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# *Stories of War and Peace On Writing the History of International Law in the ‘Third Reich’ and After*

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## **Abstract**

*This essay presents some reflections on what today is widely regarded as the standard book on the history of international law, and on its author, Wilhelm G. Grewe, who after 1945 was one of the architects of West Germany’s international legal status and of its relations with the three Western Allied Powers. In particular, the essay discusses Grewe’s principal and most influential idea, an interpretation of the history of modern international law as a sequence of epochs defined in each case by the then-dominant power in the states’ system. Since Grewe developed and formulated this idea in the context of National Socialist political and legal thought, and particularly under the influence of Carl Schmitt’s work, the essay leads back to the time of the Second World War and the ideological struggles of that time. In that respect, it is a study of the performance of international legal scholars under the conditions of a dictatorship, and of the intellectual legacy of the ‘Third Reich’ in international law. Thus, in different ways the essay explores the larger questions of the origins, validity and future of the idea of a power-based international legal order.*

This paper was originally meant to be a short review of Wilhelm Grewe’s leading book on the history of international law,<sup>1</sup> but in the event it turned into a reflection on the life and work of a renowned German legal scholar and diplomat of the twentieth century, on his times, both before and after the watershed of 1945, and on German

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<sup>1</sup> Wilhelm G. Grewe, *The Epochs of International Law* (translated and revised by Michael Byers, Walter de Gruyter, Berlin and New York, 2000). In this article, page numbers in parentheses refer to this volume.

legal science and its international reception. When I realized that the book's principal idea — an interpretation of the history of international law as a sequence of particular epochs defined in each case by the then-dominant power in the system of states — was developed in the context of National Socialist political and legal thought, and was influenced in particular by the work of Carl Schmitt, I sought to understand better the intellectual content and theoretical origins of this conception of a power-based international law, and why it has continued to appeal to a post-war audience to the present day.

I looked at the author's life, which was marked by achievements in legal science and diplomacy and services rendered to the German democratic state after the war, but also by risk, temptation and some questionable concessions made to the Hitler regime, and by a peculiar dialectic of change and continuity, rupture and persistence, governing both Grewe's thinking and the external world in which he lived and which he described as a scholar. Such a complex and non-linear story cannot be told in black-and-white terms, nor can it be put together in one central thesis asserting, with the wisdom of hindsight, a biographical or academic consistency which in reality did not exist. A life like Wilhelm Grewe's can, I believe, best be approached by careful observation and reflection, and by inviting the reader to draw his or her own conclusions. It took a long time for German academia to confront the intellectual legacy of the 'Third Reich'. This has been particularly difficult, and often painful, for those who had lived through Hitler's 'thousand years' or who inquired about what their parents or academic teachers had done during that time. Those who were born two or three decades after 1945 find themselves in a different but by no means easier situation. One of their difficulties is to avoid an attitude of moral indignation, self-righteousness and complacency.<sup>2</sup>

This essay considers a book of exceptional importance and influence, Grewe's history of modern international law, a book which in fact is the only thorough description of that history published in the last 50 years in any language, with no successor being in sight. The essay also considers the book's context, and refers to biographical data, but does not claim to present the author's 'life and work', which would require an examination of all of Grewe's numerous publications on issues unrelated to the history of international law, and also archival research.

In outline, the structure of this essay is as follows. The first part introduces the book under review and sketches its author's post-war career as a government official which made him a public figure in Germany. In the second part, some of the principal ideas of Grewe's history of international law are set out, particularly his view that '[t]he

<sup>2</sup> I am indebted to colleagues and friends who engaged in a conversation about how to try to answer 'those questions which the burden and uncertainty of our own history raises' (Joerges, 'History as Non-History: Points of Divergence and Time Lags Between Friedrich Kessler and German Jurisprudence', 42 *American Journal of Comparative Law* (1994) 163, at 165). Here at the EUI, I benefited from discussions in the framework of Professor Joerges' project on 'Perceptions of Europe and Perspectives on a "European Order" in Legal Scholarship During the Era of Fascism and National Socialism'. For my earlier thoughts about how to remember the Hitler era, see my essay 'A Novel, Germany's Past, and the Dilemmas of Civilised Germans', 128 *Contemporary Review* (1994) 236.

epochs of the modern history of international law and those of the modern system of states coincide'.<sup>3</sup> In the third part, I turn to Grewe's methodology and show how it was strongly influenced by Carl Schmitt's 'thinking in terms of concrete order'. The fourth part gives an account of Grewe's professional situation in the Germany of the 1930s and 1940s. In the fifth and central part, I attempt to establish the extent to which Grewe's historical work — its subject, its method and its sources — is associated with, or is a reflection of, the political and ideological conditions prevailing in Germany at the time of the Second World War. The sixth and final part begins by comparing Grewe's principal ideas to those developed by Hans Morgenthau, and then challenges the author's periodization of the history of international law as unduly emphasizing the discontinuities and minimizing the continuities in the development of the law.

## 1

Wilhelm G. Grewe (1911–2000) died shortly before the publication of the English edition of his most important academic work, *Epochen der Völkerrechtsgeschichte*. Originally published in German in 1984, the work was soon acknowledged as a standard text on the history of modern international law. Most reviews were very favourable,<sup>4</sup> and Grewe's general views about how to distinguish the principal periods of the history of the law of nations were adopted by the editors of the *Encyclopedia of Public International Law*.<sup>5</sup> Thus his periodization was recognized and followed by the leading German authorities on international law. This in turn led to the universal dissemination of Grewe's ideas. Given the scarcity of general works on the history of international law, there has since hardly been an author touching on an historical question of law who has not referred to the articles in the *Encyclopedia* and hence, indirectly, to Grewe's views.

<sup>3</sup> See *infra* text accompanying note 24.

<sup>4</sup> See e.g. the reviews by Akzin, in 19 *Israel Law Review* (1984) 596; Badura, in 110 *Archiv des öffentlichen Rechts* (1985) 465; Barcz, in 39 *Sprawy Międzynarodowe* (1986) 130 (with critical remarks about Grewe's treatment of the Soviet Union); Booysen, in 10 *South African Yearbook of International Law* (1984) 324; Doehring, in 45 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1985) 395; Ergeç, in 18 *Revue belge de droit international* (1984–1985) 895; Ballarino, in 22 *Rivista di diritto internazionale privato e processuale* (1986) 771; Parkinson, in 34 *International and Comparative Law Quarterly* (1985) 406; Pérez Martín, in 54 *Anuario de historia del derecho español* (1984) 701; Saulle, in 68 *Rivista di diritto internazionale* (1985) 253; and Schlochauer, in 23 *Archiv des Völkerrechts* (1985) 374; see also this author's brief review, in 79 *AJIL* (1985) 803. A recent survey described Grewe's 1984 book as the standard work of the German-language historiography of international law, particularly in consideration of the strong influence the book had. See Hueck, 'Völkerrechtsgeschichte: Hauptrichtungen, Tendenzen, Perspektiven', in W. Loth and J. Osterhammel (eds), *Internationale Geschichte* (2000) 267–285, at 267 *et seq.* For two more critical and profound reviews, see Lenssen, in 6 *Grotiana* (1985) 56; and Steiger, 'Probleme der Völkerrechtsgeschichte', 26 *Der Staat* (1987) 103.

<sup>5</sup> See the articles by Preiser *et al.* in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 7 (1984), at 126–273, and vol. II of the 'Library Edition' (1995), at 716–861. Grewe here wrote about 'World War I to World War II'. For another book which used Grewe's periodization, see K.H. Ziegler, *Völkerrechtsgeschichte* (1994).

In spite of his advanced age and fragile health, the author continued to work with patience and discipline on the subject which was his life-time's academic theme: the history of modern international law. When in December 1999 Professor Grewe wrote the preface to the English edition, he finally completed his work on the book, work that had been much more laborious than was assumed by him at the beginning. The *Epochen der Völkerrechtsgeschichte* Grewe published in 1984 was a book not coincidentally written in German language. It applied to its subject the terminology developed in that language and the theory behind it, and drew mainly on writings in German. Moreover, the text was characterized by a spirit and style that was hard to render into the English language. How the book will be received by an English-speaking audience will reveal the extent to which the attempt to create a true *translatio* has been successful.

That Grewe devoted his later years to a book with which he had entered academia as a young man testifies to his perseverance as well as to the importance he attached to the inquiry into the origins and development of the modern international legal order. The first manuscript of the *Epochen* was completed in late 1944, but in the conditions prevailing in Germany in the last months of the war the book could not be printed. 'At a time when the traditional system of international law is shaken to its foundations, the permanent fundamental principles of an international legal order can only be inferred from an historical examination', the author wrote in 1944, at the age of 33. This belief, an inclination towards history, and the caution exercised by a young scholar trying to avoid the pitfalls of a National Socialist doctrine of international law which was a barely concealed instrument of Hitler's policy of conquest prompted Grewe to rewrite the history of modern international law. An article of his written in 1943 summarizing the principal findings of his as yet unpublished book concluded by saying: 'After this war has ended, a newly founded, politically balanced world order will also bring forth a new international legal order.'<sup>6</sup> Although this carefully crafted remark referred to the end which, according to Grewe, the 'Transition Period of Anglo-American World Hegemony' had found in the Second World War, it could easily be read as a reminder that the Nazi design of international relations would not prevail and that there would not be a 'German age' as a grand finale to the history of the law of nations. Grewe's work as a legal scholar in the heart of the 'Third Reich' certainly attests to his diplomatic skills; it was, in a way, the beginning of his highly successful career as a diplomat.

After the establishment of the West German state in 1949, Grewe was included in a small circle of lawyers advising the new government of Chancellor Konrad Adenauer

<sup>6</sup> 'Eine neu begründete, politisch ausgewogene Weltordnung wird auch nach dem Ausgang dieses Krieges eine neue völkerrechtliche Ordnung hervorbringen.' Grewe, 'Die Epochen der modernen Völkerrechtsgeschichte', 103 *Zeitschrift für die gesamte Staatswissenschaft* (1943) 38–66 and 260–294, at 294.

in matters of foreign policy and relations with the three Western Allied Powers.<sup>7</sup> From 1951 to 1955, Grewe headed the German delegation negotiating the ending of the Allied occupation of West Germany. The outcome of the negotiations was the Convention on Relations Between the Three Powers and the Federal Republic of Germany of 1954 (*Generalvertrag* or *Deutschlandvertrag*),<sup>8</sup> a complex and very skilfully drafted treaty which accorded the Federal Republic of Germany 'the full authority of a sovereign State over its internal and external affairs' (Article 1), on condition that it was integrated into the Western defence alliance. For their part, the United States, the United Kingdom and France committed themselves to supporting a future reunification of the divided Germany under 'a liberal-democratic constitution, like that of the Federal Republic, and integrated within the European community'<sup>9</sup> (Article 7). The Convention and the additional treaties regulating 'questions arising from war and occupation' and the further stationing of Allied troops in Germany were a great success for the new West German diplomacy. The Convention and the treaties defined vital aspects of the political and legal status of the Federal Republic for almost 40 years, until German reunification in 1990. During 1953 and 1954, Grewe was acting head of the legal department of the West German Foreign Office, and in 1955 he became head of the political department, a post he held until 1958. In 1954 and 1955, he headed the German observer delegation at the Four Powers conferences in Berlin and Geneva. In 1955, he drew up a policy according to which the Federal Republic, as the only legitimate representative of Germany and the German people, would break off diplomatic relations with any state recognizing East Germany. This policy, which became known as the 'Hallstein Doctrine' (at the time Walter Hallstein was Secretary of State at the Foreign Office), remained in force until 1969 when the newly elected social democratic government of Chancellor Willy Brandt sought to establish closer relations with the East in the name of *détente*.<sup>10</sup> In 1958, Grewe was appointed ambassador, representing his country first in Washington, DC (1958–1962), later at NATO headquarters in Paris and Brussels (1962–1971) and eventually in Tokyo (1971–1976, with a parallel accreditation in Ulan Bator in 1974–1976).

<sup>7</sup> On this, see the short biography by Kroneck, in F.J. Kroneck and T. Oppermann (eds), *Im Dienste Deutschlands und des Rechtes: Festschrift für Wilhelm G. Grewe* (1981) 15–16; and the obituary by Frowein, in 125 *Archiv des öffentlichen Rechts* (2000) 299–301. See also Grewe's own account in his address 'Ein Leben mit Staats- und Völkerrecht im 20. Jahrhundert', *Freiburger Universitätsblätter* (1992) No. 118, 25–40, at 30–33; and his book *Rückblenden 1976 bis 1951* (1979).

<sup>8</sup> Signed 26 May 1952 (*Bundesgesetzblatt* 1954 II 59), amended by the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany of 23 October 1954 (*Bundesgesetzblatt* 1955 II 215).

<sup>9</sup> In the treaty, 'community' is written with a small initial letter (in German: 'und das in die europäische Gemeinschaft integriert ist').

<sup>10</sup> See Grewe's study, 'Warum "Nicht-Anerkennung"?', in W.G. Grewe, *Deutsche Aussenpolitik der Nachkriegszeit* (1960) 138–154; and his article, 'Hallstein-Doktrin', in W.G. Grewe, *Machtprojektionen und Rechtsschranken* (1991) 442–448. See also Speier, 'The Hallstein Doctrine', in H. Speier, *Force and Folly: Essays on Foreign Affairs and the History of Ideas* (1969) 135–153. For a collection of further articles by Grewe about the 'German Question', see W.G. Grewe, *Die deutsche Frage in der Ost-West-Spannung* (1986) (reviewed by Fassbender, in 20 *Deutschland Archiv* (1987) 1332–1334).

