

Bill Bowring

The legal significance of Potsdam: Quincy Wright versus Wilhelm Grewe in the pages of the *American Journal of International Law*

in Christoph Koch (ed) *Das Potsdamer Abkommen 1945-2015. Rechtliche Bedeutung und historische Auswirkungen* (Frankfurt am Main: Peter Lang, 2017) pp. 115-132

Introduction

The Potsdam Agreement was contained in the Protocol of the Proceedings, dated 1 August 1945, published following the conference which took place from 17 July to 2 August 1945¹. I have chosen, as my contribution to this collection, to focus on a scholarly exchange which took place in 1961–1962, that is, more than 15 years after the Agreement, in the context of one of the most dangerous crises of the Cold War, one of the precise moments at which nuclear Armageddon could have been unleashed. The protagonists, in the pages of the *American Journal of International Law* were, at first sight, two distinguished jurists, both of whom had risen high in their country's service: the international relations scholar Quincy Wright, who lived from 1890 to 1970, and was 70 years old at the time, and the lawyer and diplomat Wilhelm Grewe, who lived from 1911 to 2000, 20 years Wright's junior, and 51 years old at the time of his reply to Wright. It is immediately apparent that the Potsdam Agreement was very much the central matter of contention between them, Wright inclined to accept political realities but prepared to argue, against himself, for a "return to Potsdam", and for that reason denounced by Grewe.

I start with some brief remarks on the Cold War and the events of 1961–62, before setting out the elements of Wright's comments and Grewe's heated response. Next, I explore the background of Wright, whose many writings on war in international law show him to be an irrepressible advocate of peace. Thirdly, I show in detail, referring to two scholars in particular, Bardo Fassbender and Martti Koskenniemi, Grewe's remarkably successful careers in the Third Reich and, after an effortless transition, in the state service of the Federal Republic of Germany. Was he nothing more than a highly regarded scholar and distinguished public servant? Fourth, therefore, I turn to Grewe's intellectual position, which turns out to be a faithful reproduction of and commentary on the ideas of his mentor, Carl Schmitt. In his highly praised monograph, nearly 40

¹ Text at <http://www.pbs.org/wgbh/americanexperience/features/primary-resources/truman-potsdam/> See also Miscamble 2007.

years in the writing and publishing, *The Epochs of International Law*², Grewe showed himself to be a thinker for whom the Third Reich was simply one contesting party in a normal inter-state conflict, and for whom the Holocaust and Hitler's other crimes did not merit comment much less explanation.

*The Cold War, and the events of 1961-2*³

Elizabeth Barker wrote in 1963, in the immediate aftermath of the Berlin crisis of 1961-62: "For the nine years between May 1949 (the end of the blockade) and November 1958 (the start of Mr. Khrushchev's campaign against Western rights in the city) there was relative calm over Berlin."⁴

This was a lengthy period in which, despite the blatant failure on both sides of the Iron Curtain to implement the Potsdam Agreement, the position of West Berlin as a Land within the FRG appeared somewhat normalised, despite the constant flood of GDR citizens leaving for West Berlin and the FRG, and the starkly anomalous position of the East, in which Berlin as "Hauptstadt der DDR", Capital City of the German Democratic Republic, was only part of a city still subject to the Four Power Agreement.

It must also be noted in this context that the flight from the East was as much, or more, about living standards as about politics. While the occupying forces of each of the Four Powers were highly visible in the parts of Germany they occupied, the FRG benefited from the Marshall Plan, the European Recovery Program, ERP, in which the United States gave \$13 billion (approximately \$130 billion in current dollar value) in economic support to help rebuild Western European economies, especially the German economy, after the end of World War II. The plan was in operation for four years beginning in April 1948. At the same time the USSR made much greater use of disassembly of German industry under its control as a form of reparation. Military industries and those owned by the state, by Nazi party members, and by war criminals were confiscated. These industries amounted to approximately 60% of total industrial production in the Soviet zone. Most heavy industry (constituting 20% of total production) was claimed by the USSR as reparations. The reparations seriously hindered the ability of the GDR to compete with FRG economically⁵.

Right up until the fall of the Berlin Wall, US, British and French servicemen in uniform had the right to enter East Berlin freely under the Four Power Agreement. I myself witnessed American servicemen shopping in Alexanderplatz, and a British regimental dinner held in the now demolished Palast

² Grewe 1988 and 2001.

³ Gaddis 2007, pp. 112–115.

⁴ Barker 1963, p. 59.

⁵ See Heske 2009.

