
Between Systematization and Expertise for Foreign Policy: The Practice-Oriented Approach in Germany's International Legal Scholarship (1920–1980)

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Abstract

German international legal scholarship has been known for its practice-oriented, doctrinal approach to international law. On the basis of archival material, this article tracks how this methodological take on international law developed in Germany between the 1920s and the 1980s. In 1924, as a reaction to the establishment of judicial institutions in the Treaty of Versailles, the German Reich founded the Kaiser Wilhelm Institute for Comparative Public Law and International Law. Director Viktor Bruns institutionalized the practice-oriented method to advance the idea of international law as a legal order as well as to safeguard the interests of the Weimar government before the various courts. Under National Socialism, members of the Institute provided legal justifications for Hitler's increasingly radical foreign policy. At the same time, some of them did not engage with völkisch-racist theories, but systematized the existing ius in bello. After 1945, Hermann Mosler, as director of the renamed Max Planck Institute, took the view that the practice-oriented approach was not as discredited as the more theoretical approach of völkisch international law. Furthermore, he regarded the method as a promising vehicle to support the policy of Westintegration of Konrad Adenauer. Also, he tried to promote the idea of 'international society as a legal community' by analysing international practice.

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1 Introduction

In the course of the 20th century, the methodological approach of German international legal scholarship changed from being philosophically inspired to being more practice oriented. As Martti Koskenniemi famously stressed, the German academic writing on international law of the period between 1871 and 1933 dealt with major philosophical issues. Georg Jellinek, Hans Kelsen and Erich Kaufmann seem to have been more inclined than their French and British colleagues to develop philosophically informed theories on the relationship between international law and state sovereignty. With the theory of auto-limitation, the pure theory of law and an analysis of international law's character (*Wesen*), Jellinek, Kelsen and Kaufmann reassessed the foundations of the discipline.¹

In contrast, during the Cold War, most West German scholars explored international law from a practical, doctrinal angle. They analysed the evolving state practice, evaluated the developing international treaty and institutional law and examined whether a specific act was legal or illegal. More interdisciplinary approaches, which addressed the historical, sociological or philosophical dimension of international law, were not as common.² In particular, at West Germany's leading research institution, the Max Planck Institute for Comparative Public Law and International Law (MPI), a doctrinal approach to international law has dominated since its establishment in 1949.³ While German international legal scholarship today is also known for its constitutionalist approach to international law,⁴ the practice-oriented method has long been one of its defining characteristics.⁵

How did the change from international law as philosophy to international law as practice come about? What triggered the doctrinal preoccupation of German international lawyers? To answer these questions, this article addresses the methodological

¹ G. Jellinek, *Die rechtliche Natur der Staatsverträge: Ein Beitrag zur juristischen Construction des Völkerrechts* (1880); H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920); H. Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (1934); E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus: Rechtsphilosophische Studie zum Rechts-, Staats- und Vertragsbegriff* (1911); on this, see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), at 179–265.

² But see Scheuner, 'Naturrechtliche Strömungen im heutigen Völkerrecht', 13 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (1950–1951) 556; Wengler, 'Prolegomena zu einer Lehre von den Interessen im Völkerrecht', 50 *Die Friedens-Warte* (1950–1951) 108; Grewe, 'Macht und Recht im Völkerleben', 105 *Zeitschrift für die gesamte Staatswissenschaft* (1948) 201.

³ Fassbender, 'Denkschulen im Völkerrecht', 45 *Berichte der Deutschen Gesellschaft für Völkerrecht (BDGVR)* (2012) 1, at 6; Nolte, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland', 67 *ZaöRV* (2007) 657, at 670; on the founding of the Max Planck Institute (MPI) after World War II, see Lange, 'Carl Bilfingers Entnazifizierung und die Entscheidung für Heidelberg: Die Gründungsgeschichte des völkerrechtlichen Max-Planck-Instituts nach dem Zweiten Weltkrieg', 74 *ZaöRV* (2014) 697.

⁴ See Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany', 47 *Harvard International Law Journal* (2006) 223.

⁵ See Klabbbers, 'A German School? Book Review: Ulla Hingst, *Auswirkungen der Globalisierung auf das Recht der völkerrechtlichen Verträge*', 16 *Leiden Journal of International Law* (2003) 201, at 201; Krisch, 'The Many Fields of (German) International Law', in Anthea Roberts *et al.* (eds), *Comparative International Law* (forthcoming).

approaches of Viktor Bruns (1884–1943) and Hermann Mosler (1912–2001). Even though other German international lawyers also subscribed to the practice-oriented approach during the 20th century, Bruns and Mosler seem to be the most prominent examples of this more general trend. Bruns was the first director of the newly founded Kaiser Wilhelm Institute for Comparative Public Law and International Law (KWI) from 1924 to 1943. In the midst of the methodological dispute in German public law scholarship (*Weimarer Methodenstreit*), he introduced a practice-oriented approach to international law at the Institute. Soon, around 15 KWI researchers engaged with questions of international law and comparative public law from a legalistic perspective.⁶ The often philosophically inspired German discipline, thus, somewhat shifted its focus to practice. After World War II, Mosler became director of the renamed MPI from 1954 to 1976. The ‘spiritual father of today’s German international law scholarship’ shared Bruns’ view that international lawyers should focus on strictly legal questions.⁷ By the 1970s, between 25 to 30 academics studied international law at the Institute on the basis of this methodological perspective.⁸ Through Mosler, the approach became the leading paradigm in German international legal scholarship. Because the well-funded MPI almost had a monopoly on training academically interested young international lawyers, the impact on succeeding generations was immense. Mosler supervised 10 post-doctoral researchers (*Habilitanden*), who later all became professors at West German universities and carried on his methodological leanings.⁹ As has been stressed, for some time, it was ‘almost impossible to meet no disciple of Hermann Mosler at [German] academic events on international law, European law or comparative public law’.¹⁰

This article will lay out how the practice-oriented approach was institutionalized at the KWI in the 1920s in order to enhance international law as a legal system and to protect Germany’s interests before the various newly founded international tribunals. During the National Socialist era, the Institute provided legal expertise to the increasingly radical anti-Versailles policy of the government. At the same time, some researchers at the Institute did not theorize about the advantages of a *völkisch* international law but, rather, urged the German military to comply with the *ius in*

⁶ Institut for Comparative Public Law and International Law, Reports about the Fiscal Years 1927–1928, 1928–1929 and 1929–1930, file R 1501, 126799, at 93–99, Federal Archive, Berlin.

⁷ Koskenniemi, ‘Between Coordination and Constitution: International Law as a German Discipline’, 15 *Redescriptions* (2011) 45, at 61.

⁸ MPI, Report from 1 January to 31 December 1971, 25 IX., Rep. 5, Archive of the Kaiser-Wilhelm/ Max-Planck-Gesellschaft (AMPG).

⁹ These were Günther Jaenicke, Rudolf Bernhardt, Helmut Steinberger, Christian Tomuschat, Wilhelm Karl Geck, Albert Bleckmann, Eckart Klein, Hans von Mangoldt, Hartmut Schiedermaier and Meinhard Hilf. In contrast, Eberhard Menzel, director of the influential Kiel Institute for International Law, supervised only three *Habilitanden*, while Georg Erler, head of the Göttingen Institute for International Law, only had one. See H. Schulze-Fielitz, *Staatsrechtslehre als Mikrokosmos: Bausteine zu einer Soziologie und Theorie der Wissenschaft des öffentlichen Rechts* (2013), Anhang.

¹⁰ See Bernhardt, ‘Die Rückkehr Deutschlands in die internationale Gemeinschaft: Hermann Moslers Beitrag als Wissenschaftler und internationaler Richter’, 42 *Der Staat* (2003) 583, at 593 (all translations by the author).

bello. After 1945, Hermann Mosler regarded the practice-oriented approach as the less discredited approach to international law and as the appropriate tool to support Konrad Adenauer's policies of integration into the West. Furthermore, he hoped that the systematization of international law would lead to a stronger international legal community.

2 International Law as a Legal Order, the Treaty of Versailles and the Founding of the KWI

During the 1920s, the methodological debate in German public law peaked. In the *Weimarer Methodenstreit*, the protagonist of the field debated emphatically about the best methodological take on public law research. 'Positivists', supporting a focus on legal rules, and 'anti-positivists', advocating a liberal arts-oriented (*geisteswissenschaftliches*) opening of legal formalism, opposed each other irreconcilably.¹¹ The debate influenced the discussions on international law. Despite devoting his own research to abstract, theoretical questions,¹² the Austrian Hans Kelsen called for a positivist focus on legal norms.¹³ At the same time, Kelsen – together with the pacifists Hans Wehberg and Walther Schücking – dismissed the dominating sovereignty dogma,¹⁴ arguing that states could be bound by international rules independent of their free will.¹⁵ The more state-centric, conservative mainstream¹⁶ responded by particularly criticizing Kelsen's exclusion of political arguments. Erich Kaufmann vehemently attacked Kelsen's Neokantian approach and suggested following a Hegelian natural law theory instead.¹⁷ Furthermore, the father of dualism, Heinrich Triepel, explicitly demanded a 'connection of political considerations with the logical-formal

¹¹ On the Weimarer Methodenstreit, see M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Dritter Band, Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914–1945* (1999), at 153–186; März, 'Der Richtungs- und Methodenstreit der Staatsrechtslehre', in K.W. Nörr (ed.), *Geisteswissenschaften zwischen Kaiserreich und Republik: Zur Entwicklung von Nationalökonomie, Rechtswissenschaft und Sozialwissenschaft im 20. Jahrhundert* (1994) 75.

