


edited by
thilo marauhn and
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universality and continuity in international law



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UNIVERSALITY AND CONTINUITY IN INTERNATIONAL LAW

THILO MARAUHN AND HEINHARD STEIGER (EDS.)



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PREFACE

The contributions collected in this edited volume go back to an international symposium hosted by the Franz von Liszt Institute for International and Comparative Law of the Faculty of Law of the Justus Liebig University Gießen in 2005. This symposium brought together researchers from a broad variety of disciplines and from different regions to discuss “Universality and Continuity in Public International Law”. Scholars from law, history, theology and philosophy from Asia, America and Europe joined in fruitful debates. The outcome of the conference encouraged the editors to bring together the presentations, revised in light of the discussions and in light of ongoing research, within this volume. We are very grateful to all those participating in the symposium and to all the authors contributing to this volume.

The primary purpose of our efforts was and is to stimulate research in the history of public international law and to encourage scholars to engage in a broader analysis of different normative orders across the globe and over time. We are convinced that research in the history of public international law cannot be limited to the development of modern public international law in a European perspective. Rather it must take into account the cultural traditions of other regions and traditions which tend to be increasingly integrated into current public international law.

Our efforts would not have materialized if the Institute hadn’t had the support from other institutions. In particular, we are grateful to the German Research Foundation (Deutsche Forschungsgemeinschaft), the Friends of Justus Liebig University (Gießener Hochschulgesellschaft), the Friends of the Faculty of Law (Gießener Juristische Studiengesellschaft) and the Governing Board (Präsidium) of Justus Liebig University for the financial and administrative support. Having been able to host the symposium in the Senate Hall participants could appreciate the surrounding portraits of Gießen professors from the 17th and 18th century.

We are particularly grateful to the staff of the Institute who have not only assisted in the preparation and implementation of the symposium but who have also created an atmosphere which stimulated fruitful discussions. We want to express our gratitude to Philipp Stroh for his editorial work. Last, but not least, we are extremely grateful to the publisher, for her patience and assistance in the publishing process.

Thilo Marauhn and Heinhard Steiger
Gießen, July 2010

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UNIVERSALITY AND CONTINUITY IN INTERNATIONAL PUBLIC LAW?

Heinhard Steiger

1 INTRODUCTION

1.1 *History and Narration*

The history of international law, as any other history, is confronted with fundamental questions, what are its aims, objects, basic understandings, intentions, conceptions and methods. History is, according to Michael Baumgartner, understood here as a “retrospective construction for practical purposes motivated by the requirements of communication” (*historisches Wissen als kommunikativ motivierte retrospektive Konstruktion in praktischer Absicht*)¹, or, in other words, it is a narration in a scientific manner of historical knowledge about actions and the behavior of men and nations, of social, economic, political situations, relations among nations, based on different kinds of sources, following certain structures and methods. History tells stories. The history of international law tells stories or communicates historical knowledge about norms, institutions, orders, and systems of political behavior and the relations among nations in different regions of the world and at different times and the conditions under which such normativity could be formed. Reasoned narration demands organization of historical knowledge. Universality and continuity appear to be “implications” of this organized narrative structure. These qualities are not “given” and the historian does not “discover” them – they are constructions of the narrator, in this case the scholar of the history of international law. The question is, then, what are the criteria for such constructions?

Any metaphysical, ontological or transcendental theory of universality and continuity will, today, make a common approach to research among scholars of the history of international law with different civilizational backgrounds very difficult, if not impossible. Both notions have to be understood as scientific tools or organizational concepts for the communication

¹ Michael Baumgartner, *Kontinuität und Geschichte – Zur Kritik und Metakritik der historischen Vernunft*, Suhrkamp Verlag, Frankfurt a. M. 1972, p. 249 sq. His conceptions p. 271 sq. are widely based.

of our historical knowledge of international law, both presently and in the past, in different regions and at different times.

1.2 *Interest*

Of course, each narration and description follows certain principles, aims, objects, intentions, conceptions, interests and thus includes a subjective element of each scholar's approach. This leads us to the basic question of why we are interested in researching the history of international law in different regions and at different times and in telling the stories about them? Many answers are possible. In general, the interest of scholars of the history of international law concerns its origins and roots, when was international law born, or did other times and regions already know international law. These questions are misleading because they are starting from today's understanding of international law and its structures, even if it has tried to find a more abstract, an ahistoric understanding of the notion of international law. Since international law today is bound to the existence of the plurality of sovereign states, this notion is consciously or unconsciously used for former periods and other regions. Some even try to construct former forms of political entities as states in the sense of the three elements theory as developed by Georg Jellinek. My answer would be this. It seems of a basic interest to understand whether and how organized entities of peoples in former times established peaceful relations and interactions between them, what role rules played and how these rules, norms, and institutions were conceived and used, and also whether and how they have regulated war and its relation to peaceful relations. This opens a wider approach to the different normative phenomena which played an essential role for the relations of those entities.

1.3 *Universality*

With reference to international law we can distinguish four meanings of universality, namely universal applicability of a single common legal global world order, universal scholarship of international law, universalistic concepts of international law, and a universal perspective of the history of international law. At first sight, only the last is strictly historically oriented and therefore a "construction". Present international law is, however, also a specific historic form of international law. As such it is part of the universal history of international law and its narrative structures. Universal scholarship, and, as a part thereof, universal scholarship of the history of international law, are an historic consequence and part of the universal world order. The universalistic theories are also historic phenomena and, as such, part of the history of international law. But in the centre of an historical perspective on international law stands the universal history of international law. The