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Against Theory?

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liche Kriegsächtung. Ebenso wenig wie diese rechtstheoretischen Vordenker der »Internationalisten« des 20. Jahrhunderts werden Versuche einer Institutionalisierung und Verrechtlichung der internationalen Beziehungen in der politischen Praxis des 19. Jahrhunderts von Hathaway und Shapiro berücksichtigt. Dabei entwarf das Konzert der europäischen Großmächte – dieser Begriff fällt im Band an keiner Stelle – eine internationale Friedensarchitektur, die auf machtvолlem Zwang, zugleich aber auch auf Normen basierte. Letztere oszillierten zwischen Recht und Macht, ohne dass beide Begriffe einander gleichzusetzen waren. Aggressionskriege wurden seit dem Wiener Kongress geächtet, Interventionen hochkontrovers diskutiert (und immer nur als Ausnahme gutgeheißen), erste Einschränkungen des »Rechts zum Krieg« normiert. Mit anderen Worten: Der »radikale Plan«, Krieg als Mittel der Politik einzuschränken oder gar zu verbieten, findet sich, wenn auch mangels Kriegsverbot noch in feinen Konturen, bereits im 19. Jahrhundert.⁴ Allerdings kommt das 19. Jahrhundert im Band von Hathaway und Shapiro als eigenständige Ära überhaupt nicht vor. Es wird – das hat in der Völkerrechtsgeschichte eine gewisse Tradition – unter die »alte Weltordnung« von ca. 1600 bis 1928 subsumiert.

Nun schmälert dieser Befund, der sich freilich ebenfalls aus jüngerer Forschung ergibt, die oben genannten Vorzüge von *The Internationalists* nicht entscheidend. Es handelt sich dennoch um ein lesenswertes Buch. Besonders die Kapitel zum Diskurs der Kriegsächtung zwischen 1918 und 1928 betonen die potenziell hohe Bedeutung der Zivilgesellschaft in politischen Prozessen der Verrechtlichung – gerade in Zeiten von Unilateralisten wie Trump ein wichtiger rechtspolitischer Appell. Dennoch offenbart die viel beachtete Monographie eine grundlegende Problematik der für die Historiographie vielleicht notwendigen, aber eben auch unterkomplexen Dichotomie von »alt« und »neu«: (Auch) für die Völkerrechtsgeschichte ist diese Dichotomie so schwierig, weil radikale Umbrüche selten sind (zu denken wäre vielleicht an die Völkerrechtsdiskurse in der Französischen Revolution), Innovationen häufig vorgedacht wurden und sich meist in längerfristigen Entwicklungen ankündigen. »Alt« und »neu« mögen, mit Susan Sontag, die unverzichtbaren Pole aller Wahrnehmung und aller Orientierung in der Welt sein. Sie sollten aber nicht dazu verleiten, die Zwischen- und Grautöne, die sich dieser einfachen Dichotomie entziehen, zu überdecken.



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This is not a biography. Rather, Felix Lange focuses on Hermann Mosler's specific contribution to post-war international law in Germany and Europe. Mosler's contribution was both methodological and theoretical, as indicated in the book's title. It took shape, step by step, over the decades of

a long life as an academic and jurist. The attempt to reconstruct this side of Mosler's life, which Felix Lange achieves almost in passing, becomes a prism through which to observe post-war German and international debates on foreign policy, Europe and the post-war world order. Felix Lange thus

4 HENDRIK SIMON, The Myth of *Liberum Ius ad Bellum*: Justifying War in 19th-Century Legal Theory and Political Practice, in: *European Journal of International Law* 29,1 (2018) 113–136, online: <https://academic.oup.com/ejil/article/29/1/113/4993231>.

* FELIX LANGE, Praxisorientierung und Gemeinschaftskonzeption: Hermann Mosler als Wegbereiter der westdeutschen Völkerrechtswissenschaft nach 1945 (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 262), Berlin: Springer 2017, 405 p., ISBN 978-3-662-54217-0

combines the history of science and of ideas with legal history and contemporary history. Writing as an international lawyer himself, Lange deploys a particular analytical acuity and writes his book in an excellent style: poignant, diverting, and never jargonized.

That the book assumes a hybrid nature is conceded right at the beginning, when Lange attempts to position his study in between different approaches to writing the history of international law. According to Lange, his study owes much to a *wissenschaftsgeschichtlichen* approach à la Michael Stolleis; and yet he aspires to integrate other approaches – most notably the contextualizing approach – to overcome the typically employed dichotomy of »life« and »work«. This works well. The reader is thrown right into the great *Weimarer Methodenstreit*, a fundamental debate that would shape public legal scholarship in interwar Germany. The book opens with the circumstances leading to the establishment of the Kaiser Wilhelm Institute (KWI) for international and public law, the predecessor of the current Max Planck Institute in Heidelberg. In Lange's narrative, Mosler's academic life thus starts with the foundation of the KWI some time before it would become an academic home for Mosler himself. Once this backdrop has been drawn, the hero himself may enter the stage. Chapters three and four focus on Mosler's socialization in a Catholic milieu, his academic apprenticeship at the KWI and on his career after 1945.