By substantially contributing to the work of defining West Germany's post-war status in international law and the Western community of states, Wilhelm Grewe helped to stabilize the young German democracy. The German Government honoured Grewe by giving him one of Germany's highest decorations,<sup>11</sup> and by nominating him repeatedly, as a person 'of known competence in questions of international law [and] of the highest moral reputation',<sup>12</sup> for membership of the Permanent Court of Arbitration in The Hague.<sup>13</sup> An obituary issued by the Foreign Office praised Grewe's contributions to the re-establishment of Germany's sovereignty after the Second World War and to the Federal Republic's 'firm integration into the Western alliance'. 'As only a few can do, the eminent scholar of international law knew how to combine the theory and practice of international relations.'<sup>14</sup>

Grewe turned to his old manuscript after retiring from the diplomatic service. He revised and expanded the text, taking into consideration the literature that had been published since the 1940s; he continued the account beyond the year 1939 (where the original text had ended), and added a new chapter dealing with the period since 1945 under the title 'United Nations: International Law in the Age of American–Soviet Rivalry and the Rise of the Third World'. In this form, the book was published in 1984 by Nomos in Baden-Baden. A second, unchanged edition came out in 1988. By then, Grewe had conceived the idea of translating the book into the language which, in the meantime, had become the *lingua franca* of international law. In view of the fact that the last monograph on the history of international law in the English language had appeared in 1954,<sup>15</sup> he expected his study to be of some interest to an English-speaking audience. However, his work on a multi-volume edition of the sources of the history of international law, which Grewe published between 1988 and 1995 as *Fontes Historiae Iuris Gentium*,<sup>16</sup> delayed the realization of that project.

<sup>11</sup> The *Grosses Verdienstkreuz mit Stern des Verdienstordens der Bundesrepublik Deutschland*.

<sup>12</sup> The phrase is taken from Article 44(1) of the Convention for the Pacific Settlement of International Disputes, adopted 18 October 1907, which defines the necessary qualifications of members of the Court of Arbitration. C. I. Bevans, *Treaties and Other International Agreements of the United States of America 1776–1949*, vol. 1 (1968) 577, at 593.

<sup>13</sup> Professor Grewe was first nominated in 1954; the nomination was renewed in 1961, 1967, 1973, 1979 and 1985. His appointment ended in 1991. Letter from the Bureau of the Permanent Court of Arbitration of 7 June 2001 (on file with the author).

<sup>14</sup> See *Nachruf des Auswärtigen Amtes auf Herrn Botschafter a.D. Professor Dr Wilhelm Grewe* of 13 January 2000 (on file with the author).

<sup>15</sup> See A. Nussbaum, *A Concise History of the Law of Nations* (1947, rev. ed. 1954). German translation under the title *Geschichte des Völkerrechts in gedrängter Darstellung* (1960). Nussbaum, Professor at the University of Berlin, lost his office in September 1933 because of his Jewish descent and religion. In 1934, he became Visiting Professor, and, in 1939, Research Professor of Public Law at Columbia University in New York. See E.C. Stiefel and F. Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933–1950)* (1991) 62–64. For the circumstances of his dismissal, see A.-M. Gräfin von Lösch, *Der nackte Geist: Die Juristische Fakultät der Berliner Universität im Umbruch von 1933* (1999) 216–219.

<sup>16</sup> See *Fontes Historiae Iuris Gentium. Sources Relating to the History of the Law of Nations*, edited by Grewe in cooperation with the Institute of International Law at the Free University of Berlin (Walter de Gruyter, Berlin and New York), vol. I, '1380 BC–1493' (1995); vol. II, '1493–1815' (1988); vol. III, Part 1, '1815–1918' (1992); and vol. III, Part 2, '1919–1945' (1992). For reviews, see Fassbender, 70 *Die Friedens-Warte* (1995) 283; and Fassbender, 20 *Yale Journal of International Law* (1995) 458.

## 2

As the author himself emphasized in his preface in 1999, the English edition of the *Epochen* is not a new book. Its fundamental ideas and structure are those of the original text of the 1940s, as modified and expanded in the 1984 edition. For instance, a central element of Grewe's narrative, his account of the genesis of the modern European state, remains based on the writings of authors such as Heinrich Mitteis, Otto Brunner and Wolfgang Windelband, who all published their major works in the 1930s or before. In the 1984 edition, only the Swiss historian Werner Näf, whose relevant publications date from the 1950s, was added to this group. Literature published after 1984 was rarely taken into consideration for the English edition. The author added, however, a seventh chapter, finished in October 1998, bearing the title 'Epilogue: An International Community with a Single Superpower', in which he sought to outline, against the background of 500 years of history of the law of nations, the characteristics of the period which began with the fall of the Soviet Union and the communist world in 1989–1990. The author himself translated his book, and that text was then checked and rewritten by Michael Byers, at the time a fellow of Jesus College, Oxford, and now a professor at the Duke University School of Law in Durham, North Carolina.<sup>17</sup> In order to preserve as much as possible of the original work's style, or what Byers properly calls 'the full force of Grewe's personal perspective' (p. ix), important quotations from works in the original German, Latin and French have been retained in the footnotes.

After an introduction, which is devoted in particular to the problem of how to divide the history of international law into periods, the book opens with some 100 pages on the medieval law of nations. Grewe here was in agreement with Wolfgang Preiser, who, in his seminal paper on 'The Ends and Methods of the History of International Law', had explained: 'If one lays stress upon the point of time at which important institutions of modern international law emerged for the first time, one has to seek the beginnings of European international law in the later Middle Ages.'<sup>18</sup> Grewe also expressly agreed with Wilhelm Wengler's belief that '[t]here also existed an international law in a sociological sense in the ancient history of the peoples of the Mediterranean region and Asia.' 'But as a chain of norms the legal order which today is in force all over the world, and which we call "international law", goes back only to the later period of the occidental Middle Ages.'<sup>19</sup> Accordingly, Grewe excluded from his exposition classical and pre-classical antiquity as well as early extra-European arrangements of peoples or societies who maintained and observed certain rules of

<sup>17</sup> See Grewe's preface: '... Michael Byers, who reworked the text linguistically. He also assisted me with valuable advice as to the substance'; and Byers' 'Translator's Note': 'All of these changes were approved by Professor Grewe himself.'

<sup>18</sup> *Die Völkerrechtsgeschichte, ihre Aufgaben und ihre Methode* (1964) 61 *et seq.* (2 *Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt/Main* (1963) No. 2).

<sup>19</sup> See W. Wengler, *Völkerrecht*, vol. I (1964) 107.

law in their relations with one another (see pp. 8–10).<sup>20</sup> He wanted to describe ‘epochs’, not ‘*the* epochs’ of the law of nations, which is why the title of the original German book is more accurate than that of the English translation.

For each period, Grewe posed several ‘test questions’ in order to determine the basics of the legal system in question. First, he inquired into the spiritual foundations of the community of nations in question, its composition and its spatial extension. Is this community occidental Christendom, the circle of ‘civilized nations’ or, as the author believes for the period from 1945 until 1989, a ‘universal community without common values’? How independent are the subjects of international law? What requirements have to be fulfilled to be recognized as a new member of legal society, requirements that the United States, for example, had to fulfil in the late eighteenth century? How does international law develop and to whom does it apply? Who is able to enforce observance of this law? The answers to these questions inform us, Grewe suggested, about the particular stage of development of international law. The author further examined the various legal forms of the allocation and administration of territory and the important changes in the legal order of the seas. At the beginning of each main chapter, the reader finds a summary of the political history of the period.

The modern history of international law, according to the author, began at the time of the French invasion of Italy under Charles VIII of France in 1494. Since then, there has been a modern system of states, an ‘intensive interrelationship’ characterized by the principle of the balance of power and the ‘infrastructure’ of a permanent diplomacy, and this system constituted the basis of modern international law (pp. 13–23). The author divides the succeeding periods according to the politically dominant power which in his view substantially influenced, or even created, the respective legal order. He distinguishes a Spanish age (1494–1648), a French age (1648–1815) and a British age (1815–1919). ‘Each of these three political systems . . . produced its own unique, self-contained international legal order. The structure of each of these legal orders was determined by the particular intellectual and political style of the leading power of the time’ (p. 23). These periods are followed by the inter-war years and the Second World War as the transitional period of an ‘Anglo-American Condominium’ (1919–1944),<sup>21</sup> and by an ‘age of American–Soviet rivalry and the rise of the Third World’ (since 1945) which now, in the English edition, is said to have ended in 1989. The period since 1989 is described in the epilogue to the English edition as one characterized by the singular position of the

<sup>20</sup> The present — still rather limited — knowledge about these arrangements is summarized in the articles by Elias, Miyazaki, El-Kosheri, Truyol y Serra and Singh, on ‘History of the Law of Nations — Regional Developments’ in the *Encyclopedia of Public International Law*, *supra* note 5, Instalment 7, at 205–252, and vol. II of the ‘Library Edition’, at 716–861. See also Verosta, ‘Die Geschichte des Völkerrechts’, in A. Verdross (ed.), *Völkerrecht* (5th ed., 1964) 31–94.

<sup>21</sup> Grewe used the term ‘transitional period’ (*Übergangszeitalter*) in his 1943 article (*supra* note 6, at 282). There, the author explained that the transition stage would lead either to an ‘American century’ or to a ‘new order of the world’ established by the powers of the *Dreierpakt* (Germany, Italy and Japan). See *infra* text accompanying note 114.



United States, on the one hand, and 'a growing trend towards a stronger international community', on the other hand (p. 703).<sup>22</sup>

In this classification, Grewe saw the dividing line of 1919 as more definite and radical than that of 1815 or 1648 because it indicated the end of the 'classical' law of nations which had been in force since the late fifteenth century (p. 575). In contrast to a non-organized plurality of legally equal, but actually unequal, 'sovereign' states which until then had constituted the international legal community, the League of Nations is regarded as the first attempt to organize that community and to create a universal instrument for maintaining peace and preventing and settling inter-state conflict. At the same time, the classical free *jus ad bellum* of states was abandoned (p. 581).<sup>23</sup>

'The epochs of the modern history of international law and those of the modern system of states coincide; this is the simple, in the opinion of some people possibly banal, thesis of this book. . . [T]he state system [as a pre-established, preordained order] is necessarily the substratum which underlies the international legal order' (p. 6).<sup>24</sup> Or, with a slightly different emphasis, in the words of Emile Giraud, approvingly quoted by Grewe: 'L'évolution du droit international est commandée par celle de la politique internationale' (p. 698).

### 3

Grewe criticized from a methodological perspective the separation of legal theory and state practice in earlier studies of the history of international law. Many scholars, he said, 'lost themselves in an abstract history of the theory, which could not acknowledge the concrete intellectual historical position of a Vitoria, a Gentili or a Grotius, nor the concrete political and sociological background to their theories' (p. 2).

<sup>22</sup> See also Grewe's article 'The History of the United Nations' of 1994 (in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1994) 1–23), where he distinguished (at 12–23) 'five distinct consecutive phases' in the development of the organization since 1945, brought about by 'changes in the nature of the UN and its adaptation in the face of political reality' (at 12): 'The Phase of Western Dominance' (1945–1960); 'Decolonization and the Rise of the Third World' (1960–1970); 'Polarization Between North and South — Without an East–West Settlement' (1970–1980); 'The Crisis of the United Nations' (1980–1987); and 'The Partial Regeneration of the Organization' (since 1987). Grewe cautioned, however, that the delimitation of those phases 'is often questionable and controversial' (at 13).

<sup>23</sup> For the notions of 'classical' and 'post-classical' international law, see also Grewe, 'Was ist klassisches, was ist modernes Völkerrecht?', in A. Böhm et al. (eds), *Idee und Realität des Rechts in der Entwicklung internationaler Beziehungen: Festgabe für Wolfgang Preisner* (1983) 111–131; reprinted in Grewe, *Machtprojektionen*, *supra* note 10, at 213–231 (this latter collection of essays also includes other articles by Grewe on the history of international law).

<sup>24</sup> See also Grewe, 'Die Epochen', *supra* note 6, at 38: 'The epochs of the history of international law are closely and necessarily connected with the epochs of political history. For the nature and the transformations of modern international law are based on the structure of the modern state system and on the changes in the political situation which take place within the context of that system. The state system constitutes the substratum of the international legal order, the pre-established, pre-ordained order of things in which the legal order develops.'

On the other hand, ‘inter-State relations were regarded as a bare array of facts to be grasped and systematized by way of a theoretically derived, abstract intellectual method’, and the ‘immanent structures’ (*immanente Ordnungsstrukturen*) underlying these facts were overlooked (p. 2). Grewe insisted that both the theory and the practice of international law ‘are forms of expression of the same powers, which characterize the political style of an epoch just as much as its principles of social, economic and legal organization’ (p. 6). It seems that, of the two, he regarded state practice as the clearer, more direct form of expression of those powers, and less ambiguous or vague than academic writings. He saw theory as something which, more often than not, is advanced in the service of power politics; and he believed, along with Ulrich Scheuner, that the decisive steps towards a new international order remain in the hands of states. This view is quite different from admitting that, in the historiography of international law, doctrine has often been over-emphasized, and finding it expedient to investigate how the theory set forth by scholars and the practice of states have influenced each other.

The author explained the priority which in his view ‘real’ (i.e. sociological, economic, political, etc.) conditions of life have over a legal order — a priority equated with logical precedence — as follows:

[A] legal order is not primarily a system of coherent and precisely interacting rules without gaps and contradictions. It is rather the normative image of a natural state of order [*das normative Abbild einer natürlichen Ordnungslage*]. The totality of individual legal rules deserves to be called a legal order if it puts in order the totality of facts needing to be regulated legally in a manner which corresponds to the concrete intellectual, cultural, social and political situation in question, and which is inherently right [*lebensrichtig*] in this situation. Accordingly, the primary correlation between the individual legal rules and institutions is not logical, but morphological.<sup>25</sup> It is the subsequent task of jurisprudence to build systems and coordinate concepts.<sup>26</sup>

We can supplement this statement of methodology with an earlier related remark made by Grewe in the preface to his doctoral dissertation of 1936:

With the fall of a formalist jurisprudence, which with its conceptual notions built a normative illusory world of law and concealed the real relations of order of social life [*die wirklichen Ordnungszusammenhänge des sozialen Lebens*], the interest of the science of law has turned to the material content and the transpositive context of the legal order and its individual institutions... [Today it is a matter of priority] objectively to explore and describe living contexts of reality and their immanent structures [*lebendige[r] Wirklichkeitszusammenhänge und*

<sup>25</sup> The *Oxford English Dictionary*, vol. XV (2nd ed., 1989) 907, defines ‘social morphology’ as ‘[the study of] the various forms of social structure and the changes that take place within them or govern them’. See also Bernsdorf, ‘Morphologie, soziale’, in W. Bernsdorf and F. Bülow (eds), *Wörterbuch der Soziologie* (1955) 342: ‘Social morphology is the descriptive discipline of sociology which seeks to describe contemporary society as comprehensively as possible... The term is mostly used in the French-speaking countries.’ The article refers to a book by M. Halbwachs, *Morphologie sociale* (1938).

