The European Journal of International Law Vol. 22 no. 3 © EJIL 2011; all rights reserved

Walther Schücking and the Pacifist Traditions of International Law

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Abstract

In this article I discuss four pacifist traditions in international law in play during the 20th century, in the context of the Symposium on Walther Schücking. The article addresses the fact that these pacifist traditions have contributed to shaping the way in which we view international law today and how we understand our current world. Essentially, we see the globe as an entity legally organized through treaties, international courts for dispute settlement, and international organizations with worldwide jurisdiction. The science of law tries, with difficulty, to grasp all these phenomena in a unitary manner. Moreover, pacifism has influenced our choice of legal techniques. At the core of the pacifist traditions lies the wish of a group of pacifist intellectuals, among them Walther Schücking, to achieve a peaceful transition to what they viewed as an unavoidable state of economic interdependence on a global scale. Their specific purpose was peace – 'peace through law'. Beyond that, it occurred to almost none of them to question the beneficial aspects of their internationalist projects and the economic interdependence behind them. Peace was raised then to the level of the highest good. Who would dare dethrone it? This article suggests that we live in an era of pacifist international law. The article also takes the approach that the very existence of a variety of pacifist traditions shows that political pluralism may coexist with pacifism. Peace is indisputably a common good and pacifism does not necessarily prevent politics from continuing to flourish.

Peace is the continuation of politics by other means; for instance, by international law. This is an ideal definition both of peace – peace through politics – and of international law. Peace is many other things too,[2] but defining it in this manner fits in well

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[2] An example is the theological notion of peace as distinction between good and evil in Saint Augustin; through the distinction between good and evil, which is the essence and structure of order, the equilibrium of the world is built up: Aurelius Augustinus, *Die Ordnung* (1st German trans. C. J. Perl, 1966).

with one of the best of the internationalist traditions – that which defines the notion of international peace through the concept of treaty. This constitutes Immanuel Kant's lifelong work on peace, famously articulated in his essay 'Zum ewigen Frieden', a landmark in the history of the pacifist tradition of international law, which even in its literary form chooses the expression of a treaty in order to reinforce its message.[3] As regards politics, there is no need to define them here. It suffices to say that politics are neither war nor peace – they are just politics.

The present text deals with various key aspects of four pacifist traditions of international law. To accomplish more than that in the short space available in this symposium would be an impossible task, due to the fact that international law has always been permeated with ideals of peace. To that extent, one might say that every international lawyer works in one sense or another in the cause of peace – war always constitutes a failure; a time for reflection and for 'inner emigration'.[4] The pacifist traditions briefly explored in this text are those that regard international law as the best instrument to enhance peace in the world. Each of them employs the powerful maxim of 'peace through law'. As mentioned above, this is certainly the view of the Kantian humanist tradition. But in each of the pacifist traditions, law, and therefore international law, has a different type, a peculiar character of its own. The four advocates of 'peace through law' that this article describes point to four different realities when they say 'law'. Kant sees the treaty as the ideal means to achieve peace. In the peace agreement, consideration of the other – the friend or former enemy – is placed at the centre in order to create peace based on mutual confidence. Walther Schücking, to whom this special symposium is devoted, has an ambivalent relationship with the classic tradition of Kant that is further analysed below. A second tradition stems from the Anglo-Saxon common law, and seeks to promote peaceful settlement of international disputes by arbitration or adjudication. Within this tradition, the judge is the key figure and the guarantor of peace through valid law. Next we have Hans Kelsen's development of a theory of law that sees in the concept of law itself, understood in a broad sense – as constitution, statute, judicial decision – and in legal science, the medium through which peace shall be created. Finally, Walther Schücking is a pioneer of the modern theory of peace by international organization. His work is partly based

[3] I. Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795). Although the form might be parodic, so Lange, 'Histoire de la doctrine pacifique et de son influence sur le développement du droit international', 13 *RdC* (1926–III) 170, at 349; Lutz-Bachmann, 'Kants Friedensidee und das rechtsphilosophische Konzept einer Weltrepublik', in M. Lutz-Bachmann and J. Bohman, (eds), *Frieden durch Recht. Kants Friedensidee und das Problem einer neuen Weltordnung* (1996). That Kant started to research on peace already in the 1750s in P. Natorp, *Kant über Krieg und Frieden. Ein geschichtphilosophischer Essay* (1924), at 22.

[4] A paradigmatic example of this is Hans Kelsen. He started to write *Das Problem der Souveranität,* in 1915, in the midst of World War I, while serving in the department of justice of the Ministry of War; the book was not published until 1920: H. Kelsen, *Das Problem der Souveranität und die Theorie des Völkerrechts* (1920), at VI; *Hans Kelsen im Selbstbezeugnis. Sonderpublikation anlässlich des 125. Geburtstages on Hans Kelsen am 11. Oktober 2006* (2006), at 48–49. The hopeless cry of Joseph Kohler about 'the dishonour' of those powers which had violated 'the sanctity of law' when breaching the third agreement on 'Opening of Hostilities' of the 1907 Hague Convention may be also interpreted as a feeling of failure of lawyers: see Kohler, 'Krieg und Völkerrecht', XIX *Deutsche Juristen Zeitung* 16/18 (1914), at 1014.

on a theory of communication that aims to intensify the life of the international community and relies on the collective treaty that legalizes that community and establishes its institutional framework. Prior to the outbreak of World War I Schücking produced a groundbreaking legal treatise on the Peace Conferences in The Hague as the first world confederation of nations.[5] All of these traditions are interrelated, and occasionally point to one another, either approvingly or disapprovingly. They also share important elements. Each endorses the politics of liberal democracy and takes the view that the key to political peace is the presence of a democratic system in each of the members of the international community.[6] Further, they all assume a *pax mercatoria* of the type that emphasizes the value of economic interdependence or economic communication and *Weltwirtschaft*. This view involves the privatization of international disputes.[7] Although they do not always consider it necessary to theorize on the basis of the presupposition of the *pax mercatoria*, pacifists usually think pragmatically, transforming economics into a legal methodology, as is also true in the case of Schücking. Ahead of his time on this issue, as he was on many others, he proposed, as early as 1918, the creation of an international agency with jurisdiction over natural resources to balance the opposing interests of individual states.[8] Finally, to a greater or lesser degree these pacifist traditions share awareness of the need to change the world and of the fact that one cannot make an omelette without breaking a few eggs. In other words, political change on a grand scale was desired and one must bear the use of violence that it would entail. Thus, as Habermas mentions, the democratic states obeying the rule of law that arose from the French and American Revolutions were, while Kant was writing on a peaceful world-league of republics, 'the exception and not the rule'.[9] Similarly, Kelsen's universal law demanded the substitution, and

5 W. Schücking, *Der Staatenverband der Haager Konferenzen* (1912).

6 Democracy is required, and not merely the rule of law, since, as Kelsen puts it (against H. Krabbe), 'every state is a state under the rule of law, also the absolute monarchy': see Kelsen, *Das Problem, supra* note 4, at 26. See also generally H. Kelsen, *Vom Wesen und Wert der Demokratie* (1929); also Root, 'The Declaration of Rights and Duties adopted by the American Institute of International Law', 10 *AJIL* (1916) 211. In the case of Kant the question is also expressly put in terms of representative republicanism. Kant is, according to Lange, the inaugurator in respect of the link between the democratic principle and peace: Lange, *supra* note 3, at 350–352; also W. Schücking, *Neue Ziele der Staatlichen Entwicklung* (1913); Schücking, 'Demokratie', in K. Lenz and W. Fabian (eds), *Die Friedensbewegung. Ein Handbuch der Weltfriedensströmungen der Gegenwart* (1922), at 101.

7 The American pacifist Salmon Levinson argued that international disputes and individual disputes were essentially dealing with the same questions of property or property rights and liberty: '[t]ake the case of Alsace-Lorraine: After all, through the centuries, it was a controversy over real estate; a large amount of real estate to be sure, and involving, incidentally, a question of national allegiances; but inherently a question of title to real estate': S.O. Levinson, *Outlawry of War* (1921), at 21. For a helpful analysis of *pax mercatoria* from the perspective of the state see Simmons, 'Pax Mercatoria and the Theory of the State', in E.D. Mansfield and B.M. Pollins (eds), *Economic Interdependence and International Conflict* (2003), at 31. Lange defined this trace as the utilitarianism of the doctrine of pacifism: Lange, *supra* note 3, at 182, 185.

8 W. Schücking, *Internationale Rechtsgarantien* (1918), at 108–118. For the novelty of Schücking's proposal at least in German literature see F. Bodendiek, *Walther Schückings Konzeption der internationalen Ordnung* (2001), at 270.

9 Habermas, 'Kants Idee des ewigen Friedens – aus dem historischen Abstand von zweihundert Jahren', in Lutz-Bachmann and Bohman, *supra* note 3, at 7.

hence the disappearance, of the historical empires then still in existence and, most importantly, aimed to prevent the appearance of new ones on either side of the Atlantic. Not a very different fate for autocratic governments was implied in Schücking's conception of the organization of the world on the basis of the sentiment of brotherhood traced back to the French Revolution. This approach probably explains why Stolleis describes Schücking's general political tendency as *bürgerlichen Pazifismus.*[10] In this regard, looking beyond the rhetoric, one might argue that these pacifist traditions of international law were not in principle anti-militaristic – one needs only to have a look at the conventions adopted in the Peace conferences in The Hague.[11] Generally, in earlier perpetual peace projects, such as those of the Abbé de Saint Pierre, John Bellers, or William Penn, the use of force had been always a latent possibility, if, perhaps, one that was more candidly articulated. Indeed, one finds the requirement of a total war in order to achieve perpetual peace within some of the oldest written peace projects.[12] Those ancient authors were being revisited at the beginning of the 20th century and studied seriously by researchers of pacifism with a determined emphasis on their expressions in favour of peace. The refusal by pacifists to take notice of their comments on the use of force gave sceptics a golden opportunity for irony: 'But perhaps the encomium that would interest us most', one concluded after discussing the use of force in the text of a medieval pacifist, 'is that he was an "initiator" of the pacifist movement'.[13]

The traditions of international law described above provide evidence that the cause of peace had become an integral part of the main political projects thriving at the beginning of the 20th century. Despite the numerous critiques of their practical results, the two Peace Conferences in The Hague (1899/1907) must be recognized today as great achievements in law,[14] which contributed towards transforming pacifism into a respectable political doctrine in the international sphere. The first delegate of the United States to the Second Hague Peace Conference, Joseph H. Choate, expressed this change of attitudes in 1913 when he affirmed with pride that pacifism had come in vogue among public men, since not many years ago the Peace movement and its advocates 'were more frequently the object of ridicule than of any serious consideration'.[15]

It should be stressed that the approaches outlined in this article are exhaustive neither of the pacifist traditions in play in the history of international law, nor of

[10] Also that of his life-long friend and intellectual companion Hans Wehberg (1885–1962): M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Dritter Band 1914–1945* (1999), at 58; see also W. Schücking and H. Wehberg, *Die Satzung des Völkerbundes* (1924), at 2.

