

### **Conference Report—The Intellectual History of International Law as a Research Field—“Lauterpacht and Beyond: Jewish/German Authorship and the History of International Law”**

By Felix Lange\*

#### **A. Introduction**

Publications on the history of international law written during the Cold War can almost be counted on one hand.<sup>1</sup> A pragmatically-oriented generation studied practical areas like UN Charter law, international trade law, or international environmental law, while the theory and history of international law played only a secondary role.<sup>2</sup> An intellectual history of international law, asking which ideas and concepts inspired and formed international law writing, hardly received any attention.<sup>3</sup>

Since the 1990s, researchers have more frequently turned to the historical roots of international law thinking. With the end of the Cold War, the *European Journal of International Law* started to publish articles on the life and work of influential European international lawyers from the 20th century like George Scelle, Hersch Lauterpacht, Dionisio Anzilotti, Alfred Verdross, Hans Kelsen, and Alf Ross.<sup>4</sup> Furthermore, international

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<sup>1</sup> Ingo Hueck, *The Discipline of the History of International Law - New Trends and Methods on the History of International Law*, 3 J. HIST. INT'L L. 194 (2001); Alexandra Kemmerer, *The Turning Aside: On International Law and Its History*, in PROGRESS IN INTERNATIONAL LAW, 71, 71–94 (Russell Miller & Rebecca Bratspies eds., 2008); for the few studies during this period, see ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (2d ed. 1954); WILHELM GREWE, EPOCHEN DER VÖLKERRECHTSGESCHICHTE (1984).

<sup>2</sup> See Martti Koskenniemi, *Why History of International Law Today?*, 4 RECHTSGESCHICHTE 61 (2004).

<sup>3</sup> But see ERNST REIBSTEIN, VÖLKERRECHT: EINE GESCHICHTE SEINER IDEEN IN LEHRE UND PRAXIS (1958).

<sup>4</sup> See, e.g., Antonia Tanca, *George Scelle (1878-1961): Biographical Note with Bibliography*, 1 EUR. J. INT'L L. 240 (1990); Chaim Herzog, *Sir Hersch Lauterpacht: An Appraisal*, 8 EUR. J. INT'L L. 299 (1997); Robert Jennings, *Hersch Lauterpacht: A Personal Recollection*, 8 EUR. J. INT'L L. 304 (1997); Hans Kelsen, *Tributes to Sir Hersch Lauterpacht*, 8 EUR. J. INT'L L. 309 (1997); Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 EUR. J. INT'L L. 215 (1997); Elihu Lauterpacht, *Sir Hersch Lauterpacht: 1897-1960*, 8 EUR. J. INT'L L. 313 (1997); Stephen M. Schwebel, *Hersch Lauterpacht: Fragments for a Portrait*, 8 EUR. J. INT'L L. 305 (1997); Iain G.M. Scobbie, *The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function*, 8 EUR. J. INT'L L. 264 (1997);

legal scholars began to examine more intensively the role of international law during the National Socialist dictatorship in Germany, especially Carl Schmitt's concept of the *Grossraumordnung*.<sup>5</sup> In 2001, Martti Koskenniemi released his extensive study, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, which has become the *Standardwerk* for the history of ideas of European international legal scholarship during the late 19th and 20th century.<sup>6</sup> In subsequent years, researchers engaged in discussions about the intellectual traditions of European integration<sup>7</sup> of the United Nations<sup>8</sup> or of “American” international law.<sup>9</sup> In Germany, the Max-Planck-Institute for