Hotel, next to the now demolished Palast der Republik, the officers in their scarlet uniforms. And to the shame of the DDR, it was not possible for the Nationale Volksarmee (NVA, National Peoples Army) of the DDR to have its headquarters, the Ministry for National Defense (Ministerium für Nationale Verteidigung), in Berlin, but instead in the town of Strausberg, at the eastern end of the Berlin S-Bahn. In 1985 I cycled through Strausberg by accident; fortunately the guards in their watch-towers could not see that I was a foreigner.

Barker sets out the crucial passages in Khrushchev's speech of 10 November 1958, which was indeed all about the Potsdam Agreement, and which led directly to the Berlin crisis of 1961:

“What then is left of the Potsdam Agreement? One thing, in effect: the so-called four-Power status of Berlin, that is, a position in which the three Western Powers – the United States, Britain and France – have the possibility of lording it in West Berlin, turning that part of the city, which is the capital of the German Democratic Republic, into some kind of State within a State and, profiting by this, conducting subversive activities from Western Berlin against the German Democratic Republic, against the Soviet Union, and the other Warsaw Treaty countries.”

After a series of rhetorical questions, Khrushchev said:

“Is it not time for us to reconsider our attitude to this part of the Potsdam Agreement, and to denounce it? . . . The time has obviously come for the signatories of the Potsdam Agreement to renounce the remnants of the occupation régime in Berlin, and thereby make it possible to create a normal situation in the capital of the German Democratic Republic. The Soviet Union, for its part, would hand over to the sovereign German Democratic Republic the functions in Berlin that are still exercised by Soviet agencies.”⁶

Barker points out Khrushchev's serious error, entirely consistent with his tendency to speak off the cuff:

“It was in these terms that Mr. Khrushchev launched the Berlin crisis. It is almost impossible that he could have consulted his political and legal experts on his phrasing, since they would have prevented him from making the mistake of deriving Western rights in Berlin from the Potsdam

⁶ Cited in Barker 1963, pp. 60–61.

Agreement, instead of from Germany's unconditional surrender and the four-Power agreements of September 1944 and May 1945.”⁷

Another commentator, Petr Lunák, commented on Khrushchev’s miscalculation as to the extent that he could intimidate Kennedy, who was much younger than him and relatively experienced:

“After Khrushchev first overestimated the willingness of President Eisenhower to reach a compromise, in the aftermath of the US fiasco at the Bay of Pigs he believed that President Kennedy would not risk a war over West Berlin. The Vienna summit provided Khrushchev with an opportunity to intimidate the young president and prepare the ground for unilateral changes in Berlin. Thanks only to strong US policy in the summer of 1961 did the Soviet leader change his mind and content himself with halting East German immigration through the wall.”⁸

For the record, the key events of 1961 were the abortive Bay of Pigs invasion in April 17–19, when a CIA-backed invasion of Cuba by counter-revolutionaries ended in failure. Construction of the Berlin Wall (or Anti-Fascist Defence Wall as it was called by the GDR) commenced on 13 August⁹. 27 October was the beginning of the Checkpoint Charlie standoff between US and Soviet tanks, the closest the two sides came to actual fighting, and on 31 October¹⁰ the Soviet Union detonated the “Tsar Bomba”, the most powerful thermonuclear weapon ever tested, with an explosive yield of some 50 megatons.

A year later, on 16 October 1962 the Cuban Missile Crisis started, when President Kennedy ordered the naval blockade that intensified the crisis over Cuba and brought the US and the USSR to the brink of nuclear war. The Soviet leaders backed down and agreed to withdraw their nuclear missiles from Cuba, in exchange for a secret agreement by Kennedy pledging to withdraw similar American missiles from Turkey, and guaranteeing that the US would not move against the Castro regime.

Quincy Wright’s notes in the AJIL

Quincy Wright¹¹ was not only a distinguished scholar, with many publications, but also an adviser to Justice Robert H. Jackson at the Nuremberg Trials. He often provided advice to the U.S. State Department. He declared as follows:

⁷ **Ibidem**, p. 61.

⁸ Lunák 2003, p. 53.

⁹ Gaddis 1998, pp. 143–149, 253–255.

¹⁰ Trauschweizer 2006.

