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# Re-Introducing Walther Schücking

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## Abstract

*Walther Schücking was one of most prominent international lawyers of his generation, and yet an outsider among the German legal academic establishment. He was a progressive liberal who placed great trust in the civilizing role of international law, and yet, when serving as a World Court judge from 1930 to 1935, seemed to integrate quickly into the Court's most conservative bench. His views were said to be 'destined to become the law of the future', and yet his influence on the codification and progressive development of the 'international law of the future' after World War II was negligible. So who was Walther Schücking, and in what respect, if any, is he part of a European Tradition in International Law? This article introduces Schücking and the main features of his work, and therefore sets the stage for the subsequent, more specialized contributions to the Schücking symposium.*

## 1 Introduction

Walther Schücking, who died 75 years ago, in August 1935, was one of most prominent international lawyers of his generation, and yet an outsider among the German legal academic establishment. He was a progressive liberal who placed great trust in the civilizing role of international law, and yet, when serving as a World Court judge from 1930 to 1935, seemed to integrate quickly into what is with some reason regarded as the Court's most conservative period.<sup>1</sup> A century ago, Schücking addressed fundamental questions that still haunt international lawyers today, and gave answers that were said to be 'destined to become the law of the future',<sup>2</sup> and yet his influence on the codification and progressive development of the 'international law of the future' after

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<sup>1</sup> See O. Spiermann, *International Legal Argument in the Permanent Court of International Justice* (2005), 300 ff. The point is taken up in Spiermann's contribution to this symposium.

<sup>2</sup> J.B. Scott, 'Walther Schücking', 31 *AJIL* (1937) 107, at 109.

World War II was negligible.<sup>3</sup> So who was Walther Schücking, and in what respect, if any, is he part of a European Tradition in International Law?

The contributions to the present symposium address central aspect of Schücking's approach to international law in some detail. The following short piece should be seen as an *ouverture* that seeks to set the stage: its aim is to re-introduce Walther Schücking and his work, and to put the case, 75 years after his death, for a renewed engagement with his work.

## 2 A Biographical Sketch<sup>4</sup>

Walther Schücking was born in 1875 in Münster (Westphalia) into a liberal family of distinction. Continuing a family tradition, he took up legal studies, first in Munich, then moving on to Göttingen. A prize-winning essay on the territorial sea (allegedly written without prior knowledge of international law) was accepted as a doctoral dissertation<sup>5</sup> and brought Schücking into contact with Ludwig von Bar, one of the leading German internationalists of the time. Von Bar supervised Schücking's post-doctoral thesis (Habilitation<sup>6</sup>) and became an important mentor under whose benevolent guidance Schücking was appointed to an extraordinary chair at the (dare one say: extraordinarily) young age of 25. Two years later, Schücking's hitherto stellar career was crowned by his appointment to a full professorship at the University of Marburg.<sup>7</sup>

It was at Marburg, in the decade preceding World War I, that Schücking's academic and political approach took shape. He joined the progressive liberal movement as well as various pacifist associations, and, influenced by Alfried Fried, enthusiastically embraced 'The Work of The Hague'.<sup>8</sup> While this facilitated his integration into liberal internationalist circles, including that of the *Institut de droit international*, Schücking's political views – reflected in his sharp, often polemical, criticism, of Prussian policies – brought him into sharp conflict with conservative authorities at home. Thus he was precluded from examining law students on the ground of his political views,

<sup>3</sup> This is recognized even by those leading his re-discovery within Germany: see notably F. Bodendiek, *Walther Schückings Konzeption der internationalen Ordnung* (2001) (the leading German language study of Schücking's work). For earlier comments in the same direction see Scheuner, 'Die internationale Organisation der Staaten und die Friedenssicherung – Zum Werk Walther Schückings (1875–1935)', 58 *Die Friedens-Warte* (1975) 7.

<sup>4</sup> For further detail see notably the special commemorative edition of the journal *Die Friedens-Warte* (35 (1935) 162–239), especially the contributions by Hans Wehberg ('Das Leben Walther Schückings', at 162–175); and Charles de Visscher ('Walther Schücking – l'homme et son oeuvre', at 176–179). From a contemporary perspective cf. Bodendiek, *supra* note 3, at 43–82; and the relevant section in M. Koskeniemi's *Gentle Civilizer of Nations* (2002), at 216–222.

<sup>5</sup> *Das Küstenmeer im internationalen Rechte – im Völkerrechte wie im internationalen Privat- und Strafrechte* (1897).

<sup>6</sup> In line with German usage, this did not cover international law, but another area of public law – in Schücking's case, a largely historical analysis of constitutional law: *Der Regierungsantritt – 1. Buch: Die Urzeit und die Zeit der ost- und westgermanischen Stammesreiche* (1899).

<sup>7</sup> See Bodendiek, *supra* note 3, at 48–49, and further the detailed biographical study by D. Acker, *Walther Schücking (1875–1935)* (1970), at 8–9.

while Marburg's conservatively minded law school repeatedly refused his calls for the establishment of an institute for international law. Schücking himself later spoke of the Marburg decade as his 'years of struggle' (*Kampfesjahre*).<sup>9</sup>

