

Buchbesprechungen

Wilhelm G. Grewe, *The Epochs of International Law*, Berlin (De Gruyter) 2001, Euro 148,-

I

This is a problematic, even disturbing book. Conceived and written during the Second World War, its first German edition was published as late as 1984 with a new part that covered the events from 1945 onwards. Although Grewe and his translator (Professor Michael Byers from Duke University) have written a new final part covering the developments until the end of the Millennium, they have left the original chapters substantially intact. As a result, the book comes with a culturally distinctive baggage compiled from sources in the academic milieu of the inter-war, that the author – like many other German lawyers – carried over to the Bonn Republic within which he came to hold a visible position, including those of West Germany's ambassador to Washington and the NATO.

When I was requested to review the English edition of 2001, I looked forward to the opportunity to return to a book parts of which I knew in the German version, but which I had never read from cover to cover. As I did this now, I was first struck by the tendentious political realism that animates this narrative of international law's great »epochs« succeeding one another from the establishment of the European States-system from the end of the 15th century to the present. The closer to the present I came, the more I heard familiar voices from the German inter-war scene speaking through Grewe's text. Max Weber's and Hans Morgenthau's theories about »power« as the somewhat mystical source of political authority and Friedrich Meinecke's ideas about the reason of State – and statehood – as the centre of social life, national or international, formed much of the book's

ambiance. Above all, however, Grewe's account of international law's »epochs«, each dominated by a single power whose ideas and concepts prevailed over those of its rivals and which was able to use law to confer »general and absolute validity on its national expansionist ideology« (p. 23), was the unmistakable *analogon* of Carl Schmitt's *Grossraumlehre*, first declared in a famous lecture in Kiel in April 1939. In fact, the book reads almost like a commentary, or expansion, of Schmitt's *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin, Duncker & Humblot, 1950) and never more so than in its description of the turn from the British predominance in the 19th century to the »Anglo-American Condominium« in the inter-war period, marked by a commercial universalism (»the invasion of politics by economic powers«, p. 591), the use of the League of Nations to further British and American interests, the description of the modern State in terms of what Schmitt used to call »total State out of weakness« – the expansion of the State into »the organising principle of society« (Grewe refers to Schmitt's notorious *Der Hüter der Verfassung* of 1931, p. 589) – and especially the turn to a morally loaded »discriminatory concept of war«.

That a book shows its intellectual heritage is of course fine – even if that heritage is not specifically discussed by the author. But in this case, as the narrative proceeds towards more recent times, and begins to participate in the political debate about how to understand the present by what immediately preceded it, this work becomes quite an astonishing example of historical forgetting, even forgery, and a baffling denial of Germany's special responsibility in the destruction not only of the Versailles system in the 1930's, but of the liberal optimism about modernity's automatic benefits that had animated internationalism since Kant's Perpetual Peace (1795).

The fact that there is no mention of Germany's destruction of European Jewry during World War II, and that one gets no understanding of the Nuremberg process (beyond the suggestion of its having been »victors' justice«) may be charitably credited to Grewe's ultra-realistic method. Every aspect of international history is for Grewe a reflection of struggle for power and prestige, and political and legal doctrines never more than academic superstructures or ideological facades. Wars are begun by nobody but just »break out«. But when every politics is essentially the same, the categories of right and wrong, or good and bad, become meaningless, and (for example) Hitler's policy just one among »several incompatible intervention claims« (p. 595). When such cold realism is applied to the catastrophes of the 20th century, with all sides portrayed as essentially »similar«, the result is a perverse exculpation of the German atrocities, a continued violation upon wounded communities, a crime of forgetting.

The account of the Versailles peace system of 1919–1939 is written as pure revisionism. The principal responsibility for the Second World War is laid on the weakness of the League of Nations, the decline of neutrality and the creation of an imperial system of recognition and non-recognition, manipulated by the United States. The author comments on the *Anschluss* and the occupation of the *Sudetenland* by noting that these acts were tacitly accepted by the Western powers (with a brief acknowledgement of a subsequent change in their attitude). The inter-war system was destroyed, Grewe writes, by »those same powers that had created [it]«, with the »last blow to this system« having been inflicted by Britain« (p. 618) – by Britain's renunciation of the use of arbitration or the permanent Court to cover the »hostilities« that had begun in September 1939. In a curiously revealing slip of the pen Grewe writes of the »International Legal Order of the Inter-War Period 1919–1944« as if the period's last five years would not have been years of »war« at all! For the fact is that the Second World War is practically non-existent in this book of 725 pages. There is just the Versailles League, a series of imperial »policies«, and then suddenly the United Nations, as the »Anglo-American Condominium« turns into the Cold War.

