Rainer Hofmann, Stefan Kadelbach (eds.)

Law Beyond the State

Pasts and Futures

NORMATIVE ORDERS

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Law Beyond the State

Normative Orders

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Edited by Rainer Forst and Klaus Günther

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Rainer Hofmann and *Stefan Kadelbach* both are Professors of Public Law, European Law and Public International Law at Goethe University Frankfurt am Main.

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Law Beyond the State—Pasts and Futures: An Introduction

Rainer Hofmann

I. Introduction

On 10 June 1914, Emperor Wilhelm II signed—albeit in his capacity as King of Prussia which had annexed Frankfurt in the aftermath of the Prussian-Austrian war of 1866 thus terminating its century-long status of *Freie Reichsstadt*—the decree granting the foundation of a university in Frankfurt am Main. The final step was taken on 1 August 1914 when Wilhelm II assented to the statutes of the university. Due to the ongoing war, the inauguration on 26 October 1914 is reported to have been more sober than originally planned; lectures began the following day thus successfully ending a long and often protracted process initiated and carried forward by a number of outstanding personalities such as *Franz Adickes*, long-time mayor of Frankfurt, and *Wilhelm Merton*, founder of *Metallgesellschaft* who had succeeded in mustering the political and above all very strong financial support of leading and affluent members of Frankfurt's traditionally cosmopolitan and liberal *bourgeoisie* characterized by its very high percentage of Jews; their very substantial endowments made Frankfurt University a true citizens' university, financially independent from any Prussian state support.[1] The Faculty of Law[2], one of the five initial faculties, comprised seven full professors (*Ordinarien*) among whom

1 For an account of the history of the foundation of Frankfurt University see Ludwig Heilbrunn, Die Gründung der Universität Frankfurt am Main, Frankfurt 1915.

2 For a presentation of the history of the Faculty of Law see Bernhard Diestelkamp, Kurzer Abriss einer Geschichte der Fakultät/des Fachbereichs Rechtswissenschaft der Johann Wolfgang Goethe-Universität zu Frankfurt am Main bis zum Ende des 20. Jahrhunderts, in: Fachbereich Rechtswissenschaft (ed.), 100 Jahre Rechtswissenschaft in Frankfurt. Erfahrungen, Herausforderungen, Erwartungen, Frankfurt 2014, 11–104.

Friedrich Giese[3] who was tasked to teach Public Law, including Public International Law.

Commemorating the 100st anniversary of its foundation, Frankfurt University and a number of its institutions organized workshops and other academic events throughout 2014. Considering the eminent role usually accorded to Frankfurt scholars for the development of international law, the Faculty of Law convened, on 11 June 2014, in cooperation with the Cluster of Excellence "The Formation of Normative Orders", a workshop analyzing the role of Frankfurt in the past development of both Public International Law and European (Union) Law as well as looking into the futures of these branches of law as essential components of a "Law Beyond the State": *Michael Bothe* discussed, from a historic point of view, *Public International Law in Frankfurt*; *Martti Koskenniemi* shared his thoughts on *International Law's Futures—Yesterday, Today, Tomorrow*; *Ingolf Pernice* presented his project on *Global Constitutionalism and the Internet. Taking People Seriously*; and *Joseph H.H. Weiler* developed his vision on *Taking (Europe's) Values Seriously.*

These papers, some of them substantially enlarged and revised, and complemented by an article by *Stefan Kadelbach* on *Frankfurt's Contribution to European Law*, are assembled in this publication in order to make them available to the public-at-large.

II. The Pasts

While German-speaking scholars always had played an important role in the development of international law, both as concerns its inter-state aspects as *Völkerrecht* as well as its conflict-of-laws aspects as *Internationales Privatrecht*, this situation was not reflected in any institutional academic settings until the years immediately preceding and following World War I: 1914 saw the foundation of the Kiel *Institute for International Law* headed by *Theodor Niemeyer*; the separation between Public and Private International Law was well reflected in the foundations of the Berlin-based Kaiser-Wilhelm-Institutes for Comparative and International Public Law, under

3 See Michael Stolleis, Friedrich Giese, in: Bernhard Diestelkamp/Michael Stolleis (eds.), Juristen an der Universität Frankfurt am Main, Baden-Baden 1989, 117–127.

the directorship of *Viktor Bruns*, in 1924 and for Comparative and International Private Law, under the directorship of *Ernst Rabel*, in 1926, respectively. The strongly increasing relevance of Public International Law in Germany, not the least as a result of the Versailles Peace Treaty, was reflected, as concerns Frankfurt, in the fact that already in 1920, *Karl Strupp* began its teaching activities, first as *Privatdozent*, later (1926) as *Extraordinarius* but only in 1932 as *Ordinarius*, about one year before he—because of his being a Jew—lost his position and had to emigrate, first to Turkey, then to Denmark and France where he died in 1940—never able to take up a professorship at Columbia University which had been offered to him in 1939.[4] His and his Frankfurt successors' contribution to the development of Public International Law are presented and analyzed in the pertinent contribution by *Michael Bothe*.