“There can be little question but that East Germany is a de facto state. It is, therefore, the right and, according to the late Judge Lauterpacht, the duty of Russia and other states to recognize it unless it was established in violation of international obligations. By the Declaration of United Nations of January 1, 1942, the Allies agreed not to make separate peace, and by the Potsdam Agreement of 1945 they provided for a united, disarmed, and neutralized Germany. These agreements, however, have been violated by all the parties, notably by the West, in recognizing the German Federal Republic, making treaties with it, arming it, and admitting it to NATO. The West can hardly invoke these agreements against the Soviet Union. The latter would seem to have as much right to recognize and make peace with East Germany as the West had to recognize and make peace with West Germany.”¹¹

His reference to a “return to the Potsdam Agreement”, seized upon by Grewe, was clearly not to be taken seriously as a policy prescription in the real world.

“It would, therefore, appear that if West Berlin is to continue as an area of Western civilization, other solutions, perhaps a return to the Potsdam Agreement providing for a disarmed and neutralized Germany, should be considered. With such a solution the two Germanies would probably tend to come together and a united Germany would probably have a Western orientation. This solution, however, would mean the permanent withdrawal of West Germany from NATO, inspected disarmament for the whole of Germany, and acceptance by the West of the Oder-Neisse line and the de facto governments of both Germanies. The idea of their union by free election would have to be abandoned, because obviously the Soviet Union will not accept it, leaving it to the German governments and peoples to work out their future relations.”¹²

However, Wright was in no doubt as to the correct and realistic position to be taken by an international lawyer:

“From the point of view of international law, it would seem that the West cannot object to Soviet recognition of East Germany, but should enjoy continuous access, at least civilian, to West Berlin, which would not become legally a part of East Germany. Both the West and the Soviet Union should follow the precepts of the United Nations Charter requiring that

¹¹ Wright 1961, p. 960.

¹² Ibidem, p. 964.

they settle their international disputes by peaceful means and refrain from threat or use of force (Article 2, pars. 3, 4). In accord with those precepts, a reference of the matter to the International Court of Justice in case East Germany is recognized as an independent state and interferes with the present situation, would seem desirable. The Court would probably follow its precedent in the Portuguese-Indian case, though it was careful to rest its opinion in that case on special agreements and customs rather than on general principles of international law.”¹³

The response from Wilhelm Grewe¹⁴ was respectful to his distinguished senior interlocutor, and was in no way personal, nor did he argue ad hominem. Nonetheless, his objections went to the core of Wright’s realist appreciation of the crisis and how to overcome it. It should of course be noted that in the aftermath of the Helsinki process which concluded in 1975 with the creation of the CSCE (Conference on security and cooperation in Europe), the GDR achieved the recognition it and the USSR craved, with a seat in the United Nations and state visits by Erich Honecker and Helmut Kohl, only to vanish just a few years later.”

According to Grewe¹⁴, Quincy Wright had argued the following points:

“(1) There is no ground for legal objection to Soviet recognition of, and conclusion of a treaty of peace with, East Germany.

(2) The 1945 agreements have been violated by all the parties, ‘notably by the West’, in recognizing the German Federal Republic, making treaties with it, arming it, and admitting it to NATO.”

Grewe cited the passage set out above:

“The West can hardly invoke these agreements against the Soviet Union. The latter would seem to have as much right to recognize and make peace with East Germany as the West had to recognize and make peace with West Germany.”

“(3) If East Germany should be recognized as a fully sovereign state, West Berlin, having never been considered a part of East Germany, would remain an enclave within its territory.

¹³ Wright 1961, p. 965.

¹⁴ Grewe 1962, pp. 510–511.

(4) Access of the Western Powers to West Berlin ('at least civilian') constitutes a servitude which East Germany would be obliged to respect if it became independent.

(5) Soviet responsibility in regard to access to West Berlin would end. The Western Powers would have to argue the case with East Germany.

(6) In the long run, East Germany's interest in eliminating West Berlin's special status is likely to prove no less than India's interest in eliminating the Portuguese enclaves. Therefore, the Western Powers will have difficulty in maintaining their rights. Other solutions, 'perhaps a return to the Potsdam Agreement providing for a disarmed and neutralized Germany, should be considered'."

I cited Wright at some length, above, in order to show that Grewe had deliberately misrepresented him, for the purposes of his polemic.

Grewe replied point by point, to Wright's argument as he had reconstructed it:¹⁵

1) East Germany is not a de facto state, recognition of which is permissible ... Up to now, there is no government outside the Sino-Soviet bloc which recognizes East Germany as a de facto state. If it is not a de facto state, recognition is not permissible, but is at the least premature. Such premature recognition constitutes an illegal intervention.

2) Being an international lawyer as well as an official representative of the West German Government, I deeply regret the inability of an outstanding American colleague to see any legal difference between West Germany and East Germany as far as recognition is concerned. Nobody doubts that West Germany is a de facto state. Even the Soviet Union does not dispute this fact. There are few who doubt that it is also a de jure state. Many nations even recognize West Germany as the only government legitimately entitled to speak for the German people as a whole.