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Roberto Ago, *The European Tradition in International Law: Dionisio Anzilotti*, 3 EUR. J. INT'L L. 92 (1992); Antonio Cassese, *Realism v. Artificial Theoretical Constructs Remarks on Anzilotti's Theory of War*, 3 EUR. J. INT'L L. 149 (1992); Pierre-Marie Dupuy, *Dionisio Anzilotti and the Law of International Responsibility of States*, 3 EUR. J. INT'L L. 139 (1992); Giorgio Gaja, *Positivism and Dualism in Dionisio Anzilotti*, 3 EUR. J. INT'L L. 123 (1992); Jose Maria Ruda, *The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice*, 3 EUR. J. INT'L L. 100 (1992); Antonio Tanca, *Dionisio Anzilotti (1867-1950) Biographical Note with Bibliography*, 3 EUR. J. INT'L L. 156 (1992); Anthony Carty, *Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law*, 6 EUR. J. INT'L L. 97 (1995); Benedetto Conforti, *The Theory of Competence in Verdross*, 6 EUR. J. INT'L L. 70 (1995); Ignaz Seidl-Hohenveldern, *Recollections of Alfred Verdross*, 6 EUR. J. INT'L L. 102 (1995); Antonio Truyol y Serra, *Verdross et la Theorie du droit*, 6 EUR. J. INT'L L. 55 (1995); Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 EUR. J. INT'L L. 33 (1995); Geatano Arangio-Ruiz, *Personal Recollections*, 9 EUR. J. INT'L L. 386 (1998); Norberto Bobbio & Danilo Zolo, *Hans Kelsen, the Theory of Law and the International Legal System: A Talk*, 9 EUR. J. INT'L L. 355 (1998); Anthony Carty, *The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law*, 9 EUR. J. INT'L L. 344 (1998); Clemens Jabloner, *Kelsen and His Circle: The Viennese Years*, 9 EUR. J. INT'L L. 368 (1998); Nicoletta Bersier Ladavac, *Hans Kelsen (1881-1973) Biographical Note and Bibliography*, 9 EUR. J. INT'L L. 391 (1998); Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EUR. J. INT'L L. 287 (1998); Francois Rigaux, *Hans Kelsen on International Law*, 9 EUR. J. INT'L L. 325 (1998); Danilo Zolo, *Hans Kelsen: International Peace Through International Law*, 9 EUR. J. INT'L L. 306 (1998); Anthony Carty, *Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law*, 14 EUR. J. INT'L L. 817 (2003); Alejandro Lorite Escorihuela, *Alf Ross: Towards a Realist Critique and Reconstruction of International Law*, 14 EUR. J. INT'L L. 703 (2003); Martti Koskenniemi, *Introduction: Alf Ross and Life Beyond Realism*, 14 EUR. J. INT'L L. 653 (2003); Carl Landauer, *Antinomies of the United Nations: Hans Kelsen and Alf Ross on the Charter*, 14 EUR. J. INT'L L. 767 (2003); Ole Spiermann, *A National Lawyer Takes Stock: Professor Ross' Textbook and Other Forays into International Law*, 14 EUR. J. INT'L L. 675 (2003); Knud Waaben, *Alf Ross 1899-1979: A Biographical Sketch*, 14 EUR. J. INT'L L. 661 (2003); Henrik Zahle, *Legal Doctrine Between Empirical and Rhetorical Truth. A Critical Analysis of Alf Ross' Conception of Legal Doctrine*, 14 EUR. J. INT'L L. 801 (2003).

<sup>5</sup> See Detlev F. Vagts, *International Law in the Third Reich*, 84 AM. J. INT'L L. 661 (1990); Rüdiger Wolfrum, *Nationalsozialismus und Völkerrecht*, in RECHT UND RECHTSLEHRE IM NATIONALSOZIALISMUS (Franz-Jürgen Säcker ed., 1992); MATHIAS SCHMOECKEL, *DIE GROßRAUMTHEORIE: EIN BEITRAG ZUR GESCHICHTE DER VÖLKERRECHTSWISSENSCHAFT IM DRITTEN REICH, INSBESONDERE DER KRIEGSZEIT* (1994); see also MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND*, BAND 3, 374 (1999). Before 1990, most research was done by historians. See, e.g., Manfred Messerschmidt, *Revision, Neue Ordnung, Krieg. Akzente der Völkerrechtswissenschaft in Deutschland 1933-1945*, in 1 MILITÄRWISSENSCHAFTLICHE MITTEILUNGEN 61, 65 (1971); Dan Diner, *Rassistisches Völkerrecht. Elemente einer nationalsozialistischen Weltordnung*, 37 VIERTELJAHRSHEFTE FÜR ZEITGESCHICHTE 23, 56 (1990).

<sup>6</sup> MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001).

<sup>7</sup> See CHRISTIAN JOERGES & NAVRAJ SINGH GHALEIGH, *DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS* (2003).

<sup>8</sup> See U.N. INTELL. HIST. PROJECT, <http://www.unhistory.org> (last visited May 5, 2012).