The aftermath of World War II saw, among other developments, the advent of serious integration efforts in the non-communist part of Europe, resulting in the foundation of the Council of Europe in 1949 as a traditional inter-national organization, on the one hand, and of the European Coal and Steel Community (ECSC) in 1951/1952 as the first supranational organization, on the other hand. The ECSC formed the nucleus of what became, subsequent to the entry into force of the treaties establishing the European Economic Community and the European Atomic Energy Community in 1957 and later developments such as the treaties of Maastricht, Amsterdam, Nice and Lisbon the European Union as we know it today. These developments also resulted in the establishment of a specific branch of International Law, European (Union) Law which was to a large extent influenced by Frankfurt-based scholars such as, in particular *Walter Hallstein*, the first post-war *Rektor* of the University (1946–1948) and, as of 1958, the first President of the European Economic Community as which he served until 1967.[5] His and his successors' contribution to the development of European (Union) Law are presented and discussed in the pertinent contribution by *Stefan Kadelbach*.

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4 See Michael Bothe, Karl Strupp, in: Diestelkamp/Stolleis, ibid., 161–170.

5 See Friedrich Kübler, Walter Hallstein, in: Diestelkamp/Stolleis, ibid., 268–281.

1. Public International Law in Frankfurt

In order to cover his topic, i.e. public international law in Frankfurt, *Michael Bothe* chose to tell "three different, but intricately intermingled tales: A tale about persons who shaped teaching, research and outreach of international law in Frankfurt during a century; a tale about the history of Germany and the world at large which has had a marked impact on the life and work of these persons; and a tale about the development of legal thought to which these persons have contributed". [6]

The persons who figure most prominently in these tales are *Karl Strupp*, *Walter Hallstein*, *Heinrich Kronstein* and *Hermann Mosler*. *Bothe* considers them—and rightly so—as initiators of developments which became eventually significant for public international law at Frankfurt. These developments or aspects are the documentation of international law, the role of international economic law, and the international system as a legal community.

Strupp's strong international reputation was well reflected in, *inter alia*, his membership in the *Institut de Droit International*, first (1927) as associated member, then (in 1932) as ordinary member, and the three invitations to give lectures at the Hague Academy, in 1924 ("L'intervention en matière financière"), 1930 ("Le droit du juge international de statuer selon l'équité") and 1934 ("Les règles génèrales du droit de la paix"). In addition to publishing his important monographs such as *Das völkerrechtliche Delikt* (1920) and *Die völkerrechtliche Haftung des Staates* (1927), he initiated what became a true Frankfurt tradition: the documentation of international law as reflected in his *Wörterbuch des Völkerrechts* (published in three volumes between 1924 and 1929).

This approach, i.e. the understanding that the effectiveness of international law depends to a large extent on its being known by all relevant actors and, therefore, requires its documentation in an easily accessible, encyclopedic format was continued by *Hans-Joachim Schlochauer*, *Strupp's* former assistant who being himself a Jew, had fled to Oxford from where he returned to Frankfurt in 1951 to take up a professorship in public international law which he held until 1974. Between 1960 and 1962, he was responsible for the second edition of the *Wörterbuch*, again in three volumes. Two decades later, it was understood that such a compilation

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6 Michael Bothe, Public International Law in Frankfurt (in this book), 35.

needed the administrative support of a larger unit—and it was *Rudolf Bernhardt*, a disciple of *Hermann Mosler* and former professor of public law at Frankfurt, who having assumed his position as co-director of the Heidelberg Max-Planck Institute for Comparative and International Public Law, set out to edit the *Encyclopedia of Public International Law* (the four volume library edition was published in the nineties) to be succeeded by the *Max-Planck Encyclopedia of Public International*, edited since 2006 under the aegis of *Rüdiger Wolfrum*, available also in electronic form. Notwithstanding the fact that thanks to the internet, the real problem might no longer be to have actual access to international law documents, but consists in having access to information on international law presented in a "digestable" way, which imposes on editors of any encyclopedia an increased responsibility carefully to select the essentials of any international law aspect while strictly separating facts from assessment—the need for any encyclopedia fulfilling such requirements might be greater than ever.[7]