As to the Four-Power Agreements of 1945 (the Berlin Declarations of June 5, 1945, and the Potsdam Agreement), there can be no doubt that it was the Soviet side which sabotaged and destroyed the arrangements for a joint occupation, and began to arm the East German Communists.

¹⁵ Ibidem, pp. 511–513.

When negotiations on the rearmament of West Germany started in May, 1951, there was already a large military force of the East German regime in existence. It was not labeled an 'army', but a Kasernierte Volkspolizei (garrisoned people's police); but once again: Is it the formal label which counts exclusively in international law?

3) If East Germany were to be recognized as a sovereign state, West Berlin would remain an 'enclave'. But whose territory would this enclave be? The Supreme Constitutional Court of the Federal Republic, in accordance with the Basic Law of the Federal Republic and the Constitution of West Berlin, considers Berlin a Land (state) of the Federal Republic, its constitutional right as a land being suspended by virtue of occupation law.

4) The presence of the Western forces in Berlin rests on the right of belligerent occupation (neither 'conquest' nor 'surrender', viz., the capitulation of the German High Command is a correct definition of the legal basis for the Western position in Berlin). Free access of the occupation forces is an integral part of those rights. As the occupying Power is responsible for law and order and the restoration of public life in the occupied territory, the right of free civilian access derives from this obligation to protect some basic rights of the civilian population. What title has Mr. Wright in mind, which he seems to regard as legally better founded?

5) The Soviet Union is not bound to stay indefinitely as an occupying Power. Without any doubt, it cannot be prevented from terminating its occupation in Berlin and Germany and from withdrawing its forces, permitting the Germans to form a government of their own. But this is not what the Soviet Union is going to do. It wants to retain its forces in East Germany and around Berlin, supporting a Communist puppet government which is clearly prepared to grant treaty rights for the stationing of Soviet forces.

Again the question arises, whether international law is bound to accept every faked pretext at face value. I believe it is not, and it is a sound legal position to hold the Soviet Union responsible as long as they actually exercise occupation functions, whatever may be the label they use.

6) 'Return to the Potsdam Agreement' is a fantastic suggestion. First of all, Potsdam provided for a 'disarmed', but not for a 'neutralized' Germany. Second, it provided for a type of Four-Power control machinery which turned out to be a tragic illusion. Third, its most deplorable defect was the absence of any clear decision on the political future of Germany.

It is difficult to understand how the Potsdam policy, which caused the division of Germany, should now, 17 years later, by virtue of a strange miracle, lead to a solution whereby ‘the two Germanies would probably tend to come together and a united Germany would probably have a Western orientation’. For many years ‘Return to Potsdam’ has been a declared aim of Soviet policy.”¹⁶

It will be noted that this last remark comes very close to identifying Wright as a witting or unwitting agent of, or at least apologist for, Soviet policy. I therefore turn next to introducing Quincy Wright.

Who was Quincy Wright?

Emily Griggs wrote:

“Quincy Wright, a scholar of international relations at the University of Chicago, is often singled out as an exemplar of the unsophisticated idealism and lack of theoretical rigor that marked scholarship in international relations before World War II. Like the rest of his generation, or so the story goes, he recoiled from the realities of power politics until international events proved such attitudes imprudent; he continued to believe that increasing economic interdependence and improved international law and organization would preserve international stability ... Quincy Wright’s ideas about international politics between the wars were more practical, sophisticated and complex than existing interpretations allow.”

The abstract to her article reads:

“Contrary to conventional belief, IR theorist Quincy Wright and his cohort before World War II were neither idealists, legalists, nor moralists. Deeply grounded in the realism and pragmatism that marked the University of Chicago’s interwar climate, Wright applied an ethically neutral and empirical approach to understanding international relations. He recognized that a struggle for power drove international politics and would continue to do so for the foreseeable future.”¹⁷

¹⁶ Grewe 1962, p. 513.

¹⁷ Griggs 2001, p. 71.

