 7-14; *id.*, RdC 46 (1933-IV), 367: "le droit positif n'est qu'un faisceau de règles de competence"; *Bardo Fassbender*, Sovereignty and Constitutionalism in International Law, in: *Neil Walker* (ed.), Sovereignty in Transition (2003) 115, 129 and 132; see also, *Pierre-Marie Dupuy*, The Constitutional Dimension of the Charter of the United Nations Revisited, Max Planck Yearbook of United Nations Law 1 (1997), 1.

[44] See for on overview of different concepts of law, for example, *Benedict Kingsbury,* The Concept of Compliance as a Function of Competing Conceptions of International Law', MichiganJIL 19 (1998), 345, 348 *et seq.*; *Richard A. Falk,* The status of law in international society (1970); *Rosalyn Higgins,* Problems and Processes: International Law and How We Use It (1994); *Thomas M. Frank,* Fairness in

operation towards the model of an "international community" sustained by an international *ordre public*.[45] Within this "new world order" we hear increasingly about a common aim, common fate, common goods (*Gemeinwohl*), common heritage, common interests and common concerns of humankind.[46] The concept of international community brings the afore-mentioned maxim of co-operation and institutionalization to its logical conclusion. The international community functions as a guardian for the common interests and fundamental values that go beyond the exclusive interest of one State. It is in this sense that the German approach speaks of *universal* international law that comprises peremptory norms – *jus cogens*.[47] Strikingly, the existence of such norms is hardly doubted. The concept is not seen as endangering the national constitutional autonomy. It is rather perceived as the natural transposition of constitutional objectives on an international level and as an expression for the need of legal consequences assigned and enforced by the international community in case these fundamental rules and obligations are infringed.[48]

Finally, probably most paradigmatic for the perception of the multiple legal regimes as a unity is the idea of constitutionalization of the international legal order. German scholars often interpret the changing structure as a constitutional process to describe that the fundamental rules and community values elude the subjective will of governments.[49]

International Law and Institutions (1995); *Harold H. Koh,* Why Do Nations Obey International Law?, Yale Law Journal 106 (1997), 2599; *Anne-Marie Slaughter,* Sovereignty and Power in a Networked World Order, StanfordJIL 40 (2004) 283.

[45] See *Hermann Mosler,* The International Society as a Legal Community (1980); *René-Jean Dupuy,* La communauté internationale entre le mythe et l'histoire (1986); *Jochen Abr. Frowein,* Das Staatengemeinschaftsinteresse, in: *Kay Hailbronner/Georg Ress/Torsten Stein* (eds.), Staat und Völkerrechtsordnung – Festschrift für Karl Doehring (1989), 219; *Bruno Simma,* From Bilateralism to Community Interest in International Law, RdC 250 (1994) 217, 243-249; the most recent contribution on this topic of *Christian Tomuschat,* International Law: Ensuring the Survival of Mankind on the Eve of a New Century, RdC 281 (1999) 9, 72-90 and *passim*; *Andreas L. Paulus,* Die internationale Gemeinschaft im Völkerrecht (2000); *P.- M. Dupuy* (note 18), 245 *et seq.*; *Fassbender* (note 28), 237 *et seq.*

[46] See, for example, *Rüdiger Wolfrum,* The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312.

[47] *Alfred Verdross/Bruno Simma*, Universelles Völkerrecht, 3rd ed. (1984), 11-17.

[48] See *Jochen Abr. Frowein,* Die Verpflichtungen *erga omnes* im Völkerrecht und ihre Durchsetzung, in: *Rudolf Bernhardt/Wilhelm Karl Geck/Günther Jaenicke/Helmut Steinberger* (eds.), Völkerrecht als Rechtsordnung - Festschrift für Hermann Mosler (1983), 241; *Stefan Kadelbach,* Zwingendes Völkerrecht (1992); *Eckart Klein,* Menschenrechte und Ius cogens, in: *Jürgen Bröhmer et al.* (eds.), Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress (2005), 151; *Christian Tomuschat,* Reconceptualizing the Debate on *Jus Cogens* and Obligations *Erga Omnes* – Conluding Observations, in: *id./Jean-Marc Thouvenin* (eds.), The Fundamental Rules of the International Legal Order – *Jus Cogens* and Obligations *Erga Omnes* (2006), 423.

[49] In addition to *supra,* note 45, see *Friedmann* (note 17), 153-159; *Philip Allott,* Eunomia: A New Order for a New World (1990), 178 *et seq.*; *Jochen Abr. Frowein,* Reactions by Not Directly Affected States to Breaches of Public International Law, RdC 248 (1994-IV) 345, 355-365; *id.,* Konstitutionalisierung des Völkerrechts, Berichte der Deutschen Gesellschaft für Völkerrecht 39 (2000), 427; *Armin von Bogdandy,* Constitutionalism in International Law: Comment on a Proposal from Germany, Harvard International Law Journal 47 (2006), 223; on the *Kantian* project of *Weltgesellschaft* see also *Gunther Teubner,* Globale Zivilverfassungen, ZaöRV 63 (2003), 1; *Andreas Fischer-Lescano,* Die Emergenz der Globalverfassung, ZaöRV 63 (2003), 717; *Jürgen Habermas,* Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?, in: *id.,* Der gespaltene Westen (2004), 113.

