

# The Future of International Law Scholarship in Germany: The Tension Between Interpretation and Change

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## I. Introduction

It is a special privilege for me to address you on this topic today. I can only claim to know anything about this subject due to my sojourn at the Institute eleven years ago as a visiting fellow. It was here that I realized the inner strength of viewing the legal system – any legal system – as a whole composed of parts. I hope that my appreciation of this type of thinking will become clearer today.

A word of caution: It is presumptuous of me, as an outsider, to talk about legal scholarship in Germany. I suspect that many things I will say will sound to you inaccurate and superficial. I hope that my observations can nevertheless be regarded as offering a bird's eye view of a forest seen from afar and compared to other forests over which that bird flies, with only a few clues as to the specific characteristics of the trees making up these forests, let alone the nature and composition of the soil. My outlook is thus inevitably incomplete.

## II. International Lawyers: Interpreters and Actors

As a starting point, I would like to dwell on the role of international law scholarship in general and its main challenges. I wish to highlight two different roles played by the international law scholar: that of interpreter and that of actor. The latter role is not readily apparent.

Any type of scholarship seeks first to provide tools for understanding the particular world it addresses, and legal scholarship is no different in this respect. But legal scholarship, like many other scholarly disciplines, is not confined to interpreting the world.<sup>1</sup> It also seeks to evaluate this world and even change it, both by identifying normative goals worthy of pursuit and by exploring different tools for lawyers to use as judges or bureaucrats in legal institutions to attain these goals.

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This is an edited version of a talk presented at the Max Planck Institute of Comparative Public Law and International Law on January 16, 2007.

<sup>1</sup> Compare with *Marx's* famous statement, "Die Philosophen haben die Welt nur verschieden interpretiert, es kommt aber darauf an, sie zu verändern." ("Philosophers have only interpreted this world in various ways; the point is to change it.")

The transformation of scholarly creativity into a new legal tool is exemplified by the way in which the concept of *ius cogens* was introduced. What is today considered the epitome of the claim for a constitutional order of international law,<sup>2</sup> and has been accepted as such by international and national courts,<sup>3</sup> was first proposed by Alfred Verdross as a law professor, who then later, as a member of the International Law Commission during the drafting of the Vienna Convention of the Law of Treaties (“VCLT”), had the opportunity to influence its acceptance as an international norm.<sup>4</sup> Once introduced into the system, the concept became a useful tool for international and, later, national judges. It is elaborated, extended by some, resisted by others, but there is no turning back.

Even more fundamentally, legal scholarship changes the world through the very paradigms it applies to conceptualize it. Through interpretation of the legal landscape, legal scholars conceive of a legal system as a multi-dimensional framework of different rules that interact as a system or systems. This legal framework provides a map for travelers to use, to criticize, or to modify. In this respect, legal scholarship plays an active role in shaping society and hence bears a weighty responsibility towards society. Of all the products of legal scholarship, it is the maps of international legal scholars that are the most influential in and, indeed, necessary for conceptualizing the global legal system or systems and navigating our way around those systems. These scholars must describe a diffuse and often contested legal system that operates without central lawmaking or law-interpreting institutions. Their responsibility towards society at large is, therefore, of a most daunting magnitude.

The dual function of all legal scholars – interpretation and change – can lead them to blindness, to conflicts of interest, or to both. This might happen when their conceptualizations become incongruent with the shifting landscape. This is the moment for Thomas Kuhn’s scientific revolutions, when new paradigms must replace the old.<sup>5</sup> But scholars may fail, or consciously refuse, to acknowledge these moments in due time because their normative viewpoints are incompatible with the actual state of affairs. Similarly, scholars may try to draw maps based on their ideal vision of the world, despite its divergence with reality. Scholars should always be acutely aware of the possibility of this inherent tension and be prepared to relinquish their idealized notions when modification is warranted.

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<sup>2</sup> Armin von Bogdandy, Constitutionalism in International Law: Comment on a Proposal from Germany, 47 Harv. Int’l L.J. 223, 235 (2006).

<sup>3</sup> The concept of *ius cogens* as a higher norm of international law has been referred to as such by the ICJ (see, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226) and by several national courts, including the House of Lords (*R v. Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No 3), [2000] 1 A.C. 147, 197-199) and the Supreme Court of Canada (*Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3).

<sup>4</sup> Bruno Simma, The Contribution of Alfred Verdross to the Theory of International Law, 6 Eur. J. Int’l L. 1, 19-23 (1995).