¹² See, e.g., H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1928); H. Kelsen, *Vom Wesen und Wert der Demokratie* (1929).

¹³ See already H. Kelsen, *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze* (1911), at vii.

¹⁴ On the approach of Wehberg and Schücking, see Bodendiek, 'Walther Schücking und Hans Wehberg: Pazifistische Völkerrechtslehre in der ersten Hälfte des 20. Jahrhunderts', 74 *Die Friedens-Warte* (1999) 79; García Salmones, 'Walther Schücking and the Pacifist Traditions of International Law', 22 *European Journal of International Law* (2011) 755.

¹⁵ See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), at 317–319; H. Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (1934), at 83–84, 134–162.

¹⁶ Looking at the Hague courses of the interwar period, Robert Kolb distinguishes between the state-centric approach of Heinrich Triepel, Erich Kaufmann, Walther Schoenborn, Ernst Wolgast, Gustav A. Walz and Carl Billfinger and the community-oriented approach of Hans Kelsen, Alfred Verdross, Walther Schücking and Hans Wehberg. Kolb, 'German Legal Scholarship as Reflected in Hague Academy Courses in Public International Law', 50 *German Yearbook of International Law (GYIL)* (2007) 201, at 205–229.

¹⁷ See E. Kaufmann, *Kritik der neukantischen Rechtsphilosophie: Eine Betrachtung über die Beziehungen zwischen Rechtsphilosophie und Rechtswissenschaft* (1921), at 20–35, 75–88, 99–101.

working with terms (*Begriffsarbeit*).¹⁸ More and more, German international lawyers emphasized the influence of political power relations on international law. Thereby, the legal quality of the detested Treaty of Versailles could be challenged.¹⁹

At the same time, the practice-oriented approach in German international scholarship gained ground. International law came to be more relevant for the foreign relations of the German *Reich*. The Treaty of Versailles had established various mixed tribunals between the defeated and the victorious powers, which ruled on compensation claims for excessive measures of war and expropriation. Germany had such tribunals with Belgium, England, France, Greece, Italy, Japan, Yugoslavia, Poland, Romania, Siam and Czechoslovakia.²⁰ Moreover, the newly founded Permanent Court of International Justice (PCIJ) decided various cases involving Germany. In one of its first decisions, the Court held that Article 380 of the Treaty of Versailles obliged the German Reich to grant free passage through the Kiel Canal to a ship of a French charter company, which had war material on board (*Wimbledon* case).²¹ In the advisory opinion on the Austro-German Customs Union of 1931, the PCIJ then classified the customs union agreement as a violation of the Geneva Protocol of 1922, in which Austria had pledged to uphold its economic independence (*Custom Unions* case).²² The evolution of international law from the 'law of the books' (*Buchrecht*) to the law of practice created the need for legal experts.²³

German politicians and academics responded by strengthening academic institutions devoted to this practice. Eleven years after the American Society of International Law was created in 1906, the German Society of International Law was established in 1917. Its members now discussed legal issues like the status of the compensatory commissions of the Treaty of Versailles, the protection regime for national minorities, the relation of international to national courts and the legal significance of the Kellogg Pact.²⁴ Furthermore, at the Kiel Institute for International Law, the founder Theodor Niemeyer devoted some of his research to legal questions of the law of the sea, while his successor Schücking, together with Wehberg, published the famous commentary on the Covenant of the League of Nations.²⁵ Moreover, with the financial

¹⁸ See H. Triepel, *Staatsrecht und Politik: Rede beim Antritte des Rektorats der Friedrich-Wilhelms-Universität zu Berlin am 15. Oktober 1926* (1927), at 37.

¹⁹ See Stolleis, *supra* note 11, at 173, 182. Treaty of Versailles 1919, 225 Parry 188.

²⁰ See Schätzel, 'Die Gemischten Schiedsgerichte der Pariser Friedensverträge', 18 *Jahrbuch für öffentliches Recht* (1930) 378, at 389.

²¹ *Wimbledon*, 1923 PCIJ Series A No. 1.

²² *Customs Regime between Austria and Germany*, 1931 PCIJ Series A/B, No. 41. Protocol no. I: Declaration on the Restoration of Austria, League of Nations 1922, 12 UNTS 386.

²³ For the importance of the Permanent Court of Justice (PCIJ) for the development of international law from *Buchrecht* to practice, see O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2005), at 23–33.

²⁴ See 'Die Deutsche Gesellschaft für Völkerrecht: Ein Rückblick', 1 *BDGVR* (1957) 67. Kellogg-Briand Pact 1928, 94 LNTS 57.

²⁵ See T. Niemeyer, *Allgemeines Völkerrecht des Küstenmeers* (1926); W. Schücking and H. Wehberg, *Die Satzung des Völkerbundes* (2nd edn, 1924). Covenant of the League of Nations 1919, 13 AJIL Supp. 128 (1919).

support of the German Reich, the KWI was established in 1924–1925 in the City Palace, Berlin, and became the most important institution dedicated to the practice-oriented method.²⁶

Its first director, Viktor Bruns (born in 1884), came from an academic bourgeois family.²⁷ In the first part of his career, he focused on civil law.²⁸ After working as a legal advisor to the German army during World War I,²⁹ Bruns taught civil and Roman law as associate professor (*Extraordinarius*) in Geneva (1910–1912) and in Berlin (1912–1920).³⁰ In 1920, Bruns became full professor of public law at the Friedrich Wilhelm University of Berlin.³¹ As a colleague of Heinrich Triepel and Erich Kaufmann, he initiated the founding of the KWI and started to focus on international law.³² Why Bruns became the director of the Institute, even though he was not an expert in international law, remains somewhat unclear. Certainly, the support of Triepel, the legal historian Joseph Partsch and Friedrich Glum, the director general of the Kaiser Wilhelm Society, helped.³³ Between 1927 and 1932, Bruns then served as a national judge ad hoc at the PCIJ and as a judge at the German–Polish and German–Czechoslovak mixed tribunal. Furthermore, he provided legal advice to the German government in various cases before the PCIJ, including the *Customs Union* case.³⁴

Besides his role as a practitioner, Bruns produced innovative scholarship. In his seminal essay ‘International Law as a Legal Order’, which was introduced in the first edition of the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*ZaöRV*) in 1929, Bruns presented his perception of international law. The article is particularly interesting for its twofold reading of positivism. On the one hand, Bruns criticized positivism for understanding international law as an unconnected, loose ‘multiplicity of rules’. Most international lawyers would only reproduce the content of some

²⁶ On the Kaiser Wilhelm Institute (KWI), see A. Toppe, *Militär und Kriegsvölkerrecht: Rechtsnorm, Fachdiskurs und Kriegspraxis in Deutschland 1899–1940* (2008), at 206–211; F. Hofmann, *Helmut Strebel (1911–1992): Geogeaner und Völkerrechtler* (2010), at 70–80.

²⁷ His father was a well-known professor of medicine and his maternal grandfather a Protestant theologist.

²⁸ See his dissertation on civil law. V. Bruns, *Besitzerwerb durch Interessenvertreter* (1910).

²⁹ He was legal advisor to the deputy general headquarter of the XIII Army Corps (Zivilreferent beim Stellvertretenen Generalkommando des XIII. Armeekorps).

³⁰ See Personal Record of Bruns, Jur. Fak. 506, Prof. Dr. Bruns; Letter to Bruns, 25 July 1912, file PA 467 Bd. II, V. Bruns, Archive of Humboldt University, Berlin.

³¹ Letter of Ministry of Science, Art and Education to Bruns, 31 May 1920, file PA 467 Bd. II, 9, V. Bruns, Archive of Humboldt University, Berlin; Bruns’ interests had shifted to public law before. See V. Bruns, *Sondervertretung deutscher Bundesstaaten bei den Friedensverhandlungen* (1918).

³² On the law faculty at the Friedrich Wilhelms University of Berlin in the 1920s and 1930s, see Stolleis, *supra* note 11, at 256–257.

³³ See U. Gassner, *Heinrich Triepel: Leben und Werk* (1999), at 146.

³⁴ On Bruns in general, see Triepel, ‘Nachruf Viktor Bruns’, 11 *ZaöRV* (1942–1943) 324; Hueck, ‘Die deutsche Völkerrechtswissenschaft im Nationalsozialismus: Das Berliner Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht, das Hamburger Institut für Auswärtige Politik und das Kieler Institut für Internationales Recht’, in D. Kaufmann (ed.), *Geschichte der Kaiser-Wilhelm-Gesellschaft im Nationalsozialismus: Bestandsaufnahme und Perspektiven der Forschung, Erster Band* (2000) 490, at 501–502; A.-M. von Lösch, *Die Juristische Fakultät der Berliner Universität im Umbruch von 1933* (1999), at 388–390.

major treaties, but not systematize the general legal characteristics of international treaties.³⁵ In contrast, Bruns advocated to perceive international law as a legal system in which legal principles are arranged with each other.³⁶ He stressed that this legal system would limit the freedom of states. Instead of emphasizing the independence of states as a fundamental principle of international law – like the PCIJ had done in its *East Carelia* decision³⁷ – Bruns underlined that constraints of the individual actors for the better of the community form the basis of each legal order.³⁸ On the other hand, despite his critique of positivism,³⁹ Bruns stressed the relevance of a meticulous analysis of state practice. According to him, the ‘most important task of a science’ is to prepare ‘the work of the courts’ and to demonstrate ‘the systematic relationships of a cohesive legal system’. He criticized positivism for ‘not realizing its own program’ because the practice of states has ‘rarely been explored seriously’. In particular, the jurisprudence of international courts has ‘not yet been assessed by theory according to its importance’.⁴⁰ Hence, while rejecting voluntarist-positivist theories that stress the free will of states, Bruns embraced a research focus on international practice.