[11] For a good summary of the conventions see Brown Scott, 'The Work of the Second Hague Peace Conference', 2 *AJIL* (1908) 1.

[12] Knight, 'A Mediæval Pacifist: Pierre du Bois', 9 *Transactions of the Grotius Society* (1923) 1. See the discussion of the use of force in the peace projects of Penn, Abbé de Saint Pierre, and Bellers in F. H. Hinsley, *Power and the Pursuit of Peace* (1988), at 33–45.

[13] Knight, *supra* note 12, at 16.

[14] See also 'Presentation', in Y. Daudet (ed.), *Topicality of the 1907 Hague Conference, the Second Peace Conference/ Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la paix* (2008), at p. xvii.

[15] J.H Choate, *The Two Hague Conferences* (1913), at 41.

those which could possibly be imagined. The latter are as inexhaustible as human creativity. But those four methods of promoting peace by legal means were important during Walther Schücking's lifetime and keep cropping up in a study of his pacifism as alternative visions of world peace, despite their marked similarity to each other. It is worth highlighting that, taken together, they constitute the bulk of twentieth century international law. To that extent it might be suggested that international law in the last century has the distinguishing feature of pacifism at the service of 'the solidarity of interests'.[16]

Considering these different methods of promoting peace together also helps highlight the scope of Schücking's intellectual effort. He undoubtedly made an important contribution to the consolidation of modern international law as we know it today. Before exploring these traditions in terms of their interaction with Schücking's, we shall first give some thought to what was arguably his dual (and troubled) professional commitment: as both a political pacifist and an internationalist scholar.

1 The Pacifist International Lawyer

Schücking was one of the first professional international lawyers, as the profession was understood during the 20th century. A learned scholar, an internationally active pacifist, and the first German judge of the Permanent Court of International Justice (PCIJ) – these are his credentials. And still, he was not *simply* those things. At times, researching the life and works of Walther Schücking is a source of anxiety.[17] Controversy and polemic were often his life companions. Schücking also often displayed a steadfast refusal to admit the complexity of the political world, 'including his own position',[18] which was in truth often the most intricate and bold of all. The historical context in which Schücking was politically active as a pacifist – Germany from

[16] Schücking, 'Kultur und Internationalismus' in *Der Bund der Völker. Studien und Vorträge zum organisatorischen Pazifismus* (1918) (Mar 1910) 35, at 48; '[t]he fact that we have entered a new age of world economy, in which finally the solidarity of interests will prevail over all national differences and that the political organisation of the *Kulturwelt* has to adapt to the facts of the economic life – the fact that the beginnings of that organisation have been produced already in The Hague, cannot be concealed perpetually from the liberal (*bürgerlichen*) circles'. Schücking, *Neue Ziele, supra* note 6, at 100. Villalpando has recently defined 'solidarity' among states in the context of community interests as 'as much an objective state of affairs (a material interdependence between individuals to achieve a certain goal) as a subjective state of mind (the awareness of the existence of such interdependence, and willingness to protect it as such)'. Nevertheless Villalpando uses the concept of solidarity in the deeper framework of the 'social intercourse of states': Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law', 21 *EJIL* (2010) 387, at 396, 418. On his part Schücking's theory was still at a rudimentary stage and he referred generally only to economic interests on the one hand and peace on the other. The former would bring the latter into a kind of evolutionary process. But he was not yet able to theorize the notion of peace in itself as a value or an interest belonging to the community. However, his foresight is remarkable.

[17] For a good introduction to his life that captures this feeling see D. Acker, *Walther Schücking (1875–1935)* (1970); for Schücking as an international lawyer see M. Koskenniemi, *The Gentle Civilizer. The Rise and Fall of International Law, 1870–1960* (2002), at 213.

[18] *Ibid.*, at 221.

1907 to 1935 – partly explains this fact.[19] By the turn of the century there was a general feeling of public marginality within the German pacifist movement, which, in the words of Bismarck, was perceived to have a 'communist distinctiveness'.[20] It is also important to note that the intensity of Schücking's career as a pacifist coincides with the sinuous path of Germany towards, within, and away from World War I, and finally to the seizure of power by the Nazis. Germany and Schücking appear as in a 'counter-striving disposition' (*gegenstrebige Fügung*) that resembles Walter Benjamin's angel of history.[21] Benjamin depicts the angel of history driven into the future by the storm of progress to which his back is turned, while he, with his face to the past seeks to piece together that which has been smashed by what he perceives as a single catastrophe. Schücking's idealism was not shattered by the war. However, like the angel of progress, whom he had embraced, he recognized the catastrophe – perceived naturally as something personal – in two events: the injustice of the Peace Treaty of Versailles and Hitler's legal revolution of 1933.[22]

Furthermore, World War I and the tensions that arose in the post-Versailles period forcefully signified trouble for a pacifist-minded international lawyer; in particular for one who defended peace though international organization. While Schücking believed that international organization in general and the League of Nations in particular would be the most pressing international issues, the political spectrum in Germany from left to right was disinclined to support that organization that was considered an 'alliance of victors'.[23] But far earlier, already in the first decade

[19] A tentative reference for the start of his career as a pacifist is his own argument that in 1907 pacifism entered Germany through the published work of Otfried Nippold and his own *Die Organisation der Welt*, 'a work of the summer of 1907': Schücking, *supra* note 5, at 3. The thesis of the pacifist harassed by the militarist government is defended in Shand's apparently, historically unbalanced description: Shand, 'Doves among the Eagles: German Pacifists and Their Government during World War I', 10 *J Contemporary History* (1975) 95.

[20] P. Jost, *Die Marginalität der deutschen Friedensbewegung vor dem ersten Weltkrieg* (2009), at 7. Schücking affirmed in 1910 that German pacifists are 'a cornered sect, prosecuted and despised by the Prussian government, but the pacifist movement has already conquered the world': Schücking, *supra* note 16, at 50. See also Bodendiek, 'Walther Schücking und Hans Wehberg – Pazifistische Völkerrechtslehre in der ersten Hälftes des 20. Jahrhunderts', 74 *Friedens-Warte* (1999) 79, at 82.

[21] S. Weigel, *Body and Image Space: Re-Reading Walter Benjamin* (1996), at 54, 57, 162. Benjamin in turn borrows the image from Heraklitus, at 180. For an interesting interpretation of this image and generally of Benjamin's life and work see Arendt, 'Walter Benjamin', in *Men in Dark Times* (1968) 153, at 192.

[22] Schücking singled out these two blows as the severest calamities that had occurred during his lifetime in a letter to his friend Hans Wehberg on 8 Jan 1935, the year of his death: see Acker, *supra* note 17, at 204–205. With regard to the accuracy of Schücking's perception see also recent research on the Peace Treaty of Versailles: '[f]orced to sign it [the peace treaty] Germany's democrats now appeared to the German people not as agents of a lasting peace but as failures or, worse, traitors'. The practical consequences were that in the elections in June 1920 'the leading pro-Weimar parties lost 8 million of the 19 million votes they had received in early 1919': R.A. Kennedy, *The Will to Believe. Woodrow Wilson, World War I, and America's Strategy for Peace and Security* (2009), at 197.

[23] Fassbender, 'Walther Schücking – Champion of the League of Nations Idea in Pre-World War I Germany', Remarks in the Panel 'The Academic as Cosmopolite: Legal Visions of International Governance in the 20th Century' in *Proc. of the Am Soc Int'l L* (1999) 325, at 330; for a review of the motives behind that rejection see Fraenkel, 'Idee und Realität des Völkerbundes im deutschen politischen Denken',

of the 20th century Schücking suffered greatly because his new approach to international law did not get the reception in Germany that he thought it deserved – although it got it in other countries. The fact that he was convinced of his unique contribution made things no easier.

The controversy aroused by Schücking's active pacifism may well be attributable to his difficult exercise of a dual profession. Schücking's active life evolved and developed along with the invention of the modern profession of 'international lawyer'. In this process he characteristically adopted a standpoint that went further than contemporary political, social, or general conditions would allow. This approach tended to result in friction, but also helped drive matters continuously forward – without a doubt he was one who saw everything in the large, as the Baltic German Martens put it once.[24]

With his work as an international lawyer Schücking contributed to the inauguration of some of the now established bipolarities of the modern discipline, such as those between law and politics,[25] law and economics,[26] and cosmopolitanism and (neo)colonialism.[27] The embedded complexity of those ambivalences is simultaneously reflected in the international legal order. In this respect Schücking's work and theories can be located within mainstream international law.[28]

Vierteljahrshefte für Zeitgeschichte (1968) 1. For the time and energy devoted by Schücking, together with his colleague and friend Hans Wehberg, to the theoretical work of the League of Nations see Bodendiek *supra* note 8, at 101–111. For a contemporary attempt to ground the idea of the League as an 'alliance of victors' see C. Schmitt, *Die Kernfrage des Völkerbundes* (1926). But, remarkably, see also the same intent in W. Schücking, *Ein neues Zeitalter? Kritik am Pariser Völkerbundentwurf* (1919).

[24] 'Gentlemen, if in private life he is happy who sees everything rose-colored, in international life he is great who sees everything in the large': Professor Martens appealing to internationalism in defence of the international commissions of enquiry during the 1899 Hague Conference, quoted in W.I. Hull, *The Two Hague Conferences and their Contributions to International Law*, (1908), at 282. The meeting of the committee of the League of Nations for the codification of international law in 1926 provides an example of this. Schücking stood at the outset for 'total codification', which caused some consternation in the rest of the committee, which decided later on a 'partial codification'. The episode is described in Bodendiek *supra* note 8, at 258.

[25] In his classical article on the politics of international law Koskenniemi argues that 19th and 20th century jurists sought a secure foothold in respect of the interpretation of texts, facts, and history in logic, science, and so on in order to contain subjectivism. But they did not find that basis. Instead, their subjectivism re-emerges by transforming those texts, facts, and history into arenas of political struggle: Koskenniemi, 'The Politics of International Law', 1 *EJIL* (1990) 4; also by Koskenniemi: Schücking's 'career highlighted the genuine ambivalence of a legal politics': Koskenniemi, *supra* note 17, at 216.

[26] The emergence of international economic law as a discipline may be taken as an (impossible) attempt to undo this bipolarity of law and economics. For a recent view on the economic analysis of international economic law see Van Aaken, 'Opportunities and Limits to an Economic Analysis of International Economic Law' (6 July 2010). Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, 8–10 July 2010, available at: http://ssrn.com/abstract=1635390.

[27] For a similar ambivalence that Jouannet defines as inherent in modern international law see Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?', 18 *EJIL* (2007) 379. In his acceptance of colonialism Schücking stood neatly within the mainstream: Schücking, 'Die Ideee der internationalen Organisation in der Geschichte', in *Der Bund der Völker. Studien und Vorträge zum organisatorischen Pazifismus* (1918) 1, at 10, 24.