European Legal History published a number of mostly biographical historical studies on German-speaking international lawyers.<sup>10</sup> Besides this rising number of studies, the inauguration of the German-based Journal of the History of International Law in 1999<sup>11</sup> demonstrates that international lawyers are increasingly inclined to study the history of their profession.<sup>12</sup>

The conference “Lauterpacht and Beyond: Jewish/German Authorship and the History of International Law,”<sup>13</sup> which was held on 12 September 2011 at Humboldt Universität zu Berlin, fits well into the picture of growing interest for the intellectual history of international law. The Berlin Research Network “*Recht im Kontext*” (Wissenschaftskolleg zu Berlin)<sup>14</sup> invited experts on international law and legal history to discuss the ideas of nine well-known German-speaking legal scholars of Jewish decent and their scholarly impact on international law in the 20th century. The first panel presented “the philosophers” Lassa Oppenheim, Hans Kelsen, Georg Jellinek and Erich Kaufmann; the second panel, “the practitioners” Isaak Breuer, Fritz Bauer, Eric Stein and Marie Munk. Furthermore, the participants debated Hersch Zvi Lauterpacht’s prominent 1933 oeuvre *The Function of Law in the International Community*.<sup>15</sup> As main themes, the symposium featured the influence of the Jewish descent on the scholars’ writing, the conception of

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<sup>9</sup> See MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789-1914* (2004); MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS 1776-1939* (2010).

<sup>10</sup> See JOCHEN VON BERNSTORFF, *DER GLAUBE AN DAS UNIVERSALE RECHT: ZUR VÖLKERRECHTSTHEORIE HANS KELSENS UND SEINER SCHÜLER* (2001); FRANK DEGENHARDT, *ZWISCHEN MACHTSTAAT UND VÖLKERBUND: ERICH KAUFMANN (1880-1972)* (2008); CLAUDIA DENFELD, *HANS WEHBERG (1885-1962): DIE ORGANISATION DER STAATENGEMEINSCHAFT* (2008); FLORIAN HERRMANN, *DAS STANDARDWERK: FRANZ VON LISZT UND DAS VÖLKERRECHT* (2001); FLORIAN HOFMANN, *HELMUT STREBEL (1911-1992): GEORGEANER UND ÖLKERRECHTLER* (2010); SANDRA LINK, *EIN REALIST MIT IDEALEN – DER VÖLKERRECHTLER KARL STRUPP (1886-1940)* (2003); BETSY RÖBEN, *JOHANN CASPAR BLUNTSCHLI, FRANCIS LIEBER UND DAS MODERNE VÖLKERRECHT 1861-1881* (2003); STEPHANIE STEINLE, *VÖLKERRECHT UND MACHTPOLITIK GEORG SCHWARZENBERGER (1908-1991)* (2002); see also *the synthesis* MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, VIERTER BAND, STAATS- UND VERWALTUNGSRECHTSWISSENSCHAFT IN WEST UND OST 1945-1990*, (2012).

<sup>11</sup> Issues of the Journal of the History of International Law are available at <http://brill.nl/journal-history-international-law-revue-dhistoire-du-droit-international> (last visited May 5, 2012).

<sup>12</sup> Matthew Craven argues that the rising interest in history was triggered by the newly found optimism after the Cold War on the one hand and the concerns about the hegemonic character of international law on the other. Matthew Craven, *Introduction* to *TIME, HISTORY AND INTERNATIONAL LAW* 4, 4-6 (Matthew Craven, Malgosia Fitzmaurice & Maria Vogiatzi eds., 2007).

<sup>13</sup> The conference program is available at [http://www.rechtskulturen.de/fileadmin/pdf/rechtskulturen/Workshop/Workshop\\_III.pdf](http://www.rechtskulturen.de/fileadmin/pdf/rechtskulturen/Workshop/Workshop_III.pdf) (last visited May 5, 2012).

<sup>14</sup> The conference was part of its *Rechtskulturen* program. *Rechtskulturen: Confrontations Beyond Comparison*, FORUM TRANSREGIONALE STUDIEN <http://www.rechtskulturen.de/en/profil.html?PHPSESSID=80bc3059d8c00bd628b121fdd3c5413d> (last visited May 2, 2012).

<sup>15</sup> See HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (2000).

international lawyers as theorists or practitioners, and the significance of Lauterpacht's *The Function of Law in the International Community* for contemporary international law.

### B. The Role of Jewish Identity

Jewish identity and its impact on international legal scholarship had been a *leitmotiv* for the symposium's organizers. Reut Paz, the initiator of the conference, introduced the meeting with a reference to the infamous conference, *Judaism in the German legal science* (*Das Judentum in der Rechtswissenschaft*) of October 1936, which had been coordinated by Carl Schmitt. While the participants of the 1936 conference tried to demonstrate how "der jüdische Geist" (the Jewish spirit) had contaminated German and international law,<sup>16</sup> Paz suggested that the 2011 conference should follow in the footsteps of Hugo Sinzheimer, the father of German labor law. In *Jewish Classical Thinkers in German Legal Scholarship* (*Jüdische Klassiker der deutschen Rechtswissenschaft*), Sinzheimer writing in exile in 1938, pointed to the manifold and complex individual contributions of scholars with Jewish backgrounds on German legal thinking. Paz explained that the question of why so many of the leading international lawyers of the 19th and 20th century had a Jewish background had motivated her research on Jewish-German speaking international lawyers.<sup>17</sup> For Paz, the special attraction between German speaking Jews and international law was at the core of the conference.