World War I accelerated his marginalization.<sup>10</sup> Torn between pacifist and patriotic feelings, Schücking continued to argue for international conciliation and participated in the work of the Central Organization for a Durable Peace, but faced increasing repression and censure at home. The end of the war brought a change of fortune. The suspicious pacifist of the war years became an asset to Germany's new progressive government and was increasingly in demand.<sup>11</sup> Schücking accepted many invitations: he drafted a progressive counter-proposal for a League of Nations Covenant for the new German government (which, much to Schücking's disappointment, however was never even discussed<sup>12</sup>); represented Germany as one of the principal delegates at Versailles (where, rather naïvely, he was shocked to find that the settlement was to be imposed rather than negotiated<sup>13</sup>); and, from 1919, served as a member of parliament for the progressive liberal party. For some time, Schücking seems to have toyed with a full-time political career, perhaps expecting an appointment to a senior post; but, as that was not forthcoming, he returned to academia. The 1920s saw him oscillating between positions of influence and marginalization. There was no shortage of honours and successes, such as the authorship (with Wehberg, a fellow pacifist-in-arms and long-term collaborator<sup>14</sup>) of the leading commentary on the Covenant,<sup>15</sup> and his service as a judge *ad hoc* at the newly-founded Permanent Court and in the League's codification committee. Yet Schücking's position within the German academic setting remained uncertain. Attempts to appoint him to a chair in Berlin met with resistance; and for the first half of the decade, the PCIJ judge *ad hoc* earned his living by teaching at a commercial college (albeit a renowned one).<sup>16</sup> It was only in 1926 that Schücking was appointed to a dedicated chair in international law at the University of Kiel, combined with the directorship of Germany's oldest institute for the study of international law (now named after him).

Academically, the Kiel years were the high point of Schücking's academic career, marked by important publications (among them his Hague lectures on the

<sup>8</sup> See especially *Die Organisation der Welt* (1908). The term 'The Work of The Hague' was chosen for a series of publications addressing the impact of the Hague Conferences, vol. 1 being Schücking's *Staatenverband der Haager Konferenzen* (1912).

<sup>9</sup> Tellingly, the respective section in Acker's work is entitled 'Marburg and the Turn to Politics' ('Marburg und die Wendung zur Politik'): Acker, *supra* note 7, at 11.

<sup>10</sup> For details see *ibid.*, at 59–101.

<sup>11</sup> For details see Bodendiek, *supra* note 3, at 62–77.

<sup>12</sup> See Acker, *supra* note 7, at 113–122 for details.

<sup>13</sup> Throughout his life, Schücking (like nearly all German international lawyers) remained fundamentally opposed to the Versailles Peace Treaty, which he denounced in stark terms as a 'document of hatred': cf. Bodendiek, *supra* note 3, at 198.

<sup>14</sup> On their close relationship see C. Denfeld, *Hans Wehberg (1885–1962). Die Organisation der Staatengemeinschaft* (2008), at 41–51; as well as Bodendiek, 'Walther Schücking und Hans Wehberg – Pazifistische Völkerrechtslehre in der ersten Hälfte des 20. Jahrhunderts', 74 *Die Friedens-Warte* (1999) 79.

<sup>15</sup> *Die Satzung des Völkerbundes* (1st edn., 1921; 2nd edn., 1924).

<sup>16</sup> See Bodendiek, *supra* note 3, at 66–69.

Covenant<sup>17</sup> and the new edition of the League of Nations commentary<sup>18</sup>) and his cooperation with younger colleagues like Guggenheim, Spiropoulos, and Bruns within the liberal atmosphere of Kiel's law faculty, then dominated by Radbruch, Kantorowicz, and (Walter) Jellinek. If it was a short episode, then it was so merely because greater professional honours loomed. In 1930, Schücking was elected judge of the Permanent Court, a post he served in for the last five years of his life, from 1932 onwards as a resident of The Hague. Schücking saw this as the 'crowning' of his career; yet at a much more basic level his election to an international office protected him from the worst excesses of Nazi repression. To be sure, under the new civil service legislation passed in 1933, Schücking was ostracized from his chair for political reasons<sup>19</sup> – just like hundreds of his colleagues, including the liberal core of the Kiel law faculty, soon to be built into a bastion of national socialist 'new thinking'.<sup>20</sup> However, as a member of the international judiciary, Schücking could resist the government's demands for him to retire from the PCIJ. It was therefore as a judge at The Hague, rather than (like many of his fellow pacifists or progressive colleagues) as a refugee or in forced retirement that Schücking spent the last years of his life, cut short in 1935 by a terminal liver disease. Largely ignored by German governmental and academic circles, his death was marked by an official ceremony organized by the Dutch government, at which the liberal internationalists and pacifists of the day paid tribute to one of their greatest.<sup>21</sup>

### 3 Features of Schücking's Work

'No career could have been stranger, and yet it was natural in its every respect', observes James Brown Scott at the outset of his Schücking obituary.<sup>22</sup> Perhaps this was put in somewhat dramatic terms; yet, clearly, the biographical summary brings out that Schücking's was not an ordinary academic career: it was richer and less linear than most, and at the same time marked by great personal integrity – a matter plain to many of Schücking's contemporaries appreciating that he had led a meaningful life devoted to a cause he believed in. So what made it 'strange and natural',<sup>23</sup> this rich career full of ups and downs? It is submitted that three features stand out: Schücking's willingness to grapple with fundamental, perennial questions of the discipline; his determination to combine academic work with political activism; and his position 'on the fringes' of German international law scholarship.

<sup>17</sup> 'Le développement du Pacte de la Société des Nations', 20 *Recueil des Cours* (1927 V) 353.

<sup>18</sup> *Die Satzung des Völkerbundes* (3rd edn, with Wehberg and with the assistance of Böhmer, 1931), i.

<sup>19</sup> The official justification was that as a judge Schücking could not perform his duties as a university teacher; yet that was for reasons of convenience only: cf. Wehberg, *supra* note 4, at 173.

<sup>20</sup> On this development see M. Stolleis, *Geschichte des Öffentlichen Rechts in Deutschland* (1999), iii, 279 ff.