Although neither *Walter Hallstein* nor *Heinrich Kronstein* might be considered as engaged in public international law but rather comparative and private international law (conflict of laws), they were clearly instrumental, together with *Schlochauer*, in establishing international economic law as a subject of research and teaching in Frankfurt, notably by founding, in 1951, the *Institute of Foreign and International Economic Law*. While is activities were focused in its early years mainly on issues connected with the legal integration of European economies and competition law, it later became in the seventies, under the leadership of *Günther Jaenicke*, home for a new area of international economic law: the law of commodities (*Rohstoffrecht*) which, in recent years, has seen quite a strong renaissance, lately also in Frankfurt due to the research conducted by *Isabel Feichtner*. After *Jaenicke's* retirement the Institute was dissolved in the nineties and it took some time until, in the framework of the *Wilhelm-Merton Centre for European Integration and International Economic Order*, research and teaching activities in this field have gained again some weight after 2004, in particular in the field of investment law; a "Frankfurt specificity" is the strong interest in questions relating to the interrelationship between general international law and investment law

7 Ibid., 41.

as reflected in the topics dealt with in the annual Frankfurt Investment Law Workshops (*Rainer Hofmann*).[8]

Obviously, Frankfurt based scholars have always addressed such fundamental questions of public international law as the use of force and humanitarian law (suffice to mention the ground-breaking work of *Michael Bothe*), environmental law (again *Michael Bothe*), Law of the Seas (*Günther Jaenicke*), and more recently human rights law, including the rights of national minorities and refugees (*Rainer Hofmann* and *Stefan Kadelbach*). In addition to that, there has always been a very keen interest in dealing with more general issues concerning the (legal) structure of the international community. This clearly dates back to the writings of *Karl Strupp* and, in particular, to the post-war period when *Hermann Mosler* held the chair of public international law. Although he already left Frankfurt in 1954 to become director of the Heidelberg Max Planck Institute (thus setting the ground for a truly impressive personal linkage between Frankfurt and Heidelberg as described by *Bothe*[9]) and published his seminal works when he was Judge at the International Court of Justice[10], he left behind the strong interest in these questions as reflected in the academic work of all his successors, in particular *Michael Bothe*, *Armin von Bogdandy* and currently *Stefan Kadelbach*. This interest ranges from more practical issues such as remedies in international law and procedural aspects of human rights protection to truly general issues such as positivism vs. value orientation. And, as *Michael Bothe*, shows there has always been a Frankfurt trend not to accept a pure positivism as the fundamental basis of international law but to integrate values: This can be found, albeit in a somewhat embryonic expression, in *Strupp's* approach, before it becomes quite important in *Mosler's* seminal articles in the mid- seventies and more recently in what *Bothe* calls *Stefan Kadelbach's* school on "International Law as a Normative Order"; and indeed: an international legal system which would not be based on fundamental values and the quest for an international system

8 See Rainer Hofmann/Christian Tams (eds.), International Investment Law and General International Law (2011); Rainer Hofmann/Christian Tams (eds.), International Investment Law and its Others (2012); Rainer Hofmann/Stephan Schill/Christian Tams (eds.), Preferential and Trade and Investment Agreements (2013); Stephan Schill/ Christian Tams/Rainer Hofmann (eds.), International Investment Law and Development (2015).

9 See Michael Bothe, Public International Law in Frankfurt (in this book, 35).

10 Ibid., 44.

based on the unambiguous prohibition of the use of force and the strict respect for human rights would run counter to the deeply held convictions of all those who have been and are teaching and doing research on public international law in Frankfurt.

2. Frankfurt's Contribution to European Law

Noting that, in contrast to public international law, the history of European law only begins to attract scholarly attention, *Stefan Kadelbach* sets out to show that there is a specific Frankfurt contribution to the development of European law. In order to do so, he starts by sketching the four phases through which European legal scholarship has gone: the founding phase of the fifties and early sixties was characterized by writings, authored by persons involved in the treaty-making process, on the founding treaties themselves; the second phase, starting with the *van Gend & Loos* and *Costa ./. ENEL* cases in the mid- sixties and lasting until the end of the eighties, was marked by the unfolding of the norm programme enshrined in the treaties, supported and put forward by an increasingly important role of the ECJ as the *engine of integration* and accompanied by doctrinal debates in which the federal ideal provided the *leitmotiv* for the scholarly discussion on the process of European integration; the third phase began with the foundation of the European Union and ended with what *Kadelbach* rightly describes as "the failure of the treaty on a Constitution for Europe which was supposed to improve the political legitimacy of the Union by a new constitution-making process (Convent procedure) and, above all, by more parliamentary say in law-making"[11]—a phase during which scholars addressed issues such as the (alleged) need for limiting the development of judge-made law or for increasing the democratic legitimacy of public power in Europe while at the same time dealing with the 'Europeanization' of wide aspects of private, administrative and criminal law; the present phase is indeed characterized by a widespread and strong feeling of a crisis of European integration notwithstanding (or closely related to?) the enlargement process of the previous decade, the consequences of the problematic entry into force of the *Lisbon Treaty* accompanied by the *Lisbon Judgment* of the *Bundesverfassungsgericht* and the still on-going "Euro crisis"—

11 Stefan Kadelbach, Frankfurt's Contribution to European Law (in this book) 49.

to which one might add the profoundly shattered idea of European solidarity as witnessed in the context of the current "refugee crisis" or the various scenarios envisaged as a result of a possible *BREXIT*.