The question about the Jewish identity of international lawyers triggered a lively debate among the conference participants. The first panel on the philosophers, consisting of Monica Garcia Salmones, Jochen von Bernstdorff, Florian Hofmann, and Michael Stolleis, seemed to be rather skeptical of a strong correlation between Jewish heritage and international legal scholarship.

Garcia Salmones argued that Lassa Oppenheim (1858–1919), the inaugurator of the famous reference book *Oppenheim's International Law*,<sup>18</sup> regarded himself as an agnostic liberal cosmopolitan who had substituted the faith of his forefathers with science and knowledge. The key to understanding his scholarship was not his religious background but his acquaintance with civil law as well as with the common law tradition. Garcia Salmones stressed that with Oppenheim's move to England in 1895, he left behind much of his German philosophical background and became a British pragmatist and positivist. However, despite his secular approach to law, Judaism still might have played a role in

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<sup>16</sup> Carl Schmitt concluded that, "the Jew is only unproductive and sterile with respect to the German Geist." Carl Schmitt, *Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist*, DEUTSCHE JURISTEN-ZEITUNG, Oct. 1936, at 1196.

<sup>17</sup> REUT PAZ, A GATEWAY BETWEEN A DISTANT GOD AND A CRUEL WORLD: THE CONTRIBUTION OF JEWISH GERMAN-SPEAKING SCHOLARS TO INTERNATIONAL LAW (forthcoming 2012).

<sup>18</sup> LASSA FRANCIS LAWRENCE OPPENHEIM, INTERNATIONAL LAW: A TREATISE (1905).

Oppenheim's life. Garcia Salmones indicated that Oppenheim was engaged in Zionist activities.

Jochen von Bernstorff presented Hans Kelsen (1881–1973), the famous author of *Pure Theory of Law*. Bernstorff pointed to socio-political conditions rather than religious heritage in order to explain the motivation for Kelsen's scholarship. Bernstorff put forward that Kelsen's central beliefs in the pacifying force of law and in science as an engine for social progress were often shared by the liberal, Central European, German-speaking bourgeoisie who "not necessarily, but often" were of Jewish origin. However, according to Bernstorff it was the experience with the Austro-Hungarian empire that formed the convictions, since it had been "the force of the law that had been perceived as holding together the multi-ethnic Austro-Hungarian empire, bound to replace the missing homogenous society, in the absence of common cultural foundations." In his autobiography, Kelsen acknowledged that his *Pure Theory of Law* had been shaped by the Pre-World War I Austrian context. Nonetheless, von Bernstorff conceded that from the outside Kelsen was perceived as a Jew. Even though Kelsen converted from Judaism to Catholicism in 1905 and from Catholicism to Protestantism in 1912, nearly all of Kelsen's moves from Vienna to Cologne, to Geneva, Harvard and Berkeley had an anti-Semitic background.

Florian Hofmann similarly emphasized the socialization of Georg Jellinek (1851–1911) in the complex, multi-ethnic Austria-Hungarian governance system as a key influence on his writing. Jellinek, the integrator and moderator, not only came to be the predominant theoretical jurist of his time through combining objectivity and voluntarism, but also studied the practical and social implications of the law. Hofmann stressed that Jellinek, because of his Austro-Hungarian background, might have understood better than others what it meant for the early imperial Germany to create a common citizenship. In relation to Jellinek's religious heritage, Hofmann emphasized that Jellinek had been raised in a liberal, reform-oriented Jewish family—his father being the chief rabbi of the most important synagogue in Vienna—and suffered in his academic career by being branded as a Jew. Nonetheless, he was "no exegete" of his own faith and did not refer to his "Jewishness" in his work. Hofmann put forward that still one might find traces of the Jewish tradition in his occupation with such terms as *promise, covenant, responsibility, and freedom*, even though one had to be careful not to fall into dangerous speculation.

Michael Stolleis strongly dismissed the claim that "Jewishness" had a significant influence on the writing of Erich Kaufmann (1880–1972). Stolleis presented Kaufmann, one of the leading public law and international law scholars during the Weimar Republic, as an academic who renounced legal positivism and neo-Kantianism and embraced a form of "Protestant natural law." Stolleis argued that to regard Kaufmann, who had been baptized as a Protestant, as a Jewish expert in international law, would mean to "classify him according to the absurd categories of the Nazis." For Stolleis, Kaufmann never wanted to be Jewish. Rather he was a bourgeois intellectual, legal philosopher, expert in

international law, diplomat, and scholar who embraced the Protestant, Prussian-dominated Wilhelminic Reich. Stolleis concluded that Kaufmann belonged to those Germans who had abandoned their Jewishness.