<sup>26</sup> See p. 32. This translation is partly my own. For the German original, see p. 54 of the *Epochen*. See also Grewe’s review of E. Menzel’s *Die englische Lehre vom Wesen der Völkerrechtsnorm* (1942), in *12 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1944) 127: ‘In international law, there is a general absence of sociological studies which would reveal that many abstract principles of international law are rooted in concrete political interests, or in the spiritual, ideological or moral habitus of certain nations.’

*ihre[r] immanente[n] Ordnungsstruktur*], to discover concrete forms of community and typical modes of community life, to expose the intellectual contexts of meaning, and to establish the law-creating forces of a nation in general.<sup>27</sup>

Accordingly, Grewe rejected as fictitious and unproductive the traditional 'purity of methods'; he considered that it was necessary for legal science to take into account the results of the research of other disciplines such as philology, history, theology, sociology and the history of ideas.<sup>28</sup>

If we take these statements together with the one quoted above (about a specific state system being the substratum or foundation of a specific international legal order) and apply them to the history of international law, the result is that, at a given time, we find a concrete international situation which was given its particular shape and form by the leading power of the day. The ensuing international legal order is primarily a reflection of that context — a translation of political, economic or military conditions into legal rules and institutions, accomplished by the leading power. This legal order can be discerned by the legal scholar or, in retrospect, by the legal historian.

Knowing Grewe, it is surprising that these remarks on the nature of change in the history of international law have a Marxist ring — the legal order seems to be understood as an *Überbau*, or a superstructure, of the real (albeit not only economic) conditions of life. On the other hand, Grewe's postulate of starting out from a 'concrete' situation reminds one of Carl Schmitt's *konkretes Ordnungs- und Gestaltungsdenken* ('thinking in terms of concrete order and formation') which declared legal rules to be secondary to a 'concrete', pre-existent reality.<sup>29</sup> Arguing against positivism and 'normativism', Schmitt emphasized the 'political character' of constitutional as well as public international law,<sup>30</sup> and asserted that a connection between political

<sup>27</sup> W. Grewe, 'Gnade und Recht' (*Doctor juris* dissertation, 1936) 5.

<sup>28</sup> See *ibid.*, at 6.

<sup>29</sup> See C. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (1934, reprinted 1993) 11: 'The norm or rule does not create the order. Rather, it has, on the basis and within the bounds of an existing order only, a certain regulatory function with a relatively small degree of an autonomous validity independent of the real situation.' See also C. Schmitt, *Verfassungslehre* (1928) 22–25 (every normative regulation depends on a prior political decision, made in accordance with a concrete reality), C. Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (2nd ed., 1934) 19 *et seq.* (a norm cannot be applied to a chaos; order must have been established to make a legal order possible and meaningful), and 'Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff' (1941), reprinted in C. Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954: Materialien zu einer Verfassungslehre* (1958) 375–383. Of the vast literature about this legal theory or methodology, I mention only H. Hofmann, *Legitimität gegen Legalität: Der Weg der politischen Philosophie Carl Schmitts* (3rd ed., 1995) 177–187 and 225–226; K. Anderbrügge, *Völkisches Rechtsdenken: Zur Rechtslehre in der Zeit des Nationalsozialismus* (1978) 106–120; and R. Walkenhaus, *Konservatives Staatsdenken: Eine wissenssoziologische Studie zu Ernst Rudolf Huber* (1997) 294–320. For the importance of *konkretes Ordnungsdenken* for international law as construed by National Socialist writers, see Diner, 'Rassistisches Völkerrecht: Elemente einer nationalsozialistischen Weltordnung', 37 *Vierteljahrshefte für Zeitgeschichte* (1989) 23, at 24–34.

<sup>30</sup> See e.g. Schmitt, 'Völkerrechtliche Formen des modernen Imperialismus' (1932), in C. Schmitt, *Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923–1939* (1940, reprinted 1988) 162–180, at 168.

developments and the formation of legal concepts was necessary.<sup>31</sup> Schmitt's position, as can be perceived from his writings of the late Weimar and the Nazi period, was summarized as follows: 'Every legal regulation presupposes a "situation of normalcy" or "concrete order" as an actually existing, comprehensive solution of the fundamental problems of a political reality.'<sup>32</sup> After 1933, Schmitt's construction fitted exceedingly well the National Socialist preference for the 'concrete' over the 'abstract', the 'natural' over the 'artificial', the 'organic' over the 'mechanical' and the 'living' over the 'rational'. His construction was also an 'open' concept which allowed one to understand and interpret the law in accordance with changing (political) developments and guidelines.<sup>33</sup>

#### 4

Grewe called his preoccupation with the history of international law during the years of the Second World War an 'escape to history'.<sup>34</sup> He saw it as the second part of a two-part flight, the first having taken him away from constitutional law, a discipline that had become meaningless after Hitler's usurpation of power.<sup>35</sup> In the first years of the 'Third Reich', when Hitler sought to stabilize his regime and to reassure the German people and foreign governments alike of his 'peaceful intentions', the German science of international law had not yet completely deteriorated into propaganda, into more or less skilfully invented justifications for blatant violations of treaty and customary law, a veiling of Hitler's actions and aims, and a contribution to a strengthening among Germans of the 'fighting spirit'. This changed in about 1936, and more so after the German invasion of Poland.<sup>36</sup> The deterioration had long reached its low point when, in the winter term of 1944–1945, the most prominent of the German faculties of law, that of the capital Berlin, stopped teaching 'International

<sup>31</sup> See e.g. Schmitt, 'Über die neuen Aufgaben der Verfassungsgeschichte' (1936), in Schmitt, *supra* note 30, 229–234, at 232.

<sup>32</sup> See K. Harms, *Verfassungsrecht in Umbruchsituationen* (1999) 130.

<sup>33</sup> See Messerschmidt, 'Revision, Neue Ordnung, Krieg: Akzente der Völkerrechtswissenschaft in Deutschland 1933–1945', 9 *Militärgeschichtliche Mitteilungen* (1971) 61, at 71, 74 and 93.

<sup>34</sup> 'Flucht in die Geschichte'; see Grewe, 'Ein Leben', *supra* note 7, at 30.

<sup>35</sup> *Ibid.* at 27 *et seq.* See also Stolleis, 'Im Bauch des Leviathan: Staatsrechtslehre im Nationalsozialismus', in M. Stolleis, *Recht im Unrecht: Studien zur Rechtsgeschichte des Nationalsozialismus* (1994) 126–146, at 143: 'The National Socialist state had no need for a science of constitutional or administrative law.' For a translation into English (by T. Dunlap), see M. Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany* (1998) 87–101, at 99.

<sup>36</sup> See, in general, Messerschmidt, *supra* note 33; Vagts, 'International Law in the Third Reich', 84 *AJIL* (1990) 661; and M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 3, '1914–1945' (1999) 380–400. Of the literature contemporaneous with National Socialism, the work by E. Bristler, *Die Völkerrechtslehre des Nationalsozialismus* (1938), remains of outstanding importance. Bristler is a pseudonym used by John Herz to protect his family. For a summary of the study's findings in English, see Herz, 'The National Socialist Doctrine of International Law and the Problems of International Organization', 54 *Political Science Quarterly* (1939) 536–554.

Law' as an autonomous subject and replaced it with 'Foreign Policy and International Law'.<sup>37</sup>

What then was Grewe's professional situation at the time when he turned his attention to the history of international law?<sup>38</sup> Having studied law at the universities of Hamburg, Berlin, Freiburg and Frankfurt (1930–1934), Grewe became an assistant to Professor Ernst Forsthoff<sup>39</sup> at the University of Hamburg.<sup>40</sup> It was there that in 1936 he obtained the degree of *Doctor juris* with a dissertation supervised by, and dedicated to, Forsthoff, which was entitled 'Gnade und Recht' ('Mercy and Law').<sup>41</sup> Grewe then followed Forsthoff to the University of Königsberg in East Prussia (1936–1937).<sup>42</sup> In 1937, he joined the *Deutsches Institut für Aussenpolitische Forschung* (the German Institute for Foreign Policy Research) in Berlin,<sup>43</sup> an institution controlled by the National Socialist politician Joachim von Ribbentrop,

<sup>37</sup> See Friedrich-Wilhelms-Universität zu Berlin, *Personal- und Vorlesungsverzeichnis: Wintersemester 1944/45* (1944) 75 (announcements of two classes under that title, to be taught by Carl Schmitt and Friedrich Berber, respectively). In the winter term of 1942–1943, Berber had started offering a class entitled 'Policy of International Law' in addition to Schmitt's class on 'International Law'. Schmitt continued to teach 'International Law' until the summer of 1944.

<sup>38</sup> The information about Grewe's career in the 1930s and 1940s provided in the works cited below is incomplete and partly contradictory. Kroneck's quasi-official biography in the *Festschrift* for Grewe (*supra* note 7) covers this period in only six lines of text.

<sup>39</sup> For a brief biography, see Herrmann, in M. Stolleis (ed.), *Juristen: Ein biographisches Lexikon* (1995) 212 *et seq.* See also Weber, 'Von Albrecht Mendelssohn Bartholdy zu Ernst Forsthoff: Die Hamburger Rechtsfakultät im Zeitpunkt des Machtübergangs 1933 bis 1935', in K.J. Gantzel (ed.), *Kolonialrechtswissenschaft — Kriegsursachenforschung — Internationale Angelegenheiten* (1983) 159–181; and the remarks by Mehring, in A.J. Jacobson and B. Schlink (eds), *Weimar: A Jurisprudence of Crisis* (2001) 313–320 (with excerpts from Forsthoff's *Der totale Staat [The Total State]* of 1933, translated into English at 320–323).

<sup>40</sup> On the title page of his doctoral dissertation, 'Gnade und Recht' (*supra* note 27), published in 1936, Grewe is described as *wissenschaftlicher Hilfsarbeiter an der Hansischen Universität*. In the fall of 1933, Grewe had left Freiburg for Frankfurt where Forsthoff had been appointed professor as Hermann Heller's successor: see Stolleis, *Geschichte*, *supra* note 36, at 265 *et seq.* It seems that Grewe followed Forsthoff to Hamburg in 1935; cf. *infra* note 42; and R. Eisfeld, *Ausgebürgert und doch angebräunt: Deutsche Politikwissenschaft 1920–1945* (1991) 149. Forsthoff taught at Hamburg University from 1 April 1935, until 31 March 1936. See Weber, *supra* note 39, at 172. In 1933, Forsthoff was 31 years old, and Grewe 22.

<sup>41</sup> See *supra* note 27; Grewe, 'Ein Leben', *supra* note 7, at 25; Kroneck, *supra* note 7, at 15.

<sup>42</sup> See Grewe, 'Ein Leben', *supra* note 7, at 29. Forsthoff stayed in Königsberg until 1941, the year of Grewe's habilitation (cf. *infra* text accompanying note 60), when he accepted a chair in Vienna (see Stolleis, *Geschichte*, *supra* note 36, at 285 and 294).

<sup>43</sup> See Siebert, 'Entstehung und Struktur der Auslandswissenschaftlichen Fakultät an der Universität Berlin (1940 bis 1945)', 15 *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin — Gesellschafts- und Sprachwissenschaftliche Reihe* (1966) No. 1, 19–34, at 30. Weber claims that, before joining the Institute, Grewe had worked in the *Dienststelle Ribbentrop*, an office established in 1934 in Berlin by Ribbentrop to support his foreign policy initiatives. See Weber, 'Rechtswissenschaft im Dienst der NS-Propaganda: Das Institut für Auswärtige Politik und die deutsche Völkerrechtsdoktrin in den Jahren 1933 bis 1945', in K.J. Gantzel (ed.), *Wissenschaftliche Verantwortung und politische Macht* (1986) 185–425, at 277 (for an abbreviated version, see 'Die politische Verantwortung der Wissenschaft: Friedrich Berber in den Jahren 1937 bis 1945', in E. Krause (ed.), *Hochschulalltag im 'Dritten Reich': Die Hamburger Universität 1933–1945*, vol. 2 (1991) 939–952). However, in the comprehensive study of that institution by H.-A. Jacobsen, *Nationalsozialistische Aussenpolitik 1933–1938* (1968) 252–318, Grewe is not mentioned.

who became German Foreign Minister in 1938. The Institute<sup>44</sup> was headed by Professor Fritz (Friedrich) Berber,<sup>45</sup> and was mainly engaged in propaganda in support of Hitler's foreign policy. After 1939, it was closely associated with the *Deutsche Informationsstelle* (German Office for Information), a propaganda institution working for the Foreign Office and also headed by Berber.<sup>46</sup> Perhaps Berber had originally conceived the Institute rather as a think-tank, but Ribbentrop, eagerly following each of Hitler's moves, was not interested in original or critical ideas. Grewe was responsible for the Institute's international law section<sup>47</sup> and for the regular international law report appearing in the journal of the Institute.<sup>48</sup> The Institute readily and continuously supported the National Socialist policy of conquest.<sup>49</sup> In the main, it appears, its publications abstained from using anti-Jewish or racist language. An expert in the history of Nazi foreign policy said that in the staff Ribbentrop had assembled before becoming minister there were 'by far more individualists, outsiders and people wishing to continue their previous work under the cover of Ribbentrop's name than absolute followers of the Nazi party'.<sup>50</sup> It seems that this also holds true for Berber's Institute.