[28] This statement is not undermined by his 'quest for the *lex ferenda*', which opposed him to mainstream positivist thinking, as stressed in the contributions by Jost Delbrück and Frank Bodendiek.

But his extremely demanding and complex double commitment to the active life of a pacifist politician and to the contemplative life of an internationalist scholar was a turn of the screw and quite unique. Moreover, he occasionally failed to respect the borders of those two fields, acting as a politician when the scholar was expected and vice versa. Due to this, mistrust or misunderstanding sometimes arose.[29]

His appointment as judge of the PCIJ was well received by public opinion within and outside Germany.[30] It can be viewed as the turning-point in his life, in which he could unite the two parts of his dual vocation into one. Evidence of this is that following his appointment as a judge in The Hague he relinquished all his numerous political commitments, even though not all of them were incompatible with his new position. His new activity provided him with the opportunity to work actively in support of internationalism. After all, this was his political project. At the PCIJ Schücking's activity as a lawyer was at last his practical instrument as a politician.[31] To that extent Schücking is one of the heroes of the pacifist traditions of international law.

2 *Die Organisation der Welt:* Project and Reality

Schücking's pacifist project for a world organization lost impetus with the formation of the League of Nations.[32] Occasional remarks in his commentary on the statute of that organization show that he did not change the basic propositions of his own project after the war, but ostensibly he was no longer in a position to defend them with

[29] For his failed political efforts to secure a position in the law faculty of Berlin in order to teach international law in 'a new spirit', with seminars on 'scientific pacifism' and the 'history and theory of the peace movements', see the story in detail in A. Klopsch, *Die Geschichte der Juristischen Fakultät der Friedrich-Wilhelms-Universität zu Berlin im Umbruch von Weimar* (2009), at 174–180; also Stolleis, *supra* note 10, at 256; and Bodendiek, *supra* note 8, at 66–67; Klopsch also explains that following World War I the faculty of law remained conservative in tendency, and professors who held liberal ideas were as a rule not appointed: *ibid.*, at 174. Erzberger, Finance Minister and president of the *Deutsche Liga für Völkerbund*, who made the inconvenient political recommendation in favour of Schücking had an active role in the negotiation of the Treaty of Versailles from the headquarters in Berlin – Schücking was negotiating in the field. Erzberger was sadly assassinated on 26 Aug 1921, apparently due to his role in the armistice: see K. Epstein, *Matthias Erzberger and the Dilemma of German Democracy* (1959). For remarks by politicians on Schücking not being tough enough as a politician see Acker, *supra* note 17, at 113; also Akten der Reichskanzlei. Weimarer Republik - Die Kabinette Brüning I/II / Band 1/Dokumente / Nr. 110 Ministerbesprechung vom 3. September 1930, 11 Uhr/TOP [Aussprache über die Führung der Außenpolitik.], at 408–418, available at: http://www.bundesarchiv.de/aktenreichskanzlei/1919-1933/0000/bru/bru1p/kap1_2/kap2_110/para3_1.html.

[30] Except by the right-wing radicals who were aggrieved by the election of 'the Jew and pacifist Schücking': Acker, *supra* note 17, at 203. Schücking was, however, not Jewish.

[31] He himself spoke (probably rightly) of the 'as is generally known always unworldly jurists (*weltfremde Juristen*)': Schücking, *supra* note 23, at 15.

[32] Whether Schücking's project gained at the same time a concrete foothold in real life with the formation of the League is irrelevant to the topic discussed in the following pages: his own pacifist project. At any rate, the whole historical trajectory of the League, starting with the ban on entering imposed on Germany, is completely alien to Schücking's ideals.

the vigour he had previously shown.[33] We shall next therefore review his personal pacifist journey, especially during that period in which he expressed his own ideas on the topic without reference to the League.

The value of Schücking's legal-historical work on pacifist themes has today crossed the borders of disciplines. Together with a couple of other authors he is credited with having inaugurated peace history, opening up 'a terrain of historical enquiry that had been almost entirely neglected', in comparison, for instance, with the innumerable earlier writings on the history of war.[34] Remarkably, Schücking's text, *Die Organisation der Welt* of 1908 is by some distance the earliest of the works considered groundbreaking in this field.[35] The next of these, the famous *Der Gedanke der internationalen Organisation* by Jacob Ter Meulen, appeared almost ten years later.[36] In Schücking's case the choice of the historical approach was more of a choice of method than a mere inclination towards history, although, as his previous scholarly work (and his *Habilitation*) showed, he could do that too.[37] But *Die Organisation der Welt* was his most programmatic book, in which he wanted to combine a description of the past with his idea of the future.[38] In order to understand Walther Schücking's idea of pacifism, it is necessary to analyse the method he used to predict the future through the observation of present conditions. He acted as a visionary of progress, and this activity kept him constantly in motion: peace, it seemed to him, was always capable of future improvement. This improvement evidently implied that in the future the conditions of peace would be more favourable to his political sensibilities.

Like the arbitration movement for settlement of international disputes Schücking valued and recognized the work of pacifist movements from outside international law, such as the Quakers. The famous pacifist Alfred Fried had a great and often acknowledged influence on him.[39] Occasionally Schücking would criticize the pacifists for not being radical enough in promoting the cause of internationalism.[40] His particular

[33] Thus, on the one hand he admits that in The Hague, before the war, the states had not yet understood the potential for international collaboration, and on the other he reports the petition to the Council of the League by the commission of jurists to recover the work done in the Peace Conferences in 1899 and 1907 and to organize the third peace conference as soon as circumstances allowed it: Schücking and Wehberg, *supra* note 10, at 3, 567.

[34] For further details on the pioneer scholars and the first steps of peace history as a discipline see van den Dungen and Wittner, 'Peace History: An Introduction', 40 *J Peace Research* (2003) 363, at 363. The point is taken up in Frank Bodendiek's contribution in this volume, at 741.

[35] The author of this article has used the Leipzig edition of 1909. The idea of the book originated in a lecture given by Schüking on 30 Oct. 1907 to the Juridical Society in Vienna, as he explains in the 1908 edition of W. Schücking, *Die Organisation der Welt* (1909).

[36] J. Ter Meulen, *Der Gedanke der internationalen Organisation in seiner Entwicklung* (1917). See van den Dungen and Wittner, *supra* note 34, at 363.

[37] See Schlichtmann, 'Walther Schücking (1875–1935) – Völkerrechtslehrer, Pazifist und Parlamentarier', 15 *Historische Mitteilungen der Ranke Gesellschaft* (2002) 129, at 129.

[38] As Bodendiek and Tams express it, his method was one that developed a 'projected law': see their contributions to this symposium.

[39] Fried preferred international organization over arbitration as the ideal means to eliminate war. In this he was an inspiration to Schücking: A.H. Fried, *Die Grundlagen des Revolutionären Pacifismus* (1908), at 15–16.

[40] Kohl, 'Walther Schücking (1875–1935) Staats-und Völkerrechtler-Demokrat und Pazifist' in Redaktion Kritische Justiz (ed.), *Streitbare Juristen. Eine andere Tradition*, (1988), at 230, 237.

understanding of pacifism also served as a catalyst for progressive further development of international law. Nevertheless, as a scientist he considered himself an international lawyer.

The first four chapters of *Die Organisation der Welt* form a piece of great scholarly work. Starting with ancient Greece, they provide a smooth review of projects for the international organization of both Europe and the world in which he shows a preference for the project of the Abbé de Saint Pierre. Schücking intimates his conviction that international law *is* pacifism, and not simply an agent for peace. Further, international law can be equated with the international organization of the world. While in earlier times the aim of peace had been defended through empire – such as Dante's proposal for a world monarchy – and also, in swift succession, through a series of different political forms, a period of general disorganization ensued after the failure of the universal empire. Schücking rejected both the previous empires and the world anarchy that followed. Instead he considered that the time was ripe for the establishment of a cosmopolitan world organization. The candour and optimism of the text renders it disarming at moments, since its reliance on reason provides a contrast to other more sceptical contemporary authors dealing with the same questions.[41]

In the light of Schücking's earlier writings, which lacked this clear vision, one might suggest that in the period in which he wrote *Die Organisation der Welt* his intellectual aspirations were changing. When the topic 'peace' appears in previous texts it is handled in such a way as to represent a tougher line of international law – an attitude which, it should be noted, was probably due to his genetic boldness. Thus as an expert on the law of the sea, he had had no problem in defending the notion that a sea blockade was an institution of the law of peace when discussing the actions of the German imperial government during its conflict with Venezuela. However, the government had pronounced such blockades to be a measure of war.[42] In this conflict Germany was reacting to the confiscation of German goods and to Venezuela's subsequent refusal to submit to the jurisdiction of the Permanent Court of Arbitration (PCA) to decide over the conflict. Against the view of the experts of the *Institut de droit international* and the doctrine of Calvo, Schücking also affirmed that in the so-called peace blockade good law dictated that neutral ships should not be allowed to pass.

[41] 'It is the characteristic feature of Natural law that one had nerve enough to use the own reason and establish a rational yardstick to things.' This seems ultimately his own way of seeing things: Schücking, *supra* note 33, at 52. Kelsen's *Die Staatslehre des Dante Alighieri* is among the sceptics. Nevertheless, Schücking drew on Kelsen's text and follows some of his arguments: H. Kelsen, *Die Staatslehre des Dante Alighieri* (1905).

[42] On the difficulty of the qualification of the blockade in question see Oppenheim, who – while explaining that the Venezuela blockade was called a war blockade by the governments of Great Britain, Germany, and Italy and that the declaration of the Institut de droit international at its Heidelberg meeting of 1887 in favour of pacific blockade had added the condition that neutral ships should be allowed to enter the blockade area freely, nevertheless states twice: '[t]his blockade [that of Venezuela] although ostensibly a war blockade for the purpose of preventing the ingress of foreign vessels, was nevertheless essentially a pacific blockade': L. Oppenheim, *International Law*, (1906), ii, at 43–49; quotation at 45. In his instructive article on the question Holland complained of the undesirability of an ambiguous state like the one created in the affair and called it 'war *sub modo*': Holland, 'War *Sub Modo*', 19 *LQR* (1903) 133.