<sup>5</sup> Thomas Kuhn, *The Structure of Scientific Revolutions*, 1962.

In the international arena, as opposed to the local, domestic sphere, the situation is, again, more complex, where rival scholarly conceptualizations of the legal environment compete against one another in a more or less open marketplace of ideas. This open exchange provides a mirror for all to scrutinize themselves and ask whether they are still the better drafters of the global map. While, theoretically, such competition could yield more refined knowledge, often the outcome is isolationism and solipsism. As competitors rarely concede weakness, let alone defeat, they opt to avoid looking in this mirror. There are different reasons why scholars – especially international law scholars – refuse to look at their own reflections. There are those who stress the importance of their *métier* for reputational and institutional reasons, and more importantly, there are those who consciously misinterpret the legal environment so as to promote their opposing ideal worldviews. Those who wish to constrain power and see the world protected by a global constitutional umbrella will espouse a worldview that is quite distinct from that promoted by their ideological opponents. Both sides will know that their doctrines have not only theoretical but also practical consequences: often scholars or their students will have the opportunity to serve as bureaucrats, politicians, or judges in national and, particularly, international institutions, where they will invoke their own particular conception of international law as the authority for their legal constructs.

There are a number of ways to conceive the current global picture of the law. I will use the example of U.S. Secretary of State Condoleezza Rice's visit to Europe in late 2005 to illustrate this point. In her attempt to resolve the crisis over the CIA secret prisons in Europe, Rice assured German Chancellor Merkel that "[we] live up to our commitments under our laws and to our international obligations".<sup>6</sup> She repeated this formula a number of times once back in the U.S.: "[W]e're operating under our laws, we're operating under our international obligations." The distinction between "our laws" and our "international obligations" – with no reference to "international law" – is not accidental. It reflects a deep and conscious distrust in, and, ultimately, rejection of, the idea of a legal environment that may anchor these international obligations. This conception is not peculiar to the current Administration, but rather a view shared by scholars who deny that there is anything "out there" other than solitary treaties floating around in no particular hierarchy in the abyss of international anarchy. The main proponents of this approach belong to the younger generation of American scholars, such as Goldsmith, Posner, and Rubinfeld.<sup>7</sup> While there is a general treaty

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<sup>6</sup> See Vince Crawley, U.S. Following Rule of Law, Rice Tells German Chancellor (Dec. 6, 2005), available at: <<http://usinfo.state.gov/eur/Archive/2005/Dec/06-129768.html>> (last visited Feb. 22, 2007).

<sup>7</sup> See, e.g., Jack Goldsmith/Eric Posner, *A Theory of International Law*, 2004, (international law as reflecting short-term interests of states and their bilateral obligations); Jed Rubinfeld, *The Two World Orders*, 27 *Wilson Q.* 28 (2003), (there are two diverging conceptions of constitutionalism, a "European" one, which promotes "international constitutionalism", and the "American" one, which regards constitutional law "as the embodiment of a particular nation's democratically self-given legal and political commitments").

on the law of treaties, they maintain, its aim is merely to clarify treaty obligations; there is what is known as customary international law, but it reflects nothing more than immediate state interests and thus is inherently dubious and cannot generate obligations, let alone “law”.

No doubt, the dichotomy between this vision of international law and the more systemic, or even constitutional, view is not unique to international law. It is also fundamentally present in the diverging perceptions of public law and the central institutions that make and shape domestic law.<sup>8</sup> The American viewpoint with regard to both international and public law is distrustful of the prescription of law by non-elected institutions. In “the land of the free and the home of the brave”, law, any law, is viewed with great wariness and has to justify the legitimacy of its existence. For law is the curtailment of freedom, and the free and the brave will tolerate it only when it is a necessary evil. The political and economic markets, as well as the market of ideas, ensure personal freedom and dignity indirectly, and the state’s duty is to ensure free access to these markets for all. This mindset can be called the market mindset; the market mindset of the free and brave sees through the public institutions that render decisions and questions the impartiality of the individuals there. It views all law, including the Constitution, to be a contract and is distrustful of too much law and of the delegation of authority to third-party agents – like judges and bureaucrats – to interpret and implement the contract. In the global context, the market mindset ascribes a privileged role to the individual state in whose framework true democracy can be attained, as islands of self-determination, the key building-blocks in an international legal order of sovereign states.