In 1939, Grewe became lecturer (*Dozent*) at the *Hochschule für Politik* (School of Political Science) in Berlin,<sup>51</sup> where Berber had been teaching since 1930.<sup>52</sup> This institution had been founded in 1920 in a liberal and republican spirit as a private institution of higher learning, and had built up an international reputation during the

<sup>44</sup> For its history, see Weber, *supra* note 43. See also Paussmeyer, 'Die Grundlagen nationalsozialistischer Völkerrechtstheorie als ideologischer Rahmen für die Geschichte des Instituts für Auswärtige Politik 1933–1945', in Gantzel, *supra* note 39, 115–158, at 141–158; and Weber, 'Geschichte des Instituts für Internationale Angelegenheiten der Universität Hamburg', [www.jura.uni-hamburg.de/~iia/Geschi.htm](http://www.jura.uni-hamburg.de/~iia/Geschi.htm). For a comparison of Berber's institute with the 'Kaiser Wilhelm Institut für ausländisches öffentliches Recht und Völkerrecht' in Berlin, see Hueck, 'Die deutsche Völkerrechtswissenschaft im Nationalsozialismus', in D. Kaufmann (ed.), *Geschichte der Kaiser-Wilhelm-Gesellschaft im Nationalsozialismus* (2000) 491–527.

<sup>45</sup> For Berber, see Weber, *supra* note 43, Vagts, *supra* note 36, at 684 *et seq.*; Stolleis, *Geschichte*, *supra* note 36, at 386 *et seq.*; and the biographical notes written by his former students Randelzhofer, in *Juristen im Porträt: Festschrift zum 225 jährigen Jubiläum des Verlages C.H. Beck* (1988) 170–177; and Blumenwitz, in 103 *Archiv des öffentlichen Rechts* (1978) 605. See also Grewe, 'Ein Leben', *supra* note 7, at 38 *et seq.*

<sup>46</sup> See P. Longerich, *Propagandisten im Krieg: Die Presseabteilung des Auswärtigen Amtes unter Ribbentrop* (1987) 52 *et seq.* and 56 *et seq.* (see also the figures at 55, 57, 63 and 68); and Hecker, 'Die Forschungsstelle für Völkerrecht . . . mit ihren Vorläufern', in Gantzel, *supra* note 39, 185–381, at 269.

<sup>47</sup> See Weber, *supra* note 43, at 282 and 365.

<sup>48</sup> See Paussmeyer, *supra* note 44, at 153. The journal first had the name *Hamburger Monatshefte für Auswärtige Politik* (1934–1937), then *Monatshefte für Auswärtige Politik* (1937–1939), and eventually *Auswärtige Politik* with the subtitle *Monatshefte des Deutschen Instituts für Aussenpolitische Forschung und des Hamburger Instituts für Auswärtige Politik* (1939–1944): see Paussmeyer, *supra* note 44, at 152–154.

<sup>49</sup> I borrow this phrase from Hueck, *supra* note 44, at 516, who used it with reference to the Kaiser-Wilhelm-Institut.

<sup>50</sup> See Jacobsen, *supra* note 43, at 284.

<sup>51</sup> See Kroneck, *supra* note 7, at 15.

<sup>52</sup> See Stolleis, *Geschichte*, *supra* note 36, at 259.

time of the Weimar Republic.<sup>53</sup> Among those regularly lecturing at the *Hochschule* in its Weimar period were Walther Schücking, one of Germany's very few international lawyers of the time supporting peaceful international cooperation and Germany's active membership in the League of Nations, who in 1930 became the first German judge at the Permanent Court of International Justice.<sup>54</sup>

Upon Hitler's seizure of power in 1933, the school came under the control of Goebbels' Ministry of Propaganda, and the majority of its faculty was dismissed and forced to leave Germany.<sup>55</sup> In 1940, the institution was integrated into the newly founded *Auslandswissenschaftliche Fakultät* (Faculty of Foreign Studies) of the University of Berlin,<sup>56</sup> where Grewe was appointed lecturer (*Lehrbeauftragter*) for the subject 'Legal Foundations of Foreign Policy'.<sup>57</sup> According to a semi-official announcement, the Faculty had the 'task of promoting knowledge of the political, cultural and economic relations of the Reich with foreign states, and of the contemporary life of foreign peoples and states, through teaching and research'. It was supposed to produce, for the use of 'the government, culture and industry', future experts in

<sup>53</sup> See Jäckh, 'Die "alte" Hochschule für Politik, 1920–1933', in E. Jäckh and O. Suhr, *Geschichte der Deutschen Hochschule für Politik* (1952) 5–32; E. Jäckh, *Weltsaat: Erlebtes und Erstrebtes* (1960) 79–93 and 142–146; A. Missiroli, *Die Deutsche Hochschule für Politik* (1988) 21–58 and Annex; Nickel, 'Die Gründung der Deutschen Hochschule für Politik', *Berlinische Monatsschrift* (2000) 100, [www.luise-berlin.de/bms](http://www.luise-berlin.de/bms); and M. Boveri, *Verzweigungen: Eine Autobiographie* (ed. U. Johnson, 1977) 188–214 (recollections of a former student). For a more critical view, see Eisfeld, *supra* note 40, at 16 *et seq.* and 165–169 (emphasizing a nationalistic and revisionist attitude of the founders and the increasing influence of a rightist group of the teaching staff since 1932).

<sup>54</sup> See D. Acker, *Walther Schücking (1875–1935)* (1970) 200 *et seq.*; Fassbender, 'Walther Schücking — Champion of the League of Nations Idea in Pre-World War I Germany', summary of remarks in *ASIL Proceedings, 93rd Annual Meeting* (1999) 329 *et seq.*; and most recently F. Bodendiek, *Walther Schückings Konzeption der internationalen Ordnung* (2001) 68.

<sup>55</sup> See Missiroli, *supra* note 53, at 44 *et seq.* A number of these emigrants then taught at the New School for Social Research in New York. See P.M. Rutkoff and W.B. Scott, *New School: A History of the New School for Social Research* (1986) 84–106, at 101: 'The faculty that came together in September 1933 had been drawn for the most part from three universities: Frankfurt University ... the Kiel Institute for World Economics ... and the Berlin Hochschule.' According to Haiger, 'Politikwissenschaft und Auslandswissenschaft im "Dritten Reich": (Deutsche) Hochschule für Politik 1933–1939 und Auslandswissenschaftliche Fakultät der Berliner Universität 1940–1945', in G. Göhler and B. Zeuner (eds), *Kontinuitäten und Brüche in der deutschen Politikwissenschaft* (1991) 94–136, at 97, only nine out of 49 faculty members (i.e. 18 per cent) continued teaching at the school. For the history of the *Hochschule* between 1933 and 1940, see Haiger, *ibid.*, at 95–116; and Eisfeld, *supra* note 40, at 93–137.

<sup>56</sup> See Missiroli, *supra* note 53, at 44 *et seq.*; Eisfeld, *supra* note 40, at 139–164; and Haiger, *supra* note 55, at 114–120. For the history of the faculty, see further Siebert, *supra* note 43; and Siebert, 'Die Ostforschung an der Auslandswissenschaftlichen Fakultät der Berliner Universität in den Jahren 1940–1945', 5 *Informationen über die imperialistische Ostforschung* (1965) 1–34. Siebert's studies, though written in Marxist phraseology, are useful because the author used university and state archives. See also L. Hachmeister, *Der Gegnerforscher: Die Karriere des SS-Führers Franz Alfred Six* (1998) 119–143. Six was a promoter of the new Faculty and its dean from 1940 to 1943. For Six's influence on the work of the German cultural institutions in the neutral countries and those occupied by Germany during the Second World War, see F.R. Hausmann, 'Vom Strudel der Ereignisse verschlungen': *Deutsche Romanistik im 'Dritten Reich'* (2000) 76 *et seq.*, 429–431, 458 *et seq.*, 501 *et seq.* and 541 *et seq.* (see also 'Six' in the index of names).

<sup>57</sup> See Friedrich-Wilhelms-Universität zu Berlin, *Personal- und Vorlesungsverzeichnis: II. Trimester 1940* (1940) 81. The appointment became effective on 6 March 1940. See also Eisfeld, *supra* note 40, at 149.

particular foreign countries and regions.<sup>58</sup> In the school's curriculum, the subject assigned to Grewe figured as one of the basic fields of study (*Grundwissenschaften*).<sup>59</sup> After the Faculty of Law in Königsberg had accepted, in March 1941, parts of what was later to become Grewe's book, *Epochen der Völkerrechtsgeschichte*, as *Habilitationschrift*,<sup>60</sup> Grewe was appointed *Dozent* at the Faculty of Foreign Studies and, simultaneously, at the Law Faculty of the University of Berlin.<sup>61</sup> A year later, at the age of 31, he became extraordinary professor (*ausserordentlicher Professor*) at the Faculty of Foreign Studies, teaching the subjects 'Legal Foundations of Foreign Policy' and 'Policy of International Law' (*Völkerrechtspolitik*).<sup>62</sup> In 1943, Grewe was offered full professorships by the universities of Leipzig, Rostock and Posen.<sup>63</sup> It is reported that efforts made in 1943–1944 to set up a chair for Grewe in Berlin failed because of his marriage to Marianne Partsch, whose grandfather was Jewish.<sup>64</sup>

According to the university calendars of 1941 to 1945, Grewe mainly gave lectures and seminars on issues of the history of international law and constitutional law,<sup>65</sup> and the theory of law and state.<sup>66</sup> He also taught classes on contemporary problems of international law, as well as a general introduction to German (constitutional) law addressed to foreign students. Often, his courses would form part of the curriculum of the Faculty of Foreign Studies and that of the Law School. Grewe was a popular teacher.<sup>67</sup> Compared to the historical focus of most of his courses, the lecture class on

<sup>58</sup> See P., 'Die Auslandswissenschaftliche Fakultät an der Universität Berlin', 30 *Zeitschrift für Politik* (1940) 55 *et seq.*

<sup>59</sup> See *ibid.*; and Haiger, *supra* note 55, at 121.

<sup>60</sup> Grewe, 1944 preface, in the English edition at xiii.

<sup>61</sup> See Friedrich-Wilhelms-Universität zu Berlin, *Personal- und Vorlesungsverzeichnis: Wintersemester 1942/43* (1942) 15 and 44. In his autobiography, Grewe reversed that order, emphasizing his position at the Law Faculty. See W.G. Grewe, *Rückblenden 1976 bis 1951* (1979) 182 *et seq.* The appointments became effective on 27 October 1941. At the Law Faculty, Grewe's subjects of teaching were described as 'public law, in particular public international law'.

<sup>62</sup> See Friedrich-Wilhelms-Universität zu Berlin, *Personal- und Vorlesungsverzeichnis: Sommersemester 1943* (1943) 47. The appointment became effective on 16 December 1942. The previous description of his position as *Dozent* at the Faculty of Law (see *supra* note 61) remained unchanged. See *ibid.*, at 18. In the next edition of the university calendar (for the winter term of 1943–1944), and all following editions, Grewe is no longer listed as a member of the faculty of the Law School (although he continued to teach there), possibly because his newly acquired position as professor at the Faculty of Foreign Studies implied his capacity to teach at other departments of the university.

<sup>63</sup> See, Siebert, *supra* note 43, at 30.

<sup>64</sup> See Eisfeld, *supra* note 40, at 150; Haiger, *supra* note 55, at 127 n. 169; and Siebert, *supra* note 43, at 30. See also Hachmeister, *supra* note 56, at 135 (Protestant church wedding in 1943).

<sup>65</sup> See e.g. 'Die völkerrechtliche Struktur des europäischen Staatensystems vom 16. Jahrhundert bis zur Gegenwart' (3rd trimester, 1940); 'Die Völkerrechtspolitik Preussens und Deutschlands von 1815 bis zur Gegenwart' (1941); and 'Geschichte des Völkerrechts' (winter 1941–1942, winter 1943–1944 and summer 1944).

<sup>66</sup> See e.g. 'Geschichte der Staatstheorien unter besonderer Berücksichtigung der staatstheoretischen Grundlagen der Aussenpolitik' (summer 1941); 'Grundzüge der Staats- und Verfassungslehre der Neuzeit' (summer 1942); 'Das Naturrecht: Entwicklung und Problematik' (winter 1942–1943); and 'Geschichte der Staatslehre' (winter 1944–1945).

<sup>67</sup> Siebert, *supra* note 43, at 30 n. 85, speaks of an average number of 50–100 students attending the lectures, and of seminars with 30–50 students.



*Volk und Staat*, at the Law Faculty in the summer of 1943,<sup>68</sup> stands out as an exception. Covering the basics of the constitution of the 'Third Reich', it was a required course for every law student. From 1940, the class was alternately taught by Carl Schmitt and Reinhard Höhn, and from 1942 it was taught exclusively by Höhn, reflecting the latter's rise to power in the Nazi science of law and Schmitt's falling from the elevated position of Hitler's *Kronjurist*.

Grewe was a prolific writer, and contributed many articles not only to the (*Monatshefte für*) *Auswärtige Politik*<sup>69</sup> but also to the *Zeitschrift für Politik* and the *Jahrbuch der Weltpolitik*, both edited by Professor F.A. Six in his capacity as president of the *Deutsches Auslandswissenschaftliches Institut* (German Institute of Foreign Studies) in Berlin, an institution linked with the Faculty of Foreign Studies.<sup>70</sup> A subject he was particularly interested in was the Allied Powers' plans for a post-war international order.<sup>71</sup>

When in 1946 the University of Berlin was reopened in the Soviet sector of the city, the *Auslandswissenschaftliche Fakultät* was quietly dissolved.<sup>72</sup> After an interruption of only a few months in the summer of 1945, Grewe continued his university career, first in Göttingen (1945–1947) and then in Freiburg im Breisgau (from 1947).<sup>73</sup> More than anyone else, the person who helped Grewe get a new start was Professor Erich Kaufmann who, being Jewish, had lost his positions as a professor of law at Berlin University and as legal adviser to the Foreign Office in 1934, and had emigrated to the Netherlands in 1939.<sup>74</sup>

<sup>68</sup> See *Personal- und Vorlesungsverzeichnis: Sommersemester 1943* (1943) 72. At the Faculty of Foreign Studies, the same class was announced as 'Grundzüge der Staats- und Verfassungslehre (Volk und Staat)': *ibid.*, at 109.

<sup>69</sup> See *supra* note 48.

<sup>70</sup> Grewe also published in the *Zeitschrift der Akademie für Deutsches Recht*, the *Zeitschrift für die gesamte Staatswissenschaft*, the *Jahrbuch für auswärtige Politik*, the *Europäische Revue*, *Berliner Monatshefte* and the *Archiv für Luftrecht*.