The motive was evident: '[o]nly in that way could be brought about the menace of starvation that has moved finally Venezuela to surrender'.[43] The reasoning behind Schücking's defence of blockades as an institution of peace was that they avoided the next step of war. Arguably, Schücking was not merely taking a semantic position – that it was a peaceful measure – in a dispute which diplomats and politicians (who, considered as a professional body, are usually slow to use such sensitive words[44]) had qualified as war. It may be the case that he was pushing the concept of peace to the limits of its possibilities. Some years were still needed in order to achieve the complete elimination of war in its technical sense.[45]

But one should not completely dismiss Schücking's view that the 'peaceful life' was to be attained through international organization, especially if we put it in its historical context. The conclusion of the Hague Peace Conferences had been regarded as a success, at least in terms of the participation of powers and of the role played by public opinion; and the future direction of modern international law of the 20th century, at the time at which he was writing, was still uncertain. Thus, Villalpando explains that, as at the beginning of the 20th century, international law contained few norms not directly related to 'the preservation of each state's personal interests on its own territory', or, in other words, 'of its sovereign rights'.[46] Modern international law had

[43] Schücking, 'Rückblick auf den Streit mit Venezuela', VIII *Deutsche Juristenzeitung* (1903) 157, at 159. He won a prize at the University of Gottingen with a text on the law of the sea that was later accepted as his dissertation: W. Schücking, *Das Küstenmeer im Internationalen Rechte* (1897). He also defended a radical position in favour of using floating mines in the open sea in Schücking, 'Die Verwendung von Minen im Seekrieg', XI *Deutsche Juristen Zeitung* (1906) 1058. For a recent analysis of the legality of military operations against civil society and other non-state actors see Benvenisti, 'Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare against Nonstate Actors', *Tel Aviv University Legal Working Paper Series. Tel Aviv University Law Faculty Papers*. Working Paper 107 (May 2009); see also Art. 54, 'Protection of objects indispensable to the survival of the civilian population', of the Protocol Additional to the Geneva Conventions of 12 Aug 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; for a recent analysis of the legal questions surrounding a blockade see D. Akande, *Legal Issues Raised by Israel's Blockade of Gaza*, available at: http://www.ejiltalk.org/legal-issues-raised-by-israels-blockade-of-gaza/.

[44] Also Holland: 'for reasons which have not been made public, an entirely new departure took place, and language was used by members of the Government, both in this country and in Germany, which could only mean that war was imminent, if indeed it had not already commenced': Holland, *supra* note 42, at 134. But compare Mégret: '[b]y enlisting the lexicon of the warrior, one can conjure up all the fantasized register of battles and campaigns, heroes and traitors, victory and defeat': Mégret, 'War? Legal Semantics and the Move to Violence', 13 *EJIL* (2002) 361, at 365.

[45] Later, one of his critiques to the League of Nations in 1919 concluded with the complaint, '[b]ut it leaves open the war as a legal means': Schücking, *supra* note 23, at 10. For a critical comment on the position of the lawyer trying to reach further than the politicians in the technical elimination of war see H. Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation', 20 *Transactions of the Grotius Society*, (1934) 178. Nevertheless – and understandably, given that he was also an international lawyer on the side of progress – Lauterpacht had his own proposal for a supplementary convention between the signatory parties of the Pact of Paris under which future disputes regarding interpretation of the Pact should be submitted for mandatory adjudication by the PCIJ, at 199. The Pact of Paris is also called the Kellogg-Briand Treaty: 'General Treaty for Renunciation of War as an Instrument of National Policy', Paris, 27-8-1928/ LoN – 2137.

[46] Villalpando *supra* note 16, at 390.

already been born,[47] but at that time a global international organization was by no means one of its indispensable components.

On the other hand, one might think that if international law *per se* was peace, then by its very existence international law nourished a teleology; that is to say, peace – and no other purposes needed to be superimposed on it. This was, however, not the case. In the last chapter of *Die Organisation der Welt*, and in many other writings too, Schücking lays down the principles of a political project of economic internationalism. While the idea of sovereignty had historically provided a useful means of liberating nations from the yoke of the universal empire and Church, now, Schücking asserted, sovereignty obstructed the development of international law. He concluded that 'the sovereignty of the states in international law is nothing else than the unlimited capacity to contract in the field of private law'.[48] In the manner of a true cosmopolitan, Schücking thought globally about how to transform the world through a matrix of private law contracts. Very probably the globalization of today is the internationalization of yesterday of authors like Schücking.[49] Thus, it was natural for him to claim that modern pacifism had the merit of reducing the role of political sovereignty as the instrument of economic exploitation of territories.[50] That was a new type of pacifist neo-colonialism. Although it did not signify a change in the centrality of the economic argument in his theoretical system, there is no doubt that the war diminished his enthusiasm in this respect. It was also due to his view of economic internationalism that, characteristically, Schücking placed Pufendorf's basic norm, 'You are not alone in the world', in the terrain of the economic interdependence of his days, exclusively in terms of economic significance. In this manner he deprived it of its original ethical or social import.[51]

Further, Schücking the politician surprises the reader by suddenly transforming the text of *Die Organisation der Welt*, in its final chapter, into a political pamphlet. As such it contains an attack against the Imperial government couched in the language of combative journalism. In that regard, one can readily appreciate why some of his academic colleagues were alienated by his style of argument, which occasionally appeared somewhat too temperamental.[52] One might suggest that he was acting then as a politician-scholar overstepping the limits of academic writing.

[47] Koskenniemi's argument is that modern international law was born 'at the meetings of the *Institut de droit international* and the pages of the *Revue de droit international et de législation comparée* from 1869 onwards': *supra* note 17, at 4 and generally.

[48] Schücking, *supra* note 33, at 78.

[49] See otherwise Bodendiek's general assessment of Schücking's *oeuvre,* in which he distinguishes between globalization and internationalization and firmly categorizes his work under the second: Bodendiek, *supra* note 8, at 311. See what Schücking had to say about economic globalisation: '[a]lready have been established specialised chairs for "international polity" in Cambridge, London and Montreal whose holder's exclusive task is to study the world economy and the political postulates that might be derived from it for international law': Schücking, *Neue Ziele, supra* note 6, at 101.

[50] Schücking, *supra* note 5, at 283–284.

[51] Schücking, 'Introduction' to S. von Pufendorf, *De Officio Hominis et Civis* (1927), ii, at 30.

[52] See Erich Kaufmann's assessment of Schücking's work in Klopsch, *supra* note 29, at 174–180.

Schücking has sometimes been called an outsider,[53] and there is no doubt that the manner of expression in many of his writings bore a greater resemblance to someone like Jeremy Bentham as an essayist in 'A Plan for an Universal and Perpetual Peace' than anything one might find among German academics of the period.[54] And, as the saying goes, 'the style is the man'. Genuine incisiveness at the service of pacifist utilitarian ideology is common to both.

As a pacifist and internationalist Schücking was critical of Germany's un-collaborative attitude towards obligatory arbitration and disarmament at both the 1899 and the 1907 Hague Conferences. At the outset militarism seems to be the enemy. However, in those days both democracies and empires alike were militarist. Consequently, it might be more accurate to say that during this period Schücking focused on attacking the type of militaristic autocracy represented by Prussia.[55] Nevertheless, from the beginning of his career as a pacifist until the end of his life he remained a convinced anti-militarist.

But rather than anti-militarism *per se,* probably the major problem for pacifism and the pacifist traditions of international law generally is to produce a credible defence of the argument that there is always a legal solution to be applied before resorting to war. The assumption that war is not in principle a legitimate instrument of politics was a novelty at the beginning of the 20th century. Schücking used to compare the disappearance of inter-state war with that of civil war. On the one hand it had been extensively suppressed through inner *Rechtsfrieden*; on the other, it still existed as a possibility that was 'all too dangerous'.[56] Pacifists like Schücking helped shape the 20th century approach to international politics in this respect. Although neither they nor anyone else managed to prevent the wars of the previous century, they contributed to the re-establishment of war as a legal institution integrated into the international legal system and, to put it cautiously, helped achieve a certain degree of centralized control over it. Despite the fact that Schücking wrote that 'the main thing is that war gradually ceases to be a legal institution',[57] neither he nor the other pacifist traditions completely eliminated it in their theories.[58] It reappeared in a different form, usually as an international sanction or as a means of enforcing international law. The maxim of 'peace through law' goes, structurally, hand in hand with the maxim of 'war through law'.

One pitfall of Schücking's discourse is his tendency to generalization. This may be necessary at a political meeting or in a pamphlet, but not in academic texts.

[53] For instance, Bardo Fassbender: Rezension zu: *Bodendiek, Frank: Walther Schückings Konzeption der internationalen Ordnung. Dogmatische Strukturen und ideengeschichtliche Bedeutung. Berlin 2001*, in: H-Soz-u-Kult, 18 Feb 2003, available at: http://hsozkult.geschichte.hu-berlin.de/rezensionen/2003-1-093.

[54] Bentham,'A Plan for an Universal and Perpetual Peace', *The Works of Jeremy Bentham*, published by John Bowring, (1839), Pt VIII, at 546.

[55] Explicitly so in Schücking, *supra* note 5, at 316.

[56] Schücking, *supra* note 27, at 33.

[57] He continues, 'This is a hard blow for the militarists': Schücking, *supra* note 33, at 83.

[58] In Schücking's theory security of the international legal order is from the beginning guaranteed by the collective use of force: see B. Riehle, *Eine neue Ordnung. Föderative Friedenstheorien im deutschsprachigen Raum zwischen 1892 und 1932* (2009), at 96.

Nevertheless, while it is evident that Schücking wanted to urge his fellow countrymen to become more actively involved in the development of the institutions of peace – which explains the use of propaganda-style techniques – and also bearing in mind that the German government had at first reacted against the idea of a treaty of universal arbitration and the British plan for a PCA, the issue was far more complex than Schücking allows.[59] The question addressed below is how he contrasted German and American politicians in his views on internationalism and pacifism. He regarded the former as reactionary, and the latter as the image of progress.[60]

The embarrassment caused to Schücking by his country's attitude may be compared with the arguments presented by Philipp Zorn, the German delegate at the first Peace Conference at The Hague. Zorn opined that arbitral practice remained at an experimental stage, and therefore to proceed in an important matter like that without sufficient experience 'might lead to discord rather than to harmony'.[61] This argument resembles the prudent maxim that Lassa Oppenheim applied to progress in international law: *festina lente* (make haste slowly).[62] At the same time, the proceedings of the 1899 conference plainly show that Germany and Austria were reluctant to commit themselves to binding arbitration. They forcefully resisted the idea of other powers having a 'duty' to remind a state involved in a dispute of the necessity of arbitration. A joint effort of the most excellent French and Italian diplomacy was needed in The Hague to turn the 'moral duty' mentioned in draft Article 27 of the convention on arbitration, proposed by Germany and supported by the United States, into 'duty'.[63] The point is important in the context of Schücking's view that the conference in The Hague had produced a confederation or a league of nations. He viewed Article 27 as crucial in connecting the authority of the powers with the arbitration process. The process was voluntary and the arbitral board only had jurisdiction when both parties appealed to it. From this basis arose the importance of Article 27. For Schücking that Article was crucial to flesh out the organization 'created' in The Hague. It was Article 27 of the Convention for the Pacific Settlement of International Disputes which showed that the convention was more than a multilateral treaty of arbitration, and that behind it existed an entity formed by the signatory powers.[64] 'It is evident

[59] For a useful report see Hull, *supra* note 24, at 370–387.