### III. International Law Scholarship in Germany

German legal scholarship generally differs from the American market mindset both in the domestic public law sphere and the international law sphere. German legal scholars seem to be more at ease with the delegation of authority to non-elected institutions and actors. There is a basic confidence that these delegated bodies will promote the collective interest, with law seen as the tool that empowers these public agents as well as constrains them. This leads to the noted systemic or constitutionalist mindset<sup>9</sup> with regard to the global arena as well. It embodies a vision of international law as an ordered system, with rules of recognition that determine relationships between different areas of law and governing principles that set at least some kind of hierarchy amongst norms and ensure that no treaty is

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<sup>8</sup> See reflections on the different approaches in: European and US Constitutionalism, Georg Nolte (ed.), 2005.

<sup>9</sup> See Martii Koskenniemi, Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization, 8 Theoretical Inquiries L. 1 (2007), available at: <<http://www.bepress.com/til/default/vol8/iss1/art2>> (last visited Feb. 22, 2007).

“self-contained”. This mindset is prevalent not only amongst those who try to establish a hierarchy amongst norms but also those who treat it as a unitary whole. Thus, the systemic mindset characterizes both constitutionalists and system-builders. For instance, the project of the Encyclopedia of Public International Law is a prominent example of system-building, as it assumes that concepts in divergent treaties may have the same or similar core meanings, that there is a whole to be made from the many fragments.

To be sure, this tradition is informed by moral considerations regarding the ultimate goals for which the global community should strive for. Justice should be examined at the global level, with international institutions committed to democratic and egalitarian ideals. This has been perhaps one of the most distinctive German contributions to international law scholarship. This line of thought, certainly influenced by Kantian philosophy and the early realization that international law belongs to the realm of public law in that it emanates from state power,<sup>10</sup> was immensely weighty in shaping the way international law was conceived also beyond Germany, especially when introduced to the Anglo-American world through the writings of German and German-speaking émigrés such as Oppenheim, Lauterpacht, Schwarzenberger, Kelsen, and many others. In the works of all of these scholars, there is a pronounced endeavor to create a coherent system of laws, one that prevents contradictory outcomes and allows lawyers and courts to bridge across the islands of treaties and scanty state practice to fill legal voids. The recent International Law Commission report on fragmentation, with its suggestion that no international undertaking is beyond the reach of the VCLT, and the increasing resort by international tribunals and domestic courts to the concepts of *erga omnes* and *ius cogens* obligations are perhaps evidence of the durability and success of this approach.<sup>11</sup>

Does it make sense to ask which mindset interprets the world more accurately? Perhaps no more than asking which interpretation in a Rorschach test is more accurate. In many cases, each mindset perceives the world in the way it is predisposed to see it. When contemporary international lawyers observe the practices of states, international organizations, and international adjudicators, they often see what they are looking for. There are those who see a legal order that is in the process of being created and fortified and even regard its fragmentation as a positive sign of growing sophistication and maturity. Others are more concerned with how power shapes international obligations; yet others consider the triumph of interna-

<sup>10</sup> This is evidenced by the fact that professors of public law teach international law.

<sup>11</sup> U.N. International Law Commission, Study Group on the Fragmentation of International Law, Report: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, § 176 U.N. Doc. A/CN.4/L.682 (2006) (finalized by Martti Koskeniemi):

States cannot contract out from the *pacta sunt servanda* principle – unless the speciality of the regime is thought to lie in that it creates no obligations at all (and even then it would seem hard to see where the binding force of such an agreement would lie).

tional law a menace and seek to thwart this development. Each of the approaches views with great puzzlement the alternative visions.

Take, for example, the debate over fragmentation. Many legal scholars, quite a few of whom subscribe to the constitutional mindset, are concerned over the growing fragmentation of the law. Their reactions range from criticism of this phenomenon<sup>12</sup> to the use of what can be called “countervailing measures” or “anti-fragmentation” techniques, such as the elaboration of cohesive interpretative tools<sup>13</sup> and *ius cogens*, to constrain international actors.<sup>14</sup> These may appear to be valiant efforts to curb novel manifestations of power. But for those holding the market mindset, such efforts are largely illegitimate. For them, there is nothing problematic in the government’s resorting to different venues and to even informal arrangements that deliberately bypass legal formalities.