The killing of six million Jews and the annihilation of the Gypsy communities as parts of a deliberate German policy, or even the »conventional« war crime of the murder of three million Russian prisoners of war, receive no mention, not even euphemistically, in this book. As its first version was completed in 1944, Grewe may not have been aware of the full extent of the horrors. However, nothing excuses silence after the successive reviews and updates of the manuscript. Yet, the worst is perhaps not silence. For although Nazism or the German atrocities in the occupied territories receive no express treatment, they appear as the silent background of an attempt at relativization in remarkable passages that suggest that whatever may have happened, everybody is equally to blame:

»With the outbreak of war in 1939, both sides used supposed legal violations on the part of the other as a reason or only as a pretext, gradually to sharpen the means of warfare to the point where what is usually referred to as »total war« was achieved. This process of escalation began with air attacks against cities and civilian inhabitants, and with the sinking of merchant vessels without warning. In the course of the war it extended into all theatres, to the point where in land warfare the execution of hostages played a sad role as a reprisal against the activities of partisans« (p. 626).

»Against the activities of partisans« – as if the work of the *Einsatzgruppen*, the destruction of the Warsaw ghetto or the transport of whole populations into the death camps had been merely an excess in combating the enemy. The 1942 Wannsee Conference was not about »anti-partisan activity« but about wiping away every Jewish man, woman and child, not because they were a »danger« but because they existed. For Grewe, only two things appear noteworthy in the war of 1939–1945: the decline of neutral rights (reflecting Anglo-American moralism) and long-distance blockade and economic warfare (reflecting British and American strategies). The brief passages on Nuremberg fail to indicate why any German should have been accused in the first place – though they do note that Admirals Dönitz and Räder were not convicted because identical measures of blockade had been used on the Allied side (p. 635). In a distasteful piece of historical revisionism, Grewe associates himself with those (anonymous) critics who point out that the Nuremberg and Tokyo trials were victors' justice and that:

»those same victorious powers had committed acts of aggression and war in the course of the Second World War which, consistent with the Nuremberg Principles, had to be regarded as crimes against the peace, war crimes and crimes against humanity« (668).

But Grewe does not mention why the notion of »crimes against humanity« emerged, or what it was meant to cover. Again, the German crimes act only as a silent point or reference against which a sentence such as that which claims that the American bombing of Hiroshima and its »methods of warfare in the Vietnam war« are in »balance« (688) makes sense. That the German atrocities are in this way both non-existent and »in balance« with other peoples' crimes is both a particularly dishonest piece of revisionist propaganda and, in its relativist variant, reveals such colossal moral insensitivity that a dark shadow falls upon the whole book, whatever merits it might otherwise have.

II

For it cannot be denied that the early sections of the book make occasionally interesting reading. After reading awhile, however, Grewe's polemic realism rather too predictably reduces the legal institutions and doctrines of each period to aspects of a large struggle between the period's Great Powers. The catastrophic treatment of the 20th century inter-war era is preceded by four parts, each describing such basic structural aspects as the definition of »international legal community« and the subjects of the law in each period, how new members are accepted, and what types of legislation, adjudication or enforcement there were, with especial attention to the law on territory and the law of the sea. Brief sections deal with intellectual developments and academic doctrines, interpreted predominantly as ideological justification of the policies of the epoch's dominant power. I have no problem with treating legal doctrine in this way, familiar as it is from the writings of other political realists and certainly more credible than the old-fashioned international law orthodoxy that treats the early writers as humanist heroes, anachronistically representing what modern lawyers have the custom of admiring in themselves. But realism is not free of ideology, either, and as will be discussed in more detail below, may sometimes collapse into an aristocratic moralism.

The section on the Middle Ages highlights the way in which the modern State, the essential precondition of an international law, developed slowly from the breakdown of the feudal order and the universal pursuits of the Church and the Emperor. The discussion of the Spanish Age (1494–1648) shows both Catholic (Vitoria, Suarez) and Protestant (Grotius) writers combine their humanism with a legitimization of the expansive policies of their home States. Long sections on the just war and the formation of the new territorial order outside Europe interestingly parallel recent post-colonialist redescription of international law's past by highlighting the extent to which it had to do with organising Europe's relationship with the non-European world, a parallel that reappears in Grewe's treatment of the League's mandate system as a disguised imperialism (p. 582).¹ As every rule and doctrine is an apology for force and Empire, the only restraint is received from the balance of power (Grewe's main structural principle, pp. 19–20) that sometimes organises antagonistic actors into periods of temporary peace and order. Together with the *raison d'état*, the balance here receives a moral force that is a paradoxical aspect of much realist writing.² In Grewe, it provides the ground for such sweepingly normative claims as those that condemn the »zealots and starry-eyed idealists who were blind to or dazzled by the realities of world politics« (p. 667) that do not appear to need a normative defence at all.

The description of the French (1648–1815) and the British (1815–1919) periods focus on the way the particular institutions or doctrines developed in response to the policies and needs of the leading power. The lasting contribution of the French period was the universalist ideology of the revolution in which Grewe sees the origin of the humanitarianism that discriminates between the righteous and the criminal belligerent, as reflected later in the League and the Briand-Kellogg Pact (1928) as well as in the criminalising of the aggressor. France, of course, used the revolutionary ideas – including that of non-intervention – to carry out »monstrous interference« (p. 419) in other countries' con-

1 Cf. Antony Anghie, »Francisco de Vitoria and the Colonial Origins of International Law«, *5 Social and Legal Studies* (1996), p. 321–336.