During the initial phase of European integration, members of the Frankfurt faculty were closely involved in this process: While the essential role of *Walter Hallstein* (professor for civil and trade law 1946–1954) as secretary of state in the Chancellor's Office and later in the Ministry of Foreign Affairs and leader of the German delegation during the negotiations of the Treaty on the European Coal and Steal Community (ECSC) (from 1958–1967 he served as the first President of the European Commission) is public knowledge, the substantial contributions made, during the early stages of European integration, by *Hermann Mosler* who, in addition of being professor of public law from 1949–1954 served as head of the legal department of the Ministry of Foreign Affairs in the crucial years 1951–1953, *Carl Friedrich Ophüls*, *Hans-Jürgen Schlochauer* and *Ernst Steindorff* are much lesser known and deserve to be stressed.[12] They, and *Günther Jaenicke* who joined the Frankfurt faculty in 1959, sought to find categories for the new structure of the EC which, at first sight, seemed to be part of international law as flowing from an international treaty but the introduction of supranational powers indicated the existence of a somewhat different body of law. In contrast to the ECJ which saw the ground for the normativity of supranational law on the domestic plane in the autonomy of European law, they found its basis in the founding treaties and parliamentary assent thereto—and, thus, conceived the EC as a new public power with features of a federal entity. Such a power, however, must be subject to constitutional constraints: the rule of law—and that is why the EC was (and remains to be) conceived as a *Rechtsgemeinschaft*.[13]

During the second phase, scholarly interest focused on the consequences of this new legal order for the domestic legal system. In the Frankfurt context, this approach was personified by *Manfred Zuleeg* who served as professor from 1977–2003 (and as judge at the ECJ from 1988–1994) and analyzed these effects of EC/EU law on most areas of (domestic) law. Fully in the tradition of *Hallstein* and others, he conceived the EC/EU as a *Rechtsgemeinschaft* with federal features based on treaties serving

12 Ibid., 53.

13 Ibid., 54.

as their "constitution" while being in need for further steps to complete a true constitutional setting.

This idea of the need for a further *constitutionalization* of Europe was taken up and further developed, in the nineties and onwards, by *Ingolf Pernice* with his theory of multi-level constitutionalism, a model in which the constitutional orders of the Member States and of the EU are closely intertwined; the federal construction of the EU is built on a legitimacy of its own, a genuine kind of *contrat social* among the peoples of Europe. Also *Armin von Bogdandy* who succeeded *Pernice* in 1997 but left Frankfurt already in 2002 (to assume a directorship at the Heidelberg Max-Planck Institute and was succeeded by *Stefan Kadelbach*) developed his own theory of a *supranational federalism*. Both approaches result in a kind of 'Europeanization` of constitutional law, a process which, as *Kadelbach* rightly points out[14], could have been observed in many branches of domestic law such as labour and economic law, data protection law, environmental law, social law, and general administrative law, to be later followed by asylum and immigration law.

As most striking common characteristic among the various Frankfurt contributions to European law, *Kadelbach* identifies what he describes as "a pro-European idealism rooted in constitutional law thinking".[15] The EC/EU is considered to be a "compound of public authority complementary to the member states" which explains the need to search for ways and means to counter its constitutional deficits and the answer found in its quality as *Rechtsgemeinschaft* with a strong reliance on federal paradigms. This approach might indeed contribute to overcoming the present crisis of European integration; or, as *Kadelbach* puts it: "The contractually agreed pluralism, free of national obstinacy, among equals in a community of law with safeguards against abuses of power of all sorts, as it was sketched out by different generations of European constitutionalists and economic lawyers, can still serve as the guiding idea".[16]

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14 Ibid., 56.