Richard Falk, a distinguished product of the “New Haven” “policy-oriented” school of international legal scholarship¹⁸, and very much a progressive in international law, commented:

“Quincy Wright’s central concern during his long and remarkably productive life was with the status of war in human affairs. As a scholar he studied the subject ceaselessly, and from many angles. As a human being he worked with steadfast effort to promote a peaceful world. In these multiple roles as scholar/activist/humanitarian Quincy Wright placed great stress on the importance of international law, and he wrote often and influentially on the relevance of law to war. One exemplary feature of Quincy Wright’s achievements as man and scholar involved his extraordinary capacity to separate realms of scholarly analysis from realms of emotional commitment and fortuitous affiliation. In his legal analysis, Quincy Wright embodied the spirit of science, relying upon impartial inquiry into rules and facts so as to produce ‘the right answer’.”¹⁹

I have found no evidence to the contrary.

Wilhelm Grewe

In this section I have drawn substantially from Bardo Fassbender’s comprehensive 2002 article²⁰. At the time of his rather acerbic response to Quincy Wright, Grewe was the Ambassador of the Federal Republic of Germany to the United States of America, having enjoyed a brilliant career after WWII. Following the creation of the FRG in 1949 he was one of the small circle of lawyers advising Chancellor Konrad Adenauer in matters of foreign policy and relations with the three Western Allied Powers. From 1951 to 1955, he headed the German delegation negotiating the ending of the Allied occupation of West Germany, and helped to draft the Convention on Relations Between the Three Powers and the Federal Republic of Germany of 1954 (Generalvertrag or Deutschlandvertrag), which gave the FRG ‘the full authority of a sovereign State over its internal and external affairs’ (Article 1), on condition that it was integrated into the Western defence alliance²¹. From 1953 to 1954 he was acting head of the legal department of the West German Foreign Office, and from 1955 to 1958 was head of the political department.

¹⁸ Hathaway 2007.

¹⁹ Falk 1972, p. 560.

²⁰ Fassbender 2002.

²¹ Ibidem, p. 482.

In 1954 and 1955, he headed the German observer delegation at the Four Powers conferences in Berlin and Geneva. In 1955, he drew up the policy according to which the FRG, as “the only legitimate representative of Germany and the German people”, would break off diplomatic relations with any state recognizing East Germany. This policy, which became known as the ‘Hallstein Doctrine’ (at the time Walter Hallstein was Secretary of State at the FRG Foreign Office), remained in force until 1969²².

But Grewe is best known as the author of *Epochen der Völkerrechtsgeschichte*²³, translated into English as *Epochs of International Law*.²⁴ Fassbender informs us that the first manuscript of the *Epochen* was completed in late 1944²⁵, in the last months of WWII, when the book could not, for obvious reasons, be printed. Grewe turned to this text after retiring from the diplomatic service. He revised and expanded the content, taking into consideration the literature that had been published since the 1940s; he continued the account beyond the year 1939 (where the original text had ended), and added a new chapter dealing with the period since 1945 under the title “United Nations: International Law in the Age of American-Soviet Rivalry and the Rise of the Third World”. In this form, the book was published in 1984 by Nomos in Baden-Baden. A second, unchanged edition came out in 1988.

Grewe was not the only German scholar working in the last months of WWII. Martti Koskenniemi points out²⁶:

“Another way of composing histories of international law is exemplified by the German jurists Carl Schmitt and Wilhelm Grewe, both writing while the bombs were falling over Berlin during the end-phase of the Second World War. Schmitt’s legal realism and his late view of law as part of ‘concrete order thinking’ are today well-known and have inspired his search for legal orders determined by a powerful centre radiating its influence across the world.²⁷ Similar ideas inspired Grewe’s *The Epochs of International Law*, published in English in 2000, the most widely used textbook of international legal history today.”

Indeed, Fassbender argues that “the book’s principal idea – an interpretation of the history of international law as a sequence of particular epochs defined in each case by the then-dominant power in the system of states – was developed

²² Ibidem, p. 483.

²³ Grewe 1988.

²⁴ Grewe 2001.

²⁵ Fassbender 2002, p. 482.

²⁶ Koskenniemi 2013, p. 219.

²⁷ Schmitt 1950.

in the context of National Socialist political and legal thought, and was influenced in particular by the work of Carl Schmitt ...”²⁸. Martti Koskenniemi also observed that “Schmitt’s voice is clearly audible in such German post-war histories of international law as those by Grewe and Ziegler.”²⁹ In the footnote he added: “In 1948, Schmitt held Grewe to be the ‘foremost German international lawyer’.”³⁰ In Koskenniemi’s view, Schmitt’s standpoint was a

“political theology that is structurally homologous to Christian monotheism, historically continuous with religious teaching, and, above all, equipped by a supplement of faith that decides who is the enemy – ‘one’s own question as the figure’ – in a concrete situation³¹.... to move completely away from a philosophical-naturalist frame to a theological one, to interpret the present in light of a Christian conception of history.”³²

Liliana Obregón claims, on the contrary, that “Grewe denounced Schmitt’s work as bad history, ‘not in conformity with the historical facts and ... unconfirmed by the literature of the period’.”³³ However, it is worth citing in full the paragraph from which these words are drawn.