But, of course, it is not Rorschach tests that concern us, but the struggle over the shape of the global community. The contrast between the two mindsets serves as background for identifying the unique contribution of the so-called German view and brings to light the contemporary challenges to this view. German legal scholarship has played a particularly important and active role in the global legal discourse. Whether consciously or not, German scholars have constructed a vision of international law that empowers other international actors, especially judges, to forge links between different treaty regimes and to adopt interpretations that depart from historic agreements and, instead, favor the effectiveness of legal institutions and evolving global trends. But this is an ongoing effort that calls upon German international law scholarship to define and refine its positions, goals, and tools.

#### IV. Contemporary Challenges to German International Law Scholarship

Neither the market mindset as a theory that drives powerful governments nor its manifestations in the context of fragmentation and even the recent turn to informal international law can be viewed as a fleeting aberration by those committed to the systemic or constitutional mindset. To counter the claims inherent to the market mindset, the constitutionalists and system-builders must first address the legitimacy of the constitutionalist project. They must engage with those who extol the virtues of fragmentation as enabling states to exercise their freedoms and as a “rather positive demonstration of the responsiveness of legal imagination to social

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<sup>12</sup> Gerhard Hafner, Pros and Cons Ensuing from Fragmentation of International Law, 25 Mich. J. Int’l L. 849 (2004).

<sup>13</sup> On these expansive tools of interpretation, see *infra* notes 24-30 and accompanying text.

<sup>14</sup> See the position of the ILC at *supra* note 11.

change”.<sup>15</sup> This is a challenge at the philosophical level. A different but complementary one is the effectiveness challenge: in view of the new lawmaking modalities in the international arena and the endeavors to curb constitutionalist efforts, there is a need to reassess the effectiveness of existing legal tools and, perhaps, reshape and adjust them. The central task of the constitutionalist project is to restrain power, but the powerful constantly seek ways to overcome the legal constraints, and in the international arena, they manage to find numerous such avenues (as we saw in the discussion on fragmentation). To facilitate the creation of more sophisticated legal tools to hinder such circumvention, the very notion of power and its manifestations must be carefully analyzed. This entails responses to threshold legal questions such as what types of human interaction will be regarded as law and included as components of the legal framework. Who are the actors whose actions produce international law? If anything threatens the conceptualization of the global legal system as a global constitution, it is the proliferation of actors and the fragmentation of their actions. In other words, there is a need to rethink the building-blocks of the constitutional framework, and the first step in doing so is understanding how power manifests itself.

These two central challenges may perhaps be labeled law and power and law as power. The law-and-power challenge would be the consideration of whether – and, if so, how – to integrate the study of international politics and other sources of global power into the study of legal norms and institutions. The law-as-power discussion would seek to identify ways of preserving and enhancing the power of the law. This latter challenge relates to the question of whether the legal discourse should examine its own power, by first recognizing that power and then discussing its legitimate use. It is my claim that the deliberation of law and power and law as power would compellingly point to a distinct role for “German” scholarship in international law, as a body of scholarship that has played an important part in shaping positively the evolution of the law, and that this role should be preserved and even enhanced.

## 1. Law and Power

To understand how power asserts itself in the global arena, it is necessary to identify the different domestic and international actors that operate in the global arena and assess their strategic uses of international law. By understanding how power expresses itself, we are better able to respond to it and even contain it, rather than submitting to its constraints or being forced to accept exceptions to general rules. In fact, the study of the manifestations of power has been the domain of po-

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<sup>15</sup> Martti Koskenniemi/Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *Leiden J. Int'l L.* 553, 575 (2002). See also Gunther Teubner/Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *Mich J. Int'l L.* 999 (2004).

litical scientists domestically and international relations theorists in the international context, so insights are available to be tapped and integrated into the inquiry into the ways power shapes international law.

Indeed, understanding power is crucial for the study of particular international law doctrines, such as the doctrine on the use of force and on environmental protection. It is critical for grasping the challenges posed by decision-making in international institutions and, more broadly, the need to curb power through law, particularly through procedural guarantees of due process, transparency, participation, and other procedural principles featured in administrative law scholarship. But the study of power is even more vital for understanding the process of international lawmaking and enforcement. The doctrine on the sources of international law, particularly regarding customary international law, cannot be fully grasped without considering the interaction amongst the different actors in the global arena. The study of power highlights, first and foremost, the fact that states are not the only relevant actors on the global scene. While most of the international legal literature focuses on “states”, it is today clear that there is quite a difference between a state and the government that represents it and that overlooking this difference is wrong not only methodologically but also politically.<sup>16</sup> The formation of national policies is shaped by domestic processes, subject to capture by interest groups; hence international law doctrines and international lawmaking processes are also not immune to capture by small groups.<sup>17</sup> And with “the retreat of the state”,<sup>18</sup> private actors, primarily multinational corporations, are gaining more and more influence over the formation of global policies. The delegation of authority by governments to international institutions provides officials at these institutions – adjudicators and bureaucrats alike – with opportunities to play an ever-increasing role in shaping the obligations imposed upon states.