Bruns thus tried to advance his community-oriented vision of international law by collecting and assessing international practice. He described the task of the KWI as being ‘to research through the international legal source material, which is equally important for theory and for practice, according to a uniform plan and system and make the entire legal and political general principles, individual rules and individual decisions, which are contained in this material, available for general use in systematically organized form’.⁴¹ A memorandum of 1925 on the founding of the Institute stated:

An institution is completely missing, ... which due to systematic collection and processing of domestic and foreign material is able to rapidly provide information on legal matters relating to international law and foreign public law. ... Who in practice or in theory deals with questions of international and foreign law, knows, that in this field the individual ... researcher no longer is able to gain an overview of only the most important documents. In thousands of treaties, thousands of judgments of national or international courts, in a vast amount of government statements, parliamentary proceedings, this material is dispersed. Here can only help an organization working with exact methods that gathers the immense material of the most important civilized countries (*Kulturländer*) and processes it.⁴²

In this spirit, the research project *Fontes Iuris Gentium* produced trilingual handbooks in German, French and English, which systematized the decisions of the PCIJ (1922–1943), the Permanent Court of Arbitration (PCA) (1902–1928), the diplomatic

³⁵ As exceptions, Bruns mentioned A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) and D. Anzilotti, *Corso di diritto internazionale* (1915).

³⁶ See Bruns, ‘Völkerrecht als Rechtsordnung I’, 1 *ZaöRV* (1929) 1, at 1–3.

³⁷ See *Request for Advisory Opinion Concerning the Status of Eastern Carelia*, 1923 PCIJ Series B, No. 5.

³⁸ See Bruns, *supra* note 36, at 1–3.

³⁹ Bruns also described himself as an opponent of Kelsen’s *Pure Theory of Law* (1934).

⁴⁰ *Ibid.*, at 7–8, 12.

⁴¹ Quoted by Triepel, *supra* note 34, at 324.

⁴² Memorandum, 30 October 1925, file R 54245, 5–6, Political Archive Auswärtiges Amt (PAAA).

correspondence of the European states (1856–1878) and judgments of the German Reichsgericht on international legal questions (1879–1929). In the introduction to the *Fontes*, Bruns stated:

If a greater degree of objectivity is to be gained for research and practice in international law, it is necessary that first of all vast, difficult and unselfish preliminary work should be done: the enormous bulk of material must be collected, sifted and systematically arranged, in order that every student of questions of international law should be placed in a position enabling him to make a rapid survey of the documents relating to the particular subject of his study.⁴³

For Bruns, a rigorous assessment of the practice of courts and states was the starting point of international legal research.

The translation of the *Fontes* in foreign languages demonstrates that Bruns intended to advance his understanding of international law as a legal order through exchange with colleagues from abroad. In a memorandum from 1929, Bruns stressed that members of the PCIJ and some American colleagues had welcomed the idea to collect general rules of international law by analysing PCIJ decisions. According to Bruns, colleagues from Harvard even urged him to publish an English version of the compilation.⁴⁴ Furthermore, the KWI supported international debate and exchange in other areas. For instance, Bruns commissioned a German translation of Dionisio Anzilotti's *Corso di diritto internazionale* (1915), which he regarded as the best book on international law.⁴⁵ Shortly after its founding, the KWI also started to collaborate with Harvard, the London School of Economics and the Japanese Institute of International Law in Tokyo. According to the annual reports of the KWI, members of Yale University, Harvard University and a Swedish professor were inclined to set up similar institutes dedicated to the research on international law. The Yale professor Edwin Borchard celebrated the founding of the KWI as 'an epoch-making event in the development of the science of international law'. For him, the KWI had 'no comparable rival'. Borchard hoped that soon 'similar research institutes in other nations' would cooperate with the KWI.⁴⁶ Moreover, scholars like the Argentinian Juan Carlos Garay, the American James Brown Scott and the Latvian Max M. Laserson held presentations at the KWI, while younger scholars from the USA, Switzerland and Bulgaria were researching in Berlin for some time.⁴⁷

Brunas as director of the KWI was thus aware of the importance of international exchange for the proliferation of his research objectives. The international engagement also had some influence on the practice-oriented approach. In the memorandum on the founding of the KWI, Bruns stressed that in the USA, Britain and France

⁴³ See V. Bruns (ed.), *Fontes Iuris Gentium* (1931), at xxii.

⁴⁴ Memorandum, not dated, around November 1929, file R 1501, 126799, Federal Archive, Berlin.

⁴⁵ See Note (Vermerk), 23 September 1927, file R 54245, PAAA.

⁴⁶ Borchard, 'Institut für ausländisches öffentliches Recht und Völkerrecht', 24 *American Journal of International Law (AJIL)* (1930) 587, at 587, 591.

⁴⁷ Institute for Comparative Public Law and International Law, Reports about the Fiscal Years 1927–1928, 1928–1929 and 1929–1930, file R 1501, 126799, at 93–99; Institute for Comparative Public Law and International Law, Annual Report, 18 July 1930, 154–155.

institutions would exist that would compile, examine and prepare documents for international legal research. He explicitly mentioned the activities of the French Office de Législation étrangère et de Droit International as a role model for the KWI. Moreover, he emphasized that the KWI intended to establish a journal to fight the ‘undoubtedly existing inferiority’ of German international legal scholarship. In Bruns’ view, no German textbook on international law existed that would be able to compete with foreign treatises.⁴⁸ Similarly, in 1954, his successor Hermann Mosler stressed that the KWI had been established in the 1920s to improve the standing of German international legal scholarship. According to Mosler, at that time, German scholarship had been too theoretical and had largely neglected the practice of states and international courts. While, in the Anglo-American scholarship, J.B. Moore’s *Digest of International Law* (1906), Charles Cheney Hyde’s *International Law Chiefly as Interpreted and Applied by the United States* (1922) and Lassa Oppenheim’s *International Law* (1905) had set standards, in Mosler’s view a deep engagement with practical question had been missing in the German discipline. According to him, the German international legal discipline had turned to practice with the founding of the KWI in order to close the gap with the international standard.⁴⁹ In his explanation of the founding of the Institute, the practice-oriented approach thus migrated from the USA and Britain to Germany.

However, it would be wrong to assume that the institutionalization of the practice-oriented approach to international law at the Institute was motivated only by the interest of promoting international law as a legal system or by trying to achieve the standard of international legal scholarship of other Western countries. In the political and social context of the time, the legal expertise gathered at the KWI was regarded as an important factor in Germany’s approach to the Treaty of Versailles. Germany’s international lawyers were united in their opposition to the Treaty. For Heinrich Triepel, the clause prohibiting the reunification of Germany and Austria constituted an ‘unnatural separation’ that a ‘great nation’ could not tolerate permanently.⁵⁰ According to Erich Kaufmann, it was ‘madness’ to base a peace treaty on ‘punitive justice’.⁵¹ Not only national conservative thinkers, but also many pacifists, rejected Versailles. For Schücking, the Treaty resembled an ‘egregious injustice’ triggering a ‘right to revision’.⁵² Similarly, Wehberg described the revision of the Treaty as ‘a precondition for the reconstruction of Europe’.⁵³

⁴⁸ Memorandum of 30 October 1925, *supra* note 42, 10–12.

⁴⁹ Mosler, ‘Aufgaben und Grenzen der organisierten Forschung des Völkerrechts’, in B. Rajewsky and G. Schreiber (eds), *Aus der deutschen Forschung der letzten Dezennien, Dr. Ernst Telschow zum 65. Geburtstag gewidmet* (1956) 258, at 260–262; Mosler, ‘Rede Institutsübernahme’, undated, Department III, file ZA 139, box 10, AMPG.

⁵⁰ See Triepel, ‘Eröffnungsansprache’, 1 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDS)* (1924) 5, at 6.

⁵¹ See Kaufmann, ‘Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung’, 3 *VVDS* (1927) 2, at 14.

⁵² W. Schücking, *Die nationale Aufgabe unserer Politik* (1926), at 8, 12.

⁵³ Wehberg, ‘Die Revision des Versailler Vertrages’, 25 *Die-Friedenswarte* (1925) 150.

The KWI went along in defending German interests in the context of the Treaty. The members of the Institute not only provided legal expertise to the Federal Foreign Office (*Auswärtiges Amt*) and to German counsels appearing before the newly established tribunals and courts. Also, the research at the Institute was supposed to strengthen the overall German legal position in relation to the foreign powers. The memorandum of 1925 held: ‘The location of Germany demands a deepening of the knowledge of foreign legal concepts and positions. ... On a foreign arbitrator or on an adversary in negotiations, especially those arguments will make an impression, which stem from his conceptual world.’ It went on:

How important a systematic observation of foreign scientific statements is, knows everyone, who is aware of the meticulously organized propaganda of our neighbors in the West and East. They understand, long before a legal issue leads to diplomatic negotiations or is presented to an international court for decision, to influence the academic opinion in their favor.⁵⁴

Hence, the KWI was supposed to influence and alter the international legal discourse from a German perspective. The memorandum of 1929 underlined:

The work can and must be carried out as a German scientific enterprise without any assistance and influence of foreign countries. It is *the task of German science* because today the theoretical systematic training of German lawyers is still superior to that of foreigners. The work has to be carried out as German, because ... it will constitute an indispensable tool not only of every scientific, but also of every practical activity and the ... impact on the internationally evolving law and justice notions will be a goal, which cannot possibly be overestimated in its importance.⁵⁵

Accordingly, a bulletin of the Kaiser Wilhelm Society described ‘the fostering and development of a German international legal theory’ as one of the Institute’s main tasks.⁵⁶ In the context of Versailles, the Institute was supposed to invigorate the German position.