“The broadening and transformation of the international legal order did not begin toward the end of the century, as Carl Schmitt asserted in his far reaching interpretation of the modern development of international law. Schmitt’s other objection to the traditional view of the development of international law in the nineteenth century, that the territoriality-restricted European order presented by the *ius publicum europaeum* did not dissolve until as late as 1890 and was only then replaced by a global ‘international law’, is not in conformity with the historical facts and is similarly unconfirmed by the literature of the period.”³⁴

Which, for whatever reason, is not quite how Obregón presents it. Fassbender and Koskenniemi would seem to have the better interpretation of Grewe’s debt to Schmitt.

So, who was Grewe before WWII?

²⁸ Fassbender 2002, p. 480.

²⁹ Koskenniemi 2004, p. 494.

³⁰ Schmitt 1995, p. 203.

³¹ Koskenniemi 2004, p. 499.

³² Ibidem, p. 501.

³³ Obregón 2014, p. 933. In this chapter she devotes several pages, 928–930, to Schmitt.

³⁴ Grewe 200, p. 466–467.

According to Frowein (not confirmed elsewhere), Grewe joined the Nazi Party (NSDAP) in 1933³⁵. Fassbender relates³⁶ that having studied law at the universities of Hamburg, Berlin, Freiburg and Frankfurt (1930–1934), Grewe became an assistant to Professor Ernst Forsthoff at the University of Hamburg. Grewe then followed Forsthoff to the University of Königsberg in East Prussia (1936–1937). In 1937, he joined the Deutsches Institut für Außenpolitische Forschung (the German Institute for Foreign Policy Research) in Berlin, an institution controlled by the Nazi politician Joachim von Ribbentrop who became German Foreign Minister in 1938. The Institute was headed by Professor Fritz (Friedrich) Berber, and was mainly engaged in propaganda in support of Hitler's foreign policy. After 1939, it was closely associated with the Deutsche Informationsstelle (German Office for Information), a propaganda institution working for the Foreign Office and also headed by Berber. Hermann Weber claims that, before joining the Institute, Grewe had worked in the Dienststelle Ribbentrop, an office established in 1934 in Berlin by Ribbentrop to support his foreign policy initiatives³⁷.

Grewe was responsible for the Institute's international law section and for the regular international law report appearing in the journal of the Institute. The Institute readily and continuously supported the National Socialist policy of conquest. In the main, it appears, its publications abstained from using anti-Jewish or racist language. Overt anti-semitism is not to be found in Grewe's writings, either.

In 1939, Grewe became lecturer (Dozent) at the Hochschule für Politik (School of Political Science) in Berlin, where Berber had been teaching since 1930. In 1940, the institution was integrated into the newly founded Auslandswissenschaftliche Fakultät (Faculty of Foreign Studies) of the University of Berlin, where Grewe was appointed lecturer (Lehrbeauftragter) for the subject 'Legal Foundations of Foreign Policy'. After the Faculty of Law in Königsberg had accepted, in March 1941, parts of what was later to become Grewe's book, *Epochen der Völkerrechtsgeschichte*, as his Habilitationsschrift, Grewe was appointed Dozent at the Faculty of Foreign Studies and, simultaneously, at the Law Faculty of the University of Berlin. A year later, at the age of 31, he became extraordinary professor (außerordentlicher Professor) at the Faculty of Foreign Studies in Berlin, teaching the subjects 'Legal Foundations of Foreign Policy' and 'Policy of International Law' (Völkerrechtspolitik). It is reported that efforts made in 1943–1944 to set up a chair for Grewe in Berlin failed because of his marriage to Marianne Partsch, whose grandfather was Jewish.

³⁵ Frowein 2000.

³⁶ Fassbender 2002, p. 491.

³⁷ Weber 1986, p. 277.

When in 1946 the University of Berlin was reopened in the Soviet sector of the city, the Auslandswissenschaftliche Fakultät was quietly dissolved. After an interruption of only a few months in the summer of 1945, Grewe continued his university career, first in Göttingen (1945–1947) and then in Freiburg im Breisgau (from 1947)³⁸.