Various theoretical approaches have been developed to assist us in fully grasping the dynamics of power. Collective action theory offers insights into how international interaction evolves and can be promoted and which areas are more receptive to regulation. It explains, for instance, why the prevention of global warming – a so-called pure public good – is a much more ambitious enterprise than the prevention of the pollution of a lake shared by only a handful of riparians (and thus a so-called common-property resource).<sup>19</sup> Collective action theory can be insightful also for the system-builders when designing institutions, as it points to circumstances that can generate cooperation even amongst adversaries.<sup>20</sup> Taking relative power

<sup>16</sup> On the interactions between national governments and national courts and the European Court of Justice in the European context, and the political implications of this interaction, see Joseph H.H. Weiler, *The Transformation of Europe*, 100 *Yale L.J.* 2403 (1991).

<sup>17</sup> On the role of domestic interest groups in shaping international law, see Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 *Mich. L. Rev.* 167 (1999).

<sup>18</sup> Susan Strange, *The Retreat of the State*, 1997.

<sup>19</sup> Elinor Ostrom, *Governing the Commons*, 1992.

<sup>20</sup> This is Mancur Olson’s famous observation regarding the exploitation of the stronger actor by the weaker ones, Mancur Olson, *The Logic of Collective Action*, 1965.

into account also yields the understanding that, despite the formal equality of all states, some – those that are capable of generating public goods (such as global security) for all to enjoy – should perhaps be assigned enhanced rights and obligations.<sup>21</sup> But most importantly, collective action theory sheds light on the process of international lawmaking. As mentioned, a basic premise of the theory is that smaller groups will be able to overcome collective action problems more effectively than larger groups. This explains why a domestic minority will be able to wield greater influence over its democratically elected government than the domestic majority and, as a result, why that government's policy regarding, for example, pollution control – both domestically and internationally – will tend to be more polluter-friendly than pro-environmentalist.<sup>22</sup> This insight predicts that treaties will tend to reflect the gains of smaller domestic groups and that state practice – the product, primarily, of government action – will reflect the interests of smaller groups and, thus, international law in general will tend to be biased in favor of smaller domestic groups. This points to a legitimate role for international lawyers in the global arena: to seize opportunities when acting as judges in international tribunals or bureaucrats in international institutions to represent those interests that are less appealing to governments when negotiating treaties,<sup>23</sup> to turn international courts into venues that counterbalance treaties' pro-small group tilt. This is a role that German public law scholarship is particularly sensitive to and primed for. The sophisticated law on administrative procedure, so highly developed in Germany, can offer invaluable guidance in such areas as improving access to decision-making processes and accountability and transparency of global institutions. The EU experience can also be drawn on for rewarding lessons in this regard.

## 2. Law as Power

From the law-and-power discussion it emerges that the systemic or constitutional mindset is in itself a source of power. It empowers those actors in the domestic and global spheres – judges, bureaucrats, and even politicians – who have opportunities to enhance the coherence of the legal system, through which they can push for greater democratization and egalitarianism in world politics. The systemic or constitutional conception of international law supplies relatively independent bureaucracies and judiciaries with doctrines that enable them to expand their authority while maintaining coherence and consistency through broad interpretation of treaties and the development of customary international law. Whereas governments tend to prefer rules on treaty interpretation that look back to the his-

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<sup>21</sup> Eyal Benvenisti, *The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies*, 15 *Europ. J. Int'l L.* 677 (2004).

<sup>22</sup> Benvenisti, *supra* note 17.