<sup>71</sup> See, in particular, 'Das Bündnissystem der Alliierten', 32 *Zeitschrift für Politik* (1942) 483; 'Von den "Alliierten und Assoziierten Mächten" zu den "Vereinigten Nationen"', 33 *Zeitschrift für Politik* (1943) 262; 'Die völkerrechtspolitische Entwicklung im Jahre 1943', *Jahrbuch der Weltpolitik* (1944) 104; and 'Die Völkerbundspläne der Alliierten', 34 *Zeitschrift für Politik* (1944) 265.

<sup>72</sup> See Haiger, *supra* note 55, at 131.

<sup>73</sup> See Kroneck, *supra* note 7; and Grewe, 'Ein Leben', *supra* note 7. See also Reimann, 'National Socialist Jurisprudence and Academic Continuity: A Comment on Professor Kaufmann's Article', 9 *Cardozo Law Review* (1988) 1651. For the situation in Göttingen, see Halfmann, 'Eine "Pflanzstätte bester nationalsozialistischer Rechtsgelehrter": Die Juristische Abteilung der Rechts- und Staatswissenschaftlichen Fakultät', in H. Becker (ed.), *Die Universität Göttingen unter dem Nationalsozialismus* (1987) 102–155. Grewe formally remained a member of the law faculty of Freiburg University throughout his time in the Foreign Office.

<sup>74</sup> Thus, Schmitt's remark, in a letter of 1952, that after the war Grewe had first been 'created' by Kaufmann ('den von ihm [Kaufmann] kreierten Professor Grewe') is true. For the letter, see A. Mohler (ed.), *Carl Schmitt — Briefwechsel mit einem seiner Schüler* (1995) 125–127, at 126. For Kaufmann's biography and the animosity between him and Schmitt, see Quaritsch, 'Eine sonderbare Beziehung: Carl Schmitt und Erich Kaufmann', in M. Dreher (ed.), *Bürgersinn und staatliche Macht in Antike und Gegenwart: Festschrift für Wolfgang Schuller zum 65. Geburtstag* (2000) 71–87. See also the introduction to Kaufmann's life and work by Cloyd, in Jacobson and Schlink, *supra* note 39, at 189–196.

## 5

Was the history of international law really the escape route that Grewe described it as after the war? Perhaps, in the Berlin of the ‘total war’, there was no true escape for a university teacher of law and foreign affairs who was not ready to give up his career. Perhaps the wrong turn had already been taken in 1933,<sup>75</sup> or possibly a bit later when Grewe associated himself with Forsthoff. At any rate, Grewe’s book, in the form of the 1984 and 2000 editions, is more closely tied to the time at which it was conceived than appears at first sight. There is the subject, there is the method, and there are the sources of Grewe’s ideas, and all three are intertwined.

## A

In the German literature of international law published after 1933, and in particular after 1938, historical arguments became increasingly common. After the traditional rules of international law had been discredited as the selfish product of an unjust Anglo-American or French imperialism, not much was left as a frame of reference but history and sociology (in a National Socialist perspective).<sup>76</sup> In these circumstances, many writers referred to the old notion of the *Reich*. Historically, this notion reached back to the medieval Holy Roman Empire (*Heiliges Römisches Reich*), while ideologically it implied the concept of a sacred (or at least a specifically authorized) supremacy of a supranational, continental or universal character (*Imperium*, Empire).<sup>77</sup> Now it was misappropriated by the Nazis who styled their regime the ‘Third Reich’. As Professor Michael Stolleis of the Max Planck Institute of European Legal History noted, for traditional authors of constitutional and international law who nevertheless wanted to keep abreast of the new times, *Reich* filled the vacuum which the notion of state, attacked and defamed by the Nazis, had left. At the same time, *Reich* ‘now stood for a hegemonist domination of other nations. This was familiar territory because world history had always been understood as a sequence of *Reiche*.’<sup>78</sup>

In 1938, Heinrich Triepel (1868–1946), the famous father of the dualist theory of international law, published his book, *Die Hegemonie: Ein Buch von führenden Staaten* (*Hegemony: A Book of Leading States*).<sup>79</sup> Triepel conceived the monograph as a final contribution to his lifelong studies of federations of states but, as he wrote in the preface, during his work he learned that ‘hegemony is a social phenomenon by far

<sup>75</sup> According to Eisfeld, *supra* note 40, at 149, Grewe became a member of the National Socialist Party with effect from 1 May 1933. He was then 22 years old.

<sup>76</sup> See M. Schmöckel, *Die Grossraumtheorie: Ein Beitrag zur Geschichte der Völkerrechtswissenschaft im Dritten Reich, insbesondere der Kriegszeit* (1994) 249–251, who speaks of a ‘process of historicizing’ as characteristic of the German science of international law at that time.

<sup>77</sup> See Mergeler, ‘Reich’, in Görres-Gesellschaft (ed.), *Staatslexikon*, vol. 6 (6th ed., 1961) 774–777; Angermeier, ‘Reich’, in Görres-Gesellschaft (ed.), *Staatslexikon*, vol. 4 (7th ed., 1988) 780–782; and Iserloh, ‘Reich Gottes’, in Görres-Gesellschaft (ed.), *Staatslexikon*, vol. 4 (7th ed., 1988) 783–787.

<sup>78</sup> Stolleis, *Geschichte*, *supra* note 36, at 383, 388 and 390.

<sup>79</sup> 2nd ed., 1943, a reprint of which was published in 1961 and 1974 with an introduction by G. Leibholz. For a review in English, with extensive quotations from Triepel’s book, see Kruszewski, ‘Hegemony and International Law’, 35 *American Political Science Review* (1941) 1127.

exceeding the limits of the institutions of a federal state, and even those of inter-state structures'. He therefore aimed at comprehensively examining the entire field of hegemonist relationships, be they between individuals, groups of people, or states. The first two parts of his book are concerned with 'the leading man' and 'the leading group', respectively, whereas the third and by far the most extensive part of the book explores 'the leading state', using sociological, psychological, historical and legal methods and literature. In the fourteenth chapter, Triepel described what he saw as the partial hegemonies of Spain and France (but not England) over Europe.<sup>80</sup> Triepel's book was certainly not inspired by the ideology of National Socialism, but, on the contrary, was implicitly critical of it and the governmental practices it brought about; the study, further, did not focus on international law.<sup>81</sup> But it came out at a time of particular dilemma for those German scholars of international law who rejected, along with the Nazis, a traditional, allegedly British and French view of international law and, at the same time, did not want to support a racist concept of international law as produced by authors belonging to the SS.<sup>82</sup> The notions of *Hegemonie*, *Reich*, *Europa* and *Weltordnung* allowed this group to support Hitler's foreign policy through an adoption of geopolitical ideas<sup>83</sup> grounded on, or at least related to, older Pan-Germanic and imperialistic views<sup>84</sup> which were still common among conservative Germans after the First World War. Not surprisingly, Triepel's book met with a strong response.<sup>85</sup> Among its reviewers were the protagonists of what one might call the relatively moderate wing of German international legal scholarship at the

<sup>80</sup> See also chapter 25, 'The French Hegemonies of the Revolutionary Period'. The part of the book entitled 'Hegemony in the Principal Periods of History' (chapters 15–26) is mainly devoted to ancient Greece and Rome.

<sup>81</sup> For an extensive discussion of the book and Triepel's reserved attitude towards National Socialism, see U.M. Gassner, *Heinrich Triepel: Leben und Werk* (1999) 98–104, 333–351 and 490–494; and Gräfin von Lösch, *supra* note 15, at 376–378. But see Schmöckel, Book Review, 11 *EJIL* (2000) 744: 'at least a considerable inclination by Triepel in the regime's favour.'

<sup>82</sup> For a related controversy in constitutional law and the efforts of a more radical school to replace the notion of state (as a legal person) by that of *Gemeinschaft* (community), see Stolleis, 'Gemeinschaft und Volksgemeinschaft: Zur juristischen Terminologie im Nationalsozialismus', in M. Stolleis, *Recht im Unrecht: Studien zur Rechtsgeschichte des Nationalsozialismus* (1994) 94–125, at 110–120. For a translation into English, see M. Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany* (1998) 64–83, at 73–80.

<sup>83</sup> See Stolleis, *Geschichte*, *supra* note 36, at 388 *et seq.* However, the notion of *Reich* was also seized on by the radicalized adversaries and linked with unmistakably National Socialist terms; see e.g. the title of a journal established by the SS official Werner Best in 1941: *Reich — Volksordnung — Lebensraum: Zeitschrift für völkische Verfassung und Verwaltung* (Stolleis, *Geschichte*, *supra* note 36, at 308 *et seq.*). This merely illustrates the fact that the two groups described in the text overlapped. For the views of Best and other SS ideologists, see also U. Herbert, *Best: Biographische Studien über Radikalismus, Weltanschauung und Vernunft, 1903–1989* (2nd ed., 1996) 271–298.

<sup>84</sup> See Messerschmidt, *supra* note 33, at 84 *et seq.* and 88.

<sup>85</sup> See Gassner, *supra* note 81, at 333 n. 1174.

beginning of the war: Carl Schmitt, Ernst Rudolf Huber, Ulrich Scheuner — and Wilhelm Grewe.<sup>86</sup>

Carl Schmitt made the idea of *Reich* a constituent element of his theory of the *Grossraum* (grand space), an area under the exclusive control of a specific power. He defined *Reich* as a 'leading and basal power whose political idea spreads outwards into a particular *Grossraum*, and which categorically excludes interventions in that space by powers alien to it [*fremdräumige Mächte*]',<sup>87</sup> In the political-historical reality, Schmitt said, there always existed leading great powers. But jurisprudence held on to a general notion of 'state' and the legal equality of all independent and sovereign states, ignoring a 'true hierarchy of the subjects of international law'.<sup>88</sup>

The extent to which Grewe's subject fitted the contemporary research agenda in international law is demonstrated by a 1941 programme describing the planned contribution of German international legal scholarship to the so-called 'war commitment of the German humanities' (*Kriegseinsatz der Deutschen Geisteswissenschaften*). This project, launched by the German Ministry of Education and Science in 1940, was intended to unite the efforts of scholars in all fields of the humanities for a demonstration of the productivity and creativity of German scholars even in a time of war, and was meant to be a contribution to the 'intellectual fight' of the German people against their adversaries.<sup>89</sup> As the administrator of the *Kriegseinsatz*, Professor Paul Ritterbusch, explained in April 1940: 'It is the function of this commitment to elaborate in a scientifically incontestable way the idea of a new European order . . . and to prove it to be the truth and reality of the life of the European nations.'<sup>90</sup> Carl Schmitt helped design the project and participated with publications and lectures in Romanic studies, history and international law.<sup>91</sup>

According to the 1941 plan, the 'international law section' of the *Kriegseinsatz* would deliver four series of publications. The general title was *Wandel der Weltordnung* (*The Transformation of the World Order*), while the four series were called *Völkerrechtliche Neubildungen im Kriege* (*The Changes in International Law in the Present War*), *Die*

<sup>86</sup> His review appeared in 30 *Zeitschrift für Politik* (1940) 325. Grewe praised the book and, in particular, its central part on 'Hegemony in the Main Periods of History', but criticized the fact that Triepel had not sufficiently defined the notion of hegemony, as compared to *Macht* (power), *Herrschaft* (rule, dominion) or imperialism.

<sup>87</sup> C. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte: Ein Beitrag zum Reichsbegriff im Völkerrecht* (4th ed., 1941, reprinted 1991) 49. See also Schmitt, 'Raum und Grossraum im Völkerrecht', 24 *Zeitschrift für Völkerrecht* (1940) 145. For analysis, see L. Gruchmann, *Nationalsozialistische Grossraumordnung: Die Konstruktion einer 'deutschen Monroe-Doktrin'* (1962); and Schmöckel, *supra* note 76.

<sup>88</sup> See Schmitt, *Grossraumordnung*, *supra* note 87, at 54.

<sup>89</sup> See F.-R. Hausmann, *'Deutsche Geisteswissenschaft' im Zweiten Weltkrieg: Die 'Aktion Ritterbusch' 1940–1945* (1998). See also Hausmann, 'Carl Schmitt und die deutschen Romanisten', 23 *Romanistische Zeitschrift für Literaturgeschichte — Cahiers d'Histoire des Littératures Romanes* (1999) 409, at 419–429.

<sup>90</sup> See Hausmann, *'Deutsche Geisteswissenschaft'*, *supra* note 89, at 62.

<sup>91</sup> See *ibid.*, at 44 *et seq.*, 74, 184, 254, 288, 298 *et seq.*, 304 and 326–328; and Hausmann, 'Carl Schmitt', *supra* note 89, at 419–429.

*Träger der Weltordnung* (*The Powers Holding up World Order*) (with a subseries about *Die Reiche unserer Zeit*, or *Empires in our Time*), *Verfassung und Völkerrecht in Wechselwirkung* (*The Interaction of Constitutional and International Law*) and finally *Frieden — Krieg — Neutralität* (*Peace, War, Neutrality*).<sup>92</sup> The whole project is about states and *Reiche*, spheres of influence and hegemony<sup>93</sup> — the buzzwords of the group of comparatively moderate internationalists of the 'Third Reich', to which the architects of the international law section of the *Kriegseinsatz* — Ritterbusch, Schmitt, Hermann Jahrreiss and Viktor Bruns<sup>94</sup> — belonged. The racist concept of international law, which subordinated law and the state as a legal construct to the so-called 'realities' of *Volk*, blood and race,<sup>95</sup> did not find a place in this programme,<sup>96</sup> and indeed none of the SS ideologists was included in the circle of authors. History figured prominently in the plan. The sub series *Empires in Our Time* would also cover the history of the respective *Reiche* (Great Britain, the United States, Italy, Japan, France, Spain and Germany<sup>97</sup>), which are largely identical with those treated by Grewe in his *Epochs*. As part of the programme, Grewe himself agreed to write a piece about 'absolutism and international law'.<sup>98</sup>

In an analysis of the major works of international law actually produced as part of the *Kriegseinsatz*, Professor Hausmann remarked that all of the works argued in historical terms and sought to find in history models or patterns which would assist in explaining the evolution and the future of the new *Grossdeutschland*. 'It is astonishing', he added, 'that for the most part [the authors] abstained from describing and analyzing the new international law. Did [the authors] show concern for a foreign readership? Or rather for Hitler who thought nothing of international law, using it

<sup>92</sup> See the brochure *Deutsche Geisteswissenschaft* (Leipzig, undated, circa 1941), at 18 *et seq.* quoted in Hausmann, '*Deutsche Geisteswissenschaft*', *supra* note 89, at chapter II.11, n. 424.