3 Between Support of National Socialist Foreign Policy and Defending the *Ius in Bello*

After the National Socialist takeover, international legal scholarship in Germany changed significantly. The new leadership drove numerous international lawyers of Jewish origin and pacifist convictions into exile. Kelsen was dismissed from his chair in Cologne and fled via Geneva and Prague to the USA.⁵⁷ Schücking, who was a judge at the PCIJ, decided not to return from The Hague to Germany and was stripped of his position at the University of Kiel before he died in 1935.⁵⁸ In addition, the national

⁵⁴ Memorandum, 30 October 1925, *supra* note 42, at 9–10.

⁵⁵ See Memorandum, not dated, around November 1929, *supra* note 44, 3.

⁵⁶ Die Kaiser Wilhelm-Gesellschaft zur Förderung der Wissenschaften, November 1926, file R 54245, PAAA.

⁵⁷ R.A. Métall, *Hans Kelsen. Leben und Werk* (1969), at 60–77; J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010), at 278–281.

⁵⁸ F. Bodendiek, *Walther Schückings Konzeption der internationalen Ordnung: Dogmatische Strukturen und ideengeschichtliche Bedeutung* (2001), at 77–81.

conservative Erich Kaufmann, who famously had celebrated war as a 'social ideal' before World War I,⁵⁹ had to leave for the Netherlands in 1938 because of his Jewish heritage.⁶⁰ Formalist approaches to international law, which had come under pressure before, started to be questioned from even more sides. Carl Schmitt lambasted against the 'positivist-normativistic forcing norm network (*Zwangsnormengeflecht*) of Versailles' and polemicized that behind the 'thin veneer of juridical legalizations' the 'grimace of a menial and cruel kind of rape and suppression' was hidden.⁶¹ In addition, *völkisch*-oriented authors like Ernst Wolgast, Norbert Gürke and Gustav Adolf Walz dismissed the 'abstract-formalist' thinking of the League of Nations era and tried to integrate terms like *Volk* and *Reich* into their theoretical conceptions of international law.⁶²

With the expansion of the German Reich after 1938, this politicized sociological approach was even further radicalized. Friedrich Berber, a leading propagandist for Foreign Minister Joachim von Ribbentrop, formulated the programme for international legal research in light of the imminent war:

[The] exceedingly successful foreign policy of the Führer [has] led German international legal scholarship to the recognition of its task as reality-based and present-responsible political science (*wirklichkeitsverbundener und gegenwartsverantwortlicher politischer Wissenschaft*). Instead of dead formulas and abstract terms, the politics of international law come to the fore as the academic observation of the concrete political international law, as the treatment of international law under the dynamic aspect of transformation, the struggle of new ideas with old formulas. It has not only the task of finding and unmasking the political, historical and ideological backgrounds of the Western European and Anglo-Saxon international law, to supply German foreign policy in its struggle for freedom and greatness of the German people with weapons in international law and to find new forms, new vessels for new policy ideas and creations; it has above all to work out the system of a real international legal order (*Völkerrechtsordnung*) that no longer is a summation of more or less random formal rules.⁶³

Soon a geopolitical and racist vision for the reconstruction of Europe started to compete in German international legal scholarship. In the context of the German invasion of *Rest-Czechoslovakia* in March 1938, Carl Schmitt published his notorious theory of Great Space (*Großraumtheorie*).⁶⁴ Based on the American Monroe Doctrine of 1823 and the Roosevelt Corollary of 1904, Schmitt implicitly demanded that the Western

⁵⁹ Kaufmann, *supra* note 1, at 146.

⁶⁰ F. Degenhardt, *Zwischen Machtstaat und Völkerbund: Erich Kaufmann (1880–1972)* (2008), at 126–130.

⁶¹ See C. Schmitt, *Nationalsozialismus und Völkerrecht* (1934), at 28; on Schmitt's take on international law, see Carty, 'Carl Schmitt's Critique of Liberal International Legal Order between 1933 and 1945', 14 *Leiden Journal of International Law* (2001) 25, at 34–47.

⁶² See Wolgast, 'Konkretes Ordnungsdenken im Völkerrecht', 4 *Völkerbund und Völkerrecht* (1937–1938) 74; N. Gürke, *Völk und Völkerrecht* (1935); Walz, 'Völkerrecht und Nationalsozialismus', 1 *Völkerbund und Völkerrecht* (1934–1935) 473; on this, see Diner, 'Norms for Domination: Nazi Legal Concepts of World Order', in D. Diner, *Beyond the Conceivable: Studies on Germany, Nazism, and the Holocaust* (2000) 49.

⁶³ See Berber, 'Deutsche Völkerrechtswissenschaft', in B. Rust (ed.), *Deutsche Wissenschaft: Arbeit und Aufgabe* (1939) 62, at 63.

⁶⁴ See C. Schmitt, *Völkerrechtliche Großraumordnung und Interventionsverbot für raumfremde Mächte: Ein Beitrag zum Reichsbegriff im Völkerrecht* (1939).

powers had to tolerate German expansion in Europe because it belonged to the German sphere of influence.⁶⁵ At the same time, *völkisch* authors relied on racial criteria for the classification of the world. Reinhard Höhn, member of the Schutzstaffel, stressed that the ‘empire of the People Community’ (*Reich der Volksgemeinschaft*) formed the ‘living heart of the European Great Space (living space)’. He postulated that the ‘*völkisch* organizing principle’ should be extended to foreign policy.⁶⁶ Werner Best, a leading figure of the Gestapo, even denied that international law existed at all. A *völkisch* order, which did not know any law at all, would have the advantage of not ‘preserv[ing] artificially’ the status quo.⁶⁷ Due to the political and military strength of Germany, these lawyers regarded traditional international law as an outmoded relic of the pre-war period.

With the exception of these geopolitically and ideologically informed theories, formalist, practice-oriented international law did not lose its relevance under National Socialism.⁶⁸ In particular, the KWI supported the National Socialist foreign policy with legal expertise on the basis of a formal understanding of international law. In 1933, the National Socialist politician Hans Frank appointed Bruns as an expert in international law to the Academy of German Law.⁶⁹ In his scholarship, Bruns now vehemently criticized the Treaty of Versailles as a violation of Germany’s equality.⁷⁰ Also, he justified the introduction of compulsory military service in March 1935, even though it could hardly be brought in line with the provisions of the Treaty.⁷¹ Furthermore, after the Munich Agreement of 30 September 1938, he stressed that the ‘question of the ultimate fate of the Sudeten Germans ... is decided in the sense of the indisputable German right’.⁷² During World War II, members of the KWI then criticized the Allied war opponents. An anonymous article in the *ZaöRV* sharply attacked Britain’s political reasons for going to war and emphasized the need to counter England with ‘a constructive plan for Europe’.⁷³ Moreover, Bruns repeatedly stressed that the British naval blockade violated the rules of neutrality.⁷⁴ When, from 1944 to 1945, Carl Bilfinger became the successor to Bruns, the Institute moved even further to the

⁶⁵ On this, see U. Herbert, *Best: Biographische Studien über Radikalismus, Weltanschauung und Vernunft 1903–1989* (1996), at 271–275.

⁶⁶ See Höhn, ‘Reich – Großraum – Großmacht’, 2 *Reich, Volksordnung, Lebensraum: Zeitschrift für völkische Verfassung und Verwaltung* (1942) 97, at 173–176.

⁶⁷ Best, ‘Völkische Großraumordnung’, 10 *Deutsches Recht* (1940) 1006, at 1007; on this, see Herbert, *supra* note 65, at 275–298.

⁶⁸ See Vagts, ‘International Law in the Third Reich’, 84 *AJIL* (1990) 661.

⁶⁹ Furthermore, Bruns became a member of the National Socialist Association of German Legal Professionals. See Questionnaire Deutsche Dozentenschaft, undated, file Z-DI/164, Ka. 6, at 001, Archive of the Humboldt University, Berlin.

⁷⁰ See V. Bruns, *Deutschlands Gleichberechtigung als Rechtsproblem* (1934).

⁷¹ See Bruns, ‘Der Beschluss des Völkerbundes vom 17. April 1935’, 5 *ZaöRV* (1935) 310.

⁷² See Bruns, ‘Die Tschechoslowakei auf der Pariser Friedenskonferenz’, 8 *ZaöRV* (1938) 607, at 607.

⁷³ Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht, ‘Gegnerische Kriegsziele’, 11 *ZaöRV* (1942–1943) 1; see also Bilfinger, ‘Die Kriegserklärungen der Westmächte und der Kelloggspakt’, 10 *ZaöRV* (1940) 1.