<sup>23</sup> See Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in: *The Impact of International Law on International Cooperation* 85, Eyal Benvenisti/Moshe Hirsch (eds.), Cambridge University Press, 2004.

torical intention of the negotiators, thereby maximizing governments' influence on the outcomes of the interpretation process,<sup>24</sup> international tribunals have developed alternative interpretative approaches, such as "evolutionary interpretation",<sup>25</sup> which are inspired by systemic goals such as coherence and efficiency.<sup>26</sup> Recourse to the doctrine of customary international law allows judges wide discretion to make new law while couching it in existing practices. Indeed, international tribunals exercise considerable discretion in both "identifying" state practice and in determining whether following that practice reveals a state's acknowledgement of its binding quality, making it a customary international law norm.<sup>27</sup> Courts rarely engage in systematic review of state practice, instead relying on proxies such as adopted treaties or decisions of other international institutions as reflections of state practice.<sup>28</sup>

Moreover, international tribunals have promoted what Lauterpacht referred to as "the principle of effectiveness" in treaty interpretation to ensure that the treaties effectively achieve their goals, even reading into the texts additional obligations if necessary.<sup>29</sup> If a treaty establishes institutions, the courts will bolster those insti-

<sup>24</sup> Vienna Convention of the Law of Treaties, art. 31(1) (emphasis on "the ordinary meaning to be given to the terms of the treaty in their context"); *ibid.* art. 32 (reference to the preparatory work of the treaty and the circumstances of its conclusion).

<sup>25</sup> For this interpretation, see *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* Judgment, ICJ Reports 1997, 7, reprinted in: <<http://www.icj-cij.org/idocket/ihs/ihsjudgement/ihsjudframe1.htm>> (last visited July 15, 2007), 37 ILM 167 (1998). On the WTO Appellate Body's explicit preference of contemporary concerns over the historic intergovernmental agreements, see Richard H. Steinberg, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints, 98 Am. J. Int'l L. 247 (2004), (suggesting, for example, that, in its *Shrimp/Turtle* decision, the Appellate Body invoked "contemporary concerns of the community of nations about the protection and conservation of the environment" in its interpretation of the particular treaty by referring to "the secondary rank attributed to this criterion by the Vienna Convention, the lack of reliable records, and the ambiguities resulting from the presence of contradictory statements of the negotiating parties", despite the availability of records of the negotiations).

<sup>26</sup> Benvenisti, *supra* note 23. For a coherent interpretation, see the growing use of Article 31(3)(c) of the VCLT, for example, in the *Iron Rhine (JZEREN RIJN) Railway (Belgium v. Netherlands)* (award of May 24, 2005), available at: <<http://www.pca-cpa.org/ENGLISH/RPC/BENL/BENL%20Award%20240505.pdf>> (last visited Jan. 25, 2007).

<sup>27</sup> As Lauterpacht noted already in 1958, "In few matters do judicial discretion and freedom of judicial appreciation manifest themselves more conspicuously than in determining the existence of customary international law." Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, 368.

<sup>28</sup> As Meron has observed, "Notably absent from many of these cases [in which international tribunals invoke customary international law] is a detailed discussion of the evidence that has traditionally supported the establishment of the relevant rules as law." Theodor Meron, *Revival of Customary Humanitarian Law*, 99 Am. J. Int'l L. 817, 819 (2005).

<sup>29</sup> Lauterpacht, *supra* note 27, at 227-228 ("The activity of the International Court has shown that alongside the fundamental principle of interpretation, that is to say, that effect is to be given to the intention of the parties, beneficent use can be made of another hardly less important principle, namely that the treaty must remain effective rather than ineffective."). According to Lauterpacht, the "principle of effectiveness of obligations, conceived as a vehicle of interpretation, is an instrument of considerable potency. It may be as comprehensive as all the rules of interpretation taken together." *Ibid.* at 282.

tutions, strengthening their authority internally and externally. At the internal level, the court will reinforce an institution's authority and impact vis-à-vis state parties beyond what the negotiators intended. At the external level, the court will recognize the institution's status as a "subject" of international law that must be treated and recognized as such by non-member states.<sup>30</sup>

Only on rare occasions do scholars acknowledge this active role of international judges in shaping international law or discuss its legitimacy. There seems to be some concern that exposing the lawmaking function of tribunals would weaken them. But any such concern would be misplaced. To begin with, scholars must acknowledge this role for the simple fact that it exists. Moreover, this role must be recognized because its legitimacy is coming under growing criticism. Finally, justifying the judicial activism on moral grounds will bolster its legitimacy, which, in turn, will increase the effectiveness of the constitutional mindset.