<sup>93</sup> See e.g. the following (only partially realized) contributions: Schmitt, 'States and *Reiche*'; Hamel, 'The Notions of *Reich* and State Since the End of the Middle Ages'; Jahrreiss, 'Sovereignty in the Old and the New World Order'; Scheuner, 'British Maritime Supremacy and the European Balance of Powers'; Wenzel, 'French Hegemony Over Europe'; Dietze, 'Europe as an Entity of Political Significance in International Legal Theory and in Reality'; Maunz, 'The Spanish *Reich* at the Height of Its Power'; Raschhofer, 'Central Europe and the European Order'; Rogge, 'European Order and Colonial Expansion'; and 'The Core of the *Reich* and Parts of the *Reich* of Lower Rank [*Reichskern und nachgeordnete Reichsteile*]' (author not given).

<sup>94</sup> See Hausmann, '*Deutsche Geisteswissenschaft*', *supra* note 89 (2nd ed. 2001 forthcoming), at 253 *et seq.* I am grateful to Professor Hausmann for sending me an advance copy of this text.

<sup>95</sup> For brief essays on the underlying general Nazi ideas, see C. Schmitz-Berning, *Vokabular des Nationalsozialismus* (1998) 109–125 (*Blut, Blut und Boden* and compound words composed of *Blut-* or *blut-*), 375–380 (*Lebensraum*), 481–530 (*Rasse* and compound words) and 642–679 (*Volk, völkisch* and compound words).

<sup>96</sup> It is a telling fact that the notion of *Volk*, so strongly emphasized by the more radical faction, appears in the title of only one contribution: '[Der] Volkstumsgedanke im Völkerrecht' ['The Idea of Ethnicity in International Law'] by Tatarin-Tarnheyden, and that this title is formulated in the most cautious way. But see Hausmann, '*Deutsche Geisteswissenschaft*', *supra* note 89, at 256 *et seq.* (pointing to the racist arguments in Maunz's contribution about Spain).

<sup>97</sup> Russia is also mentioned but no author had yet been found to deal with this delicate subject.

<sup>98</sup> Grewe did not publish a book or article bearing this title. But see his chapter 'The French Revolution: Postulates and Ideological Programmes Relating to the Law of Nations' (at 413–424).

only to achieve his objectives?<sup>99</sup> While both assumptions are correct, the decisive reason is, I believe, that the contributors to the ‘war commitment’ did not know *what* to present as the current international law, given (1) the rejection of the traditional rules, in which they had had a share; (2) the fact that National Socialism, after having attained power, had not honestly engaged in bringing about new, and ostensibly ‘just’, generally accepted norms but demonstrated an utter disregard for international law; and (3) that they could not possibly approve as ‘international law’ the racist ideology of the SS jurists. What, accordingly, was left but the writing of the history of international law, and the foreign policy of the present day? The writing of history could again either be in accordance with traditional standards, or explain Nazi Germany as a ‘necessary’ or ‘right’ result of historical developments; often it would try to do both. The dilemma was that in either case one supported or at least partially defended the Hitler government’s arbitrary use of power in Germany and the countries it had occupied.

The *Reich* and its ‘European mission’ was also a leitmotif of the publications of other sections of the *Kriegseinsatz* (philosophy, history, constitutional law),<sup>100</sup> as well as of similar projects launched by other Nazi institutions<sup>101</sup> — among them the Faculty of Foreign Studies of the Berlin University and the *Deutsches Auslandswissenschaftliches Institut*, both headed by F.A. Six, which organized a research project called ‘The Reich and Europe’.<sup>102</sup> The project was devoted to three major issues: ‘1) the idea of the Germanic *Reich*, its historical shape and future greatness, 2) the spiritual, political and economic relations between this idea and the European world of nations and states, and their concrete expressions in history, [and] 3) the awareness of the unity of Europe, and the reorganization of the continent.’<sup>103</sup>

## B

As regards the method applied by Grewe, I have already noted a certain similarity to Schmitt’s *konkretes Ordnungsdenken*.<sup>104</sup> ‘First and foremost’, Schmitt wrote in his book on *Grossraumordnung*, ‘international law is a concrete order’.<sup>105</sup> Berber popularized

<sup>99</sup> Hausmann, ‘*Deutsche Geisteswissenschaft*’, *supra* note 89, at 257.

<sup>100</sup> See the respective chapters in Hausmann, ‘*Deutsche Geisteswissenschaft*’, *supra* note 89. A prominent publication was a collection of lectures delivered by historians, and by Schmitt, in Nuremberg in 1941. See F. Hartung, T. Mayer, *et al.*, *Das Reich und Europa* (2nd ed., 1943). The volume opens with a programmatic foreword by Ritterbusch. For an extensive analysis of the writings of German historians during the Second World War in support of a German hegemony over Europe, see K. Schönwälder, *Historiker und Politik: Geschichtswissenschaft im Nationalsozialismus* (1992) 208–267: ‘*Ordnung, Grossraum*, *Reich*: guiding notions of historical interpretation during the war.’

<sup>101</sup> See Hausmann, ‘*Deutsche Geisteswissenschaft*’, *supra* note 89 at 84–98. See also Schmitz-Berning, *supra* note 95, at 213–215 (*Europäische Neuordnung*) and 426 *et seq.* (*Neuordnung Europas*).

<sup>102</sup> See *ibid.*, at 88 *et seq.* For Six, see *supra* note 56.

<sup>103</sup> Six, ‘Das Reich und Europa als Forschungsaufgabe’, *Die Weltliteratur* no. 9–10 (1942) 178, quoted in Hausmann, ‘*Deutsche Geisteswissenschaft*’, *supra* note 89, at 88. Not surprisingly, Six’s plan had a strong racist emphasis, sharply distinguishing the European nations according to their ‘Germanic’ or ‘Nordic’ traits.

<sup>104</sup> See *supra* text accompanying notes 29 *et seq.*

<sup>105</sup> Schmitt, *Grossraumordnung*, *supra* note 87, at 11.

Schmitt's ideas in a *Festschrift* presented by 'German science' to Hitler on the occasion of his fiftieth birthday; one can also say that he offered an interpretation tacitly accepted by Schmitt:

So it has been the Führer's exceedingly successful foreign policy that eventually caused the German science of international law to discover and realize its task as a political science that is in touch with reality and responsible to the present. Instead of dead formulae and abstract notions, a political science of international law [*Völkerrechtspolitik*] is coming to the fore as a scholarly observation of concrete political international law. International law is treated in a dynamic perspective of constant change, of a fight of new ideas against old forms. This political science of international law has been given the task of discovering and unmasking the political, historical and ideological background to the West European and Anglo-Saxon international law, of supplying German foreign policy with weapons of international law [*völkerrechtliche Waffen*] to assist it in its fight for the freedom and greatness of the German people, and of finding new forms and new vessels for new political thoughts and creation. But what is more, this science must work out a system of a true international legal order which is no longer a result of adding more or less random and formal rules . . . but an order of a community of free and equal peoples based on justice and set in the living stream of history.<sup>106</sup>

It cannot have been difficult for Grewe to explain, at the time, his historical work as following that programme.

However, it would be an over-simplification, and to an extent wrong, to identify Grewe's method with Schmitt's more ambiguous or Berber's rather plain version of *konkretes Ordnungsdenken*. As Triepel's work<sup>107</sup> demonstrates, a sociological approach to international law was not a National Socialist invention. Rather, such an approach both pre-dated and survived the 'Third Reich'. In his renowned lecture on 'Constitutional Law and Politics' (*Staatsrecht und Politik*) of 1926, Triepel had attacked a 'logical purism' that cut off jurisprudence from other fields of science, and stated emphatically that constitutional law cannot be studied without taking into consideration political life. Rules of constitutional law, he said, must be related to the political forces creating and shaping them — political forces which, at the same time, are governed by the law.<sup>108</sup> Approvingly, he quoted the French jurist Léon Duguit (1859–1928): 'Il n'y a pas deux vérités sociales.'<sup>109</sup>

Our [i.e. legal] science is not only confronted with the transcendental content of law, but with empirically given legal systems . . . which come and go, and are differently organized according to place and time. Therefore, every legal order is a 'given', and consequently a 'being', and this fact cannot be understood without considering the social relations regulated by law. . . It is impossible to understand legal norms without forming an impression of the relations of purpose [*Zweckbeziehungen*] which make up the law, of the *interests* which to acknowledge, or disapprove of, or reconcile is the first task of a legal order or, if you prefer, its premise.<sup>110</sup>

<sup>106</sup> Berber, 'Deutsche Völkerrechtswissenschaft', in *Deutsche Wissenschaft. Arbeit und Aufgabe* (1939) 62 *et seq.*; quoted in Weber, *supra* note 43, at 376. See also Stolleis, *Geschichte*, *supra* note 36, at 386 and 388.

<sup>107</sup> See *supra* text accompanying note 79 *et seq.*

<sup>108</sup> H. Triepel, *Staatsrecht und Politik. Rede beim Antritte des Rektorats der Friedrich Wilhelms-Universität zu Berlin am 15. Oktober 1926* (1927) 19. For a translation into English (by B. Cooper), see Jacobson and Schlink, *supra* note 39, at 176–188 (with an introduction by R. Poscher, *ibid.* at 171–176).

<sup>109</sup> *Ibid.*, at 11 ('There are not two social truths or realities').

<sup>110</sup> *Ibid.*, at 20.

Without discussing in detail Triepel's place and importance in the long methodological struggle which engaged the attention of German constitutional lawyers in the late Empire and the Weimar Republic,<sup>111</sup> it can be said that Schmitt's *konkretes Ordnungsdenken* carried to an extreme the political-sociological approach to (constitutional) law which, in Germany, had been developed in response to the positivism of Paul Laband which prevailed until the turn of the century. Unlike Triepel's method, Schmitt's thinking can be interpreted as a 'sociological positivism' construing law according to a particular political reality and thus putting it completely at the disposal of the prevailing forces in power.<sup>112</sup> Such a tendency of inferring a legal 'ought' from a factual 'is' can be observed in National Socialist writings on international law. It was meant to support a claim for the legal recognition of the 'facts' Germany had established in Europe. After the 1919 Peace of Versailles German authors loudly decried that international law, as practised by the Western powers, had degenerated into a mere reflection of a position of power; but now German authors vigorously asserted that law must acknowledge 'reality'.<sup>113</sup>

Grewe's narrative of alternating leading powers establishing 'their' own international law seems to correspond with such views. The legal change which occurs as a result of a change in the international power structure is viewed as a matter of fact and not judged by comparison with previously accepted rules or other standards or values. It could be said that forming such a view, and refraining from a retrospective legal judgment, is precisely the task of an historian, and that one must distinguish the method to be employed by a legal historian from that used by a lawyer who assesses a situation according to the law in force. However, Grewe himself did not recognize these two roles as different, and evaluated change in the present or future in the same way he evaluated past change. Consider this statement in his 1943 article:

Since September 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

<sup>111</sup> For such a discussion, see Gassner, *supra* note 81, at 222–290 (with a summary at 286–290). See also W. Pauly, *Der Methodenwandel im deutschen Spätkonstitutionalismus* (1993) 209–245; and Stolleis, *Geschichte*, *supra* note 36, at 158–186 (with many further references). In addition to Triepel, one must also mention Hermann Heller who developed a theory of state (*Staatslehre*) as *soziologische Wirklichkeitswissenschaft* (sociological study of reality) to which he assigned the task of 'understanding and explaining the state as a real historical structure on the basis of its socio-historical context and causalities' (H. Heller, *Staatslehre* (1934) 48). It is, however, impossible in this essay adequately to discuss Heller's ideas and their importance to (international) legal thinking in the time of National Socialism. For an introduction to Heller's method in the context of the Weimar methodological debate, see H. Wendenburg, *Die Debatte um die Verfassungsgerichtsbarkeit und der Methodenstreit der Staatsrechtslehre in der Weimarer Republik* (1984) 184–195 and 205–215. See also the short description of Heller's life and scholarly work by Dyzenhaus, in Jacobson and Schlink, *supra* note 39, at 249–256.

<sup>112</sup> See Leibholz, 'Introduction', in H. Triepel, *Die Hegemonie: Ein Buch von führenden Staaten* (2nd ed., reprinted 1961), at x.

<sup>113</sup> Not surprisingly, this position was once more reversed after the total defeat of Germany in 1945. Now, international law once again became a 'weapon of the weak' which should support, for instance, the continued existence of the *Reich* as a subject of international law.



China — or whether the reorganization of the world personified by the powers of the Triple Alliance [Germany, Italy and Japan] will succeed.<sup>114</sup>

Thus either an American or a German–Japanese hegemony is foreseen as the subject of the next chapter in the history of the law of nations.<sup>115</sup> There is not even the smallest suggestion that the latter would not simply be another form of Great Power supremacy in the traditional style, but instead a global tyranny based on the dogma of racism and a perpetuation of war and violence, and leaving no room for anything that would deserve the name 'international law'.<sup>116</sup>

However, in his review of Triepel's book on hegemony, Grewe explicitly approved the author's combination of sociological, historical and legal methods and categories.<sup>117</sup> He did not join the National Socialist critics who opposed Triepel's method as being based on a 'traditional individualistic sociology'.<sup>118</sup> Carl Schmitt, in particular, disapproved of Triepel's abstract and general definition of 'leadership'.<sup>119</sup> It therefore appears that Grewe's method was closer to Triepel's, and therefore closer to a more conventional sociological approach than to Schmitt's ideologically charged theory.<sup>120</sup> Grewe, however, did not adopt Triepel's commitment to certain values and standards.