<sup>21</sup> Many of the eulogies are reproduced in the special 'Schücking edition' of the journal *Die Friedens-Warte*, *supra* note 4.

<sup>22</sup> Scott, *supra* note 2, at 107.

<sup>23</sup> *Ibid.*

## A Grappling with Fundamentals

A first feature of Schücking's work is its focus on what might be called the 'big questions' or 'grand designs'. To be sure, his immense list of publications<sup>24</sup> includes many entries on smaller matters, newspaper articles, or shorter historical pieces. Yet the key publications centre on major conceptual issues, notably what today would be termed 'international security' and international organization. *Der Staatenverband der Haager Konferenzen (The International Union of the Hague Conferences)*, first published in 1912, is the key example. In it, Schücking advanced his argument that the Hague Peace Conferences ought to be seen as the establishment of a world confederation, of which the Permanent Court of Arbitration was a truly international organ.<sup>25</sup> And while that claim is as unlikely to find broad acceptance today as it was then, Schücking based it on broad-ranging arguments about the evolution of international cooperation from the technical to the political and from *ad hoc* to permanent; and on the need for international law as a science to accommodate the new phenomenon of international organization.<sup>26</sup> Whatever the merits of the main ('world confederation') claim, the analysis could hardly have been broader in focus.

To a large extent Schücking's subsequent work, while not in the form of the one major treatise and while increasingly pragmatic in tone, can be seen an attempt to explore the details of this ambitious design. The world confederation was to give effect to a universal international order based on law, characterized by four main features:<sup>27</sup> (i) the progressive outlawing of war, which Schücking firmly believed would have to be regulated and 'tamed' by law; (ii) the recognition of a legal commitment to disarmament; (iii) the move towards compulsory third-party dispute resolution; and (iv) the establishment of an international executive. After World War I, the League of Nations was the obvious test case for Schücking's design, and not surprisingly formed the centre of gravity of his work.<sup>28</sup> In retrospect, it is interesting to see how much Schücking was willing to look beyond the obvious deficiencies of the League, and to view the Covenant – in conjunction with the Kellogg-Briand Pact and the General Act for the Pacific Settlement of Disputes – as a step on the way towards a more ambitious world organization.<sup>29</sup> And again, even where we disagree with his views on specific

<sup>24</sup> Comprehensive bibliographies can be found in the works by Acker (*supra* note 7, at 210–226) and Bodendiek (*supra* note 3, at 314–333).

<sup>25</sup> *The International Union of the Hague Conferences* (1918), at 43–87.

<sup>26</sup> See *ibid.*, at 1–43; and *Die Organisation der Welt*, *supra* note 8, at 10–66.

<sup>27</sup> The following is a simplified description; cf. Bodendiek, *supra* note 3, at 206–274, as well as Bodendiek's contribution to the present symposium for a comprehensive and more differentiated analysis.

<sup>28</sup> In addition to the Commentary co-authored with Wehberg, see notably Schücking's Hague lectures (*supra* note 17), as well as 'Die Einarbeitung des Kelloggpaktes in den Völkerbundpakt und die Genfer Generalakte', 1 *Acta Scandinavia juris gentium* (1930) 49; 'Der Völkerbund', in B. Harms (ed.), *Volk und Reich der Deutschen* (1929), iii, at 52; 'Die Organisation der Völkerbundexekution gegen den Angreifer', 16 *Zeitschrift für Völkerrecht* (1932), at 529 (with Rühländ and Böhmert).

<sup>29</sup> See notably his comment that the League, for all its deficiencies, was 'mankind's only hope': 'Zur Struktur des Völkerbundes', in W. Schücking, *Die nationalen Aufgaben unserer Politik* (1923), at 40. It should be noted that this positive assessment never led Schücking to revise his critical assessment of the Versailles Peace Treaty.

matters, his willingness and ability to situate the League within the broader historical setting remain impressive. A large number of shorter pieces, typically written versions of public speeches, can be seen as variations on this general theme, ambitious in scope and accessible in style. The general impression one gains is that of an academic willing to engage with what was (or, at least, was to become) one of the fundamental questions of his discipline: the progressive establishment of a world order based on law.

By the same token, even where Schücking ventured into more technical areas, he approached specialized matters from the perspective of a generalist. His comprehensive study of international mediation<sup>30</sup> hardly ever gets lost in detail, but places mediation within the broader ambit of peaceful dispute resolution, which is seen as an essential element of the rule of law. In the same vein, Schücking's long analysis of the failed attempts to codify the law of territorial sea in 1930 contains passages on the virtue of codification as such, and the need for the law to reflect fundamental changes in international relations.<sup>31</sup> And, lastly, the same applies to Schücking's judicial writing. Famously, in his separate opinion in *Oscar Chinn*, when faced with the interrelation between successive treaties, Schücking relied on the most ambitious of arguments, that of the superiority of a constitutional arrangement – later to be taken up in debates about peremptory norms: 'the Court would never . . . apply a convention the terms of which were contrary to public morality'.<sup>32</sup> And even where Schücking adopted a much more sovereignty-centred approach, as in the *Wimbledon* dissent, he drew on fundamental concepts: hence the regime of the Kiel Canal had to be narrowly construed because it restricted Germany's sovereignty.<sup>33</sup>

From today's perspective, Schücking's desire to argue by way of 'deduction' from broad principles can make for difficult reading, especially because he rather frequently chose to portray his own conclusions as 'logical' or 'natural' consequences of an accepted premise.<sup>34</sup> In fact, at times, a little more technical detail might have benefited Schücking's argument. Yet from even the most cursory involvement with his work it becomes clear that Schücking was a generalist in the best sense of the word. He aimed high, and even where he failed to persuade, today's readers used to overly specialized literature will appreciate that he grappled with fundamentals.