In the discussion that followed the first panel, one group of participants supported the panels' rather cautious approach to "Jewishness" as the intellectual stimulus for Kaufmann, Oppenheim, Kelsen, and Jellinek. Ulrich K. Preuß agreed that instead of following Jean Paul Sartre's classical thesis that Jews turned to cosmopolitanism because they had no particular nation to turn to, Kelsen's approach to international law could more plausibly be explained as a reaction to nationalism and particularism in the multi-ethnic Austro-Hungarian empire. Similarly, Phillippe Sands pointed to Lauterpacht's socialization in Lviv (Lemberg /Lwow), during his formative period as a young man at law school, as helpful for understanding the motivation behind Lauterpacht's writing. Sands stressed that in a period of only four and a half years, six different sovereigns ruled the city which was divided between hostile groups of Poles, Ukrainians, and Jews. According to Sands, for Lauterpacht "law represented security against mayhem."

The skepticism about "Jewishness" as an important factor in the life of the "philosophers" did not go unchallenged. Paz underlined that all of the international legal philosophers came from rabbinic households and that, for instance, Jellinek took parts of his ideas about psychology from his father, who was a cabalistic theorist. Amos Israel-Vleeschouwer suggested that it might be helpful to talk of "Judaisms instead of one Jewish thought". For instance, Jellinek's writing could be described as a form of scientific cosmopolitan Judaism. Furthermore, Koskenniemi depicted the Galician-born Hersch Zvi Lauterpacht (1897–1960) as strongly influenced by his Jewish background. After leaving the Galician university because of the *numerus clausus* that affected Jews, the Zionist Lauterpacht moved to Vienna where he was elected President of the World Federation of Jewish students. Even though Lauterpacht ended his activities as a Jewish Zionist after his move to Britain in 1923, he still worked as a legal advisor for Jewish organizations on issues of international law and participated (not very successfully) in the declaration of Israeli independence. Koskenniemi conceded that it might turn out that "Jewishness" did not motivate the writing of Lauterpacht or his colleagues of Jewish descent. However, he argued that some distinctive features are common among all of the "philosophers" of Jewish descent. Firstly, in contrast to their Christian contemporaries like John Westlake, Tobias Asser, Louis Renault, Johann Caspar Bluntschli, and Walther Schücking, they shared a certain reluctance to approach international law through practice and were neither pacifists nor arbitration enthusiasts. Secondly, they believed that by going deeper into scholarship, they would contribute to improving the condition of the world. Koskenniemi suggested that there might be something "Judaic" to this.

The second panel consisting of Amos Israel-Vleeschouwer, Joachim Perels, Marion Röwekamp and Alexandra Kemmerer also debated the question of Jewish identity. With the exception of Röwekamp on Marie Munk, the presenters were more inclined than the

“philosophers” panel to attribute a significant role to Judaism and Jewish identity for explaining the practical occupation and international law writing of the “practitioners” Isaak Breuer, Fritz Bauer and Eric Stein.

Israel-Vleeschouwer presented Rabbi Isaac Breuer (1883–1946), one of the leading ultra-orthodox thinkers and activists, as a neo-Kantian philosopher and theorist of law who practiced international law by representing the ultra-orthodox Jewish organizations before the United Nations. Israel-Vleeschouwer characterized Breuer’s work as a Jewish ultra-religious critique of nationalism, individualism and rights-based regimes, and he demonstrated that Breuer made many references to divine law, God, and Judaism in his work. According to Breuer, because sovereignty was heresy, one had to try to save humanity through “an infinite good law.” As an example, Breuer pointed to the *Peace of Jerusalem* where a society “while serving God’s law found harmony on earth.”

In his paper on Fritz Bauer (1903–1968), Joachim Perels, who could not be present in person at the conference, stressed that Bauer had been a fierce social democrat and *Reichsbanner* fighter during the Weimar Republic. Bauer, who came to be the central figure for the persecution of national socialist crimes in the early Federal Republic, was interned in the concentration camp Heuberg after the national socialist takeover. In his book *War Criminals Before Court*, Bauer, writing in Swedish exile in 1944, examined how national socialist elites could be brought to justice under international law. While Perels held that Bauer was not a practicing Jew and that his ideas were mainly based on Hugo Grotius’s concept of state crimes, he hinted that a look into the Old Testament reveals some roots of his thinking about justice.