15 Ibid., 61.

16 Ibid., 63.

III. The Futures

While the contributions in the first section of this publication are concerned with the past, and more precisely with the past of public international law and European law in Frankfurt, the second section assembles contributions looking into the future of these branches of law—and necessarily not in Frankfurt but worldwide: *Martti Koskenniemi* presents, on the basis of a short and concise history of public international law theories, his very own ideas on the future of public international law for which he sees an urgent need to overcome its instrumentalization within the process of globalization as a tool of "global wealth extraction" instead of an instrument for shaping a "better future for all—not then, but now"[17]; he is followed by *Joseph H.H. Weiler* who develops, modifying the title of his famous critique on the European Court of Justice's jurisprudence on human rights[18], his thoughts on Europe's future by looking at Europe's values, at the "spiritual condition of Europe and the role law plays in shaping it."[19] Finally, *Ingolf Pernice* is concerned with the Internet—obviously a most essential factor in the current development of the international political (and legal) order—and the impact it might have on the future of international law: He sees it as a means to develop a system which would eventually allow for the participation of all persons actually affected by global decision-making in that decision-making process and would, thus, contribute to the establishment of a system "taking people seriously".[20] While all three of them look at different aspects of international and European law from different perspectives—one thing they have in common is that they all deal with the (potential) role of international law beyond the (boundaries of national) state(s) and, thus, with the actual future of international law as "law beyond the state".

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17 Martti Koskenniemi, The International Law's Futures—Yesterday, Today, Tomorrow (in this book), 71.

18 See J.H.H. Weiler/Nicolas Lockhart, "Taking rights seriously" seriously: The European Court and its fundamental human rights jurisprudence, 32 (1995) Common Market Law Review, 51–94,579–627; it goes without saying that this title is referring to Ronald Dworkin's seminal book Taking Rights Seriously (1977).

19 J.H.H. Weiler, Taking (Europe's) Values Seriously (in this book), 93.

20 Ingolf Pernice, Global Constitutionalism and the Internet. Taking People Seriously (in this book), 151.

1. International Law's Future—Yesterday, Today, Tomorrow

In his contribution, *Martti Koskenniemi* wants to "examine the historical dynamic that lawyers have presumed underlies the process towards future unity" including a study on the "views about the international world involved", and the "legal theory and the institutional mechanism assumed to bring about that future".[21]

As one would expect *Koskenniemi* to do, he looks at the history of international law the emergence of which he dates back to the "European encounter with indigenous communities in the context of 16th century colonial expansion".[22] The first phase of international law development, starting with Spanish theologians-lawyers such as *Francisco de Vitoria* adapting *Thomas Aquinas'* doctrinal thoughts to the current needs of Spanish colonialism, encompassing the later fundamental additions and modifications to the theoretical foundations of international law by such eminent lawyers as *Hugo Grotius* and *Samuel Pufendorf*, and ending with *Immanuel Kant's* "influential teleology on peace and republicanism", remained dominated by the "weight of natural law".[23] The second phase, beginning with the French Revolution and ending with the outbreak of World War I, was characterized by the "Rise of Professional International Law"[24] which meant that "international law was not about realizing contested futures but about coordinating state behaviour through diplomacy"[25], or, as *Lassa Oppenheim* wrote, that international law was a law "between, not above, the single states", a regulatory technique available to nations; nonetheless there were, as *Koskenniemi* rightly observes, some authors who, while accepting that international law emanated from the will of states, thought that such will was determined by "an underlying progresssive history pointing to an increasingly united world".[26]

However, the outbreak of World War I, and the horrors it implied, led to the abandonment of the previously predominant idea of international law as a mere tool for diplomacy among states. There was a widespread

21 Martti Koskenniemi, The International Law's Futures—Yesterday, Today, Tomorrow (in this book), 71.

22 Ibid., 72.

23 Ibid., 72 f.

24 Ibid., 74.

25 Ibid., 74.

26 Ibid., 76.

understanding of the need for permanent institutions with appropriate institutional design.[27] And so there was a "turn to institutions", notably the League of Nations with its Covenant which was seen by some as some kind of "higher law" but then, as *Koskenniemi* rightly points out, politicians wanted "a system of international organization to facilitate international co-operation but failed to give it powers independent from the ambitions of members".[28] Still, the weakness of the institutions, the (perceived) failure of the League in the thirties turned many away from an international law of the Geneva-based institutions into fascination for an unending struggle for power, for the rise and falls of empires, away from an international law of co-operation between states back to an international law of mere coordination of national interests.[29]