[60] Among the Americans he mentioned admiringly were President Theodore Roosevelt (1858–1919) and Elihu Root (1845–1937): Schücking, *supra* note 33, at 61, 67.

[61] Hull, *supra* note 24, at 307.

[62] L. Oppenheim, *The League of Nations and Its Problems* (1919); Kingsbury, 'Legal Positivism as Normative Politics. International Society, Balance of Power and Lassa Oppenheim's Positive International Law', 13 *EJIL* (2002) 401, at 408; Schmoeckel, 'The Story of a Success: Lassa Oppenheim and His "International Law"', in M. Stolleis and M. Yanagihara (eds), *The Acceptance of Modern International Law in East Asia* (2002), at 57.

[63] *The Proceedings of the Hague Peace Conferences – The Conference of 1899*. Under the supervision of James Scott Brown; Prepared in the Division of International Law of the Carnegie Endowment for International Peace (1920), at 759–764. For the positions of the German and US delegates on this question see Hull, *supra* note 24, at 306 and 310.

[64] 'Convention for the Pacific Settlement of International Disputes', available at: http://www.pca-cpa.org/upload/files/1899ENG.pdf.

from this', wrote Schücking, referring to the wording of Article 27, 'that the powers regard the Permanent Court of Arbitration as their organ, and are concerned when a proper case arises'.[65] Perhaps for this very reason, both Germany and the United States viewed Article 27 with suspicion and would have been satisfied with the much looser commitment contained in the notion of 'moral duty'.

Indeed, the United States was equally indecisive on the question of binding arbitration, and displayed both enthusiasm and, at the same time, an unwillingness to commit fully. Consequently, at both conferences, when the time came to adopt the convention on arbitration, it made a declaration recalling the Monroe doctrine.[66] In other words, the United States and Germany vacillated between the desire to foster the cause of peace through arbitration and the effort to preserve their right of isolation; one of the prohibited words in Walther Schücking's new legal vocabulary of peace. Despite that, Schücking only criticized the 'sad attitude of our (German) Imperial government'.[67]

In his younger years, therefore, Schücking tended to feel that, where internationalism was concerned, the grass was greener on the other side. This position may be challenged in retrospect, but his perception helps to show what style of international law and diplomacy he preferred.

Historical developments, especially in respect of international organizations, influenced his change of opinion in this matter, and he became, as it were, a little less internationalist. Otto Gessler (1875–1955) who, among other public positions, held the office of Minister of Defence during the period of the Weimar Republic, recalled that when Schücking became a judge at the PCIJ he learned that there, together with law, politics also played a role, 'and not a small one'.[68] However, one might suggest that by the time he arrived in The Hague Schücking was already a heavyweight in the matter of politics. High politics had played the leading role during the period of his struggle to bring forward during World War I the future idea of international organization starting from the work done at the Peace Conferences. He described his instruction in politics as having been previously mistaken, when he and the pacifists had divided the world into imperialists and pacifists. Alas, he later learned that there were, unfortunately, pacifists who were at the same time imperialists: '[t]hus, it seems to me that America under all circumstances wishes to be the state that gives *the peace to the world*'.[69]

[65] Schücking, *supra* note 5, at 52.

[66] Hull, *supra* note 24, at 311, 326; stating the criticism that the American delegation received for this see Fraser, 'A Sketch of the History of International Arbitration', 11 *Cornell L Q* (1925–1926) 179, at 203.

[67] Schücking, *supra* note 33, at 67.

[68] O. Gessler, *Reichswehrpolitik in der Weimarer Zeit* (1958), at 409; for the perspective of the international lawyer compare the statement by Root in his remarks to the Advisory Committee of Jurists in The Hague, in June 1920, that the PCIJ needed not persons who are '"playing politics", but who have the international mind': Root, 'The Constitution of a Permanent Court of Justice', 15 *AJIL* (1921) 1, at 11; compare also on the attitude of Schücking in the PCIJ O. Spiermann, *International Legal Argument in the Permanent Court of International Justice* (2005), at 303–304. The argument of Schücking's 'becoming aware of politics' may (only) partly explain his role as a sovereignty-minded national lawyer, as perceived by Ole Spiermann.

[69] W. Schücking, *Der Weltfriedensbund und die Wiedergeburt des Völkerrechts* (1917) (emphasis in the original), at 13.

Understandably, especially after the outbreak of World War I, politicians and lawyers in many countries, including those who previously had not been much attracted by the idea, began drafting proposals for an international organization.[70] We have the example of Lassa Oppenheim, who was decisively opposed to a world federation or even a European federation, which he considered utopian. In his study of the future of international law he highlighted the importance of the foundational aspect of the Peace Conferences for internationalism, but he did not consider it feasible to develop from them an organization with any authority over the sovereignty of states.[71] The shock of the war, however, induced him to side even with the cause of pacifism. Although he rejected the unrealistic aspect of pacifism ('for these reasons I cannot call myself an orthodox pacifist, and cannot work with the ordinary everyday pacifists') he concluded, 'I nevertheless call myself a pacifist'.[72] Shortly before his death he also drafted a design for a League. In the context of this general awareness that something 'had to be done', and given the active contribution from every part of the world towards international organization, it was the plan of President Wilson for the League and his decision in pursuing it which caused Schücking trouble from the beginning.[73] This was not only because Wilson's plan did not closely follow the work done in The Hague, which was Schücking's main conception for a future international organization. It also aimed to create anew a worldwide international organization, with all the consequences such a project would entail. While Wilson's plan was alienated from The Hague project by the burden of failure that latter project obviously carried, such a novelty in the issue of the league – as Schücking and the German pacifists viewed it – was fated to contribute to the much-feared 'alliance of victors'.

Ultimately the alertness of Schücking's political instinct again proved, intriguingly, to be ahead of the times. In a critique of the project of the League of Nations he drafted in Paris, Schücking expressed his criticism of the anti-democratic nature of the League. He regarded the Council of the League as an 'aristocratic regime' of the world (incidentally one in which Germany had no part), and saw it as an offshoot of the 'imperialistic tendencies of the great powers'. Schücking also appraised the draft negatively owing to what he considered the legal novelty of a political right of intervention.[74]

[70] See, for instance, in Great Britain Winkler, 'The Development of the League of Nations Idea in Great Britain, 1914–1919', 20 *J Modern History* (1948) 95. See the helpful summary description of the different projects in C. Bouchard, *Le citoyen et l'ordre mondial. Le reve d'une paix durable au lendemain de la grande guerre* (2008), Annex 3; 6.

[71] L. Oppenheim, *The Future of International Law*, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 39 (1921).

[72] Lassa Oppenheim, letter to Hugh Richardson, 4 Oct 1915. Hugh Richardson (1864–1934) was a prominent member of the Society of Friends (Quakers) vitally interested in the cause of peace and internationalism. His correspondence with Lassa Oppenheim is deposited in the *Swarthmore College Peace Collection*; the draft for the League by Oppenheim is in Oppenheim, *supra* note 58.

[73] Acker, *supra* note 17, at 88–89.

[74] Schücking, *supra* note 23, at 7, 9, 14.

3 Peace through Arbitration and Adjudication

The projects for a League of Nations put forward by the United States and Great Britain did provide for obligatory recourse to arbitration.[75] However, the pacifist tradition promoting arbitration and the judicial settlement of international disputes did not as a rule embrace the concept of an international organization, and was rather inclined against the promotion of a world federation.[76]

Regarding the question of dispute settlement Schücking agreed that international arbitration and adjudication was an essential part of the pacifist project, and this circumstance created an affinity between him and the American pacifists, in particular with James Brown Scott.[77] But the German never quite considered that arbitration and international adjudication would be enough to secure peace. Brown Scott, on the other hand, consistently expressed his view that the instrument for international peace was a permanent judicial court among sovereign countries.[78] In Brown Scott's view this had not yet been achieved by the work in The Hague. The Peace Conferences had produced neither a permanent nor a judicial institution (the members of the PCA had no permanent position or salary).[79]

For those promoting peace through judicial settlement before and after World War I the two main proposals remained the establishment of an international court and the codification of international law. In order to achieve such codification another international conference was needed. This would not be easy. The most pragmatic men of peace, but perhaps less experienced in matters of international law, estimated that 'it may take two years to prepare such a code'.[80]

The realists pointed to a sociological problem with the project of an international code. The 'too optimistic friends of the peace movement' did not see that the international powers represented very different stages of social advancement. The certainty of international law was from the outset gravely endangered by this fact. For example, if one looked closely at the cases presented by pacifists as settled by arbitration, one would discover that many were in fact adjusted diplomatically. The real number of cases in which legal principles or legal forms had been applied did not give grounds for optimism in this regard.[81]

[75] But not the project of France: Bouchard, *supra* note 70, Annex 1. In Germany there was no official plan for the League as at Feb 1919: Acker, *supra* note 17, at 115.

[76] Koskenniemi, 'The Ideology of International Adjudication and the Hague Conference', in Daudet (ed.), *supra* note 14, at 127, 144–151.

[77] Thus Brown Scott endeavoured to procure a translation into English of Schücking's *Die Staatenverband;* on Brown Scott see Hepp, 'James Brown Scott and the Rise of Public International Law', *J Gilded Age and Progressive Era*, Apr. 2008.

[78] Brown Scott, 'The Work of the Second Hague Peace Conference', 2 *AJIL* (1908) 1; Brown Scott, 'The Codification of International Law', 18 *AJIL* (1924) 260.

[79] Brown Scott, 'The Proposed Court of Arbitral Justice', 2 *AJIL* (1908) 772.

[80] Senator Knox, Secretary of State under President Taft, thought, however, that it would take five years: Levinson, *supra* note 7, at 18.

[81] From the report of the meeting of the International Law Association, 'Note and Comment – The Last Meeting of the International Law Association', 6 *Michigan L Rev* (1907–1908) 238, at 239.

For internationally minded lawyers, on the other hand,[82] the real problem was always that of overriding sovereignty. This was a common conundrum for each of the peace traditions of international law.[83] Specifically in the case of the judicial settlement of disputes, as Elihu Root put it, it was impossible to give an international court unlimited jurisdiction. As a realist-pacifist he knew that the key question was gradually to broaden the scope of the law that such a court would be competent to apply and, in order to achieve that, codification was needed. The role of international courts would increase only when there was sufficient international codification – that is to say, laws to be applied – in place. Through codification, states could retain control over the international courts and judges.[84]

In fact, there had been slow but steady progress in the laws on dispute settlement since the beginning of the 20th century. The Convention on the Pacific Settlement of International Disputes previously mentioned was the 'crown jewel' of the 1899 Hague conference.[85] The intellectual impetus behind the PCA came from the British in the person of their delegate, Sir Julian Pancefote, also in the 1899 conference.[86] The fact that during the 1907 conference the plan for a permanent judicial tribunal developed the nucleus of what became the PCIJ after the war attests to the importance of these early projects.[87] But still in 1907 the powers had not been able to agree on the precise method of appointing the judges of a court of justice.