## C

This leads us to the question of the sources of Grewe's ideas, a question which cannot be separated from that of the methods applied by him. The impression that Grewe followed Schmitt's ideas is increased because Grewe's language is partially borrowed from Schmitt.<sup>121</sup> While the adoption of that language in the war years could be seen as an expression of tactical caution (or opportunism), such an explanation is negated by

<sup>114</sup> Grewe, 'Die Epochen', *supra* note 6, at 283. In 1940, Carl Schmitt had more incautiously proclaimed: 'This time [in contrast to the seventeenth and eighteenth centuries] the order is built by Germany and the Reich. . . What is coming, is our new Reich.' ('In einem mächtigen Wandel aller geschichtlichen Begriffe entstehen neue Inhalte und neue Proportionen, steigen neue Raumbegriffe auf und bildet sich neues Recht in neuen Ordnungen. Dieses Mal wird die Ordnung von Deutschland und vom Reich her gewonnen. . . Was kommt, ist unser neues Reich.') See Schmitt, 'Die Formung des französischen Geistes durch den Legisten' (lecture in Berlin, May 1940), 1 *Deutschland — Frankreich: Vierteljahresschrift des Deutschen Instituts Paris* (1942) 1–30 (quotation at 30), reprinted in G. Maschke (ed.), *Carl Schmitt, Staat, Grossraum, Nomos: Arbeiten aus den Jahren 1916–1969* (1995) 184–210 (quotation at 210). See also Hausmann, 'Deutsche Geisteswissenschaft', *supra* note 89, at 327 *et seq.*

<sup>115</sup> In the event, it was neither of these two, but rather an 'Age of American–Soviet Rivalry and the Rise of the Third World', see the title of Part 6 of Grewe's English edition.

<sup>116</sup> For an analysis of the relationship between traditional Great Power thinking and irrational racism in Hitler's foreign policy and warfare, see K. Hildebrand, *Deutsche Aussenpolitik 1933–1945: Kalkül oder Dogma?* (5th ed., 1990). See also *ibid.*, at 82: 'Nolens volens, Hitler's conservative and "liberal-gouvernemental" minded officials in the ministries of the "Third Reich" helped to cover the "Fuehrer's" true policy.'

<sup>117</sup> See Grewe's book review, in 30 *Zeitschrift für Politik* (1940) 325, at 326.

<sup>118</sup> See Gassner, *supra* note 81, at 348 *et seq.*

<sup>119</sup> See Schmitt, 'Führung und Hegemonie', 63 *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche* (1939) 513, at 518–520.

<sup>120</sup> See also Huber, 'Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft', 4 *Jahrbuch des öffentlichen Rechts* (1910) 56, reprinted as M. Huber, *Die soziologischen Grundlagen des Völkerrechts* (1928). The work is not mentioned by Grewe.

<sup>121</sup> See *supra* text accompanying note 25 *et seq.*

the fact that Grewe retained such passages in the 1984 and 2000 editions of his book. It is impossible that this happened by chance. Grewe must have been certain of the correctness of what he had said, and confident that it would not be misunderstood.

Carl Schmitt is one of the most frequently (and usually approvingly) quoted authors in the *Epochen*;<sup>122</sup> and in an autobiographical speech in 1992 Grewe praised Schmitt's outstanding gifts as a jurist and intellectual.<sup>123</sup> As is evident from a diary entry of Schmitt's, it was a relationship of mutual esteem.<sup>124</sup> However, the extent to which Schmitt's ideas have influenced not only Grewe's analysis of specific developments and events in the history of international law<sup>125</sup> but also the general conception of his book, is a question that is yet to be answered. In this respect, a remark by Schmitt in an article published in 1940 deserves attention. The notion of *Grossraum* (grand space), he said, is a key not only to concepts for the future development of international law, but also to a correct perception of the European law of nations in former centuries. 'If the *Grossraum* notion is applied, there remain by necessity only a few subjects of international law who create and shape the general course of global development.'<sup>126</sup> In the same year, Schmitt remarked in passing that the history of

<sup>122</sup> The index of the 1984 edition has 26 entries, that of the English edition only four. The latter is incomplete; quite a few citations of Schmitt's works (e.g. at 582, 589, 619 and 622) are omitted. Conversely, Grewe (together with E.R. Huber, E. Forsthoff and A. von Freytagh-Loringhoven) is one of the most quoted authors in a recent commentary on Schmitt's studies in international law. See Maschke, *supra* note 114, at 655.

<sup>123</sup> Grewe, 'Ein Leben', *supra* note 7, at 38. For traces of the relationship between the two in Schmitt's personal papers, see D. van Laak and I. Villinger, *Nachlass Carl Schmitt: Verzeichnis des Bestandes im Nordrhein-Westfälischen Hauptstaatsarchiv* (1993) 69 (correspondence), 325 (notes and materials concerning Grewe), 422 *et seq.* and 567 *et seq.* (books and articles by Grewe in Schmitt's library).

<sup>124</sup> On 16 October 1948, Schmitt noted: 'Grewe's achievements as a scholar of international law are truly exceptional. He is now the foremost figure in the German science of international law. That is not only an achievement and a task but also a situation. May all good geniuses assist him.' See Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951* (ed. E. Freiherr von Medem, 1991) 203.

<sup>125</sup> See e.g. his remarks about 'the return to a discriminatory law of war' (at 619–624) or the *Hegung* (containment) of war (at 622), and the importance attached to the issue of territory (*Raumordnung*) (see chapters 8 of Parts 1–6, and section XI of Part 7). Grewe's characterization of 'The League of Nations and the Kellogg–Briand Pact as Instruments of the Anglo-American Condominium' (at 585) very much reminds the reader of Schmitt's *Positionen und Begriffe im Kampf mit Weimar—Genf—Versailles* (see *supra* note 30). And, while Schmitt called the international law of the nineteenth century a *Zwischen-und Übergangsgebilde* (see Schmitt, 'Reich und Raum: Elemente eines neuen Völkerrechts', 7 *Zeitschrift der Akademie für Deutsches Recht* (1940) 201, at 202; and Schmitt, *Grossraumordnung*, *supra* note 87, at 68), Grewe spoke of a *Übergangszeitalter der anglo-amerikanischen Vorherrschaft* for the time of 1919–1944 (Part 5 of the *Epochen*, in the English translation, 'The Transition Period of the Anglo-American Condominium').

<sup>126</sup> See Schmitt, 'Raum und Grossraum im Völkerrecht', 24 *Zeitschrift für Völkerrecht* (1940) 145, at 177: 'Der Begriff des Grossraumes dagegen kann zu einem Schlüssel wirklichkeitsgemässer Begriffsgestaltung und Einsicht werden. Er führt notwendigerweise dazu, dass — neben mancherlei Subjekten des Völkerrechts — nur wenige Schöpfer und Gestalter der erdräumlichen Gesamtentwicklung übrig bleiben.' See also Schmitt, 'Reich und Raum', *supra* note 125, at 203; Schmitt, *Grossraumordnung*, *supra* note 87, at 73 (proclaiming the breakdown of the system of international law 'that was based on England and France as the leading Reiche'); and Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950) 164 ('The Great Powers . . . as the bearers and guarantors of the spatial order led by them [Träger und Garanten der von ihnen geleiteten Raumordnung]').

international law is in reality a 'history of Reiche'.<sup>127</sup> In Grewe's view, at any given time, there is only one power which, after having overcome its rivals, determines the character and political form of a specific age, including its international legal order:

The international legal order of any particular period emerges out of the struggle between the ideas and postulates of the rival powers regarding the future of international law... The stronger the leading position of the particular predominant power, the more that power marked the spiritual face of the age, the more it made its ideas and concepts prevail...<sup>128</sup>

'The epochs of the modern history of international law and those of the modern system of states coincide' (p. 6).<sup>129</sup> Grewe's periodization of the history of international law did not follow Schmitt's but rather that of another author, Wolfgang Windelband, who had written a book on *The Foreign Policy of the Great Powers in Modern Times*. It had first been published in 1922, covering the period between 1494 and 1919.<sup>130</sup> From the third edition onwards, the subtitle read *From 1494 to the Present*.<sup>131</sup> It appears that this book strongly impressed and influenced Grewe. In his preface, Windelband said that in his book he would try to unite the changing features of modern international relations into a more general picture, and to condense the manifold events into a formula capturing the essence and meaning of European foreign relations since the end of medieval times. This effort encouraged Grewe to attempt to accomplish something similar for the narrower field of international legal relations. The fact that Windelband had explained that he had begun work on his book without knowing all the details of the entire European history from the fifteenth century up to the twentieth probably gave Grewe the confidence that he could do the same for international law.

Windelband distinguished the following periods: 'The struggle for Italy (1494–1519)'; 'the struggle against Spanish supremacy (1519–1659)'; 'the struggle against French supremacy (1659–1815)'; 'England as a world power and the continental reorganization'; and 'the international state system since 1871'. Grewe, it will be remembered,<sup>132</sup> combined the first and the second periods and ended that period not with the Pyrenian Peace of 1659 but with the Peace of Westphalia (1648), an event the earlier literature of the history of international law had already viewed as a

<sup>127</sup> See Schmitt, 'Reich und Raum', *supra* note 125, at 202; and Schmitt, *Grossraumordnung*, *supra* note 87, at 67 ('[die] bisherige Geschichte des Völkerrechts, die in Wirklichkeit eine Geschichte von Reichen ist').

<sup>128</sup> See at 23. This translation is partly my own. For the German original, see *Epochen*, at 43 *et seq.*

<sup>129</sup> For the full quotation, see *supra* text before note 23.

<sup>130</sup> W. Windelband, *Die auswärtige Politik der Grossmächte in der Neuzeit (1494–1919)* (1922). An outline of his view of the development of the modern European state system had appeared a year earlier. See Windelband, 'Wilhelm III von Oranien und das europäische Staatensystem', in L. Bergsträsser *et al.* (eds), *Von staatlichem Werden und Wesen: Festschrift Erich Marcks zum 60. Geburtstage dargebracht* (1921), reprinted in W. Windelband, *Gestalten und Probleme der Aussenpolitik: Reden und Aufsätze zu vier Jahrhunderten* (1937) 11–33.

<sup>131</sup> W. Windelband, *Die auswärtige Politik der Grossmächte in der Neuzeit von 1494 bis zur Gegenwart* (3rd ed., 1936; 4th ed., circa 1937; 5th ed., 1942). The third edition, which was used by Grewe, covered developments until the beginning of the Abyssinian conflict, the fourth edition until the German–Austrian Treaty of 1936. In the fifth edition, the period 1919–1939 was treated by a younger author, Kurt Flügge.

<sup>132</sup> See *supra* text following note 20.

turning point.<sup>133</sup> For the following period, Grewe adopted Windelband's concluding year (1815). However, what Windelband had styled as a time of struggle against the supremacy of Spain and France, respectively (*Der Kampf gegen die Vormachtstellung Spaniens/Frankreichs*),<sup>134</sup> Grewe simply called 'the Spanish Age' and 'the French Age' — an important shift of emphasis. A position of leadership in the state system which in Windelband's formulation was contentious and fragile became definite for Grewe. Windelband's even more cautious name for the subsequent era ('England as a world power and the continental reorganization') is also replaced by Grewe's bold 'the British Age', and this age is extended until 1919. The date which for Windelband had marked the beginning of a new age, the foundation of the German Empire in 1871, was thus downgraded by Grewe, who instead emphasized the importance of 1919. This again was in accordance with the dominant view in international law that regarded the establishment of the League of Nations as a major turning point in the development of the international legal order. The subsequent periodization is Grewe's alone. The clear lines are lost in a fog, and the periods chosen become shorter (which is the case in many historical works when the author approaches the present). An Anglo-American transition period — of which it was unclear where it would lead to when Grewe wrote his book during the war — is followed in the 1984 and 2000 editions by an age of American–Soviet rivalry and, eventually, a time of a possible United States hegemony. This periodization is based on political events (the end of the Second World War and the end of the Soviet Union, respectively), the first of which coincides with the foundation of the United Nations.

Although in his 1936 edition Windelband approvingly described Hitler's rise to power and what he interpreted as Hitler's 'policy of peace',<sup>135</sup> the book was not written in a Nazi spirit. Windelband appears rather to have been what in Germany is called

<sup>133</sup> See Fassbender, 'Die verfassungs- und völkerrechtsgeschichtliche Bedeutung des Westfälischen Friedens von 1648', in Ingo Erberich *et al.* (eds), *Frieden und Recht* (1998) 9–52, at 21 *et seq.*

<sup>134</sup> Cf. a similar emphasis in the classical study by L. Dehio, *Gleichgewicht oder Hegemonie: Betrachtungen über ein Grundproblem der neueren Staatengeschichte* (1948): 'The State System up Until the Failure of the Spanish Striving for Hegemony Under Philipp II' (chapter 1); 'The State System up Until the Failing of the French Striving for Hegemony Under Louis XIV' (chapter 2), etc.

<sup>135</sup> See W. Windelband, *Die auswärtige Politik der Grossmächte in der Neuzeit von 1494 bis zur Gegenwart* (3rd ed., 1936) 382 *et seq.*

*nationalkonservativ*.<sup>136</sup> He admired Bismarck,<sup>137</sup> which did not prevent him from loyally serving the democratic Prussian state in the period of the Weimar Republic. It is no coincidence that, when, in the 1942 edition of his book, he would have been forced to defend Hitler's war, he left those particular chapters to someone else.

## 6

'[I]nternational law is the function of the civilization in which it originates, that is, of the regulative ideas laid down in the ethics and *mores* of this civilization, of the political, economic and general social forces prevailing in it, and finally, of the specific psychological factors manifesting themselves in the individuals determining it'; it 'is usually the result of objective social forces'. In the international field, 'a competitive contest for power will determine the victorious social forces, and the change of the existing legal order will be decided, not through a legal procedure provided for by this same legal order, but through a conflagration of conflicting social forces which challenge the legal order as a whole'.