This process is either based on a synopsis of different "world order treaties"[50] or aligned with the UN Charter itself.[51] In times of increasing fragmentation, this concept bears also a possible answer to problems of co-ordination and systemic integration. Constitutionality implicates a hierarchy which may employ different structural principles, such as subsidiarity or complementarity, to solve conflicts of regimes and institutions.[52] This completes the idea of a unified and universal international legal system. In a systemic understanding of the international legal order, the fundamental rules form the basis of an international constitutional arrangement that replaces an imaginary *Grundnorm*. To carry on the famous dictum of *Wolfgang Friedmann*, one is tempted to say that under the German approach to international law, at least as I perceive it, the international legal system has not only moved from co-ordination to co-operation but would also be in the process of moving from inter-national to supra-national. It is the attempt to confirm a normative code beyond the State, and it is a striking example of the power of vision in international scholarship.

E. Conclusion

If I may very briefly conclude with some elementary remarks comparing my own vision with the "main stream" German doctrine of international law, I would be tempted to distinguish two rather contrasting elements.

On the one hand, I feel for a good part closer to this doctrine than to the still predominantly "formalist" French general approach dominated by a persistent fascination for the sovereign State as a unique, even if not anymore exclusive subject of public international law.[53] As I tried to explain in my general course on international

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[50] *Tomuschat* (note 42), 268 *et seq.*

[51] Building on the work of *Alfred Verdross,* Die Verfassung der Völkerrechtsgemeinschaft (1926), the champion in this regard is certainly *Bardo Fassbender,* UN Security Council Reform and the Right of Veto – A Constitutional Perspective (1998), 89-115; *id.,* The United Nations Charter as Constitution of the International Community, Columbia Journal of Transnational Law 36 (1998), 529; see also *P.-M. Dupuy* (note 43); *id.,* Ultimes remarques sur la "constitutionalité" de la Charte des Nations Unies, in: *Regis Chemain/Alain Pellet* (eds.), La Charte des Nations Unies, constitution mondiale? (2006), 219; *James Crawford,* The Charter of the United Nations as a Constitution, in: *Hazel Fox* (ed.), The changing constitution of the United Nations (1997), 3; *Thomas M. Frank,* Is the U.N. Charter a Constitution?, in: *Jochen Abr. Frowein et al.* (eds.), Negotiating for Peace – Liber Amicorum Tono Eitel (2003), 95.

[52] See, *Bruno Simma,* Fragmentation in a Positive Light, MichiganJIL 25 (2004), 845; *Stefan Oeter,* The International Legal Order and its Judicial Function: is there an International Community – despite the Fragmentation of Judicial Dispute Settlement?, in: *Dupuy et al.* (note 16), 583; *Pierre-Marie Dupuy,* Fragmentation du droit international ou des perceptions qu'on en a ?, in: *Rosario Huesa Vinaixa/Karel Wellens* (eds.), L'influence des sources sur l'unité et la fragmentation du droit international (2006), préface.

[53] With some individual exceptions (in particular *G. Scelle, R. Cassin, M. Virally, R.-J. Dupuy*, not to speak of French speaking *non* French authors such as *M. Bourquin, H. Rolin* and *Ch. de Visscher*) in a centralized country like France, this tradition still remains impregnated with the legacy of "les légistes du Roi"; a tradition which was then continued by the Jacobins and Napoleon. The same inspiration is still maintained, at least for some part, in the case-law of the *Conseil d'Etat,* an ideology which nevertheless did not prevent the same *Conseil d'Etat* to become and remain a most efficient protector of the individual against most arbitrary decisions of the State as an administration and *puissance publique.*

law at the Hague Academy of International Law[54], precisely devoted to analyzing and theorizing the unity of the international legal order, I do share the view that the UN Charter introduced a major shift in the international legal system whatever weaknesses may affect the UN as an international institution.[55] I also consider that as a logical consequence of the principles, laid down in particular in the first two articles of the Charter, international *jus cogens* forms part of *positive* international law[56] as the ICJ itself has finally recognized explicitly in 2006.[57] This has to be stressed since a number of excellent authors still seem to have major difficulties (may they be technical and/or ideological) to accept this legal reality. Such a skeptical if not even negative approach to *jus cogens* comprises different types of scholars, ranging from the advocates of "*le genie propre du droit international"*[58] to some of the dominant authors inspired by the so-called "*critical legal studies"*. Whatever the inherent difficulties attached to *jus cogens* may be, it is part of positive international law because precisely the States, *not* the authors, wanted it from 1969 onwards. Paradoxically enough, it is in the name either of positivism or of "realism" that these authors do not want to consider the recognition of *jus cogens* in positive law because it does not meet their vision of the international legal system.[59] Yet the very fact that States decided to introduce not only the concept but also the definition of *jus cogens* into contemporary international law entails, in normative terms, some structural and substantial consequences. It is from this perspective that concepts like the "constitutionalization" of international law as a structured legal order may be deemed useful, even if they also comprise a metaphorical dimension.