## B *The Scholar as an Activist*

Notwithstanding his fondness for broad-ranging arguments, Schücking at no point saw himself as a 'blue sky thinker'. Far from it – few academics can have been as committed as he was to see his views applied in practice. Diplomats and practitioners may

<sup>30</sup> *Das völkerrechtliche Institut der Vermittlung* (1923).

<sup>31</sup> 'Der Kodifikationsversuch betreffend die Rechtsverhältnisse des Küstenmeeres und die Gründe seines Scheiterns', in Rechts- und Staatswissenschaftlichen Fakultät der Christian-Albrechts-Universität zu Kiel, *Festschrift Max Pappenheim zum fünfzigsten Jahrestage seiner Doktorpromotion* (1931), at 319.

<sup>32</sup> *Oscar Chinn case*, PCIJ, Series A./B. No. 63 (1934), at 149 (Separate Opinion Schücking).

<sup>33</sup> *Wimbledon case*, PCIJ, Series A., No. 1 (1923), at 132 (Dissenting Opinion Schücking). See further Spiermann (in this volume), at 783.

<sup>34</sup> For a similar observation see M. Garcia-Salmones, 'Walther Schücking and the Pacifist Traditions of International Law' (in this volume), at 755.

have mused at his lack of pragmatism. But oft-quoted comments about Schücking's 'pure heart'<sup>35</sup> or 'professorial manner'<sup>36</sup> miss an essential point: as much as he was an academic, Walther Schücking was a political activist; and it is precisely his dedicated attempt to combine both careers that marks him out among other international law scholars.

The two main fora of Schücking's political activity have been mentioned already.<sup>37</sup> In Marburg, he joined the progressive liberal party and became involved with the pacifist movement, two long-term affiliations that he pursued actively and with considerable devotion. For present purposes, it is crucial to note how closely Schücking's academic and activist sides were intertwined. Of course, 'Schücking the activist' profited from insights gained through his academic work; these ensured his influence in organizations such as the Inter-Parliamentary Union or (as long as moderate pacifism dominated) in the *Deutsche Friedensgesellschaft* (German Peace Society). But, more importantly, the activist's beliefs and commitments increasingly informed the approach of the scholar. This is clear from Schücking's focus on the fundamental questions of the discipline, but more so from the manner in which he addressed himself to them: there is nothing value-neutral about his treatment of legal problems; when 'Schücking the academic' wrote, he did not step out of his 'activist' shoes.<sup>38</sup> The discussion of international sanctions in one of Schücking's last substantial publications provides an example in point: his long article examines existing sanctions procedures (notably Article 16 of the Covenant) in some detail, but this analysis provides only the starting-point for a passionate plea for the progressive development of a fully-fledged sanctions regime comprising the mandatory imposition of collective sanctions, to be agreed by a majority decision within the League Council and subject to proportionality requirements and at least some form of judicial oversight.<sup>39</sup> By the same token, Schücking's manifold publications on the peaceful settlement of disputes combine an analysis of the existing law with far-reaching proposals for its improvement, on which academic and activist agreed.<sup>40</sup>

In Schücking's view, this cross-fertilization did not mean that the distinction between the *lex lata* and the *lex ferenda* were to be given up; quite the contrary: he insisted that it served a crucial function.<sup>41</sup> However, the activist scholar, unlike many of his

<sup>35</sup> Cf. the observation by the German Head of Delegation at Versailles, Walter Simons, in a letter to his wife (quoted in Acker, *supra* note 7, at 118).

<sup>36</sup> Cf. M. Huber, *Denkwürdigkeiten. 1907–1924* (1974), at 278–279.

<sup>37</sup> *Supra*, sect 2.

<sup>38</sup> As explored in Ole Spiermann's contribution to this symposium, things may have been different with respect to 'Schücking the judge'. For more on Schücking's activism see *infra*, sect 4B.

<sup>39</sup> Schücking, Rühlmann, and Böhmert, 'Die Organisation der Völkerbundexekution gegen den Angreifer', 16 *Zeitschrift für Völkerrecht* (1932) 529, especially at 554 ff.

<sup>40</sup> See, e.g., *Die Organisation der Welt*, *supra* note 8, at 66–74; 'Der Weltgerichtshof', in *Die nationalen Aufgaben der auswärtigen Politik* (1926), at 44 ff; and further Schücking, *supra* note 30.

<sup>41</sup> Schücking did not lay down his methodological approach in any comprehensive way. The following notably draws on his 'Neue Ziele des Völkerrechts', in *Christliche Welt* (1913), cols 547–548; *Neue Ziele der staatlichen Entwicklung* (1913); 'Allemagne et le progrès du droit international', 1 *La revue politique internationale* (1914) 417. For details see Acker, *supra* note 7, at 13–19.

positivist contemporaries, found the *lex ferenda* to be an equally legitimate object of scientific study. This approach was both limiting and expansive: limiting because the *lex ferenda* was to be *studied*, not imagined – hence Schücking devoted much energy to justifying why the law should take a particular development, how a different law would better serve mankind, etc., and in this respect drew on historical precedents as well as natural law (which he quite naturally considered to be a relevant element of the law) and the insights of pacifism.<sup>42</sup> (From today’s perspective, we need not always accept his arguments, let alone his deductions, which often simply seem to confirm what Schücking considered to be a desirable outcome; yet we should acknowledge the lengths he went to in order to distinguish himself from utopian thinking.)