These quotations are from neither Carl Schmitt's nor Wilhelm Grewe's writings, but from an article published by Hans Morgenthau in 1940.<sup>138</sup> Grewe shared these convictions (in fact, he expressed them at about the same time). Like Morgenthau, he warned against the pursuit of a legalistic or moralistic approach to international

<sup>136</sup> The historian Wolfgang Windelband (1886–1945) was the son of the philosopher Wilhelm Windelband (1848–1915) whose lecture on the philosophy of history he co-edited in 1916. See W. Windelband and B. Bauch (eds), *Geschichtsphilosophie. Eine Kriegsvorlesung. Fragment aus dem Nachlass* (1916). Wolfgang Windelband's first publications, one of which was his PhD thesis supervised by Erich Marcks, date from 1908 (*Der Anfall des Breisgaus an Baden (1805)* and *Badens Erwerbungen in den Koalitionskriegen (1795 bis 1805)*). His further work, including his *Habilitationsschrift* of 1914 supervised by Hermann Oncken, focused on the history of Baden, a territory in the southwest of Germany, and on the life and work of Otto von Bismarck. He was a co-editor of Bismarck's *Gesammelte Werke (Collected Works)* (1924–1932). In 1922, Windelband was appointed extraordinary professor (*ausserordentlicher Professor*) in Heidelberg, and in 1925 full professor in Königsberg. Only a year later, he entered the Prussian Ministry of Culture as *Personalreferent*. At the time, Carl Heinrich Becker was Minister of Culture and the Social Democrat Otto Braun was Prime Minister. In 1926, Windelband also became honorary professor of history at the University of Berlin. In 1933, he lost his position in the ministry and assumed the office of a full professor in Berlin. In 1936, when the ministry relegated him to Halle, he resigned from his professorship and was given emeritus status. His further studies were devoted to Bismarck's foreign policy. See W. Weber, *Biographisches Lexikon zur Geschichtswissenschaft in Deutschland, Österreich und der Schweiz* (2nd ed., 1987) 665 *et seq.*; Andreas, 'Nekrolog', 172 *Historische Zeitschrift* (1951) 661 *et seq.*; and H. Heiber, *Walter Frank und sein Reichsinstitut für Geschichte des neuen Deutschlands* (1966) 698–701.

<sup>137</sup> See e.g. *Die auswärtige Politik der Grossmächte in der Neuzeit von 1494 bis zur Gegenwart* (3rd ed., 1936) 319 *et seq.*

<sup>138</sup> See Morgenthau, 'Positivism, Functionalism, and International Law', 34 *AJIL* (1940) 260, at 274–276, reprinted in H.J. Morgenthau, *Dilemmas of Politics* (1958) 210–235 (quotations at 224 *et seq.*); and H.J. Morgenthau, *The Decline of Democratic Politics* (1962) 282–307 (quotations at 296 *et seq.*). See also H.J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (3rd ed., 1960) 278.

politics: '[O]ne has to be careful to avoid illusions and utopian thinking' (p. 703).<sup>139</sup> Both reacted to the phenomenon of overestimating international law in the heyday of the League of Nations and the Hague Court.<sup>140</sup> 'Until the early thirties', Grewe remembered, 'the German public suffered from the trauma of the Versailles Treaty.'<sup>141</sup> To him, as to most other Germans interested in law, Versailles was the perfect example of an equation of power politics and international law: the powerful had defined 'the law' and forced the weak to comply with it in the name of 'world order'. 'The fate of the German–Austrian customs union [in 1931]', Grewe said in his autobiographical sketch, 'demonstrated that even an institution like the Permanent Court of International Justice was not protected against being made an instrument of political interests, and violating the fundamental principle of the impartiality of the judge.'<sup>142</sup>

Therefore, while Grewe can be called a realist, and his *Epochs* a book reflecting this realism, he did not emphasize the 'ineffectiveness' of international law in the way Morgenthau did. Instead, he took that law seriously and understood the law as a means of shaping the world — not as the only or even a principal means but as one of several, and employed by the powerful. This implies that Grewe did not agree with the ahistorical nature of the basic tenets of Morgenthau's realist theory. He did not use as an argument a seemingly unchanging human nature, nor did he generalize the experiences of a particular phase of history, the inter-war years, but instead he paid attention to the changing *ambiance*<sup>143</sup> in which rules of international law are brought into existence.

Following Windelband, Grewe claimed that his periodization derived from a discovery of 'immanent' or 'inherent' structures (*immanente Ordnungsstrukturen*) in the manifold events and ideas that constitute the history of foreign relations.<sup>144</sup> But a close examination would probably show that Grewe's periods are constructs masterly imposed upon the matter, which organize the vast amount of facts and events in an

<sup>139</sup> See also W.G. Grewe, *Friede durch Recht? Vortrag gehalten vor der Juristischen Gesellschaft zu Berlin am 23. Januar 1985* (1985) 20–23.

<sup>140</sup> For a depiction and critique of Morgenthau's ideas, see B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (1993) 22–72. Schmitt's influence on Morgenthau is reflected upon by Koskenniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations', in M. Byers (ed.), *The Role of Law in International Politics* (2000) 17–34. What Koskenniemi here says about the Weimar experience standing behind Morgenthau's realism may very well also be relevant to the development of Grewe's ideas: 'The image of law that emerges from his [Morgenthau's] writings is one that was crafted within German public law in the inter-war era, whose central concern was the ability of the Weimar Constitution to withstand the challenges that were posed to it from the left and from the right. From this, Morgenthau extrapolated an analogous image of international law as the image of weakness, the image of a (pure) formalism or of moral illusion that are unable to maintain international order.' *Ibid.*, 26 *et seq.* Unlike Morgenthau, Grewe reacted to that weakness not by distinguishing power (international politics) and international law and discarding the latter, but by recharging international law with the element of power.

<sup>141</sup> See Grewe, 'Ein Leben', *supra* note 7, at 27.

<sup>142</sup> *Ibid.*

<sup>143</sup> See at 6. Grewe used the term with reference to D. Schindler, *Verfassungsrecht und soziale Struktur* (1932) 92 *et seq.*

<sup>144</sup> See *supra* text at the beginning of Section 3 of this essay.

appealingly clear way — or images with artificially sharp contour lines, drawn according to the author's personal experiences at a time overcharged with political antagonism and conflict both in the domestic and the international spheres, and drawn according to certain assumptions, the most important of which was that at a given time a certain state has certain fundamental interests, and that it is these interests which make the state either support or reject a rule of international law. If that state happens to be the leading power of the day, its interests will thus shape the international legal order. To give an example, Grewe said of the 'British Age': 'In respect of the nineteenth century, the slogan "Freedom of the Seas" can only properly be understood against the background of Britain's claim to maritime dominion' (p. 551). While this proposition will convince most readers, other translations of interests into legal claims and then of claims into rules are far less clear. At best, I suppose, a closer examination will characterize Grewe's periods as 'ideal types', in Max Weber's terminology, that is, sharply defined abstractions which assist in perceiving more distinctly the 'typical' features of a particular time in the history of international law. However, such abstractions are precisely the opposite of the *natürliche Ordnungslage*, or 'natural state of order',<sup>145</sup> that Grewe claimed to use as the basis of his analysis. Furthermore, as much as they perhaps inform us of the grand lines in the modern history of the law of nations, they foster the belief that 'might is right', and that the autonomy of (international) law is but an illusion.<sup>146</sup>

The author emphasized the breaks in the development of international law by magnifying change and minimizing continuity. But a lot of this change may actually be the result not of a new leading power's wilful intervention in the normative body of international law but of general technical and scientific developments — developments which would have produced change even if the dominant power had remained the same. What is more important, one might just as well have written the history of international law from the opposite point of view, asking what rules and principles remained unchanged, or were essentially preserved, even when this was contrary to the interest of a certain power.<sup>147</sup> One could start with the rules that any peaceful intercourse of distinct organized communities requires (such as rules about the conclusion of treaties, the treatment of foreigners and the settlement of disputes), and go from there to rules with a more material content governing, for instance, intercommunal trade.<sup>148</sup> From the fact that, in order to achieve more than merely an enforced short-term observance of such rules, the rules must be negotiated between

<sup>145</sup> See *supra* text accompanying note 126.

<sup>146</sup> See, in this respect, Grewe's early article 'Generalklauseln und neues Recht', 16 *Deutsches Volkstum: Halbmonatsschrift für das deutsche Geistesleben* (1934) 146 ('In National Socialist thought, the autonomy of subject areas (*Autonomie der Sachgebiete*) [like economy, philosophy, and law] has been overcome'; these areas 'have been understood and brought together from the political viewpoint'; 'the incorrectness of the liberal antitheses of law and power, politics and ethics, scientific and political thinking has been recognized').

<sup>147</sup> For a similar thought, see Steiger, *supra* note 4, at 118–120.

<sup>148</sup> For the idea that a body of such essential rules is *préconstitué*, see Verosta, 'Regionen und Perioden der Geschichte des Völkerrechts', 30 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1979) 1–21, at 12 *et seq.* (referring to the studies of B. Paradisi).

the participating communities and cannot simply be imposed, not even by a particularly powerful group, it follows that the socio-economic and political conditions prevailing in one of the communities (and any change thereto) may have a less decisive impact on the intercommunal system of rules than was presumed by Grewe. There is a difference between acknowledging a powerful state's ability to win wars and to achieve, by force and the threat of force, its objectives in exceptional situations of crisis, and claiming that an age of law as such bears the stamp of that state. The effort of identifying continuities instead of discontinuities could result in an impressive account of what one may call 'the essence of modern international law'.

Grewe depicted the modern history of international law as a history of hegemony, a potentially eternal fight for supremacy, a sequence of alternating 'Great Powers' organizing and reorganizing the state system, usually after a war won by one power and lost by the other power. 'Every new age in the history of international law has arisen from such a catastrophe [of war].'<sup>149</sup> In this respect, Grewe took up (and, as far as the history of international law is concerned, very likely concluded) a historiographic tradition encapsulated by the phrase 'The Rise and Fall of the Great Powers'. It is a circular view of history,<sup>150</sup> a history in which all a weak state can do is to strive for power and, if possible, domination of the others. It is the exact opposite of the idealist 'grand narrative of the slow and unsteady progress of law against power, reason against ideology, international against national, order against chaos in international affairs over three hundred and fifty years [since the Peace of Westphalia of 1648]'.<sup>151</sup>

Writing history, it appears, always has something to do with our image of the future. Suppose Grewe's story, and not the nicer idealist story, is true, will things go on and on forever like this, or is there an alternative? Obviously, Grewe felt that his explanation of the development of international law lacked persuasiveness for the time after the First World War. Regardless of what had been going on before, after that war no single power was able unilaterally to impose its will on the international community. In his epilogue to the 2000 English edition, the author expressed his doubts in the following terms: '[O]ne hesitates to compare the predominance of the United States today with that of Britain, France or Spain in past centuries' (p. 703).

On the whole, Grewe saw the latest period of international law as still remaining within the framework of 'modern international law' as constructed by him. 'George Bush spoke of a "new world order" . . . [N]othing of the sort has yet appeared' (p. 701). In particular, Grewe held that '[p]olitical decision-making by nation-States will remain the single most identifiable determinant of events in the international arena' (p. 705). However, in the epilogue's section on law-making and the development of 'public interest norms', we find this remarkable statement:

<sup>149</sup> See Grewe, 'Die Epochen', *supra* note 6, at 294.

<sup>150</sup> In her review, Saule, 68 *Rivista di diritto internazionale* (1985) 253, interestingly spoke of an (unknown) 'applicazione . . . della concezione ciclica vichiana' by Grewe ('vichiana' refers to the Italian philosopher of history, Giambattista Vico (1668–1744)).

<sup>151</sup> See Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* (1999) 9, at 91.



The author of this book admits that he has modified his systemic orientation in light of the events of the 1990s. He is now more inclined to consider the possibility of a more closely integrated international community having its own law-making potential, something which seemed utopian... There is now a strong tendency ... to recognize that the consensual structure of the international legal system, based on national sovereignty, is incapable of sustaining today's global order. Thus, there is a growing inclination to consider the present period to be one of changing parameters ... (p. 715)

Without dissociating himself from his view of earlier periods, Grewe was now ready to share, in principle, hopes 'for a better-organized, more effective global constitution' (p. 703).<sup>152</sup> The consequences of this statement are enormous. Carl Schmitt once proclaimed 'the end of the state'. If Grewe had been more emphatic in his style, he would have spoken of the end of international law as he knew it.

While Grewe's resolute view of the history of international law as a function of great power politics was new, he continued a tradition of writing the history of international law begun in the nineteenth century, a tradition the founders of which had taken as a starting point for their historical reflections on the state as they experienced it in their times, and had looked back on the past with that particular form of state in the forefront of their mind. Grewe revitalized that tradition and even carried it over the edge of a new century. With his 1984 book, he certainly reinvigorated the study of historical issues in international law, and drew the attention of a new generation of scholars to the discipline.<sup>153</sup> Can we, after all, say that Wilhelm Grewe recollected, at a very precarious moment of world history, the constituent elements of a legal order of international life? That he tried to demonstrate the law's lasting worth for every nation; whether victorious or defeated, a rising or a falling power in the capricious course of history? Or did he, at such a very precarious moment, draw a picture of the history of international law in which the strong may do as it pleases and the victorious is rewarded with the right, or at least the opportunity, to determine the new law?

After a few remarks on Carl Schmitt's work and conduct in the 'Third Reich', Grewe once said: 'All I wanted to do here was to show you what kind of temptations and risks a German scholar of international law was subject to in those years.'<sup>154</sup> Grewe's own life and work attest to these temptations and risks. And mistakes. However, in the books of history they stand side by side with his significant contributions to legal science and his services to his country and the Western alliance after the war. It is unfortunate that a man of his powers of intellect and reflection never talked about those 'temptations and risks' and how they influenced his view of the history of

<sup>152</sup> For a discussion of the meaning of the notion of constitution in international law, see Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 529–619, and Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998), Part 1.

<sup>153</sup> See e.g. the review of *The Epochs* by Kolb, in 32 *Revue belge de droit international* (1999) 598.

<sup>154</sup> See Grewe, 'Ein Leben', *supra* note 7, at 38.

international law, preferring instead what he must have considered ‘the security of silence’, and thus not helping us in our effort to understand and learn.<sup>155</sup>

<sup>155</sup> For a brief but thoughtful reflection on the ‘psychological disposition [in the years after 1945] to let the past be past’, see Stolleis, ‘Im Bauch des Leviathan’, *supra* note 35, at 145 *et seq.* and 100 *et seq.*, respectively (English translation). For Carl Schmitt’s statement of 1947 that he would now go into ‘the security of silence’ (*die Sicherheit des Schweigens*), see C. Schmitt, *Antworten in Nürnberg* (ed. H. Quaritsch, 2000) 39–42.