2 On this generally, cf. especially Martin Griffiths, *Realism, Idealism and International Politics. A Reinterpretation* (London and New York, Routledge, 1992).

stitutional development. Its universalism was a »fiction« that »served to disguise an unrestrained policy of expansion« (421). All of this, Grewe concludes, with express reference to Schmitt, lifted the »traditional limits or ›hedgings‹ of war« and created the ideological basis for a total war against an adversary which, because he was a criminal, deserved no mercy (p. 423). It is odd how this Schmittian argument, too, forces political realism into a moral nostalgia about an imaginary period somewhere before the Revolution when wars were supposedly waged as »cabinet wars« in a restrained way between adversaries that regarded each other as *justus hostes* (p. 367–8).

Grewe's unrelenting realism leads him to include in his discussion of the British age a long section that explains how the abolition of the slave trade after 1807 did not emerge from principally humanitarian motives (though, he concedes, such motives were involved) but from British economic and political interest (pp. 554–569). The argument is probably not altogether wrong. What makes it disturbing in this context is the dogmatic – and perhaps old-fashioned – realism that animates it, leaving its own assumptions unexamined and again ending in an aristocratic, or Nietzschean, morality that extols the »courage« to see the world in terms of the naked truth of lust for power. This was a familiar posture of right-wing intellectuals in the Weimar Republic, carried over across the Atlantic in the writings of Hans Morgenthau.³ When morality is used to indict French, British and American hypocrisy, the implication is a quiet legitimation of German foreign policy in 1871–1944 as, simply, what everybody else had always been doing. Connected with Grewe's methodological silence about Germany's policy manoeuvres – its colonial wars in East Africa or against the Herero population in what now is Namibia, its obstructive opposition to arbitration in the Hague Conferences of 1899 and 1907, or the absence of any comment on its behaviour during the »July crisis« of 1917 or the violation of Belgium's neutrality at the outset of the war – the reader will inevitably – and rightly – feel that he is reading propaganda. This feeling is strongest in Grewe's description of the League as an extension of British

and American imperialism (especially p. 585–588) that was cloaked in a universalist ideology. Here the period's legal positivism as well as its naturalism stand accused. The former becomes an apologist of Empire by the circuitous route of rejecting of the 19th century limitation of international law to civilised States. As a truly universal system its disciplines everyone in the same degree. Naturalism, again, becomes an imperial instrument by incorporating secular notions of international justice (cf. e.g. p. 584). Again, Grewe's own realism leads into a moral position, as it were, by default. For, Grewe writes, there was universal ethics that would have corresponded to the League's or later the UN's universal ambition. Taking up Schmitt's originally anti-semitic argument, Grewe thus ends up in lamenting the empty normativism into which a universal concept of international law had fallen in the absence of shared »ethical standards« of universal import (p. 585).

The last section, superadded to the book to cover the events after 1984, brings the narrative to a conclusion. Though the logic of power has not changed for Grewe – no really new world order has been established (701) – he does envision the possibility of a »more closely integrated international community« (715). The end of the Cold War leads, again, to a universalism of sorts. At this point, however, the Schmittian critiques have become thin. Though Grewe thinks it »striking that most writing on democracy and international law has come from American authors«, this is not really portrayed as an aspect of the hegemonic struggle. The Epilogue is less critical and more descriptive than any of the previous sections. One wonders the extent to which that follows from Germany's finally receiving membership among the Great Powers, manifested in the book's last section that deals with the establishment of the Law of the Sea Tribunal in Hamburg. But the really awkward fact is that the epilogue makes no attempt to link itself to the previous chapters. No message is received from history. The book ends without a formal conclusion which in effect leaves Grewe's mechanistic realism alone on the stage of history, eating its way into any future age, making its purported morality always an instrument of the strongest power.

³ Cf. Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002), p. 437–465.

Grewe's *Epochs* appears today as a periodic piece from the discipline's least fortunate moment: infused with a cold Realism that was *en vogue* as its author conceived it, insensitive to the worst crisis faced by Western civilization. Methodologically dogmatic, the book shows no awareness of the paradox of a realism that reduces every normative institution or doctrine to an apology of brute force – apart from its own apology that seeks normative direction from its admiration power, internalised in an attitude of calculated brutality. Its history is the old history of Kings and wars and grand settlements, great periods slowly changing, never changing, under the monotonous rhythm of *the eternal return of the Same*. Why this translation now? Perhaps it reflects the post Cold War attitude that sees it respectable, again, to reflect upon Western Europe's legacy, manifested likewise in the establishment of the Journal of the History of Inter-

national law/Revue de l'histoire de droit international in 1999 and the symposia on the »European Tradition in International Law« in the European Journal of International Law. In the redescription of international law's history, the opportunity arises to emphasise some of its aspects while downplaying other aspects. But the choice of the silences in this books is a particularly objectionable act of political retouching. The profession that came up with the notions of crimes against humanity and genocide has a special responsibility for remembering what those notions once referred to. Grewe's forgetfulness can only turn to have positive value if it highlights the moral choices involved in the construction of disciplinary self-consciousness and demonstrates that even in this field, the work of *Vergangenheitsbewältigung* (mastering the past) is far from having been fully accomplished.

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