More importantly, however, Schücking’s ‘quest for the *lex ferenda*’<sup>43</sup> was based on a scientific ethos that not everybody shared: to him, to study the existing law was insufficient. Rather than merely understanding the law, legal scholars were to strive to turn law into an instrument of justice,<sup>44</sup> to bring it into line with the demands of international morality. As put by Martti Koskenniemi, to Schücking ‘[l]awyers were not describers of but participants in international politics and had a duty not only to report on existing law but to further its development’.<sup>45</sup> Given Schücking’s inclination for sharp, polemical argument, this was not likely to earn him universal appreciation. However, it is a key to appreciating Schücking’s work. Unlike most of his colleagues, he did not shy away from political argument; and unlike many other politically active academic lawyers, he did not believe the two roles could or should be separated. This ‘activist’ interpretation of his academic role would seem to be the second distinctive feature of Schücking’s career.

### C A Prophet Occasionally Honoured in His Own Country

There is a third distinctive feature, which is very clearly brought out by the brief biographical sketch given above. Unlike many other celebrated international lawyers, Schücking, for most of his life, had little or no influence on academic debates within his home country.<sup>46</sup> In fact, for most of his life, he remained ‘on the fringes’ of Germany’s early 20th century legal academic establishment. His Marburg ‘years of struggle’<sup>47</sup> have been mentioned already, as have been his difficulties in obtaining an international law chair in 1920s Weimar Germany – a chair from which he was purged immediately after the end of the Weimar Republic. Clearly, in a number of respects, Schücking the academic stood out among his fellow German law professors: politically because few of them shared his pacifist leanings; methodologically because few were as keen as he was to look beyond the *lex lata*; and structurally because most

<sup>42</sup> See notably *Die Organisation der Welt*, *supra* note 8, at 7–8.

<sup>43</sup> Cf. the title of Jost Delbrück’s contribution to this volume.

<sup>44</sup> *Neue Ziele der staatlichen Entwicklung*, *supra* note 41, at 5.

<sup>45</sup> Koskenniemi, *supra* note 4, at 216.

<sup>46</sup> Hertz, ‘Walther Schücking Memorial’, 54 *Die Friedens-Warte* (1957/1958) 293; Kohl, ‘Walther Schücking’, in Kritische Justiz (ed.), *Streitbare Juristen. Eine andere Tradition* (1988), at 230, 235–237; Koskenniemi, *supra* note 4, at 222.

<sup>47</sup> Cf. *supra* note 9.



remained focused on the sovereign state while Schücking embraced the concept of international organization.<sup>48</sup>

The extent to which Schücking was marginalized during large parts of his professional life in the first place reflects negatively on the German academic setting. This is obvious for the Nazi years, which brought to an 'abrupt halt'<sup>49</sup> any serious attempts by liberal German scholars to engage in an international discourse on questions of international law. During the *Kaiserreich*, which in other areas of intellectual life did embrace liberal and progressive thinking, the German legal establishment was unwilling to countenance pacifist leanings or progressive liberal internationalism that would have been more readily acceptable in the United Kingdom or France.<sup>50</sup> Insofar as Schücking met with resistance during the Weimar Republic, this reflects the continuing influence of a conservative academic *milieu* even after the important social-political changes of 1918/1919.

Schücking's position 'on the fringes' of German academia may be contrasted with the high esteem in which he was held abroad, even before he became a member of the Permanent Court:<sup>51</sup> he was elected to the *Institut* as early as 1910, and later was to be a vice-president; he was a member of the Curatorium of the Hague Academy and one of the first Germans to lecture there;<sup>52</sup> in addition, he was an active participant in the Inter-Parliamentary Union and an internationally accepted authoritative commentator on the League's Covenant. Taking up this theme, much of the literature rightly stresses the discrepancy between respect for Schücking abroad and his marginalization at home.<sup>53</sup> In the stark terms used by James Brown Scott, eventually this was to make him 'a martyr in his own country [but] a model to the outside world'.<sup>54</sup>

Admittedly, there is a risk of overstating the point. So it should be recalled that, at least occasionally, the prophet *was* honoured in his home country. Until 1933, Schücking always found his audience within Germany: throughout his career, pacifist and progressive circles provided him with a platform; even in Marburg, he established close bonds with Neo-Kantian philosophers.<sup>55</sup> And of course, during the Weimar years, Schücking at least occasionally was very much in favour with progressive government circles. (As a general rule, few of the marginalized of this world become World Court judges, whether *ad hoc* or permanent; and few represent their countries at peace Conferences or participate in major codification projects.) So we need not imagine Schücking a complete outcast: he was sidelined by a structurally conservative academic environment, but, before 1933, occupied a 'niche' that other scholars on the fringes might have been rather envious of.

<sup>48</sup> Hertz, *supra* note 46, at 293.

<sup>49</sup> Koskenniemi, *supra* note 4, at 261.

<sup>50</sup> *Ibid.*, at 216.

<sup>51</sup> See Bodendiek, *supra* note 3, at 66–74, for details.

<sup>52</sup> Cf. *supra* note 17.

<sup>53</sup> In addition to the works by Acker (*supra* note 7) and Bodendiek (*supra* note 3) see, e.g., Fassbender, 'The Academic as a Cosmopolite', 93 *Proceedings Am Soc Int'l L* (1999) 329; Hertz, *supra* note 46, at 293–294; Koskenniemi, *supra* note 4, at 222.

<sup>54</sup> Scott, *supra* note 2.

<sup>55</sup> See Bodendiek, *supra* note 3, at 50–53, for details.

Still, the central point remains. Within his key ‘target group’, fellow German international law professors, Walther Schücking wielded little influence even before the political repression of the Nazi era. Hence it does not come as a surprise that German international law never saw the emergence of an institutionally relevant ‘Schücking school’, and what influence there may have been withered away after 1933.<sup>56</sup> No doubt, Schücking’s progressive and activist approach to the discipline would have made him an outsider among British, French, or US-American international lawyers as well. However, the German international law scholarship of the first third of the century was particularly likely to object to his progressive and activist approach to the discipline. The ‘cosmopolite’<sup>57</sup> therefore operated largely without a safe home base. This seems to be the third distinctive feature of Walther Schücking’s academic career.