⁷⁴ Bruns, ‘Der britische Wirtschaftskrieg und das geltende Seekriegsrecht’, 10 *ZaöRV* (1940) 24; Bruns, ‘Die britische Seesperre und die Neutralen’, 11 *ZaöRV* (1942–1943) 477.

nationalist right.⁷⁵ This might explain why an observer later dismissively spoke of the 'nazified Institut für ausländisches öffentliches Recht und Völkerrecht'.⁷⁶

However, support for the National Socialist policy objectives had its limits. The KWI could partially escape from *völkisch* politicization. The anti-Semitic program of the National Socialists did not receive a great deal of attention in the Institute's scholarship, and many members tried to establish a relative distance from the party. Neither Bruns, nor his deputy Ernst Martin Schmitz, had applied for membership in the Nationalsozialistische Deutsche Arbeiterpartei, and only one of the six department heads joined the party.⁷⁷ Also, Joachim-Dieter Bloch, who according to National Socialist understanding was a 'quarter Jew', was able to keep his research position at the Institute during the National Socialist era.⁷⁸ Moreover, the publications of the Institute mostly addressed specific doctrinal problems and did not engage with *völkisch* theory. The articles in the *ZaöRV* often concerned questions like the development of the League of Nations,⁷⁹ legal perspectives on political incidents⁸⁰ and the evolution of the laws of war.⁸¹ While most of the time the writers defended and legitimized the German legal position,⁸² *völkisch*-inspired claims on collective minority rights⁸³ or on the Greater Space theory⁸⁴ remained the exception. Furthermore, the Institute continued to keep the avenues for foreign exchange open. Until 1938, scholars like the Swedish international lawyer Åke Hammarskjöld and the young British researcher Clive Parry published articles in the *ZaöRV* on provisional measures of international courts, the Geneva Conventions and British blockades in the Pacific.⁸⁵ Even in 1942,

⁷⁵ On Billfinger, see Lange, *supra* note 3, at 697–731.

⁷⁶ G. Schwarzenberger, *The Inductive Approach to International Law* (1965), at 25, n. 46.

⁷⁷ See Abschrift Instituts – Fragebogen, Control Commission for Germany, (British Element), file FO 1012/358, 92116, National Archives, London.

⁷⁸ See Bloch, 'Dr. Joachim-Dieter Bloch (1906–1945): Ein Juristenleben am Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht', 74 *ZaöRV* (2014) 873.

⁷⁹ See Gretschaninow, 'Die Zusammensetzung des Völkerbundes', 4 *ZaöRV* (1934) 208; Makarov, 'Sowjet-Union und Völkerbund', 5 *ZaöRV* (1935) 34; Gretschaninow, 'Das Ende der Mitarbeit Japans im Völkerbunde', 9 *ZaöRV* (1939) 55.

⁸⁰ Von Freyberg-Eisenberg, 'Das deutsch-englische Flottenabkommen vom 18. Juni 1935', 6 *ZaöRV* (1936) 1; Von Nostitz-Wallwitz, 'Die Annexion Abessiniens und die Liquidation des abessinischen Konflikts', 7 *ZaöRV* (1937) 38; Schmitz, 'Die Abmachungen von Nyon und Genf (14. und 17. September 1937)', 8 *ZaöRV* (1938) 1.

⁸¹ Stauffenberg, 'Das Prisenrecht der französischen Instruktionen vom 8. März 1934', 8 *ZaöRV* (1938) 1; Schmitz, 'Sperrgebiete im Seekrieg', 8 *ZaöRV* (1938) 641; Moltke, 'Die britische Order im Council vom 27. November 1939 über die Beschlagnahme deutscher Ausfuhrwaren', 10 *ZaöRV* (1940) 110; Schmitz, 'Die "offene Stadt" im geltenden Kriegsrecht', 10 *ZaöRV* (1940) 618.

⁸² See, in particular, Bruns, *supra* note 70, n 75; Moltke, *supra* note 81; Schmitz, *supra* note 81; Berber, 'Die Amerikanische Neutralität im Kriege 1939/1941', 11 *ZaöRV* (1942) 445.

⁸³ Kier, 'Über die Gestaltung eines Volksgruppenrecht', 7 *ZaöRV* (1937) 497; Raschhofer, 'Entwicklung und Funktion des neuen Volksgruppenrechts', 11 *ZaöRV* (1942) 418.

⁸⁴ Küchenhoff, 'Großraumgedanke und völkische Idee im Recht', 12 *ZaöRV* (1944) 34.

⁸⁵ Hammarskjöld, 'Quelques aspects de la question des mesures conservatoires en droit international positif', 5 *ZaöRV* (1935) 5; Hammarskjöld, 'Réforme éventuelle de l'article 30 de la Convention de Genève de 1929', 7 *ZaöRV* (1937) 67; Parry, 'British Practice in Some Nineteenth Century Pacific Blockades', 8 *ZaöRV* (1938) 627. Geneva Conventions 1949, 1125 UNTS 3.

articles by the French international lawyer Louis le Fur on European federalism and the Finnish lawyer Erik Castrén on citizenship and statelessness appeared in the journal.⁸⁶ Furthermore, Bruns became a member of the Curatorium of the Hague Academy of International Law in 1936.⁸⁷

In addition, during World War II, some members of the KWI were not willing to compromise the laws of war. This was not the typical German position. International lawyers from outside the Institute suggested that it should consider the applicability of the Hague Conventions in Poland only because this argument played a role in foreign literature.⁸⁸ Also, it was argued that some of the laws of war should not apply to the Soviet Union as the ravager of ‘all international legal order’.⁸⁹ In contrast, some members of the Institute embraced the applicable *ius in bello*. Ernst Martin Schmitz explicitly stressed in the Academy of German Law that the restructuring of Poland in the so-called *Gaue* violated the Hague Conventions.⁹⁰ Bruns, Schmitz, Mosler and Berthold Graf von Stauffenberg drafted the German Prize Ordinance (*Deutsche Prisenordnung*), the Prize Court Order (*Prisengerichtsordnung*) as well as parts of a regulation on aerial warfare (*Luftkriegsordnung*) and thereby incorporated the applicable *ius in bello* rules concerning sea and aerial warfare into German law.⁹¹ Furthermore, they supported Helmut James Graf von Moltke, the legal advisor of the Wehrmacht and founder of the oppositional *Kreisauer Kreis*, with legal expertise in his efforts to convince the military to observe the *ius in bello* obligations. For instance, when the question arose how prisoners of war should be treated, who had been released and later retained again, the legal experts advocated to grant the protection of the Hague Conventions.⁹² Despite their strong support for the National Socialist revisionist policies of the Treaty of Versailles, some members hoped for the systematic application of the *ius in bello* in wartime.

⁸⁶ Le Fur, ‘Fédéralisme et Union Européenne’, 11 *ZaöRV* (1942) 12; Castrén, ‘Die gegenseitigen Pflichten der Staaten in bezug auf den Aufenthalt und die Aufnahme ihrer Staatsangehörigen und der Staatenlosen’, 11 *ZaöRV* (1942) 325.

⁸⁷ See Letter of Bruns to Dean of the Law Faculty, University Berlin, 19 October 1938, file PA 467 Bd. II, Archive of Humboldt, University of Berlin, Berlin.

⁸⁸ See Messerschmitt, ‘Revision, Neue Ordnung, Krieg: Akzente der Völkerrechtswissenschaft in Deutschland 1933–1945’, 9 *Militärgeschichtliche Mitteilungen* (1971) 61, at 90–91.

⁸⁹ See Grewe, ‘Die neue Kriegsphase’, 2 *Monatshefte für Auswärtige Politik* (1941), 748, at 749, 751.

⁹⁰ See Messerschmitt, *supra* note 88, at 90–91. Hague Convention for the Pacific Settlement of International Disputes 1899, 1 *AJIL* 103 (1907); Hague Convention for the Pacific Settlement of International Disputes 1907, 2 *AJIL* Supp. (1908).

⁹¹ See ‘Zweck und Aufgaben des Instituts’, Memorandum, August 1939, quoted in Toppe, *supra* note 26, at 207.

⁹² See Mosler, ‘Die Rückführung entlassener Kriegsgefangener in die Kriegsgefangenschaft’, undated, around January 1944, Department III, file ZA 139, box 12, AMPG; on von Moltke, see van Roon, ‘Graf Moltke als Völkerrechtler im OKW’, 18 *Vierteljahrshefte für Zeitgeschichte* 18 (1970) 12.

4 The Practice-Oriented Approach in West Germany after 1945

After 1945, the practice-oriented approach started to become dominant in German international legal scholarship. The re-established German Society of International Law focused mainly on issues directly linked to pertinent practical questions like the legal status of Germany, the legal structure of international organizations and the relation between the *Grundgesetz* and international law.⁹³ Also, newly created German international law journals like the *Archiv für Völkerrecht* and the *Jahrbuch für internationales und ausländisches öffentliches Recht* examined international legal questions from a doctrinal perspective.⁹⁴ Moreover, the heads of the influential Kiel and Göttingen Institutes for International Law, Eberhard Menzel and Georg Erler, subscribed to the practice-oriented approach.⁹⁵ Furthermore, the renamed Max Planck Institute continued the application-oriented method of the KWI. Hermann Mosler, born in 1912, personified the link between the old KWI tradition and the German research focus after 1945 like no one else. A research assistant at the KWI since 1937, he had been strongly influenced by the thinking of Bruns and Schmitz.⁹⁶

Mosler stemmed from a Catholic bourgeois family. His father had supported the Catholic Zentrum party and had been pushed to leave his position as chief justice of the Regional Court in Bonn after the National Socialist takeover.⁹⁷ Because of this background, Mosler did not share the nationalist *völkisch* enthusiasm of most of his classmates at university.⁹⁸ Nonetheless, as a student, he joined the Sturmabteilung (SA) for four months (December 1933 to April 1934) and later became a member of the National Socialist Association of German Legal Professionals (NS-Rechtswahrerbund).⁹⁹ In his dissertation, however, he embraced the idea of an objective international legal order based on natural law and expressed his hope that Hitler in his 'Peace Talks' had committed himself to international law and the non-intervention principle.¹⁰⁰

After 1945, Mosler quickly became one of the most influential and most respected West German international lawyers. Besides heading the MPI for more than 20 years (1954–1976), he sat as the first German judge at the European Court of Human Rights (1959–1981) and became the first German judge at the International Court of Justice (1976–1985). Three reasons motivated Mosler to continue with a practice-oriented

⁹³ 'Die drei Tagungen der deutschen Völkerrechtslehrer in Hamburg 1947–1949 und Deutsche Gesellschaft für Völkerrecht: Gründung und Tätigkeit 1950–1956', 1 *BDGVR* (1957) 71.