Kemmerer introduced Czech-American Eric Stein (1913–2011), a German-speaking Jewish émigré and the first legal scholar in the US to do research on and teach the Law of European Integration.<sup>19</sup> Before starting his academic career, which made him one of the most influential international lawyers in the United States, Stein had fled from Czechoslovakia to the United States after the National Socialist invasion in 1939. Kemmerer argued that the “legal entrepreneur” Stein was strongly influenced by his immigration to the United States, his experience of exile, and his Czech and European heritage. Even though Stein identified himself as agnostic, his Jewish background impacted his thinking. In a letter to a colleague late in his life, Stein declared: “Despite my abominable religious education, deep down I have never succeeded in breaking the bond and I am left with my inarticulate longing to believe in the myth.”

Röwecamp did not find traces of her Jewish heritage in the work of Marie Munk (1878–1975), who was the first female law student and female attorney in Prussia, and became

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<sup>19</sup> See Alexandra Kemmerer, *Europa ließ ihn nicht los: Zum Tod des großen Rechtsgelehrten Eric Stein*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 3, 2011, at 32.



one of the first judges and a leading politician on family law in the Weimar Republic. In 1934, after the National Socialist take-over, Munk was dismissed as a judge and sought exile in the United States, where she worked as a lawyer. Röwekamp argued that despite her émigré experience, Munk's approach to the law was characterized by her gender and class. While Munk was born to a Jewish mother, and thus the *Nürnberger Gesetze* categorized her as Jewish, she never referred to her Jewish heritage in private correspondences nor in her professional life. Röwekamp proposed that Munk "chose" to be a woman over being Jewish.

The framing of the conference around the question of "Jewishness" and "Jewish identity," hence, led to an energetic controversy. While there was agreement that all of the scholars were perceived and treated as Jews by the outside world, there was controversy especially in relation to the "philosophers" whether an intrinsic "Jewish" motivation inspired Kaufmann, Oppenheim, Kelsen, Jellinek and Lauterpacht to turn to international law.

One could argue that a methodological problem is partly responsible for the divergent views. How does one detect the impact of Jewish origin if a writer does not explicitly refer to it in his writing? For some, this simply is evidence that there exists no connection. For others, the absence of reference can be read as a form of "suppressed Jewish identity." As one of the participants put it, if one understands identity as individuals having a specific relationship to their background and reacting in a certain way to it, negative reactions like conversion and self-description as an agnostic might also be interpreted as expressions of Jewish heritage. Regrettably, methodological issues did not receive much attention at the conference. It seems that a deeper reflection on what "identity" means, and whether and how a concept of identity could be used as a tool to explain academic scholarship would have enriched the discussion.

After "Lauterpacht and beyond," the question about what explains the correlation between Jewish heritage and international law scholarship still seems not to be answered satisfactorily. On the one hand, if there is something to the claim that Jews turned to international law because they had no nation state to turn to, how can this be squared with the Zionist activities at that time? On the other hand, if it is true that for converted Jews, their Jewish identity did not matter at all, it still has to be explained why such a high number of German speaking individuals of Jewish descent, even if converted, came to be the leading international lawyers in the 20th century.

There might exist alternative or additional factors besides Jewish identity that explain why so many international lawyers were of a Jewish background. For instance, one could argue that the overrepresentation of international lawyers with Jewish backgrounds in the profession is due to Jewish academic achievements in that period, in general. As Paz laid out, 16–18% of legal academia in both Austria and Germany was of Jewish descent, even though Jews accounted for less than 1% in the population in Germany before the rise of national socialism. It might be that a particular appreciation of education in German



speaking Jewish bourgeois families led to their children's success, academically and as international lawyers. Furthermore, as Cindy Daase suggested, instead of concentrating only on "Jewishness," it might be interesting to ask whether and how "minorities" in general influenced the writing of international law or the international law project. More scholarship on these issues promises to be rewarding.

### C. International Lawyers as Theorists or Practitioners

A second main theme of the conference was the self-perception of the international law profession. Are international law professors best described as theorists or as practitioners? Most of the participants agreed that the scholarship of German speaking academics of Jewish origin during the 20th century reflected a turn from theory to pragmatism.