## 4 Re-engaging with Schücking’s Work

Remembering Walther Schücking, and situating his work, is one thing; re-engaging with both is quite another. A person of high moral integrity he may have been, and one whose life was interesting precisely because it was in many respects unusual. But not each and every interesting or impressive personality merits our attention. Schücking does, it is submitted: 75 years after his death, we can profit from reading or re-reading his work and from reflecting on his approach to the discipline.

### A *Its Accessibility*

The first point to make in this respect is that Schücking’s work is *accessible*. There are two aspects to this. One is straightforward – a prerequisite, rather than a reason, for re-engagement, but still important: in order to engage with Schücking’s work, one need not be able to read German (although it does not hurt). While Schücking largely published in German, relevant samples of his written work are in English or French and often readily available. This of course applies to his judicial writings and his contributions to international projects, such as the League Codification Committee or the *Institut de droit international*. In this respect, Schücking’s opinions in the *Wimbledon* and *Oscar Chinn cases*,<sup>58</sup> as well as his report on the codification of the territorial sea,<sup>59</sup> may provide instructive starting-points for readers interested in his work. Beyond that, the 1927 Hague lectures on the development of the League of Nations Covenant<sup>60</sup> provide a good introduction to Schücking’s thinking about the League and his vision of international organization. But most importantly, soon after the

<sup>56</sup> Scheuner, *supra* note 3, at 9; Bodendiek, *supra* note 3, at 300–309, for details.

<sup>57</sup> Fassbender, *supra* note 53, at 329.

<sup>58</sup> See *supra* notes 32–33.

<sup>59</sup> ‘Eaux territoriales’, in Société des Nations, *Comité d’experts pour la codification progressive du droit international* (1927), at 29–60; reproduced in S. Rosenne (ed.), *Committee of Experts for the Progressive Codification of International Law* (1972), ii, at 55–85.

<sup>60</sup> *Supra* note 17.

<sup>61</sup> *The International Union*, *supra* note 25.

publication of the German original, the Carnegie Endowment commissioned a translation into English of Schücking's central study on the Hague Conferences,<sup>61</sup> which not only puts forward Schücking's claim that by 1912 states had (unwittingly, as it were) established a world confederation, but also explores the very concept of international organization. In short, Schücking's written work need not be confined to a German-speaking audience.

In fact – and this is the more important aspect – it may even make for interesting reading. Certainly in his native German Schücking wrote in accessible language and expressed his views clearly and often poignantly. His shorter pieces in particular, many of them based on public speeches, engage the audience directly, often verge on the polemical, and retain a rhetorical quality to this date.<sup>62</sup> There is little attempt to hide behind technical, legal jargon; no sitting on fences; but firm opinions clearly expressed. At least to some extent, this survives even in the translations and in his foreign-language works. The following passage, taken from the preface to *The International Union of the Hague Conferences* may convey a feeling for Schücking's engaging style:

The stately Peace Palace, which has been built [at The Hague] by a thousand industrious hands, is merely the symbol of a new age. There is now to be built by a thousand intellects the invisible palace of law and justice under whose roof the whole civilized world shall live together in peace. Here again it is a matter of laboriously placing one stone upon another until the whole structure towers in the heavens for all time, like the noble structure of the pyramids.<sup>63</sup>

Even those who do not share the optimism expressed in these lines, or find the dramatic way in which it is expressed curious, are likely to appreciate that Schücking cared about style and managed to avoid the dry legalese that dominates much of our writing. In fact, to conclude on this first point, a re-engagement with Schücking's works may even result in a feeling of nostalgia: nostalgia for 'the old days' when articles could be short, needed few footnotes, but were full of clearly-worded opinions. In this respect, 'a dose of Schücking' may remind us that academic writing can be engaging, and perhaps even elegant or witty.

## **B No 'Flight from Politics'**

There is a second point, a second benefit to be gained from re-engaging with Schücking's work: Schücking's emphasis on fundamental values, and his insistence that jurists ought to look beyond the existing law, may immunize us against the risks of a purely technical approach, which is content with functional expertise, but ignorant of the political dimensions of legal choices. In this respect, 75 years on, we may hope to draw some inspiration from Schücking's scientific ethos. This should not be read as a plea for the unreflective adoption of Schücking's approach. Re-reading his works, one cannot avoid the impression that Schücking perhaps was rather too committed to certain fundamental values or too quick to proclaim them as principles guiding the

<sup>62</sup> For details see the bibliographies by Acker and Bodendiek, both *supra* note 24.

<sup>63</sup> *The International Union*, *supra* note 25, at p. xi.

interpretation of the law.<sup>64</sup> In retrospect, it seems that, at times, his analysis would have been more convincing had it been less passionate or ‘value-driven’. But even where he ‘oversold’ his argument, Schücking’s insistence that lawyers would have to do more than ‘determine the state of positive law’<sup>65</sup> remains important. In fact, it may be particularly important for contemporary international lawyers embroiled in debates about differentiation, specialization, and fragmentation.