⁹⁴ See explicitly Walter Schätzel, Hans Wehberg and Hans-Jürgen Schlochauer, 'Geleitwort', 1 *Archiv für Völkerrecht* (1948) 1.

⁹⁵ See Section 4A.

⁹⁶ For more on this, see Lange, *Praxisorientierung und Gemeinschaftskonzeption: Hermann Mosler als Wegbereiter der westdeutschen Völkerrechtswissenschaft nach 1945* (forthcoming).

⁹⁷ For the request to terminate his position, see Mitteilung über den Versetzungsantrag, 30 November 1933, Department III, file ZA 139, box 42, AMPG.

⁹⁸ On students as the National Socialist avant-garde, see M. Grüttner, *Studenten im Dritten Reich* (1995).

⁹⁹ See the questionnaire when he applied for the Second State exam. Questionnaire, 22 July 1937 and 21 April 1936, file BR-PE no. 17033, at 3/6, Landesarchiv Nordrhein-Westfalen, Duisburg, Germany.

¹⁰⁰ H. Mosler, *Die Intervention im Völkerrecht* (1937).

approach to legal scholarship. First, to him, practice-oriented international legal scholarship seemed to be less discredited than the ideologized *völkisch* theory of international law. Second, his experience as a legal advisor to Konrad Adenauer strengthened his belief that the practice-oriented approach could contribute to the ‘normalization’ of Germany’s international relations after 1945. Third, he regarded practice-oriented research as a promising avenue that would lead towards a legal community at the international level.

A Turning Away from Theoretical *Völkisch* International Law

For Mosler, the different degrees of rapprochement to the racial ideology of the National Socialists had methodological implications for the post-war period. In his view, the line between discredited and not-discredited colleagues ran along different methodological preferences. This became particularly evident during a lecture that Mosler held in 1966 in Heidelberg on the topic of constitutional law during the National Socialist era.¹⁰¹ The newspaper article, written by a journalist present at the lecture, will be cited here in part:

By accumulation of citations, [Hermann Mosler] explained to his Auditorium, how legal scholars of rank applauded to the new political order, and with their constitutional constructions tried to understand, justify and support the Nazi regime. As a preliminary point, Mosler used the writings of Carl Schmitt, E. Forsthoff, E. R. Huber and O. Koellreutter to show how the conventional constitutional terms were liquidated and perverted as to put a constitutional law cloak on the total leader state (*totalen Führerstaat*). ... The new legal thinking brought an end to the traditional concept of legislation, which gains its content from rule of law principles and functions as a guarantor against the abuse of power. As to sweep away this ‘ghost world of general ideas’ all legal opinions were fought, which are based on predictable, predetermined standards and constitute a part of justice thinking of Roman provenance. ‘Concrete order thinking’ was the slogan, that took away the opportunity to attain standards from regulating norms. ‘Concrete’ became a meaningless, non-binding magic formula to destroy the material determinate legislation, the expression of objective ratio. In its place stepped the plan and will of the ‘Führer’, which united law and legislature and whose acts created legally binding legal propositions. ... Degeneration of the scientific and legal method (*Entartung der wissenschaftlich-juristischen Methode*)¹⁰² and ignorance of the facts of the Third Reich characterize the ... theory of leadership, which sank into barbarism and came off in an apocalyptic finale.¹⁰³

This depiction of National Socialist constitutional law demonstrates that Mosler regarded the opening for new theoretical concepts as a unifying element of the discredited legal scholarship. In his view, scholars affiliated with National Socialism had left the formal legal research agenda behind and had reinterpreted law in the interest of the National Socialist ideology. From this interpretation of the past, Mosler concluded

¹⁰¹ See Universität Heidelberg, Akademisches Rektorat, Auszug aus dem Senatsprotokoll, 23 February 1965, 12 March 1965, file B II 151c3, University Archives, Heidelberg.

¹⁰² The term ‘*Entartung*’ seems to be not well chosen because the term was used by the National Socialists who agitated against the ‘*Entartung*’ of the German race. See C. Schmitz-Berning, *Vokabular des Nationalsozialismus* (2007), at 178–183.

¹⁰³ See ‘Der Mythos verdrängte den Logos’, *Heidelberger Tageblatt* (22 July 1966).

that a formalist practice-oriented approach was the right one. In his view, because of its orientation towards practice, the KWI had not given in to National Socialist pressure in the same way as other institutions.¹⁰⁴

Of course, this was only part of the truth. Mosler's remarks also had an apologetic function. As we have seen, the KWI was involved in the legal justification of the foreign policy of the National Socialist government, at least insofar as that mirrored national conservative positions.¹⁰⁵ Furthermore, outside of the KWI, the formalist legal method had been used to systematize and comment upon some of the most racist National Socialist laws. Notoriously, even the Nuremberg laws were accompanied by legal formalist commentary.¹⁰⁶ However, Mosler had a fair point when he underlined that between 1933 and 1945 many German scholars had started to redefine formal law concepts. By coining new terms on the basis of the *völkisch* ideology, it was particularly easy to demonstrate the support for the new regime.¹⁰⁷ For instance, Carl Schmitt renounced 'normativism' and 'legal positivism' and demanded a 'new type of jurisprudential thinking', which he called 'concrete order thinking'. He argued that only this thinking was 'up to the number of new challenges of the public, ethnic, economic and ideological situation and the new forms of community' and could do justice to 'the nascent communities, orders and designs of a new century'.¹⁰⁸ Furthermore, international lawyers like Ernst Wolgast, Norbert Gürke, Gustav Adolf Walz and Reinhard Höhn overwrote old legal concepts with the new ideologized terminology of *Volk* and *Reich*.¹⁰⁹

Moreover, Mosler was not the only one who after 1945 regarded the practice-oriented approach as a counter model to National Socialist approaches. It is striking that some of the international lawyers, who had embraced the National Socialist ideology during the 1930s, turned to practice after 1945. Eberhard Menzel was said to be a pragmatist and practice-oriented lawyer,¹¹⁰ even though in the 1930s he had proposed to rethink international law in light of the National Socialist agenda.¹¹¹ Also, Georg Erler described the 'pedestrian-sober research on text and reality of the

¹⁰⁴ Letter of Mosler to Georg Schwarzenberger, 22 June 1965, Department III, file ZA 139, box 10, AMPG.

¹⁰⁵ See discussion earlier in this article.

¹⁰⁶ See W. Stuckart and H. Globke (eds), *Kommentare zur deutschen Rassengesetzgebung* (1936).

¹⁰⁷ Oliver Lepsius has stressed that the ideology was particularly open to new interpretations. See O. Lepsius, *Die gegensatzauflösende Begriffsbildung. Methodenentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft im Nationalsozialismus* (1994), at 101–125.

¹⁰⁸ Schmitt, *Über die drei Arten rechtswissenschaftlichen Denkens* (1934), at 67.

¹⁰⁹ See discussion earlier in this article.

¹¹⁰ See Hecker, 'Die Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht von 1946 (mit ihren Vorläufern), das Institut für auswärtige Politik und die Vereinigung (1973) zum Institut für internationale Angelegenheiten', in K.J. Gantzel (ed.), *Kolonialrechtswissenschaft, Kriegsursachenforschung, internationale Angelegenheiten: Materialien und Interpretationen zur Geschichte des Instituts für Internationale Angelegenheiten der Universität Hamburg 1923–1983 im Widerstreit der Interessen* (1983) 183, at 223; as representative publications, see, e.g., E. Menzel, *Legalität und Illegalität der Anwendung von Atomwaffen* (1960); Menzel, 'Der deutsche Festlandssockel in der Nordsee und seine rechtliche Ordnung', 90 *Archiv des öffentlichen Rechts* (1965) 1.

¹¹¹ See F. Giese and E. Menzel, *Vom deutschen Völkerrechtsdenken der Gegenwart* (1938).

applicable international law' as 'the appropriate and well-understood task' of the KWI's work,¹¹² while, in the 1930s, he had detected the (alleged) political influence of 'big business, Judaism and Masonry (*Großkapital, Judentum und Freimaurerei*)' on Woodrow Wilson's foreign policy.¹¹³ It is thus telling that the international lawyer Fritz Münch in 1956 praised the practice-oriented approach of a colleague for the 'more intuitive than theoretical-sophisticated reasoning of his propositions'. Münch stressed: 'Certainly we today have a sense that a too theoretical treatment of the law, also of its very foundations, very easily leads astray.'¹¹⁴ By concentrating on practice, German international lawyers found a common research language, which focused on the here and now and kept the enmeshments and burdens of the past at bay.