Christoph Möllers pointed to a move from theory to practice in the day-to-day occupation of an international lawyer between the 1880s and the 1920s. In the late 19th century, a public law jurist and international lawyer had to engage with theoretical problems of the law simply because not many cases existed. Möllers suggested that Oppenheim might be regarded as "shift[ing] the self-description of what a professor of international law really does" by taking a more practical approach to international law in the later stage of his career. Garcia Salmones assented and stressed that Oppenheim's connections with US international lawyers spurred his reinvention as a practitioner. Bernstorff pointed out that—at least for Germany—the Versailles Treaty and the presence of the League of Nations created the need for international lawyers as practitioners. Even the theorist Kelsen turned to more practical questions when he wrote his critique of the League of Nations in 1937.<sup>20</sup>

In the eyes of the conference participants, after World War II practice became even more center-stage in the international law profession. It seemed to be no coincidence that of the two generations of scholars, the "philosophers" Oppenheim, Jellinek, Kelsen, Kaufmann, and Lauterpacht wrote their most influential pieces in the 1920s and 1930s or even before, while at least Bauer and Stein of the "practitioners" had their strongest professional influence after 1945. The speakers debated what caused this shift to practice and how one should judge it.

Stolleis explained that German international lawyers after World War II were preoccupied with rebuilding Germany's international reputation and thus lacked the intellectual energy to revive the debates of the 1920s and 1930s. Furthermore, in his view the loss of the Jewish intelligentsia, who often did not return to Germany after the war, accelerated the turn to pragmatism. Kemmerer remarked that, after the war, it was not only in Germany

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<sup>20</sup> HANS KELSEN, ZUR RECHTS-TECHNISCHEN REVISION DES VÖLKERBUNDSTATUTS (1937).

that international lawyers took a pragmatic approach to international law. For lawyers teaching in France and the United States like René Cassin, Paul Reuter, Eric Stein, and Louis Henkin, a theoretical approach such as Kelsen's was interesting but did not help respond to the pressing practical issues of the time.

Evaluating the turn to practice caused some controversy. Koskenniemi expressed his deep disappointment over the push back of theory after 1945. He argued that in the 1960s in Germany, Hermann Mosler at the Max-Planck-Institute for Comparative Public Law and International Law at Heidelberg founded a tradition, speaking in terms of a "rather unproblematic" international community that was "light years away from the complexity of the writings in the 1920s and the 1930s." Koskenniemi dismissed the "impoverished pragmatism" of contemporary international law, which he described as stemming from a specialized, managerial world being built under a technical and economically oriented globalization. He postulated to abandon "McDonalds law" and suggested learning from the debates of Lauterpacht and his colleagues. Phillippe Sands challenged the view that international scholarship of the inter-war years was superior to today's. Sands argued that the pre-war discussions were not taken up in Great Britain because a significant structural change had occurred. In his view, international law has evolved beyond issues like whether international law really is law because "the Lauterpacht vision took root." Koskenniemi conceded that the "stupid" question about whether international law really is law has gone, but noted that issues about what law is, what an international lawyer does, and how law relates to nationhood, the international sphere, or to democracy are not on the agenda of international lawyers today.

Like the controversy about Jewish identity, discussions about the turn to practice might open up a new set of questions. Are there additional factors that enhanced the "practical turn" in international law? For instance, it might be that the rise of the United States as the Western super power led to the Americanization of the German philosophic tradition. German international lawyers might have adapted the American pragmatic approach to international law as a model for their own endeavors. Furthermore, it could also be that post-1945 German international lawyers deliberately decided to focus on a rather empirical, practical method of international law scholarship because in their view the horrors of the Holocaust and World War II had discredited grand theories and ideologies.

More generally, the debate on the turn to pragmatism seems to have relevance for the self-conception of the profession today. Are international lawyers today practitioners or theorists? Kemmerer indicated that in contemporary scholarship one could witness an increased occupation with theory, while Koskenniemi seemed very skeptical of that observation. What is the day-to-day occupation of international lawyers? What should it be? The conference demonstrated that the history of international law writing can be understood as an exercise in self-reflection.

#### **D. *The Function of Law in the International Community and Contemporary International Law***

Hersch Zvi Lauterpacht was the intellectual inspiration of the symposium. Former International Court of Justice (ICJ) President Stephen M. Schwebel once described Lauterpacht's achievements as "unsurpassed by any international lawyer of [the 20th] century . . . he taught and wrote with unmatched distinction."<sup>21</sup> Most of the participants at the conference seemed to sympathize with this statement. Koskenniemi presented the newly edited version of Lauterpacht's main book *The Function of Law in the International Community*, originally published in 1933.<sup>22</sup> Koskenniemi introduced four central themes of Lauterpacht's writing: The description of international law as a system, presenting international law as international governance through international institutions, the idea of international community consisting of individual human beings, and a form of "functional pragmatism," a "need to engage with international institutions in reforming the world through law." According to Koskenniemi, it was Lauterpacht who "invented" these aspects that are central to the contemporary discussion in international law. For Koskenniemi, Lauterpacht's life and work best represents the maturity of international law during the interwar era.