Differentiation and specialization of course are not bad as such (nor indeed is fragmentation), but rather signs of evolving, maturing legal orders. However, they render more acute one of the great ‘professional’ risks that lawyers face: that amidst the quest for specialized expertise, we are prone to forget that law, as an instrument, is hardly ever value-neutral. The prominence of the deliberately neutral vocabulary of managerialism, just as the ‘functionalist turn’,<sup>66</sup> in recent international discourse suggests that this risk should not be ignored.<sup>67</sup> If anything, it is increased by the reliance that international law places on decisions taken on the basis of scientific, technical, or other ‘objective’ criteria. In this respect as well, ‘a dose of Walther Schücking’ may be beneficial. His work abounds with references to the need for lawyers to be forward-looking and progressive – or, in one of the more dramatic variations on the theme, for ‘the international law jurist . . . to point out to mankind the ways and means which will lead it out of the dark valley of the past up to the bright heights of the future’.<sup>68</sup> In order to be able to do this, international lawyers would have to draw on historical precedents to ‘project’ a law of the future that would better accommodate the demands of justice, and, while insights from science no doubt had their place, they could be no substitute for normative decisions.

On that basis, it seems clear that Schücking would have shared the views of today’s ‘anti-managerialists’; for him, it was beyond doubt that (as was recently put emphatically) ‘the fate of international law is not a matter of re-employing a limited number of professionals for more cost-effective tasks but of re-establishing hope for the human species’.<sup>69</sup> In fact, Schücking’s own work can be seen as a life-long struggle against a technocratic, a-political understanding of the law – whether in its positivist or functionalist variation. In this respect, it has lost none of its relevance, and retains its critical potential.

### C *Far-sighted Projections*

While personal integrity and scientific ethos may inspire, in the end a scholar’s standing will depend on the substance of his work. How does Schücking fare on that count? Does his work offer insights relevant for contemporary international lawyers? Given his concern with fundamental questions, we cannot expect ready-made answers to specific questions or problems. And yet his work remains highly informative. It is informative because Schücking’s writings have foreshadowed the development of international

<sup>64</sup> For similar observations see Garcia-Salmones, *supra* note 34; Koskenniemi, *supra* note 4, at 221.

<sup>65</sup> Cf. *Die Organisation der Welt*, *supra* note 8, at 9: ‘Die Erkenntnis des Positiven [Rechts]’.

<sup>66</sup> Klabbers, in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009), at 99.

<sup>67</sup> For a critique see notably Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’, 70 *MLR* (2007) 1.

<sup>68</sup> *The International Union*, *supra* note 25, at p. xi.

<sup>69</sup> Cf. Koskenniemi, *supra* note 67, at 30.

law in a number of important respects. Not all of his views were ‘destined to become the law of the future’,<sup>70</sup> but it is one of the more interesting aspects of the ‘Schücking rediscovery’ how often his projections – even without any ‘medium’ such as that of a ‘Schücking school’ – have come to be reflected in contemporary international law. Three examples may illustrate this point.

(i) Schücking’s assessment of international organizations provides the most obvious example. Within Germany, he was the first to appreciate how fundamentally international organizations would change the international system,<sup>71</sup> and among the early 20th century studies on international organization, his treatment – both in his early, more theoretical form of the *Staatenverbund* and in his subsequent, more pragmatic manifestation of the Covenant Commentary – stands out as particularly systematic and thorough.<sup>72</sup> Like many pioneers, Schücking overplayed his argument: few today would accept his interpretation of the Hague system as the beginning of a ‘world confederation’, and it may be that his vision of a future ‘world society under law’ was but a projection of the state onto the international scene that did not sufficiently reflect the presence of non-state actors, and their transformative effect on the system.<sup>73</sup> And yet, right from his early writing on *Die Organisation der Welt*, Schücking realised that ‘The Hague’ would mark a turn to internationalism and international solidarity, and ‘that this . . . spirit . . . was not so easily returned to its jar’.<sup>74</sup> Whatever the final outcome of the process, in his recognition of the trend towards international organization, Schücking was a much more accurate analyst than many of his contemporaries and correctly described the gradual transfer of state powers to international institutions.

(ii) Beyond this general assessment, Schücking was often far-sighted in his description of the necessary pillars on which the international society would eventually rest. In fact, these correspond to a considerable extent with what most international lawyers today would believe to be the cornerstones of the international system. This notably applies to his views on the use of force in international relations.<sup>75</sup> Article 2(4) UNC implements (in fact: goes beyond) Schücking’s insistence on the need to tame war by turning it into an institute of law;<sup>76</sup> and Schücking’s claim that the international system would have to abolish states’ right to wage war is no longer seriously disputed as a matter of principle.

By contrast, in line with the legalist spirit of the inter-War period, Schücking probably placed more emphasis than later generations on the role of compulsory dispute

<sup>70</sup> Scott, *supra* note 2, at 109.

<sup>71</sup> Scheuner, *supra* note 3, at 21. Cf. the detailed assessment of German scholarship by Bodendiek, *supra* note 3, at 170–204.

<sup>72</sup> See Potter, ‘The Origin of the Term “International Organization”’, 39 *AJIL* (1945) 803, at 805.

<sup>73</sup> See Spiermann, *supra* note 1, at 303–304, as well as sect 6 of his contribution to the present symposium; and further Koskeniemi, *supra* note 4, at 221–222. This is conceded in Bodendiek’s otherwise very positive assessment of Schücking, *supra* note 3, at 311.

<sup>74</sup> I. Clark, *International Legitimacy and World Society* (2007), at 82.

<sup>75</sup> This is widely accepted: cf. Bodendiek, *supra* note 3, at 207–215, for detailed references.