Grewe's apologia for Nazi policy and blindness to the Holocaust

Martti Koskenniemi has provided a close reading and critique of *The Epochs of International Law*³⁹. His primary contention is as follows:

“Above all, however, Grewe's account of international law's ‘epochs’, each dominated by a single power whose ideas and concepts prevailed over those of its rivals and which was able to use law to confer ‘general and absolute validity on its national expansionist ideology’ (p. 23), was the unmistakable analogon of Carl Schmitt's *Grossraumlehre*, first declared in a famous lecture in Kiel in April 1939. In fact, the book reads almost like a commentary, or expansion, of Schmitt's *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* and never more so than in its description of the turn from the British predominance in the nineteenth century to the ‘Anglo-American Condominium’ in the inter-war period, marked by a commercial universalism (‘the invasion of politics by economic powers’, 591), the use of the League of Nations to further British and American interests, the description of the modern State in terms of what Schmitt used to call ‘total State out of weakness’ – the expansion of the State into ‘the organising principle of society’ (Grewe refers to Schmitt's notorious *Der Hüter der Verfassung* of 1931, p. 589) – and especially the turn to a morally loaded ‘discriminatory concept of war’⁴⁰.

Koskenniemi is especially concerned by Grewe's blindness to the Holocaust:

“The fact that there is no mention of Germany's destruction of European Jewry during the Second World War, and that one gets no understanding of the Nuremberg process (beyond the suggestion of its having been ‘victors' justice’) may be charitably credited to Grewe's ultra-realistic method. Every aspect of international history is for Grewe a reflection of struggle for power and prestige, and political and legal doctrines never

³⁸ Fassbender 2002, p. 495.

³⁹ Koskenniemi 2002.

⁴⁰ *Ibidem*, p. 747.

more than academic superstructures or ideological facades. Nobody starts wars; they just ‘break out’. But when every politics is essentially the same, the categories of right and wrong, or good and bad, become meaningless, and (for example) Hitler’s policy is just one among ‘several incompatible intervention claims’ (595). When such cold realism is applied to the catastrophes of the 20th century, with all sides portrayed as essentially ‘similar’, the result is a perverse exculpation of the German atrocities, a continued violation upon wounded communities, a crime of forgetting”.⁴¹

As Koskenniemi points out, even the Second World War disappears – and the following passage dissected by Koskenniemi continued through several revisions into the final *Nomos* edition:

“In a curiously revealing slip of the pen Grewe writes of the ‘International Legal Order of the Interwar Period 1919–1944’ as if the period’s last five years would not have been years of ‘war’ at all! For the fact is that the Second World War is practically non-existent in this book of 725 pages. There is just the Versailles League, a series of imperial ‘policies’, and then suddenly the United Nations, as the ‘Anglo-American Condominium’ turns into the Cold War. The killing of six million Jews and the annihilation of the Gypsy communities as part of a deliberate German policy, or even the ‘conventional’ war crime of the murder of three million Russian prisoners of war, receive no mention, not even euphemistically.”

It is a matter of surprise and shock to me that so many of my colleagues refer to Grewe, and to Schmitt, as eminent scholars whose work is to be cited with approval, and without any contextualisation or comment.

Conclusion

The scholarly exchange which is the subject-matter of this contribution to the Anniversary of the Potsdam Agreement does not contain an analysis of the Agreement itself. Nor have I attempted to provide one. There is no dispute as to the fact that what the victorious powers agreed in 1945 did not come to pass. History turned out, as usual, rather differently.

Instead, I have used this exchange, in which the Potsdam Agreement was an essential and central topic, to throw light on the reasons for the sharp ani-

⁴¹ *Ibidem*, p. 747.

mosity shown by Wilhelm Grewe to the very idea of the Agreement, or, come to that, the de facto existence and right to recognition of the GDR. Grewe was not at all the only scholar to emerge unscathed from a history of conformity, accommodation, and approval for the Third Reich and the Nazi regime, and to be completely acceptable to the new elite of the Federal Republic of Germany. His extraordinary analysis and conclusion in his magnum opus were in fact the basis not only for much scholarship in the FRG, but also for its political and diplomatic stance at the highest levels.

Together with Foreign Minister Hans-Dietrich Genscher, Kohl was able to resolve talks with the former Allies of World War II to allow German reunification. Over the objections of Bundesbank president Karl Otto Pöhl, he allowed a 1:1 exchange rate for wages, interest and rent between the West and East Marks. In the end, this policy would lead to the strangulation of enterprises in the new federal states. Following the fall of the Berlin Wall, whose construction was the background for the exchange explored in this contribution, in 1989, a reunification treaty was signed on 31 August 1990, and was overwhelmingly approved by both parliaments, FRG and GDR, on 20 September 1990. On 3 October 1990, the GDR officially ceased to exist. In my own lifetime Czechoslovakia, Yugoslavia and the USSR have all vanished. There can be no “return to Potsdam”, even as a fantasy.

