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HISTORIES OF INTERNATIONAL LAW SYMPOSIUM

Historicizing a Classic

Wilhelm Grewe's Epochs of International Law in Context

MATTHEW G. SPECTER — 5 January, 2015

Response to Marcus Payk and Alexandra Kemmerer

For several years, I have been researching the intellectual biographies of two major figures in 20th century German political and legal thought: Hans Morgenthau and Wilhelm Grewe. As an intellectual historian with no formal legal training, but a professional interest in the history of international law in the German-speaking realm, the posts by Kemmerer and Payk spoke to me.

Hans Morgenthau (1904-1980), a German-Jewish lawyer trained in Munich, Berlin, and with Hugo Sinzheimer in Frankfurt, fled Nazi Germany in 1933. After years in

European exile, he began an academic career in the United States, obtaining fame at the University of Chicago, where he taught for thirty years. There he authored works like *Politics among Nations* (1948), a classic that was republished many times and is credited with a decisive influence on the nascent academic discipline of international relations. Stints as an adviser to George Kennan's Policy Planning Staff in the State Department were followed by service in the Kennedy and Johnson administrations. By 1965 he had become one of the most recognized dissenters from the U.S. war in Vietnam.

Wilhelm Grewe (1911-2000) began his legal career under Ernst Forsthoff in 1933, and taught law and the "legal foundations of foreign policy" in Berlin and Leipzig during the war. In 1951, Grewe was brought into the Foreign Office and rose to a series of prominent positions including Ambassador to the U.S. from 1958-1962. In retirement he published Epochs of International Law (1984), which had been substantially completed by 1944 but never published. The book, like much of Morgenthau's oeuvre, have been described as classics of *Realpolitik*.

In *Atlantic Realisms, 1930-1960: A Comparative History*, I aim to show that both Morgenthau and Grewe represent "paths from Schmitt", and that differences in intellectual and political context can account for differences in the so-called realisms they developed. In it, I build on existing work by Bardo Fassbender on Grewe and Martti Koskeniemmi on Grewe and Morgenthau on the history of reception of Schmittian ideas, but do not treat intellectual biography as an end itself. It follows my earlier publications on Habermas and Schmitt. Methodologically, it brings together a contextual approach to the transnational flow of political

ideas across the Atlantic, with a comparative and theoretical approach to questions of empire and world order in history and international relations. It builds therefore on a "historiographical turn" in international political thought, a field somewhat broader than the history of international law, but not entirely distinct from it.

Since David Armitage claimed the beginning of the end of a "fifty years' rift" between history and international relations in 2001, works by Richard Richard Tuck, Duncan Bell, Erez Manela, Jennifer Pitts, Karuna Mantena, and Nicholas Guilhot on the intellectual history of imperialism, international law, and international relations theory, have greatly advanced our contextual understanding of international political thought—and these advances have given me a sense of an intellectual community to which I can address my project.

Are existing histories of international law satisfactory?

In this regard, I think I am even more optimistic than Payk or Kemmerer, who both seem torn between pessimism and optimism. Payk notes that the recent "historiographical turn" in the international law written by lawyers "has gone largely unnoticed" by professional historians, and this lack of regard is deserved: "Despite the recent interest in fashioning a global history and in the postcolonial turn, little has changed. In other words, even when working on historical topics, lawyers are predominantly interested in understanding the law itself… Historians might find something lacking [in this]."

In his review of the *Oxford Handbook of the History of International Law*, Jacob Katz Cogan implies that this state

of the art work still has major limitations. Cogan cites Witt, who argues that international legal history is still in its pre-social history infancy, and Neff who admits, "Many blank spots exist." Both Cogan and Kemmerer see limits to the ability to achieve grand syntheses, or metanarratives: Cogan is of the opinion that "[m]any of the grand syntheses are outdated, written at too high a level of generality or thesis-driven", while Kemmerer states that "once we get beyond large syntheses …mutual awareness [between lawyers and historians] begins to thin." One of Cogan's chief examples of an "outdated" grand synthesis is Grewe's *Epochs*, which as Kemmerer rightly notes was still "firmly rooted" in the pre-San Francisco era, because it was substantially complete in 1944, (and only republished with minor updating in 1984).

But instead of discarding the grand synthesis, I am contextualizing it within Grewe's career as a whole, and from there make claims about German history, Atlantic history and the comparative history of empire. It is easy to show, in *Epochs* and ancillary texts published in Germany during the war, Grewe's preoccupation with Schmittian themes, among them the notion that the U.S. Monroe Doctrine of 1823 might serve as a model for the construction of a European *Grossraumordnung*. Schmitt had made the same argument beginning in 1939. I fully agree with Payk when he explains historians' desire to paint a portrait of international law *in* history – as he puts it:

"*Rather than vesting terms [like imperialism or sovereignty, pace Anghie] with an explanatory power of their own, historians would point to the specific acts, experiences and utterances that actually created the different meanings of these terms at different times. In fact, we know shamefully little about how international law arguments, actors and*

networks—going beyond the textbook laws and maxims—may have influenced national foreign policies and shaped the public imagination."

Based on findings in the Grewe *Nachlass*, Political Archive of the German Foreign Office, and elsewhere, I will show that Grewe was one such *actor who made international law arguments that influenced*–or better, implemented—the national foreign policies of the Third Reich in the 1930s and 40s. Writing for the *Jahrbuch der Weltpolitik*, a publication of the Deutsches Auslandswissenschaftliches Institut in Berlin in 1942, Grewe writes: "With the creation of a Reichskomissariat Ostland, wide expanses of Russian territory have come under German administration.... An enormous effort will be necessary to conquer this space. Its conquest will decide the world-political contest in our favor." Grewe's institutional affiliations placed him under the aegis and in the employ of figures whose own ideological-political profiles are quite unambiguous: Ernst Forsthoff, Fritz [Friedrich] Berber, Karl-Heinz Pfeffer, Franz Six, and Joachim von Ribbentrop.

What is meant by contextualism?

I find some limitations in both Payk's and Kemmerer's characterizations of the contextual historical method. Payk writes that: "Lawyers must accept that historians often insist on the contingency of the course of history and see international law not in terms of suprahistorical categories but instead as an epiphenomenon of distinct political and cultural processes." Contingent yes, epiphenomenon, no. There is no reason why a contextual historical method, *pace* Skinner or enhanced by the intellectual field theory of Bourdieu or other theorists, need reduce international law

to mere epiphenomenon. Both Payk and Kemmerer echo Cogan's phrase about law as a "deep product of its time", and therefore without any autonomous power to drive events. I prefer to think of ideas and processes dialectically, and without prejudging the relative power of one or the other. Thus in my view the relative weight of ideas and processes is the subject of the conversation between lawyers and historians, not a chronic stumbling block or disciplinary aporia.

Finally, I am entirely sympathetic to Kemmerer's plea for reflexive disciplinarity, i.e., foregrounding one's own interest in the materials in question, if it will reassure skeptics that a contextual method is not hiding an agenda behind an empiricist and objectivist façade. That said, I don't think that contextualism necessarily "sunders past from present", or depoliticizes, since the construction of the context can be a self-consciously political act, partial and perspectival, and still generate new and true propositions about the history of international law with discomfiting power.

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