On the other hand, one should not underestimate the importance of "fiction" in law in general and international law in particular. Here, as I experienced once at a fascinating colloquium organized in *Göttingen* some years ago,[60] one should be extremely cautious with language. In legal terms, as it is at least understood in the francophone legal tradition, "fiction" does not mean unrealistic, fallacious or mistaken. It even means, once again in *legal* terms, no less than just the contrary.[61] A "legal fiction" is true in law even if it is does not correspond entirely to factual reality. It avoids insurmountable difficulties in providing factual evidence for certain principles or rules as they are laid down by the legislator. In private law, the maxim "everyone is supposed to have full knowledge of the law" ("*nul n'est sensé ignorer la loi*") is wrong in fact but true in law. It has an axiomatic dimension. The concept of "international community as a whole" (may it be envisaged as incorporating the institution of State or not), for example, does

[54] See *supra,* note 18.

[55] *Ibid.* 215-245.

[56] *Ibid.* 269-307.

[57] ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of Congo *v.* Rwanda), Jurisdiction, Judgment of 3 February 2006, para. 60 and 64.

[58] See, in particular, *Jean Combacau*, L'Etat, bric-à-brac ou système ?, Archives de philosophie du droit, Le système juridique (1986), 102.

[59] See also the most stimulating article of *A. Gattini,* Un regard procédural sur la fragmentation du droit international, Revue Générale de Droit International Public 110 (2006), 303, especially at 333-34.

[60] Colloquium on the role of the United States in international law, organized by *Michael Byers* and *Georg Nolte* in October 2001; see *Michael Byers/Georg Nolte* (eds.), United States Hegemony and the Foundations of International Law (2003).

[61] See *P.-M. Dupuy* (note 18), 258-265.

obviously contain an element of fiction.[62] However, as I explained elsewhere, it is ultimately a *legal* fiction. Thanks to it, I don't need to provide the factual demonstration of its actual existence. Suffice it to point to more than eighty treaties and an ever expanding case law which expressly refer to this very concept of "the international community" from which then legal features can be drawn.[63] It is true in law that there is indeed an "international community", at least in international law. And it is so not because the reality of this "community" can or could be demonstrated from a sociological or political point of view; it is merely true because positive international law has instituted a legal concept named "international community as a whole", and because the subjects of international law refer quite ordinarily to this concept, recognizing it as a legally valid one. In constitutional terms, this legal affirmation extends to the recognition of the competence of the General Assembly and/or the Security Council to speak in the name of this "international community". Fiction in this sense seems to be taken as one of the constitutive elements of the modern international legal order. In my view, the recognition of the constitutive role of "fiction" does not stop us from taking international law as seriously as (or even more than) any other legal order. However, beyond the lexical and linguistic ambiguities of the term outside its legal significance, would most of my friends and colleagues in Germany contradict me on this point? It is for them to answer. As for me, I feel indeed almost at home in Germany...

[62] *Ibid.*

[63] *Ibid.*

Annex – English translation of quotes

Note 3:

Until now positive international law has essentially been a law between States but today the individual joins the State as a subject of obligations and rights under international law. Beside the obedience claimed by States for their positive law, the international legal community demands an immediate obedience for supranational positive international law which may stand in conflict with national law. The principle of equality of peoples is deviated from by a special law which addresses a single people now. [...] Germany can find an auspicious way into future only in closest co-operation with other people in the world. Apart from the German people, there is hardly another people in the world which has a greater will and deeper understanding that it is necessary in a genuine international legal community to bear the necessary limitations of its own sovereignty.

Note 4:

[The 'Archiv des öffentlichen Rechts'] will be open for all authors that qualify by their degree of scientific scholarship and are committed to the single supreme objective which, however, shall be decisive for the spirit of the 'Archiv': the restoration of the *Rechtsstaat*, the renewal of the idea of the rule of law, the authority of law not only in matters of the State and administration but also in the interstate relations of peoples.

Note 5:

International Law is a common good of all people that remained also with us; it is a bridge and the connection to the outside world from which we were separated for so many years.

Note 29:

The conflict between justice and legal certainty has probably to be solved in such a way that positive law, secured by statute and authority, has to prevail even if its content is unjust and futile, except the contradiction between positive law and justice has reached such an intolerable degree that the law as a 'wrongful law' has to make way for justice.