[82] For the key role of the 'international mind' see Root, *supra* note 68.

[83] Schücking and Kelsen were in favour of attributing true sovereignty to the international organization and the legal order respectively. But this is the question that made their proposal unacceptable for many. Thus Kelsen speaks of the 'solely true sovereignty that is to say, that of the universal international legal order': *supra* note 4, at 288; Kant and the pacifist tradition promoting arbitration and the judicial settlement of international disputes were on the realist side, recognizing that the true point of contention lay in the question of sovereignty.

[84] Root, 'The Codification of International Law' (Report submitted to the 23rd Conference of the Interparliamentary Union, Washington DC, 3 Oct 1925), 19 *AJIL* (1925) 675. For an account of the legacy of Root to international law that starts with his activity as co-founder and president of the American Society of International Law in 1906 see Slaughter, 'Rereading Root' in Proceedings of the 100th Annual Meeting, 99 *AJIL* (2006) 203. On contemporary questions of sovereignty see Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon Redux', 3 *Austrian Rev Int'l and European L* (1998) 345.

[85] Crawford and Schrijver, 'The Institution of Permanent and Adjudicatory Bodies and Recourse to Ad Hoc Tribunals', in Daudet (ed.), *supra* note 14, at 153, 154.

[86] In the reports it is called the 'The Pancefote plan': Scott Brown, *supra* note 63, at 709–729. Lange refers, however, to a plan produced in the meetings of the 'Inter-Parliamentary Union': Lange *supra* note 3, at 405. For a detailed account explaining that Pancefote was acting under instructions and produced a plan during the conference see, *Arbitration and the United States. A Summary of the Development of Pacific Settlement of International Disputes with Special Reference to American Policy*, World Peace Foundation Pamphlets, Vol. IX (1926), at 464–467. Crawford and Shrijver also attribute a more universal origin to arbitration, and, if located anywhere, its source lies rather in American soil, through the American Peace Association and the Pan-American Movement: Crawford and Schrijver, *supra* note 85, at 156; it also appears as an American project in Koskenniemi, *supra* note 76; the resolution for a permanent court of arbitration by the Inter-Parliamentary conference adopted in Brussels in 1895 in W. Evans Darby, *International tribunals* (1904), at 515.

[87] For this point and a detailed description of the different types of dispute settlement see Crawford and Schrijver, *supra* note 84, at 160.

On the eve of the second Hague conference, the German professor and peace delegate Zorn recognized Britain's leading role in introducing the arbitration plan and in pursuing the scheme for the PCA. He traced it back to religious and humanitarian sentiments popular with both the English and the American peoples. Despite his critical attitude to what he regarded as an often dismissive attitude towards international law on the part of Britain, on this question he attributed all the progress to that country.[88] For their part, historians referred the principle of arbitration to the early projects of universal peace, such as that of Pierre Du Bois, lawyer and counsellor in the court of Philippe le Bel, in the 13th century.[89] In the modern era, the principle appears in several of the classics of international law. Vattel, for example, considered that the law of nature 'recommends peace', although then he supported arbitration half-heartedly.[90] Schücking found the renaissance of arbitration in modern times in the newly-born United States, when George Washington requested an arbitration tribunal from the former mother country for the settlement of a boundary dispute with Canada in 1790, which resulted in the Jay Treaty.[91]

However, Zorn was right to trace contemporary efforts back to Britain. In his history of the influence of pacifism in the development of international law, Lange attributes the great advancement of the cause of disarmament and arbitration in the 19th century to what he regarded as 'at least an unofficial alliance' of pacifism and free trade. It was Richard Cobden (1804–1865), the British manufacturer, politician, and promoter of the cause of free trade, who had come round to believing the case for that alliance. Thus in 1842 he wrote: 'It has struck me that it would be well to try to engraft our Free Trade agitation upon the Peace movement. They are one and the same cause.'[92] And, *pace* Lange, no sooner said than done: the first peace congress with this particular inclination to free trade met in London in 1843. Until 1853 several congresses were held, which produced two important results in terms of propaganda for the cause of political peace: the prohibition of war loans and the encouragement of arbitration treaties. As early as 1849, Cobden personally brought a motion before Parliament calling for international arbitration, and he campaigned intensively for the reduction of public expenditure on armaments and non-intervention in European affairs.[93] In this context, it is unsurprising to note that the plan for universal peace put forward by

[88] Zorn reviews the questions dealt with in The Hague in 1899: Zorn, 'England und die neuere Entwickelung des Völkerrechts', XI *Deutsche Juristen Zeitung* (1906) 145, at 150.

[89] The treatise *De recuperatione terre sancte* by Dubois contemplating a court of arbitration appeared in 1306: Lange, *supra* note 3, at 208; Schücking, *supra* note 33, at 29. For a review of arbitration in antiquity and the middle ages see Le Baron de Taube, 'Les origines de l'arbitrage international antiquité et moyen age', 42 *RdC* (1932–IV), 5.

[90] E. de Vattel, *The Law of Nations or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns* (trans. J. Chitty, 1883), Bk II, Ch XVIII, at 275.

[91] Schücking, *supra* note 6, at 102; *Arbitration and the United States, supra* note 86, at 479–484.

[92] Lange, *supra* note 3, at 375; quotation by Cobden at 374.

[93] Taylor, 'Cobden, Richard (1804–1865)', in *Oxford Dictionary of National Biography* (Sept 2004); online edn, May 2009, available at: www.oxforddnb.com/view/article/5741, accessed 22 June 2010. Talking about the negative consequences of trade barriers in diplomatic relations between states Schücking asserted that 'not for nothing such energetic pioneers of the peace movement like Cobden and others have been at the same time freetraders': Schücking, *supra* note 8, at 109.

Bentham in 1789 included both free trade and a universal court of judicature to settle differences between the nations.[94]

Other accounts of the history of peace through arbitration do not take Lange's utilitarist perspective. They depict the origins of modern arbitration as the result of the success of the Alabama arbitration and of the interaction of pacifism with high politics.[95] Finally, a number of German pacifists, like Eduard Loewenthal, were proud to see the origins of an obligatory international judiciary in their own efforts – in the case of Loewenthal, literally as his own idea. A journalist and writer of the stature of a man of the 18th century, he was the author of books on topics ranging from physics to the codification of international law. Loewenthal was also an active propagandist in the international arena, and as such his activities were taken seriously in important political spheres.[96]

Earlier proposals for a council and high court of international arbitration, such as that by Cobden's good friend the Italian-born British lawyer Leone Levi (1821–1888), in turn appeared independently of the cause of peace. They drew inspiration from the pragmatic need for commercial tribunals and improved commercial arbitration arrangements.[97]

From a more technical perspective, the advancement in the active promotion of arbitration and adjudication on English soil has been attributed to the increase in commerce and the accompanying growth of intercourse between states. That was an important factor behind the preference for a political effort to develop the principles of international law in a pragmatic manner during the second half of the 19th century. The new emphasis on commerce explains the shift towards the practice of arbitration and adjudication and away from the abstract natural law approach previously taken by the British.[98] That this is still the case today is evidenced by the practice arising from the bilateral investment treaties (BITs). As Zimmermann explains, '[T]he high level of investor protection that they (the BITs) provide is upheld by arbitration'.[99]

[94] Most notably too, provisions for disarmament and for independence for the colonies, since 'it is not in the interest of Great Britain to have any foreign dependencies whatsoever' and they 'increase the chances of war': Bentham, *supra* note 54, at 547.

[95] See *Arbitration and the United States, supra* note 86.

[96] See the early proposal of a *Weltstaatenbund* with an obligatory 'international judiciary' dated around the 1870s, in E. Loewenthal, *Geschichte der Friedensbewegung* (1907), at 98. Loewenthal, as a prominent international pacifist, was also founder of the *Deutsche Verein für Internationale Friedenspropaganda* in 1874; he also claimed to be the initiator of the idea of the influential Inter-Parliamentarian Union; for his status among the circle of the Inter- Parliamentarian Union see R. Uhlig, *Die Interparlamentarische Union, 1889–1914* (1988), at 369, 566.

[97] See Darby, *supra* note 86, at 216; Rubin, 'Levi, Leone (1821–1888)', in *Oxford Dictionary of National Biography*, *supra* note 93.

[98] For a description of these new visions and contexts of international law during the second half of the nineteenth century see Lobban, 'English Approaches to International Law in the Nineteenth Century' in M. Craven, M. Fitzmaurice, and M. Vogiatzi (eds), *Time, History and International Law* (2007), at 66, 72–78. See also Crawford, 'Public International Law in Twentieth-century England', in *Jurists Uprooted. German Speaking Émigré Lawyers in Twentieth-century Britain* (2004), at 681.

[99] Zimmermann, 'Transfer-of-Funds Liberalization Across International Economic Law' (2 July 2010). SIEL, Second Biennial Global Conference, *supra* note 25, at 18; see also generally Hansen, 'Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty Drafters, Arbitrators and Parties', 73 *MLR* (2010) 523.

Later, the United States also officially took up the flag of arbitration as a tradition of peace and became a firm supporter of international adjudication, starting within its own continent. In fact, the Peace Conference of The Hague of 1907 had been postponed in order that the Third International Conference of the American States could be held at Rio in 1906, at which a resolution was adopted to recommend the negotiation of a general arbitration convention at the conference in The Hague.[100]

In the end the conventions agreed in The Hague did not achieve obligatory arbitration.[101] But they succeeded in raising public expectations, and politicians also began to place more weight on this method of securing peace, as a matter both of policy and of practice. Consequently, a great number of arbitration treaties were concluded following the peace conferences. Some of these came in for harsh criticism after the war on account of the fact that they contained open and sweeping reservations of a kind that rendered them practically ineffective.[102] Given the real political difficulties of the times, one must acknowledge that the repeated charge that such treaties were not worth the paper they were written on is only partly deserved. For instance, when it was announced in the summer of 1911 that the American President Taft had signed treaties of compulsory arbitration without reserving vital interests and issues of national honour, the Senate of his country immediately cancelled the whole programme. A genuinely disappointed Taft affirmed that 'this relegates the United States to the rear ranks of those nations which are to help the cause of the universal peace'. [103]

4 Kant, Kelsen, and Schücking on Peace

Considered structurally, Schlichtmann is right to contrast Schücking's legally-organized pacificism with the 'utopian pacifism' advocated by the anarchists, who renounced law, sanctions, and the institutions of a government. Schlichtmann also, more remarkably, contrasts Schücking's pacifism with the utopian pacifism of Woodrow Wilson.[104] He relies for this on Japanese authors who felt a certain

[100] See generally N. Murray Butler, *The International Mind, An Argument for the Judicial Settlement of International Disputes* (1912). The American Delegate, Joseph H Choate, affirmed that the second Hague conference had been postponed for that purpose by 'the courtesy of the signatory powers', in Hull, *supra* note 24, at 316. The same Choate called fostering arbitration as means to decide controversies 'the American doctrine': Choate, *supra* note 15, at 33.