Sands and Isabel Feichtner agreed with the depiction of Lauterpacht's manuscript as one of the key international law books. For Sands, the "radical book" still resonates today because of its modernity and its relative comprehensiveness. Particularly, Sands admired Lauterpacht's fearlessness and independence of spirit in articulating his vision against the mainstream. Feichtner stressed that three themes of the manuscript could particularly enrich the contemporary discussion: Lauterpacht's idea of the international community gradually becoming reality through progress in legal and political integration, the question about the object and method of international legal scholarship, and his description of the role of the judge in the international legal system.

Yoram Shachar was more skeptical of Lauterpacht's writing. He expressed his fear about the "utopia of international law" and the "audacity of the dream." Shachar asked, "By idealizing Lauterpacht and other idealist" would one not create "the basis for mega tyranny?" In Shachar's view, a world organization ruled by law would inevitably be abducted by tyrants, and in that case, refugees would have no state to turn to.

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<sup>21</sup> STEPHEN M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* (1987).

<sup>22</sup> For reviews of the book, see: Isabel Feichtner, *Sir Hersch Lauterpacht: The Function of Law in the International Community*, 22 *EUR. J. INT'L L.* 1177 (2011); Alexandra Kemmerer, *Lauterpacht, Hersch: The Function of Law in the International Community*, *FRANKFURTER ALLGEMEINE ZEITUNG*, Sept. 29, 2011 at 36, available at <http://www.gbv.de/dms/faz-rez/FD1201109293248950.pdf>.

Besides Shachar's critique, the participants who embraced *The Function of Law* in general, also pointed to one weakness in Lauterpacht's approach. Koskenniemi criticized Lauterpacht for not elaborating on the close link between law and politics. While Lauterpacht treated the two as distinct phenomena, Koskenniemi stressed that law is politics because every legal institution is an institution that operates power. Sands underlined that judges often come to judicial results by integrating political considerations in their thinking, especially if terms like *equitable* have to be interpreted. Feichtner agreed that there was an important place for politics in international law and international relations, which Lauterpacht missed. Kemmerer described a feeling, shared among the participants, of a certain uneasiness with the idealized preeminence of the rule of law and the completeness of law in Lauterpacht's account, an account that did not leave much space for political contestation.

#### **E. History of International Law and Its Potential**

Despite the rising interest, the intellectual history of international law is still to a large extent unexplored territory. As Christoph Möllers pointed out, German law faculties are having a hard time transforming into research institutions that are open to historical, sociological, and philosophical research. The conference, however, can be seen as a step towards opening up interdisciplinary scholarship. It revealed various potential routes for further research.

Besides the issues treated above, the participants also raised other intriguing questions. Paz, for instance, pointed to the relationship between "German public law" and international law scholarship, and Koskenniemi asked the German international legal academy to start looking at its own heritage and analyze the context of the debates in the 1920s. Does a specific German tradition in international law exist? If yes, what are its elements and under which conditions did it emerge? Furthermore, Helmut Aust underlined that the ongoing discussion about the constitutionalization and fragmentation of international law was indebted to the work of Lauterpacht and his colleagues. Aust described Kelsen and Lauterpacht as the "building blocks" for the debate of constitutionalization, and mentioned Stein for contributing constitutionalist language and references to federal structures. It seems promising to examine the roots of contemporary theory more closely and to analyze under which sociopolitical and cultural circumstances the ideas were constructed.

On a more abstract level, tracing the roots of international law scholarship in the 20th century has the potential to assist international legal scholars in conceptualizing their own role as academics. The historical studies enable scholars to renegotiate the ideas of their predecessors in the context of an increasingly globalized world. Also, knowing what motivated international legal scholars and how international legal scholarship functioned in the past can provide assurance and orientation today. Koskenniemi argued at the conference that the international lawyers of the 1920s and of today have certain

trademarks: The belief in rationality, individualism, and international institutions combined with a certain sentimental inclination to try to do good in the world.

Are international lawyers today really motivated by a “romantic idea about world unity”? What would this mean for their scholarship? As Paz articulated: How can one theorize the way one’s identity as an individual affects the professional enterprise? Whatever the answers to these questions may be, it seems quite clear that today’s scholarship can only benefit from a deeper and improved understanding of the contexts and factors that shaped international law writing in the past.