The law-and-power inquiry therefore infuses the systemic or constitutional mindset with legitimacy. As discussed, this discourse grounds the legitimacy of bureaucrats and judges acting to counterbalance the influence of domestic interest groups that hijack the political process.<sup>31</sup> It is possible, but only possible, that these officials and jurists would counter the pro-small group lean of treaties in their interpretation of the texts and of state practice.

Philosophical reflections of contemporary global processes may also help to clarify questions of the legitimacy of the systemic or constitutional mindset. The growing interest of philosophers in the moral aspect of global allocation of competences and duties, which includes discussions on egalitarianism from a global perspective,<sup>32</sup> and, in particular, their increasing focus on the legitimacy of international law and specific international institutions<sup>33</sup> are a rich resource for legal scholars devoted to the constitutional project.

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<sup>30</sup> This stance is discernible also in the jurisprudence of the European Court of Justice (see Weiler, *supra* note 16) and, in fact, is common also in domestic courts.

<sup>31</sup> This is in line with the scholarship that justifies judicial review of domestic legislation on the basis of the flaws of the democratic system, see, e.g., Johan Hart Ely, *Democracy and Distrust*, 1980.

<sup>32</sup> See, e.g., Simon Caney, *Justice Beyond Borders: A Global Political Theory*, 2005; Thomas Pogge, *World Poverty and Human Rights*, 2002; Simon Caney, *Cosmopolitanism, Democracy and Distributive Justice*, 31 *Canadian J. Phil. (Supplementary Volume)* 29 (2006).

<sup>33</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004); Allen Buchanan/Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *Ethics & Int'l Aff.* 405 (2006); Simon Caney, *Cosmopolitan Justice and Institutional Design: An Egalitarian Liberal Conception of Global Governance*, 32 *Soc. Theory & Prac.* 725 (2006). Philosophers have begun to examine specific institutions like the IMF, the World Bank, and the WTO, see, e.g., Simon Caney, *The Responsibilities and Legitimacy of Economic International Institutions*, 2006 (draft manuscript, on file with author).

### 3. Acoustic Separation of Law and Power?

One could argue that the study of law should be kept distinct from the study of power and distinct from philosophical debates. There are obvious risks to admitting that lawyers – including legal scholars – not only interpret the world but also change it. Admitting the law-altering role of the “merely observing” lawyer might provoke claims of the illegitimacy of this role or its limited effectiveness. We know that politicians tend to underestimate the power of international judges and often make mistaken calculations when agreeing to delegate power to them. There is strong evidence to suggest, for example, that the negotiators of the WTO regime failed to realize the significance of establishing the Appellate Body.<sup>34</sup> So perhaps we should keep quiet? Many believe that, for the constitutionalist project to succeed, it must draw attention away from lawyers’ active law-making role. Like formalist judges, some scholars believe that their silence on this matter obscures their activism and thus shields them from criticism. And perhaps there are those who truly believe that, for example, when the WTO Appellate Body marries trade with labor rights or with the environment, the simple explanation is that this is merely in line with what the texts say, because this is the better argument.

So perhaps one way to ensure the divide between law and power is to maintain the divide between the rhetoric of positive international law, on the one hand, and the adjacent disciplines of philosophy and international relations, on the other. Under such an approach, legal scholarship would not engage directly in an analysis of morality or of power (including its own power), but would be informed by the insights garnered from neighboring disciplines. This was the solution proposed by the erstwhile international lawyer Hans Morgenthau, a German émigré to the U.S.<sup>35</sup> In 1940, he initially called for “a truly scientific theory of international law”,

<sup>34</sup> See Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement 9* (Jean Monnet Working Paper No. 9/00, 2000), available at: <<http://www.jeanmonnetprogram.org/papers/00/000901>>.

From interviews with many delegations I have conducted it is clear that, as mentioned above, they saw the logic of the Appellate Body as a kind of Super-Panel to give a losing party another bite at the cherry, given that the losing party could not longer block adoption of the Panel. It is equally clear to me that they did not fully understand the judicial let alone constitutional nature of the Appellate Body.

Richard Steinberg, *supra* note 25, at 251 n.27, states,

A few WTO DSU negotiators contemplated the possibility that in interpreting WTO agreements, the Appellate Body would engage in expansive lawmaking. However, most trade ministers consistently underestimated or dismissed that possibility, focusing instead on the virtues of its function of applying the rules.

See also Peter van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System*, Maastricht Faculty of Law Working Paper 2005/1, 2005, available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=836284](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=836284)> (last visited July 15, 2007) (analyzing the success of the Appellate Body despite early modest expectations).