B In Support of Konrad Adenauer's integration into the West

One further reason why the practice-oriented approach took hold in Germany after 1945 was because of its value for German foreign policy. By assisting the government with legal expertise, international lawyers contributed to leading West Germany back onto the Western path on the basis of Konrad Adenauer's policy of *Westintegration*. The involvement of Mosler in this policy is particularly telling. In 1950, he became part of the German delegation headed by Walter Hallstein, which represented West Germany in the negotiations on the Treaty of the European Community of Coal and Steel (ECCS) in Paris.¹¹⁵ As a member of the legal committee, Mosler pre-discussed the composition and function of the various organs with lawyers from Belgium, the Netherlands, Luxembourg, France and Italy.¹¹⁶ After returning to Germany, he became head of the legal department of the re-established Auswärtige Amt from 1951 to 1953. In this function, Mosler contributed to formulating the German position on the General Treaty, which reduced the restrictions on West Germany's sovereignty.¹¹⁷ Also, he was involved in the domestic controversy about the European Defence Community, which provided for an integrated European army.¹¹⁸

¹¹² G. Erler (ed.), *Völkerrechtliche Forschung: 25 Jahre Institut für Völkerrecht der Universität Göttingen (1930–1955)* (1955), foreword.

¹¹³ Erler, 'Der Einfluß überstaatlicher Mächte auf die Kriegs- und Völkerbundpolitik Woodrow Wilsons', 8 *Deutsches Recht* (1938) 159.

¹¹⁴ Münch, 'Wilhelm Kaufmann und der ursprüngliche Monismus', 53 *Die Friedens-Warte* (1956) 117, at 119–120.

¹¹⁵ On this, see L. Herbst, *Option für den Westen. Vom Marshallplan bis zum deutsch-französischen Vertrag* (1989), at 74–86. Treaty Establishing the European and Steel Community 1951, available at www.cvce.eu/content/publication/1997/10/13/11a21305-941e-49d7-a171-ed5be548cd58/publishable_en.pdf (last visited 9 April 2017).

¹¹⁶ See 'Kurzprotokolle des juristischen Ausschusses', Record of Proceedings, file B 15, vol. 18, PAAA; on the negotiations, see Boerger-de Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome', 21 *Contemporary European History* (2012) 339, at 340–347.

¹¹⁷ See Niederschriften über Besprechungen beim Staatssekretär Hallstein, Nachlass Grewe, vol. 56–57, PAAA; Niederschriften über Besprechungen des Beratenden Ausschusses, Nachlass Grewe, vol. 57, PAAA.

¹¹⁸ See Herbst, *supra* note 115, at 87–98.

Mosler tried to benefit from his experience as a legal advisor in his academic research. It was natural for him to 'evaluate the participation [at the Schuman plan conference] in his scholarship'.¹¹⁹ Shortly after the organizational structure of the ECCS had been laid out in Paris, Mosler commented on its juridical quality. He argued that the 'fusion of sovereignty rights' and the 'supranational structure' distinguished the Schuman plan from conventional associations between states like the League of Nations and the United Nations (UN). While the obligations of the parties could still be assessed according to international law, the Community had a constitutional structure.¹²⁰ Hence, there was a strong link between Mosler's work as a practitioner and his scholarship. He underlined that the practical experience at the negotiations in Paris 'infinitely enriched' his academic work because he had seen 'from the inside, how the government of a modern state works and how legal thinking and practice of international law are mutually dependent on each other'.¹²¹ In the years to come, Mosler concentrated on the legal character of the new European law,¹²² the interpretation of the Basic Law¹²³ and the analysis of the legal potential of international organizations¹²⁴ as well as of international courts.¹²⁵ Instead of examining theoretical aspects of legal questions, he utilized the practice-oriented method in order to accompany European integration and consolidate West Germany as a partner of the West.

Mosler was not the only German international lawyer after 1945 who took this route. Various scholars stressed the relevance of international law for West Germany. As Ulrich Scheuner remarked during a meeting of the German Society of International Law in the mid-1950s, '[e]ven though Germany has moved geographically and politically to the edge of the sphere of life of the free world, ... because of its volatile situation and the unsolved problems of its existence, it depends even more on the weight of law in the relations of nations'.¹²⁶ Similarly, Wilhelm Grewe argued in retrospect: 'New problems arose [after 1945] that compelled to return to the realm

¹¹⁹ Letter of Mosler to Herbert Kronstein, 28 October 1950, Department III, file ZA 139, box 5, AMPG.

¹²⁰ See Mosler, 'Die Wendung zum supranationalen Gedanken im Schumanplan', *Recht, Staat, Wirtschaft* (1951) 245, at 248–259.

¹²¹ Mosler, Festrede des Laureaten Hermann Mosler anlässlich der Verleihung des Robert Schuman Preises, 3 December 1982, Department III, file ZA 139, box 2, at 12, AMPG.

¹²² Mosler, 'Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl. Entstehung und Qualifizierung', 14 *ZaöRV* (1951) 1; Mosler, 'Zur Anwendung der Grundsatzartikel des Vertrages über die Europäische Gemeinschaft für Kohle und Stahl', 17 *ZaöRV* (1956–1957) 407.

¹²³ See Mosler, 'Kulturabkommen des Bundesstaats: Zur Frage der Beschränkung der Bundesgewalt in auswärtigen Angelegenheiten', 16 *ZaöRV* (1955) 1; Mosler, 'Die auswärtige Gewalt im Verfassungssystem der Bundesrepublik Deutschland', in H. Mosler and G. Schreiber (eds), *Völkerrechtliche und staatsrechtliche Abhandlungen: Carl Bilfinger zum 75. Geburtstag am 21. Januar 1954* (1954) 243.

¹²⁴ Mosler, 'Die Aufnahme in internationale Organisationen', 19 *ZaöRV* (1958) 275; Mosler, 'Die Erweiterung des Kreises der Völkerrechtssubjekte', 22 *ZaöRV* (1962) 1.

¹²⁵ E.g., Mosler, 'Organisation und Verfahren des Europäischen Gerichtshofs für Menschenrechte', 20 *ZaöRV* (1960) 415; Mosler, 'Nichtteilnahme einer Partei am Verfahren vor dem Internationalen Gerichtshof', in I. von Münch (ed.), *Staatsrecht – Völkerrecht – Europarecht: Festschrift für Hans-Jürgen Schlochauer* (1981) 439.

¹²⁶ Scheuner, 'Die wissenschaftliche Pflege des Völkerrechts in der Bundesrepublik Deutschland', 1 *BDGV* (1957) 80, at 83.

of the applicable constitutional and international law: the field of international law had to answer questions which the quadripartite occupation, the war criminal trials, the special position of Berlin, the division of Germany, the creation of NATO and the European integration, the rearmament and the Non-Proliferation Treaty had raised.¹²⁷

At the same time, the practical approach contained a conscious, political programme. By limiting oneself to strictly legal argumentation, one tried to regain the trust of the (Western) world. At the meeting of the German Society of International Law in 1952, Mosler argued that the German science of international law:

should be reserved enough not to transcend the limits drawn by the jurisprudential task. The weight of the voices, speaking at this conference, will be the heavier, the more the temptation is resisted, to encroach on economic and political problems, ... on which other bodies are more knowledgeable or where desires and fears mix with scientific arguments.¹²⁸

Thereby, Mosler asked his German colleagues to approach international law from a legal perspective. For him, this was the avenue to enhance international exchange, especially when approaching foreign scholars. Accordingly, he opened the MPI for international discussions on legal questions with increasing success. While, during the 1950s, the West German discipline was often preoccupied with its own problems (war criminal tribunals, the legal status of Germany, international law and the Basic Law), this soon started to change. In the 1960s and 1970s, Mosler invited foreign colleagues to various colloquia on topics like human rights protection in Europe.¹²⁹ Already in 1961–1962, researchers from Korea, the USA, Japan, Spain, Australia and Canada were listed as ‘foreign employees’ of the Institute.¹³⁰ By 1975, 40 scholars from 18 countries, not only from Europe and the USA but also from India, Taiwan and Brazil, had spent some time at the MPI,¹³¹ while the number rose to 61 researchers from 27 countries by the end of the Cold War.¹³² In retrospect, Mosler described ‘the recovery of a position in international exchange’ as the ‘main goal’ in the post-war period. The approach of Bruns was ‘the academic and pragmatic program which seemed right at that time’. In his view, the resumption of the KWI method had been very helpful in fighting the ‘heavy burden of international isolation’.¹³³ For Mosler, the practice-oriented method paved the way for the Federal Republic to become an equal international partner of the West.

¹²⁷ Grewe, ‘Ein Leben mit Staats- und Völkerrecht im 20. Jahrhundert’, 31 *Freiburger Universitätsblätter* (1992) 25, at 30.

¹²⁸ Mosler, ‘Völkerrechtliche Fragen des Schuman-Planes: Vortrag vor der Deutschen Gesellschaft für Völkerrecht in Hamburg 1952’, Department III, file ZA 139, box 30, at 2–3, AMPG.

¹²⁹ See Bernhardt, *supra* note 10, at 592.

¹³⁰ MPI, Report, 30 April 1961 to 30 September 1962, at 11, IX, Rep. 5, AMPG.

¹³¹ MPI, Report, 1 January to 31 December 1975, 20, IX, Rep. 5, AMPG.

¹³² MPI, Report, 1 January to 31 December 1989, 35–36, IX, Rep. 5, AMPG.

¹³³ See Mosler, ‘Rückblick und Ausblick anlässlich des Eintritts von Karl Doehring und Jochen A. Frowein in die Institutsleitung und nach der Emeritierung von Hermann Mosler vom 27.2.1981’, Department III, file ZA 139, box 10, at 36–40, AMPG.