[101] For a helpful review of the question see see Hull, 'Obligatory Arbitration and the Hague Conferences', 2 *AJIL* (1908) 731.

[102] Especially before World War I the signature had taken place of a large number of 'treaties and agreements behind the pompous verbosity of which there glares cynically the absence of any effective legally binding obligation': Lauterpacht, *supra* note 45, at 195.

[103] Quoted in Fraser, *supra* note 66, at 206. The detailed account is in *Arbitration and the United States, supra* note 86, at 524–534. In this affair one American senator warned about the danger of growing sentimental 'over the brotherhood of man', quoted in Butler, *supra* note 100, at 108.

[104] See Schlichtmann, *supra* note 37, at 145; Fraenkel refers to the utopian aspect of the 'diplomacy of the people' in foreign policy that President Wilson put forward in his 14 points. For this reason the principle of publicity of 'open covenants of peace openly arrived at' was later watered down: Fraenkel, *supra* note 23, at 11–12.

fascination for Wilson's personality. They also displayed a degree of cautiousness in their comments, arising from the sense of the dangers involved in a possible American–Japanese conflict. In Japan, the American President's idealist pacifism before and during World War I and its sudden transformation into realism in the negotiations of the Peace Treaties were analysed with close attention. For one of those authors, the defeat of Wilsonian idealism was not surprising, 'because such is the fate of any utopianism'.[105]

Of course, anyone who has read Schücking knows that the picture is not quite as clear-cut as Schlichtmann puts it. The utopian aspect of Schücking's pacifist theory or, simply, international law theory becomes evident in comparison with Kant's project for perpetual peace. To put it briefly, the absence of a philosophical and psychological effort in Schücking's pacifism is what renders it, not idealist, but utopian. This should not be taken to suggest that every international lawyer should be a political philosopher. But Schücking's project was of such ambitious scope as to demand engagement with basic philosophical issues – such as theories of human nature, society, or indeed peace and war. However he did not pursue them, while others – like Kelsen – did. In comparison, the pacifist proponents of international arbitration and adjudication worked with a certain philosophy, surely unsophisticated but nonetheless reflective, in their sociological approach. They usually analysed the questions of peace from the perspective of the average citizen or individual. 'The average individual of these modern days views war with apprehension and alarm'; but the average individual also had passions, greed, common sense, and so on.[106] With respect to Schücking, I do not refer to the equally conspicuous absence of a cosmopolitan morality in his project, but rather to his tendency not to recognize that he was addressing human beings; that is to say free individuals who possess inner complexity and depth. The immediate consequence of this utopian aspect is the practical absence of a concept and a theory of the international community based on 'solidarity of interests', which nevertheless entirely underpins his idea of a peaceful political international organization and his theory of international law in general. It is only through short or rhetorical suggestions that we learn of the enormous claim that the function of the principles of internationalism and solidarity of interests is to bring peace, where hitherto the principle of the balance of power had produced war. Or, even less persuasively, he presents the 'solidarity of interests' as a piece of evidence in respect of which no further enquiry is needed, regarding it as necessary merely to find the right international organization

[105] Words by journalist Murobuse Takanubo (1889–1970) from the June 1919 issue of the Japanese literary magazine *Chūō kōron* quoted in Miwa, 'Japanese Opinions on Woodrow Wilson in War and Peace', 22 *Monumenta Nipponica* (1967) 368, at 385, 388. Miwa explores the rather positive appraisal in Japan of Wilson's pacifist politics. He was even compared in that country to a samurai, a rather high compliment. Later, after the severe terms of peace offered to Germany were made public, that was interpreted as the destiny of his utopianism. Wilson 'went to war with its global program filled with moralistic overtones', said Miwa. However, he could not keep the promises contained in his project. Incidentally, Uchimura Kanzō, a Christian Japanese, wrote during this period on the '"samurai virtues" as functional for world peace': *ibid.*, at 377.

[106] Floyd Clarke, 'A Permanent Tribunal of Arbitration: Its Necessity and Value', 1 *AJIL* (1907) 342, at 342.

for 'the *unquestionably* present international community of interest'.[107] His foundational argument of the solidarity of interests presupposes a theory of a community of interests. But to be fair, perhaps it would have been impossible for Schücking, as a pioneer of the emergence of international organization, to have produced such a theory. The lacuna, however, weakens his ideas.

Without attempting to unearth all the historical layers that separate us from Schücking, I would suggest that today we might divide the 'theory of international community of interest' into two. We might seek to formulate a theory of 'international community' and, on the other hand, explore a theory of 'international interests'. This would dispel the myth that an international community must be identical to an international economic community. To research them separately would also facilitate the establishment of a debate between the two theories, which becomes difficult if they are integrated from the outset.

Nonetheless, looking back, we can see that Kant's famous essay analyses peace as between states, not between individuals. But he seeks to complicate the concept of peace through the concept of war. It is through this strategy that he introduced a philosophical notion of human nature in the project for global peace – something that one, as stated above, misses in Schücking. What makes Kant's essay so important as a humanist manifesto is that it tries to demonstrate that 'peace proves to be up to all wars'.[108] To be sure, Kant's depiction of human nature in *Zum ewigen Frieden* tends to be more Hobbesian than anything else. But again, this is not completely the case because he adds to Hobbes's notion an explicit optimist touch. Although the motive for seeking peace is mainly natural necessity, human reason, which is ultimately freedom, is able to offer an alternative: peace through law.

In respect of the particular point of the interaction between states produced by commerce or 'reciprocal self-interest', Kant grants that it serves as a guarantee to international peace, but hastens to add 'it is not true, precisely from motives of morality'.[109] The spirit of commerce, Kant explains, cannot coexist with war, and that spirit is slowly taking possession of every nation.

Like Kant, Kelsen also produced a complex theory of international peace: one grounded entirely on the notion of war as a sanction. The idea that international law is true law because it can be regarded as a coercive order in which the use of force is a monopoly of the community is based on Kelsen's general theory of law as a coercive instrument.[110] Implicitly, Kelsen builds his entire system of law and peace

[107] Schücking, 'Die Annäherung der Menschenrassen durch das Völkerrecht', in *Der Bund*, *supra* note 16, at 57, 63 (emphasis mine); after the War also: 'in this world-economic age' 'international law too noticed that international solidarity of interests, unquestionably present': Schücking, *supra* note 8, at 6.

[108] Natorp, *supra* note 2, at 19. For Schücking on Natorp see 'Die wichtigste Aufgabe des Völkerrechts', in *Der Bund, supra* note 16, at 79, 81.

[109] Kant, *supra* note 3, at 62.

[110] See H. Kelsen, *Law and Peace on International Relations,* The Oliver Wendell Holmes Lectures, 1940–41 (1948); also H. Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtsatze* (1911); Kelsen, *supra* note 4, at 118. For a discussion on the coercive paradigm in Kelsen see Kammerhofer, 'Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law', 22 *Leiden J Int'l L* (2009) 225.

on a determined notion of human nature. It may be adhered to or not, but certainly it cannot be regarded as that of a utopian theorist of international peace. It is probable that his thesis on the need for war as a collective sanction also derives from a Hobbesian notion of human nature. Why would one individual (or one state), in Hobbes's understanding, obey the law? The answer seems simple: law carries the sword.[111] That Kelsen's conception of war as sanction would create a tension with the pacifist movements is evident.[112] One cannot fail to notice, however, that it is in itself an essential element of Kelsen's pacifist project of a universal law. Moreover, in the pacifist project for the organization of the world that Schücking developed before World War I, he also contemplated an international coercive force. He regarded it as necessary due to the psychological influence it might exert in order to move the countries to obey the decisions of the future international courts of arbitration and adjudication. But in Schücking's pacifist vocabulary coercive force constituted the legal institution of 'execution', not war. One might interpret this *turn to force* in the Schücking's theory as a realist blind spot. After World War I, he retained essentially the same ideas regarding the use of force. Thus in his commentary on the statute of the League of Nations, Article 16 of which contains provisions for coercive measures to be used against the state that started a war – and for military action against violators of peace – Schücking preferred to attribute to those measures the nature of legal execution of the wording of the statute.[113]

The difference between Kelsen and Schücking in this question is the fact that Schücking discusses the collective use of force in isolation from the rest of his theory. This is so because, on the whole, he presupposes a sociological 'community of international law (*Völkerrechtsgemeinschaft*)'.[114] By contrast, coercion is a fundamental part of Kelsen's theory of law.

On the other hand, we may take literally Schücking's argument that his work on peace was a continuation of the seminal work on international peace done by Kant.[115] In the community of (commercial and industrial) communication that Schücking proposes by means of his theory of international organization we may discover an attempt to affirm that the Kantian idea of the legality of the actions (*die Gesetzmäßigkeit der Handlung*) of states was not sufficient to secure peace.[116] Substance (community) was also needed. In this regard, the technical progress of the first years of the twentieth century only confirmed in practice to Schücking what

[111] 'And covenants without the sword are but words, and of no strength to secure a man at all': T. Hobbes, *Leviathan* (ed. Curley, 1994), ch xvii, at 2. He refers also to the 'sword of justice': ch xxxix, at 5.

[112] J. von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001), at 79; see Verdroos who names Kelsen (and Strisower) as the actor of the renaissance of *ius ad bellum*, but with the difference from the classic doctrine that war was only allowed by Kelsen on occasion of a violation of positive law: A. von Verdross, *Völkerrecht* (1937), at 192.

[113] For his (and Wehberg's) opinion on the point of the League's war as an execution and for the commentary on Art. 16 see Schücking and Wehberg, *supra* note 10, at 91–95; 617–633.

[114] Schücking, *supra* note 5, at 87.

[115] See Bodendiek, *supra* note 8, at 178–182.

[116] The idea that the formality of Kant was insufficient is in Natorp, *supra* note 3, at 18.

seemed obvious to him in theory: the need for a far-reaching concept of political organization affecting states in terms of their whole existence and their national and political aims.[117]

A central element of Kant's proposal is the aim of establishing a universal peace treaty or peace league.[118] A specific peace treaty would only finish a single war, but reason calls for the termination of the state of war altogether. This Kantian league is nevertheless, as Lutz-Bachmann also observes, modest in its aims.[119] These are limited to the maintenance of peace, without requiring that states relinquish their sovereignty (which Kant calls power) or be subjected to overarching public laws. It is probable that what lay behind Kant's argument was not only the historical background of low level interdependence among nations during the time he was writing, and his negative view of human nature, but also the previous experience of the 'miserable comforters', as he called classic international lawyers.[120] Those reasons in support of a league of states, as opposed to a federal world state and world citizenship, might be combined with the positive argument of the high esteem in which he held the democratic constitution of the republic. This is expressed in the first definitive article of the conditions for peace: only a world composed of democratic republics would achieve perpetual peace.