<sup>35</sup> See Martti Koskeniemi, *The Gentle Civilizer of Nations*, 2001, 459. Morgenthau had embarked on a career in international law in Europe before immigrating to the U.S. in 1937 and becoming one of the founders of the discipline of international relations.

which must “come closer to the reality”.<sup>36</sup> His “functional theory of international law” was to “prepar[e] the ground for satisfying the greater ethical and political desire to improve international relations by means of the law”.<sup>37</sup> But ultimately, Morgenthau did not pursue his agenda within the framework of the study of international law. He felt that a more radical step was necessary and set out to found the new discipline of international relations. It was from within this latter discipline that ultimately, despite many initial doubts, international law became the subject of critical analysis.

Maintaining acoustic separation may thus be a useful solution for lawyers as they will thereby benefit from the insights of theories of power and interaction, while at the same time retaining the self-contained logic of the law. Where lawyers willingly admit that the law is open to several interpretative options, the understandings and observations from international relations theories and other relevant sciences that study “the laws which govern the social relations of men”<sup>38</sup> could be of indirect use to the interpreter. Similarly, this can be the case with respect to the philosophical discourse on global justice.

Yet, at the same time, it is imperative that we be aware of the limits of acoustic separation and the promise inherent in a more comprehensive approach. This point can be illustrated using the context of civil engineering. Kelsen likened the constitutional project to the construction of a pyramid of norms. We tend to focus on the pyramid’s horizontal and vertical dimensions, establishing the higher norms, their internal relationships, and their impact on lower level norms and on exceptional ones. But we do not discuss their external interface with life outside the pyramid, even though the strength, stability, and sustainability of any pyramid depend not only on the allocation of internal pressures but also on the operation of external ones. A pyramid must be constructed on foundations that take into account soil properties, soil dynamics, and slopes. A pyramid built on rock needs a different foundation from that built on sand. For legal engineers, power is what replaces soil properties and dynamics at the foundation of our normative pyramid. And philosophical inquiries into how our pyramid must be shaped are our equivalent to the aesthetic considerations that guide engineers.

In other words, in order to fully understand our legal pyramid, we must examine it not only from within but also from without. We can choose not to call the external view a “legal” view. But we must understand it all the same, for in so doing, we come closer to fulfilling our calling to interpret the world, as well as to suggesting how it can be improved. My main point is that open acknowledgement of the external input can strengthen the systemic thinking. Moral insight into the desirability of certain norms and institutions, along with the observation that treaties tend to privilege the powerful domestic interests and powerful states at the ex-

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<sup>36</sup> Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *Am. J. Int’l L.* 260, 273 (1940).

<sup>37</sup> *Ibid.* at 284.

<sup>38</sup> *Ibid.*

pense of the weak (or politically weak), only legitimizes the systemic mindset in the face of the criticism of its opponents.

## V. Conclusions and Suggestions

The traditional role of German international legal scholarship has been to imagine and re-imagine, build and rebuild, a system of international law. Perhaps precisely due to its success in this endeavor, it is increasingly being questioned and challenged. In my view, these challenges to this system's legitimacy and effectiveness cannot be assumed away. More importantly, they need to be tangibly addressed because exploring both issues will only enhance the project. German international law scholarship and, more generally, German public law scholarship have been indispensable in transforming international law and are equipped with all the necessary resources to continue to do so. It is possible to venture on analyzing the context without relinquishing the study of the system from within.

The Max Planck Institute has a unique capacity to engage in such a comprehensive approach to the study of international law. Perhaps the beginnings could be modest: specific inquiries into contemporary global concerns such as global warming, collective security, and global welfare. Working groups composed of lawyers and experts from the relevant fields (political scientists, economists, military personnel, meteorologists) will be able to assess the better legal institutions that should and can be constructed.

In some respects, this type of scholarship in international law is in no way revolutionary. Suffice it to recall how the laws of armed conflict have evolved: It was never the work of lawyers alone. Many have suggested that the efforts to codify the laws of war during the nineteenth century, from the Brussels Conference of 1874 through the two Hague Peace Conferences, were successful due to the active participation of military experts experienced in the realities of combat. Their involvement was based on the realization, guiding us in the global context as well, that lawyers need to know more about the context in order to produce a better text, that we will strengthen and sharpen our tools not only by scrutinizing the legal texts, but also by looking at their context.