C International Law Practice as the Foundation of the International Legal Community

Besides supporting Western integration, the practice-oriented approach also seems to have been motivated by a belief in the international rule of law. By focusing on international law's doctrine and systematizing international legal rules, the German discipline hoped to strengthen the rule of law on the international level. While this assumption was not often made explicit, it reveals itself in Mosler's General Course at The Hague on the international society as a legal community (1974).¹³⁴ In the summer of 1974, Mosler was invited to present his conceptual understanding of international law at The Hague Academy. For the first time since the 1930s, the Curatory chose a Germany-based international lawyer to deliver the General Course. West German international legal scholarship had finally regained its good reputation in international legal discourse.¹³⁵ Mosler's lecture was written in the context of the international debate. But even though he regarded Philip Jessup's *Transnational Law*, C.W. Jenks' *Common Law of Mankind* and Wolfgang Friedmann's *The Changing Structure of International Law* as rewarding (but slightly over-optimistic) interpretations of the state of international law, his lecture did not engage with the central claims of these authors.¹³⁶ Rather, Mosler borrowed the language and concepts from his friend and colleague at the European Court of Human Rights, Alfred Verdross. Since the 1950s, Mosler had emphasized how Verdross' *Verfassung der Völkerrechtsgemeinschaft* of 1926 had deeply inspired his thinking.¹³⁷

Mosler based his lecture on a broad overview of the practice of international law. In his chapters on international subjects, the sources of international law, state responsibility, international organizations, international economic law and the peaceful settlement of disputes, he depicted and interpreted international treaty law and analysed relevant state practice. As Koskeniemi ironically emphasized, Mosler's lecture did not enclose a lot of 'theoretical ballast'.¹³⁸ But instead of only describing the various existing rules, Mosler connected and systematized them. Like his teacher Bruns, he believed in an international legal order, which he called the 'international legal community'. Mosler even detected highest principles in the international legal order, similar to the constitutional order at the domestic level. He stressed that 'in spite of the lack of a general constitution for the functioning of the international community there are many constitutional elements of varying form and importance'.¹³⁹ Besides statutes of international organizations and the principle of consensus,¹⁴⁰ Mosler also pointed to substantive constitutional elements in international law: '[T]he constitution of the

¹³⁴ Mosler, 'The International Society as a Legal Community', 140 *Recueil des Cours (RdC)* (1974 IV) 1.

¹³⁵ Ipsen, 'International Legal Scholarship in West Germany after World War II', 50 *GYIL* (2007) 111, at 129–132.

¹³⁶ See Mosler, *Problèmes de l'Organisation de la Communauté internationale*, Madrid Vorlesung vom 27.28.4.1959 (German version), Department III, file ZA 139, box 18, at 7–11, 14–20, AMPG; Mosler, 'Souveräne Gleichheit und universelle Staatengemeinschaft im Völkerrecht der Gegenwart', in *Jahrbuch der Heidelberger Akademie der Wissenschaften* (1976) 77, at 89.

¹³⁷ Letter of Mosler to Alfred Verdross, 14 January 1952, dept. III, file ZA 139, box 28, AMPG.

¹³⁸ Koskeniemi, *supra* note 7, at 61.

¹³⁹ Mosler, *supra* note 134, at 32.

¹⁴⁰ *Ibid.*, at 32.

international community, while it is certainly a rudimentary one, cannot be restricted to *mere formal principles*, and dispense with *any substantive principles* of coexistence and co-operation within the society of States.¹⁴¹ These would have a special status in the hierarchy of norms: ‘Constitutional principles containing substantive law are of a higher character because it is essential that all other rules must not infringe upon them.’¹⁴² Mosler called these principles the common public order:

The public order of the international community ... consists of principles and rules the enforcement of which is of such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force. The reason for this follows simply from logic: the law cannot recognize any act either of one member or of several members in concert, as being legally valid, if it is directed against the very foundation of law.

According to Mosler, the prohibition of the use of weapons of mass destruction by the aggressor and the non-derogable ‘basic rules’ of the European Convention on Human Rights were examples of such rules.¹⁴³

This reading of international law was strongly influenced by the development of international practice. At the 1968–1969 UN conference on the law of treaties, state officials of various countries had agreed to include the notion of *ius cogens* into the Vienna Convention of the Law of Treaties (VCLT).¹⁴⁴ Article 53 held that a ‘treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law’. It defined a peremptory norm as a norm ‘accepted and recognized by the international community of States as a whole’ and ‘from which no derogation is permitted’. Mosler had closely watched this development. For him, *ius cogens* was an expression of the international public order.¹⁴⁵ In his Hague lecture, he then referred to Article 53 of the VCLT as evidence for substantive fundamental principles.¹⁴⁶ Mosler thus based his understanding of the international society as a legal community governed by constitutional elements on an analysis of the current legal developments. Even though he was well aware that during the Cold War the development of international law depended on the common interests of the American and Soviet superpowers,¹⁴⁷ he arranged the existing international legal norms into a sophisticated legal system. Thereby, Mosler came to be a Cold War precursor of the constitutionalization approach in international law.¹⁴⁸ But in contrast to recent programmatic visions of

¹⁴¹ *Ibid.*, at 97–98 (emphasis in the original).

¹⁴² *Ibid.*, at 97–100.

¹⁴³ *Ibid.*, at 33–34.

¹⁴⁴ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

¹⁴⁵ Mosler, ‘Ius Cogens im Völkerrecht’, 25 *Schweizerisches Jahrbuch für internationales Recht* (1968) 9, at 23–24.

¹⁴⁶ Mosler, *supra* note 134, at 35.

¹⁴⁷ *Ibid.*, at 36–40.

¹⁴⁸ On Mosler as a precursor, see Kadelbach and Kleinlein, ‘International Law – A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles’, 50 *GYIL* (2007) 303, at 308.

constitutionalization,¹⁴⁹ he understood his reading as descriptive and reflective of the international legal practice. In his vision of international law, international practice and the international legal community were closely linked with each other.

5 Conclusion

This study demonstrates that the institutionalization of the practice-oriented approach at the KWI and MPI was one very important reason for its far-reaching impact in German international legal scholarship. The Institutes had the financial and intellectual capacities to influence international legal scholarship at universities across Germany. Furthermore, because of the close relationship to German foreign policy practice, the KWI and MPI supported the different agendas of different governments over the course of the 20th century. During the Weimar period, the KWI assisted the government before the new international tribunals with legal expertise in the context of the Treaty of Versailles. Between 1933 and 1945, it legitimized some of the radical National Socialist anti-Versailles policies. After 1945, lawyers at the MPI then contributed to Germany's integration into the West by providing legal expertise to the Adenauer government. At the same time, since the founding of the KWI, members at the Institute have regarded the practice-oriented approach as a tool for systematizing and strengthening the idea of the rule of law at the international level. Bruns understood international law as an international legal order that had to be systematically analysed by legal researchers. During World War II, some lawyers at the KWI then tried to uphold the *ius in bello* even in times of 'total war'. In the 1970s, Mosler recognized constitutional elements in the international legal community based on an assessment of the development of international practice since the end of the World War II.

What does this story tell us about (German) international legal scholarship today? Does the experience of *völkisch* theorization during the National Socialist period discredit theoretical approaches per se? Or, on the contrary, is the practice-oriented approach linked so closely to the respective foreign policy that it does not allow for independent scholarship? First, it should be stressed that even though German legal scholarship still comes with its particular approach,¹⁵⁰ German international legal research has somewhat changed in the past 20 years. For instance, at the Max Planck Institute, Armin von Bogdandy now assesses the legitimacy of international institutions and courts via the scheme of international public authority,¹⁵¹ while Anne

¹⁴⁹ See, e.g., Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 579; Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 9.

¹⁵⁰ See Krisch, *supra* note 5.

¹⁵¹ See, e.g., von Bogdandy, Goldmann, Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' 28 *EJIL* (2017) 115.

Peters looks at international law through the prism of global constitutionalism.¹⁵² Rather than systematizing international practice like Bruns and Mosler, these recent approaches seem to aim at influencing and altering practice at the global level from a more normative perspective. Second, the experience with National Socialist theory today certainly does not provide a convincing argument against a more interdisciplinary approach to international law. Theory can, of course, be filled with conceptions that are not based on National Socialist ideology. For instance, the sociological approach of Myres McDougal in the USA during the Cold War did not incorporate fascist ideology but, rather, understood itself as a promoter of human dignity.¹⁵³ Also, the theoretically informed Third World approaches to international law are written from a firmly anti-fascist (and anti-colonial) perspective.¹⁵⁴ Third, like theory, practice can also be used for the bad as well as for the good. As the narrative demonstrates, through a formalist approach, one can legitimize measures of National Socialist foreign policy as well as the integration of West Germany into Western Europe. What stems from the practice-oriented approach – if used to provide legal expertise to politicians – depends on its underlying politics. Fourth, the practice-oriented approach should not be misunderstood as merely providing practical advice to the government in power. As this study shows, the choice of a practice-oriented method often seems to come with a commitment to the international rule of law. By collecting and systematizing international legal rules, Bruns and Mosler intended to strengthen the role of international law in international relations. All in all, the practice-oriented approach often seems to oscillate between building an international legal order and supporting the foreign policy of a particular state with legal expertise.

¹⁵² See www.mpil.de/de/pub/forschung/nach-rechtsgebieten/voelkerrecht/global-constitutionalism.cfm (last visited 9 April 2017); see also, e.g., Peters, 'The Merits of Global Constitutionalism', 16 *Indiana Journal of Global Legal Studies* (2009) 397.

¹⁵³ See McDougal, 'International Law, Power and Policy. A Contemporary Conception', 82 *RdC* (1953 I) 133.

¹⁵⁴ See, e.g., Chimni, 'Third World Approaches to International Law: A Manifesto', 8 *International Community Law Review* (2006) 3.