This failure of the third phase, often attributed to an excessive reliance on legal rules and institutions, opened the way for a "realistic" approach to international relations: Law was no longer conceived as a means to express any shared values of a future world, but as a tool to maintain peace in the cold-war era for which it needed the great powers.[30] Notwithstanding the advent of strongly integrationist movements in Europe (Council of Europe and European Economic Community) which eventually imagined international law's future as a larger version of itself, on the global level the cold war prevented international lawyers from being too clear about international law's *telos.* It was sufficient that it helped containing conflicts and assisted in "peaceful coexistence". However, legal thinking on progressive modernization persisted and resulted in the changes of the sixties when the "international community" was increasingly assigned with tasks in social, environmental and humanitarian fields; this paved (again) the way for ideas of international law as "law of cooperation" as a means to solve global problems. This development was soon reflected in the rise of human rights with individuals as subjects of international law, the reduction of areas considered to be purely "domestic affairs" and the perception of the UN system as producer and administrator of international law. The ideal of future was seen, as *Koskenniemi* points out, as a public-law governed international community of states, "collaborating to resolve common problems with the view of just distribution of the fruits of progressive

27 Ibid., 76.

28 Ibid., 77.

29 Ibid., 78.

30 Ibid., 79.

modernization across the world."[31] But these expectations were not met as poverty and conflict persisted, mainly in the Southern hemisphere. By the early eighties, the kind of state and public administration existing in the Third World (and in the socialist countries), was seen as the main obstacle to progressive development and resulted in a renaissance of liberalism (or the advent of neo-liberalism) with the prevailing idea that "regulatory solutions and state-centrism had to give room to free markets as an instrument of change".[32]

So, "in the eighties international law's welfarism and public law orientation began to crumble. State-driven modernization was put to question […] The policies of the IMF and the World Bank were now directed to combating inflation, supporting private investment and opening access to the markets".[33] *Koskenniemi* also notes that "while diplomacy oriented itself towards dismantling of institutions designed to advance global redistribution, novel optimism arose with respect to the security system".[34] And indeed, the demise of socialism and the ensuing end of the Cold War opened new possibilities for the Security Council to act, first in its quite successful reaction to the occupation of Kuwait by Iraq, and later on with respect to the armed conflict in Yugoslavia, the genocide in Rwanda and other crises—albeit less successful, these actions resulted in a new belief in the possibility of a rule-based security system and an increased rhetoric of the rule of law, most strikingly reflected in the strong advances made by international criminal jurisdictions such as ICTY, ICTR and ICC. In *Koskenniemi's* view, the preferred institutions were "those of the market, courts and arbitral tribunal plus private-public relationships".[35] This trend towards a *judicialization* of solving conflicts was seen in the establishment of the WTO dispute settlement system or the increasing reliance on investor-state arbitration under rules such as ICSID, or UNCITRAL. The then prevailing social theory of a methodological individualization resulted in the spread of human rights activism as witnessed by the expansion of the Council of Europe human rights protection system into Central and Eastern Europe, in new or increasingly effective human rights treaty monitoring both under the UN and regional auspices in

31 Ibid., 80.
32 Ibid., 81.
33 Ibid., 81.
34 Ibid., 82.
35 Ibid., 82.

Africa, Europe, and the Americas. The "Kosovo crisis of 1999 demonstrated the willingness of Western actors to undertake a military operation even against the UN Charter if only a conflict could be depicted as a humanitarian crisis or 'state failure', a kind of systemic collapse that would be dealt with through regime change and transformation occupation"[36]—an approach which, it might be added, failed later on both in Afghanistan and Iraq. *Koskenniemi* rightly observes that "lawyers began to learn the languages of global governance and regulation"[37], and to think in international relations categories such as strategic choices and optimal efficiency while there was a strongly increasing trend to establish specialized legal sub-regimes. Interests of members of specific groups started to be seen as 'rights' which, in turn, prompted a "ubiquitous process of rights balancing in authoritative institutions" applying "indicators, standards, and criteria for benchmarking and assessment […] The technical aspects of legal work were stressed at the expense of openly normative ones".[38] However, by the end of the millennium, this era, termed by *Koskenniemi*, as the *Washington Consensus*, was over as it had been dismantled in view of the havoc which restructuring had wreaked in developing countries. "The result was a kind of 'restructuring with a human face' in which the institutions of the state were enlisted to provide the rule of so as to guarantee the security of private rights and the proper operation of the market and where democracy would operate as a channel to deal with political conflict".[39]

In the first years of the new millennium, named by *Koskenniemi* as the 'post-neoliberal future', international lawyers were greatly concerned by the challenges which its (perceived) "fragmentation" brought to the role of international law in global governance: In the presence of an ever increaseing number of specialized legal sub-regimes such as trade, human rights, humanitarian and environmental law, many lawyers felt the absence of an "overarching objective, public ethos or vision of the future".[40] Lawyers were also busy dealing with regime-conflicts or mechanisms to integrate norms from an 'alien regime'. Nonetheless, the concern over "fragmentation" gradually dissipated, not the least as a result of the effects of the world-wide 'fight against terrorism' in the aftermath of 9/11:

36 Ibid., 83.
37 Ibid., 84.
38 Ibid., 84.
39 Ibid., 85.
40 Ibid., 85.

"Domestic security agencies were empowered and secret operations conducted in ways that few attempted to justify under international law. The widely accepted 'illegality' of the US-UK war against Iraq […]"[41], the widespread practice of extraordinary renditions or torture as a means of interrogation strongly damaged the perception of law as a means to shape the future—although the global human rights system and the global security system were able to create a *modus vivendi* in which such violations of fundamental norms of international law were, as 'exceptions', integrated into the new normality of a post-liberal age.[42] In line with this development, the prevailing social theory of the post-neoliberal period (re-)turned to political realism a resurgence of geopolitics with institutional decision-making and increased recourse to secret or otherwise 'exceptional' measures thus highlighting the role of the executive—not the law-makers'![43] The neo-liberal idea that competition of projects and agendas would result in a kind of 'equilibrium' was replaced by the feeling that the "peaceful normality of the law could not be trusted; stronger executive rule was needed"[44]—coupled with a clear shift towards the acceptance of (more) authoritarian rule.

According to *Koskenniemit*, the present situation of international law might be well discussed taking as example the debates concerning TTIP, or more specifically, the public interest in Investor-State arbitration (ISDS). He sees this as a conflict between international law targeted to produce 'wealth' against international law to protect, inter alia, the environment, human rights and security. In this situation, the "optimal realization of conflicting interests is allocated to the state understood as a 'regulator' whose operations are checked and supervised by groups of impartial international 'experts'.This is an image there is little reason to share".[45] This is a very clear statement which is explained by the argument that such bodies are not part of—what *Koskenniemi* calls—"our institutions, set up and operating in accordance with our constitution, by virtue of the compact we have made".[46] Instead, he sees ISDS as a prime example of the "re-definition, within the fluid process of 'globalization', of political com-

41 Ibid., 86.
42 Ibid., 86.
43 Ibid., 87.
44 Ibid., 87.
45 Ibid., 88.
46 Ibid., 88.

munities as no longer masters of their own lives, but turned into localized 'regulators' of global wealth extraction".[47]

Against this background, *Koskennemi* turns to thoughts about the future and, more precisely to *Kant*, who supposed that the fact that we cannot objectively know the future and that the past is not available as an impartial verification, "has no bearing on our duty to work in order to make the future better than the present, and not just for ourselves but for all. This would be to think not of a future 'then' (to which intermediate generations would be sacrificed), but now".[48] While this is clearly a conclusion to which many would want to subscribe, as it ascribes international law the objective of contributing to the creation of a 'better world for all', again something one would not like to disagree with—still, there seem to remain fundamental questions such as who defines in which procedure what constitutes a better future and by which means such a better future might be achieved.

2. Taking (Europe's) Values Seriously

At the very outset of is contribution, *Weiler* states that he is interested "in the spiritual condition of Europe and the role law plays in shaping it" as forming part of his interest in three interrelated themes: "The way in which legal norms and practices reflect and shape political culture; a more general interest in non-instrumental and non-functionalist dimensions of law; and the spiritual dimensions of legal regimes generally and the European legal order more specifically".[49]

In the first section of this contribution, simply entitled "Values—History and Historiography", *Weiler* sets out by showing that European integration had, since its very inception, always combined two strands, a functionalist and an idealist, or pragmatism and values, and stating that, in addressing (European) values, he wants to identify the "content of values discourse as a matter of fact, situating it conceptually and then examining it critically".[50] He starts out by showing that the (historically) first trilogy of

47 Ibid., 90.
48 Ibid., 90.
49 J.H.H. Weiler, Taking (Europe's) Values Seriously (in this book), 93.
50 Ibid., 96.

values, i.e. peace prosperity and supra-nationalism, has lost, for the present "Schengen generation", its mobilizing force but has been replaced by a second trilogy of values, i.e. democracy, human rights and rule of law, as constituting the basis for Europe's self-understanding as a "Community of Values".[51] The ensuing historiography of these values and their conceptualization and (intended) implementation in the process of European integration explain, in *Weiler's* view, "deep-seated habits and practices" characterizing the European Union: Its perception as a project of things to be done and to be achieved, and, at least as regards the second trilogy, its problems in grafting values such as democracy and human rights.[52] But what essentially remains is the "centrality of value speak as part of general European Union discourse".[53] This leads to a truly fascinating conclusion concerning the input of these two value trilogies into European law which is said to have transformed classical international law in three successive waves:[54] "In Wave I State obligations were converted into enforceable Community rights—turning […] the indi-vidual from Object to Subject" (with obvious reference to the *van Gend & Loos* case); "In Wave 2 Human Rights opposable against the Community and Union Institutions (and in some cases against the Member States directly) were articulated *ex nihili* injecting a human centered core into the market instrumentalities" (a process initiated in the *Stauder*, *Internationale Handelsgesellschaft*, *Nold* and *Hauer* cases); "In Wave 3 … Citizen rights are being fleshed out, destined in the rhetoric of the European Court to constitute the fundamental status of Individuals in the Union" (here reference is made to cases such as *Grzelczyk*, *Baumbast* or *Garcia Avello*): The common thread is indeed the Individual, with the European Union as a polity in which the individual is in the center—"a very efficient way of summarizing the two trilogies of values the underlying etrhos of which is, indeed, a deep humanist commitment".[55]