The question of Mosler's attitude towards National Socialism and how (far) he served the regime cannot be avoided. Felix Lange manages to paint an ambivalent and differentiated picture. He shows that Mosler inherited a sort of natural skepticism towards the Nazi ideology because of his upbringing in the Catholic Rhineland. Yet this did not prevent him from pursuing a career as a lawyer under the particular training requirements that had been established by the Nazis. He even joined the SA for a time. On the other hand, he allegedly had close contact with members involved in the attempted *coup d'état* on 20 July 1944, notably James Graf von Moltke and Berthold von Stauffenberg. Lange emphasizes that all we know about Mosler's activities at that time derives from his own testimony written with hindsight; the sources thus need to be treated with great caution. What can be established from Mosler's academic publications and his work at the KWI, though, is that

he successfully resisted adopting an ideologically tainted approach to international law.

After 1945, Mosler worked at the law faculties in Bonn and Frankfurt, where he also started his career as a legal and policy advisor. Lange describes the expert opinions that Mosler wrote for the lawyers defending Alfried Krupp in one of the Nuremberg trials. Mosler viewed the trials as a chance for international law, as they confirmed his deeply held conviction that international law consisted of binding and enforceable rules. International law was also a guideline and instrument to respond to Allied policies in occupied Germany, notably to counter Allied demolition plans. Mosler eventually took part in the negotiations for the so-called »Schuman-Plan« with Walter Hallstein and joined the German foreign office. Again, international law was both an instrument and a guide for realizing Germany's integration into the Western states, a strategy that he vehemently defended at the cost of permanently breaking off collaboration with his East German colleagues. Mosler had been directly involved in establishing Europe's first supranational organization, the European Coal and Steel Community. He would eventually make organizational questions in international law one of his main research interests as director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. That Mosler was not keen on practicing legal studies as *l'art pour l'art* in the academic ivory tower is evident from his subsequent service as a judge at the European Court of Human Rights and the UN's International Court of Justice.

By way of these and other examples, Lange demonstrates the cornerstone of Mosler's methodology, the practice-oriented approach. Mosler's method proceeded in two steps: firstly, by collecting facts about state practices in an empirical and scientific fashion; secondly, by interpreting the findings from a humanities and jurisprudential point of view. This second step was vital lest the researcher remained in the anemic stage of merely collecting instead of moving on to systematization and theoretical conceptions. And this is how Mosler ultimately derived his grand conception of the international society as a legal community that he outlined during the *Cours général* at the *Académie de droit international* in The Hague in 1974. Felix Lange puts this lecture at the heart of the book's second part and portrays it as a synthesis and outcome of Mosler's experience as a lawyer, policy

advisor, and judge. Mosler's key proposition was that states cannot derogate supreme principles of the international legal community because these have constitutional character. At the same time, he emphasized the importance of sovereign states as key actors of this legal community.

Lange presents the lecture as a key text in international legal scholarship and provides us with an impressive commentary that contextualizes the text, traces ideas back to their roots and first discussions, embeds it in the current academic framework, and juxtaposes it with other contemporary ideas about the international order. The chapter on Mosler's lecture is beautifully framed by two other chapters. The first of these focuses on the alternative and equally prominent approaches by other German jurists at the time, which, however, eventually did not come to yield the same influence. Felix Lange avoids the biographical illusion of hindsight when he acknowledges that, at the time that Mosler was writing, it was by no means clear that his conception and his scholarly work would ultimately exert such influence and

win out over alternative approaches. Chapter eleven goes back to examining Mosler's personality behind the text, his convictions and normative beliefs, and his socialization derived from both his Catholic upbringing and a deep engagement with natural law theories.

Felix Lange has written an impressive account of Mosler's life and work that is simultaneously a grand tour through international legal scholarship in the post-war world. He has unearthed a great amount of previously unstudied archival material that enables him to analyze and contextualize Mosler's work at a depth that is eye-opening. His book takes a biographical and historical approach; it earned him the award that carries his protagonist's name (the *Hermann-Mosler-Preis*), awarded by the German Society for International Law in 2017. The award recognizes that Lange's book has the potential to serve as a reference point for both future scholars of modern international law as well as legal historians.



Thomas Clausen

From Prussia to the People's Court*

On 21 December 1944, two former *Staatssekretäre* met in the main chamber of the National Socialist People's Court (*Volksggerichtshof*) in Berlin. Apart from having served the German state as senior civil servants, both were men in their fifties, both had earned doctorates in jurisprudence, and both had served as part of the XI Corps on the Western and Eastern front during the First World War. In any other respect, they could not have been more different. One man sat in the judge's chair – Roland Freisler, one of the most notorious jurists of the »Third Reich«. The other man – Hermann Pünder – was the former head of the Reich Chan-

cellery where he had served three different Chancellors between 1926 and 1932. Now he stood in the dock, accused of having committed high treason in the wake of the failed military coup of 20 July 1944.

In den Fängen des NS-Staates (»in the clutches of the Nazi state«) is an account of Pünder's trial and the immediate context. What makes this trial noteworthy is not merely its verdict – Pünder was acquitted while his co-defendant, Eugen Bolz, was sentenced to death – but also its aftermath. Despite the acquittal, Pünder was seized again by the Gestapo and handed over to the SS, surviving

* TILMAN PÜNDER, *In den Fängen des NS-Staates*. Staatssekretär Dr. Hermann Pünder 1944/45, Münster: Aschendorff 2018, 224 p., ISBN 978-3-402-13310-1