The inauguration of an era of perpetual peace nonetheless called for the formation of a league. Moreover, Kant's comments on the question seem to imply that, in the absence of a peace alliance, international law supported war as a means of pursuing a state's aims. And it is within this Kantian framework of the key role of a league of nations for international peace that one might evaluate Schücking's project. His audacity in interpreting the work done in The Hague as laying the groundwork for a league of states evidences the fact that he was both a political adventurer and a classic. Schücking was advancing the political times when he seized the opportunity provided by concrete international political actions (the meetings of The Hague) for attaining

[117] Schücking, *supra* note 5, at 74.

[118] The name of Wilson's league of peace may originate from Kant. Habermas traces in this regard the Kantian tradition of Woodrow Wilson: J. Habermas, *Der gespaltene Westen* (2004), at 152–157. Perhaps his depiction of Wilson's role in Paris is somewhat romanticized there; compare Kennedy, 'The Move to Institutions', 8 *Cardozo L Rev* (1987) 841, at 877.

[119] Lutz-Bachmann, *supra* note 3, at 38.

[120] At the beginning of the second definitive article, Kant wrote, 'For while Hugo Grotius, Pufendorf, Vattel and others, whose philosophically and diplomatically formulated codes do not and cannot have the slightest force (since states do not stand under any common external constraints), are always piously cited in justification of a war of aggression (and who therefore provide only cold comfort), no example can be given of a state having been moved through reports armed with the arguments of such important men, to be prevented of its project [of going to war]'. And at the end of that same article, '[b]ut, since they with their idea of international law do not want a World Republic, and they reject in hypothesis what is right in thesis, then in the place of a positive idea of a World Republic (in order to prevent losing everything) we might lay out only the negative substitute of a league that rejects war, is permanent and ever growing': Kant, *supra* note 3, at 32; 37. For a comment on Kant and the international lawyers see Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law', 15 *Eur J Int'l Relations* (2009) 395.

Kant's ideal, a league for a perpetual peace. Certainly Schücking's notion of a *Weltstaatenbund*[121] originated from earlier pacifist writings.[122] But if we trust his 1912 review of scholarship, Schücking should be credited with having introduced it, albeit cautiously, in the texts of international law. The fact that in *Das Problem der Souveränität* Kelsen, commenting on the specific question whether the work done in the Hague had produced an international organization or not, did not mention Schücking's work, but only that of Franz von Liszt focusing on the International Prize Court, is telling in this respect.[123] Perhaps this omission has to be interpreted as evidence of an ideological affinity with Schücking, which cannot indeed be denied, rather than as lack of consideration.[124]

Admitting that the term *Weltstaatenbund* was scarcely politically correct, and following von Liszt, Schücking decided to call the organization in The Hague a union (*Staatenverband*). However, it was clear to him that 'in reality' we live already in a *Weltstaatenbund*.[125] Further, he followed the work of German positivist theorists (Paul Laband and Georg Jellinek) on this topic in arguing that the *Staatenbund* constituted an international law treaty and not a separate entity with independent legal personality. Thus Schücking argued that only if the concept of *Staatenbund* was understood in the sense proposed by Laband was the organization in The Hague a *Weltstaatenbund*. This was his way of avoiding the undeniable difficulty in seeking to attribute a diminished level of sovereignty to those states that had participated in the Hague Conferences on the basis of that very participation. It may also have been an attempt to appease the fears of the majority of international lawyers who did not believe, at the beginning of the twentieth century, in a loss of sovereignty of the state. For Schücking the idea was clear: the 'organisation of the Hague was definitively not enough' to impair the sovereignty of its

[121] Koskenniemi translates *Weltstaatenbund* as 'World Confederation'. Others left the expression untranslated (Spiermann) or, as Koskenniemi states, put it wrongly as 'federation', like the translator into English of Schücking's text of the work done in The Hague: Koskenniemi, *supra* note 17, at 217; Spiermann, *supra* note 64, at 303–304.

[122] E. Loewenthal, *Ein Weltstaatenbund als sicherstes Mittel zu Beseitigung des Krieges* (1896), mentioned in Uhlig, *supra* note 96, at 934; *der Welstaatenbund* also in Loewenthal, *supra* note 96.

[123] Kelsen, *supra* note 4, at 268–274. He referred to von Liszt's 'Das Wesen des völkerrechtlichen Staatenverbandes und der internationale Prisenhof, in *Festgabe der Berliner juristischen Fakultät für Otto Gierke* (1910), iii. Von Liszt analysed the convention that had created the International Prize Court (Convention (XII) relative to the Creation of an International Prize Court. The Hague, 18 Oct. 1907). The Prize Court was a world court with power to override decisions of national courts; it admitted the majority principle and opened the possibility for private individuals to start proceedings. For those reasons von Liszt saw in the Prize Court the sign that the confederation of The Hague was 'not only an association of persons but an organization with personality [*Verbandspersönlichkeit*]. If the old concept of sovereignty does not suit to this construction, then that concept has to be modified': *ibid.*, at 44. The rules of prize law that the Court had to apply were agreed in the Declaration of London, but that declaration was never ratified.

[124] The mutual ignorance of Descartes and Hobbes is a classic case of intellectual affinity as a cause of rivalry: F. Brandt, *Thomas Hobbes' Mechanical Conception of Nature* (1927), at 129–142.

[125] For both arguments in Schücking, see *supra* note 5, at 238–239; at 275; see also Riehle: Schücking 'is the only author that develops a vision of a *Weltstaatenbund* already before the war': Riehle, *supra* note 58,

members.[126] As a matter of fact Schücking hardly seemed to be able to keep that many balls in the air.

The question also arises as to what, after all, Schücking's point was when he insisted on the existence of a *Weltstaatenbund* after The Hague conferences if it did not affect state sovereignty. Taking all these issues into account, one possible argument could be that he wanted to declare the birth of a world organization. No matter how tiny it was at the moment or that its practical political and legal effects appeared non-existent, the main thing was that the organization was already in place.

Despite the fact that his thesis regarding the confederation (*Weltstaatenbund*) of The Hague is generally not admitted,[127] one cannot deny that some institutional arrangement occurred at the Peace Conferences of 1899 and 1907, namely the Permanent Court of Arbitration. Furthermore, Schücking is persuasive in arguing that prior to the League of Nations important work towards international organization had already been done. In affirming this spirit of continuity he concurred with the most prominent figures of the American peace movement, including James Brown Scott, Elihu Root, William Howard Taft, and Andrew Carnegie.[128] But while they stressed the achievements made in relation to international legal arbitration prior to World War I, Schücking for his part – and, one must emphasize, practically alone – did the same, defending the particular pacifist tradition of international organization. To be sure, Schücking was also putting forward his own sense of progressively 'becoming organised', and in that he was beginning with the work done in The Hague. But it was not World War I that inspired him, as seems to be the case of the general narrative of the establishment of the League.[129]

Facing the disaster of World War II, and especially the failure of the League of Nations, Kelsen opted in March 1941 – when he gave the Oliver Wendell Holmes Lectures – for an international court with compulsory jurisdiction. This may be contrasted with an international administration that would be a means to maintain international peace and order. The setting of the lectures – the country where for more than 30 years international lawyers had advocated the establishment of an international court of justice – may have influenced his choice. But certainly he was also trying to follow the more realistic trend of the development of international law.

The ideal of an international court with compulsory jurisdiction for the organization of the post-war world, endowed with an administrative organ capable of enforcing

at 242. For the enduring importance of the questions surrounding the theory of the *Weltstaatenbund* see Tinnevelt and Mertens, 'The World State: A Forbidding Nigthmare of Tyranny? Habermas on the Institutional Implications of Moral Cosmopolitanism', 10 *German LJ* (2009) 63.

[126] Schücking, *supra* note 5, at 81–82.

[127] For instance Schücking is not mentioned by Amerasinghe, who considers the Hague Conferences to have been 'conferences *ad hoc*': C.F. Amerasinghe *Principles of the Institutional Law of International Organizations* (2005), at 2; although Reinalda refers to 'the Hague System' he does not use Schücking's work either:, B. Reinalda, *Routledge History of International Organizations. From 1815 to the Present Day* (2009), at 57.

[128] Kennedy, *supra* note 118, at 841, at 889.

[129] *Ibid.*, at 987; see also Elihu Root emphasizing in The Hague that the future PCIJ should follow the scheme of the 1907 Peace Conference: Root, *supra* note 68, at 1–2.

the court's decisions, was a constant theme in Kelsen's writings during the 1930s and 1940s.[130] In many texts Kelsen argued in favour of an international court that would not permit reservations of jurisdiction by states based on the possibility of qualifying the dispute as political. During that period, this argument formed the central core of Kelsen's pacifist theory.[131] The lack of a project with that compulsory jurisdiction would remain one of the reasons for his disillusionment with the United Nations Charter.[132]

Kelsen's objective was to achieve a legal world order or *Weltrechtsordnung*, in a manner analogical to the *Welstaatenbund* of Schücking. The *civitas maxima* is for Kelsen *that* world legal order towards which human consciousness was moving. Kelsen assumed that the history of law was an evolutionary narrative; and he considered factually law's ultimate telos to be *total order*. Kelsen's main argument is therefore that law is identical with international law. Moreover he regarded any type of global international organization, court, or administrative body as nothing more than a tool for the evolution of the world legal order, which constituted his pacifist project.[133]

5 Final Thoughts

The pacifist traditions described in this text contain a wealth of wisdom and knowledge worth revisiting every now and then. They also tell stories of peace and war, often lived through the experiences of their authors. But most significantly these pacifist traditions of international law speak about politics and the involvement of serious intellectuals in political life through their pacifist projects. Walther Schücking occupied a position of considerable importance among them.

Pacifism may seem difficult, paradoxical and often insufficient. But what is clear is that modern international law – international economic law included – cannot be understood without its pacifist traditions. In that respect, one might state that we are all pacifists now.

[130] In Mar 1944 he wrote, 'For many years the author has tried to show that the establishment of a court with compulsory jurisdiction is the first and indispensable step to an effective reform of international relations', in Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization', 53 *Yale LJ* (1944) 207, at 214. Further on the question see H. Kelsen, *Law and Peace on International Relations, supra* note 110.

[131] Kelsen, 'Compulsory Adjudication of International Disputes', 37 *AJIL* (1943) 397; see also Kelsen, 'International Peace – By Court or Government?', 46 *Am J Sociology* (1941) 571.

[132] See Kelsen, 'Collective Security and Collective Self-Defense Under the Charter of the United Nations', 42 *AJ IL* (1948) 783, especially at 789–791.

[133] In his last writings Kelsen adopted the language of science as the objective arbitrator between pacifism and imperialism: '[i]n the political ideology of pacifism the primacy of international law plays a decisive part because it excludes the sovereignty of the state. . . . The meaning of the former (of the sovereignty excluded by the primacy of international law) is supreme legal authority', in Kelsen, 'Sovereignty and International law', 48 *Georgetown LJ* (1959–1960) 627, at 636.