<sup>76</sup> See, e.g., *Die Organisation der Welt*, *supra* note 8, at 82.

resolution.<sup>77</sup> While we have become used to celebrating the recent creation of new courts and tribunals, the legalisation of dispute settlement has been a cumbersome process, and our approach to international courts and tribunals has become rather technical. Only a few see compulsory arbitration or adjudication as a realistic way to preserve international peace and security; binding dispute settlement is no doubt useful, but its role seems more limited than early 20th century internationalists (including Schücking) believed.<sup>78</sup>

From today's perspective, Schücking's views on an 'international executive' presumably are the most 'modern'. Over time, Schücking became convinced that the international society of the future would be in need of an 'international police'.<sup>79</sup> Fully aware of the concerns that this would raise among states, he saw this as a long-term goal; however one that international lawyers caring about the future should prepare for.<sup>80</sup> And it is in his projections on this topic that Schücking was arguably at his most prophetic. Even as a pacifist, he accepted that there remained room for institutionalised military sanctions against a law-breaker;<sup>81</sup> and while that distinguished him from many fellow pacifists, his views are reflected in today's UN system for collective security. Unlike many others, he did not, however, restrict himself to military sanctions, but in his later works studied economic sanctions (such as the freezing of a state's assets) in some detail<sup>82</sup> – which might be said to foreshadow the subsequent diversification of the international sanctions 'portfolio'. As for the imposition of sanctions, Schücking was adamant that, in order to be effective, the Covenant's regime would have to be replaced by a system that allowed for mandatory collective sanctions, binding members of the League just as non-members,<sup>83</sup> and which would be either enforced by international institutions or by individual states implementing a binding international decision.<sup>84</sup> In retrospect, it is clear that Schücking has not always been correct in predicting which areas of international relations would be most likely to see the emergence of international executive agencies.<sup>85</sup> Yet the international 'sanctions bureaucracy' we are beginning to see emerging since the 1990s, with its flexible mix of sanctions committees, monitoring bodies, and state and regional enforcement agencies, is probably not too far removed from Schücking's vision of an international executive with different degrees of centralization. Lastly, it deserves to be repeated that

<sup>77</sup> Scheuner, *supra* note 3, at 21.

<sup>78</sup> Cf. Jennings, 'Introduction', in A. Zimmermann *et al.* (eds), *The Statute of the International Court of Justice. A Commentary* (2006), at 35.

<sup>79</sup> Schücking's approach is pursued in Wehberg's much-neglected study on *Theory and Practice of International Policing* (1935), especially at 43 ff.

<sup>80</sup> See Schücking, *supra* note 25, at 295–309, for early considerations.

<sup>81</sup> W. Schücking, *Wege des Pazifismus* (1923), at 21.

<sup>82</sup> Schücking *supra* note 28, at 558 ff.

<sup>83</sup> Cf. Schücking *supra* note 18, at 37.

<sup>84</sup> Schücking *supra* note 28, at 554 ff.

<sup>85</sup> To give but two examples, international law has not moved towards the international supervision of national navies in the form of a *Flottenpolizei* envisaged by Schücking and others; and there has been no serious attempt to set up international institution for the organization of migration. Contrast W. Schücking, *Internationale Rechtsgarantien* (1918), at 43 ff, 120 ff.

even though Schücking's views on an international executive were largely in the form of projections, he did stress the need for procedural guarantees against sanctions<sup>86</sup> – an issue that was to be largely overlooked in 1945 and that haunts us today.

(iii) To these points, one should add a further comment on Schücking's views on how existing international organizations evolve over time. It is relevant because, unlike the previous comments, it highlights a very pragmatic side of Walther Schücking's work. Based on an evolutionary approach, he – without saying so expressly – treated constitutive instruments of international organizations quite naturally as 'living instruments'<sup>87</sup> that would evolve over time. This is really the core theme of his Hague Lectures on the development of the Covenant:<sup>88</sup> in quite a systematic way, Schücking analysed modifications to the Covenant's text as well as tacit re-interpretations, and explored how the Covenant ought to be interpreted so as to facilitate a better realization of the League's objects and purposes. The later chapters of the study address dynamic elements in international law more generally and contain insightful comments on the inherently transformative character of self-determination, the doctrine of change of circumstances, and, more generally, the evolution over time of the League's ideas and ideals.<sup>89</sup> In short, in this Hague course given more than eight decades ago, one finds a rather modern set of techniques by which treaties can over time be adapted to changing circumstances – based, of course, on the premise that they should, and can; a premise widely accepted today, but innovative at the time.

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The preceding sections suggest that 75 years after his death, Walther Schücking's life and work merit our attention: a 'Schücking re-discovery' is a worthwhile endeavour. By engaging with his work, contemporary international lawyers will rediscover the spirit of an age full of hopes and ambitions. And while we may not want to go back, uncritically as it were, to the simple truths of the time, we should acknowledge (and may occasionally need reminding) that it is in this spirit of – sometimes naïve – hope and ambition that much of our modern 'invisible palace of law and justice'<sup>90</sup> was constructed. Walther Schücking was certainly not the palace's chief architect, but he was one of the 'thousand intellects . . . [who] laboriously place[d] one stone upon another', seeking to ensure that, one day, 'the whole structure' would indeed 'tower[. . .] in the heavens for all time, like the noble structure of the pyramids'.<sup>91</sup> Few today would take this as an accurate description of actual international law. But it is due to the efforts of Walther Schücking and like-minded internationalists that we can view it as a 'realistic utopia' worth our efforts.

<sup>86</sup> See Schücking *supra* note 28, at 556 ff.

<sup>87</sup> On the broader issue see M. Shaw, *International Law* (6th edn, 2008), at 936–938.

<sup>88</sup> 'Le développement du Pacte de la Société des Nations', *supra* note 17.

<sup>89</sup> *Ibid.*, at 385 ff, 406 ff, 436 ff, and 445 ff.

<sup>90</sup> *The International Union*, *supra* note 25, at p. xi.

<sup>91</sup> *Ibid.*