The second section is going beyond history and historiography and devoted to laying the ground for *Weiler's* central thesis dealing with the resurrection of virtue—as distinct from values. A central part of this thesis is the argument that "upholding or believing in a value, has replaced virtue

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51 Ibid., 100.

52 Ibid., 103 f.

53 Ibid., 104.

54 Ibid., 106 ff.

55 Ibid., 106.

or rather has become the virtue" or, putting it differently, "believing in the importance of honesty counts as practicing the virtue of being honest".[56] In bringing the distinction between values and virtues to European Integration, *Weiler* follows Aristotle, Maimonides and Aquinas in two respects, i.e. that virtue is a personal characteristic, a habit, and that this habit is acquired, perfected through practice—and in that sense law is affecting "our virtuous disposition".[57] *Weiler* differs, however, from the three thinkers insofar as he profoundly believes that the "resurrection of virtue theory requires an understanding that virtues cannot stand alone from values and that values cannot stand alone from virtues—but nonetheless, the two are distinct".[58] On this basis, *Weiler* formulates his thesis which he will try to illustrate in the major part of his essay, i.e. that the "habits and practices of European integration, and some of its foundational legal structures and processes, militate against those noble values" (of European integration)[59], or, putting it differently, "the corrupting tendency of European practices on both values and virtues which are central to the realization of the deepest objectives of European Integration".[60]

This means that in the larger part of his essay, *Weiler* is examining whether the actual practices of European integration actually militate against—instead of supporting—the realization of the core values of European integration, i.e. prosperity and solidarity,[61] democracy,[62] peace,[63] the rule of law,[64] protection of fundamental human rights,[65] and, finally, European citizenship.[66] For obvious reasons, it is impossible to give, in the framework of this introduction, a detailed account of the arguments put forward and discussed by *Weiler*—even more so as these pages are absolutely worth reading in detail! Nonetheless, a number of issues should be referred to—the choice being made obviously a very subjective one.

56 Ibid., 108.
57 Ibid., 109.
58 Ibid., 110.
59 Ibid., 110.
60 Ibid., 112.
61 Ibid., 112–116.
62 Ibid., 116–124.
63 Ibid., 124–128.
64 Ibid., 128–133.
65 Ibid., 133–140.
66 Ibid., 140–143.

Weiler rightly asserts that there was an idealistic dimension to the quest for *prosperity*: When set against the destruction and poverty prevailing in the early fifties Europe, individual and social prosperity meant personal and collective dignity, absence of the embarrassment of dependence on others.[67] The principal motor towards prosperity is based on ordo-liberalism, is self-interest and competition which produces prosperity—and winners and losers.[68] Taking the central pillars of European integration, the four fundamental freedoms, it is clear that they are at the center, they are the norm—and competing values such as public order are the exception which must be interpreted narrowly: "The free market we interpret expansively, the competing values restrictively".[69] Then there might be need for solidarity—with the losers. But this solidarity is mainly left to government, "social solidarity is almost entirely through agency".[70] So, while "individual self-interest will produce prosperity, public agency at national and infranational level will take care of the less fortunate. As we strive for prosperity, we forget about the virtues of compassion, generosity and responsibility".[71]

When it comes to *democracy*, *Weiler* obviously has to turn to the proverbial 'democratic deficit' of the European integration process which, as he argues, will not go away (that easily) as the "two primordial norms of democracy, the principle of accountability, and the principle of representtation, are compromised in the actual practices of the Union".[72] Still, notwithstanding this democratic deficit on the European level, the European construct has been democratically approved over and over again—on the Member States level. This is explained with the "invasion of a market mentality into the sphere of politics whereby citizens become consumers of political outcomes rather than active participants in the political process".[73] This again impacts on the understanding of (democratic) legitimacy of political decision-making: "Legitimation through accomplishment, professionalism and results instead of through process becomes,

67 Ibid., 113.
68 Ibid., 114.
69 Ibid., 114.
70 Ibid., 115.
71 Ibid., 116.
72 Ibid., 118.
73 Ibid., 119.