Bibliography

- BARKER, Elizabeth, *The Berlin Crisis 1958-1962*, International Affairs 39.1, 1963, pp. 59–73
- FALK, R., *Quincy Wright: On Legal Tests of Aggressive War*, The American Journal of International Law 66.3, 1972, pp. 560–571
- FASSBENDER, B., *Stories of War and Peace. On Writing the History of International Law in the Third Reich' and After*, European Journal of International Law 13.2, 2002, pp. 479–512
- FASSBENDER, B./PETERS, A., *Introduction: Towards A Global History of International Law*, in: The Oxford Handbook of the History of International Law, edd. B. FASSBENDER/Anne PETERS, Oxford 2012, pp. 1–26
- FROWEIN, J. A., *Nachruf auf Wilhelm G. Grewe*, Archiv des öffentlichen Rechts 125, 2000, pp. 299–301
- GADDIS, J. L., *We Now Know: Rethinking Cold War History*, Oxford 1998
- idem, *The Cold War*, London 2007
- GREWE, W., *Other Legal Aspects of the Berlin Crisis*, American Journal of International Law 56, 1962, pp. 510–513
- Idem, W., *Epochen der Völkerrechtsgeschichte*, 2nd ed., Frankfurt a. M. 1988,
- idem, *The Epochs of International Law*, Transl. and rev. by M. BYERS., Berlin 2001
- GRIGGS, E. H., *A realist before 'realism': Quincy Wright and the study of international politics between two World Wars*, Journal of Strategic Studies 24.1, 2001, pp. 71–103
- HATHAWAY, O. A., *The Continuing Influence of the New Haven School*, Faculty Scholarship Series, Paper 834., 2007, at http://digitalcommons.law.yale.edu/fss_papers/834
- HESKE, G., *Volkswirtschaftliche Gesamtrechnung DDR 1950–1989: Daten, Methoden, Vergleiche*, in: Historical Social Research, Supplement 21, 2009, at <http://nbn-resolving.de/urn:nbn:de:0168-ssoar-285875>

- KOSKENNIEMI, M., rev. *The Epochs of International Law. By Wilhelm Grewe. Translated and revised by Michael Byers.*, Berlin, De Gruyter, 2001, *International & Comparative Law Quarterly* 51, 2002, p. 745.
- idem, *International Law as Political Theology: How to Read Nomos der Erde?*, *Constellations* 11.4, 2004, pp. 492–511
- idem, M., *Histories of International Law: Significance and Problems for a Critical View*, *Temple International and Comparative Law Journal*, 2013, 27.2, 215-240
- LUNÁK, P., *Khrushchev and the Berlin Crisis: Soviet Brinkmanship Seen from Inside*, *Cold War History* 3.2, 2003, pp. 53–82
- MISCAMBLE, W. D., *From Roosevelt to Truman: Potsdam, Hiroshima, and the Cold War*, Cambridge 2007
- OBREGÓN, L., *The Civilized and the Uncivilized*, in *The Oxford Handbook of the History of International Law*, edd. B. FASSBENDER/A. PETERS, Oxford 2014, Chapter 38, pp. 917–939
- SCHMITT, C., *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Berlin, 1950
- idem, *Glossarium. Aufzeichnungen des Jahres 1947–1951*, Berlin 1995
- idem, *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum*, New York 2003
- TRAUSCHWEIZER, I. W., *Tanks at Checkpoint Charlie: Lucius Clay and the Berlin Crisis, 1961–62*, *Cold War History* 6.2, 2006, pp. 205–228
- WEBER, H., *Rechtswissenschaft im Dienst der NS-Propaganda: Das Institut für Auswärtige Politik und die deutsche Völkerrechtsdoktrin in den Jahren 1933 bis 1945*, in: *Wissenschaftliche Verantwortung und politische Macht*, ed. K. J. GANTZEL u. aa., Hamburg 1986, pp. 185–425
- WRIGHT, Q., *The Status of Germany and the Peace Proclamation* *American Journal of International Law* 46, 1952, pp. 299–308
- idem, *Some Legal Aspects of the Berlin Crisis*, *American Journal of International Law* 55.4, 1961, pp. 959–965
- de Zayas, A. M., *Nemesis at Potsdam: The Anglo-Americans and the Expulsion of the Germans: Background: Execution, Consequences*, Routledge, London, 1979