Introduction

This book deals with the history of the theory of international law in the twentieth century. At its center stands the historical reconstruction of the ideas on international law advanced by Hans Kelsen and his most important students. Those ideas arose for the most part in the period between 1916 and 1950. My goal is to develop an overarching approach that explains the specific orientation and inner structure of Kelsen's works on international law against the background of the debates over the theory of international law and legal policy carried on in his day. To that extent, the reconstruction I have undertaken is grounded in a historical perspective on the evolution of the discipline of international law.[1] At the forefront is an examination of the discourses about the method and construction of international law that influenced Kelsen and his students and which were at the same time substantially shaped by them. In the process, however, attention will also be given to nineteenth- and early twentieth-century theoretical approaches to international law that Kelsen encountered before and during the First World War. I will use these theoretical debates to develop a historical approach to explaining the particular orientation and inner structure of the theory of international law articulated by the Austrian jurist Kelsen. The "key" to Kelsen's writings on international law that I offer here can also provide an answer to the question why they were, on the one hand, among the most vehemently criticized approaches to the theory of international law of the twentieth century, and, on the other hand, do not seem to have lost their fascination for scholars even at the beginning of the twenty-first century.[2]

[1] For a methodoligically reflected approach to legal history see M. Stolleis, *Rechtsgeschichte als Kunstprodukt: Zur Entbehrlichkeit von 'Begriff' und 'Tatsache'* (Baden-Baden: Nomos, 1997).

[2] The continuing interest in Kelsen's theory of international law is evident from the special issue of the *European Journal of International Law* on Hans Kelsen that was published in 1998 (*EJIL*, 9 [1998]), and in which various essays by well-known scholars of international law staked out critical positions on Kelsen's theory of international law.

To anticipate the findings of my interpretation, let me say at this point that the reconstructed doctrine of international law can be adequately grasped only if we place it within the tension-filled relationship between the two crucial goals of the international law theorist Kelsen: (1) establishing a non-political method for the field of international law, and (2) promoting the political project – which originated in the interwar period – of a thoroughly legalized and institutionalized world order. Kelsen's approach to international law was characterized by the constant effort to advance these two prima facie conflicting goals through his writings on international law.

Kelsen saw himself as the founder of a method of jurisprudence that was critical of ideology, the so-called "pure theory of law." This new jurisprudential methodology was to allow jurists to engage with law as a subject of study in a non-political and thus purely "scientific" way. In addition, as a political person, Kelsen developed during the interwar period – probably influenced by his experiences in the First World War – into a committed internationalist, who saw in the creation of an institutionalized legal community of states the only path toward a more peaceful world order. Subsequently, Kelsen, as a legal scholar, found himself confronted with the problem that he was not able to openly pursue his own political preferences for the "cosmopolitan project" of an institutionalized rule of law in international relations, but was compelled to make the non-political method he postulated the yardstick also of his own legal-theoretical works when dealing with the normative material. Kelsen's solution, this much can be anticipated here, was a methodologically guided critique of those theoretical and doctrinal constructs that stood in the way of his own political program, which he developed at the end of the First World War.

The explanatory approach laid out here thus reconstructs the inner connection between Kelsen's legal methodology and his own cosmopolitan project underlying his fundamental critique of the *fin-de-siècle* mainstream German international legal scholarship. Kelsen's way of working, which seems largely "destructive" toward the traditional doctrine of international law, can therefore be understood and explained as a strategy for uniting two goals whose impetus seems at first glance contradictory. This interpretation of his works, derived from a historical study of the primary and relevant secondary literature, allows me to explain the inner structure of Kelsen's theory of international law by setting it against the inherent tension between the postulate of a non-political science of international law, and his own "highly political" project

developed during the interwar period. Thus, behind the interpretation presented here stands the question about the self-understanding and role of the international lawyer as both a scholar and a political individual, a question that has by no means been resolved even at the beginning of the twenty-first century.

Since the time of his *Habilitation* in 1911, Hans Kelsen had been searching for a more "scientific" method of jurisprudence. By applying contemporary insights from the theory of science to jurisprudence, Kelsen became, with his project of the "Pure Theory of Law," which found its scholarly culmination in 1934 in the monograph of the same name, the "*Alleszermalmer*" ["universal destroyer"][3] of the traditional methodology in German-language jurisprudence.[4] This modern revolt arose before and during the First World War in the collapse of the old Viennese world, which was marked by the rise of the masses, nationalism, and anti-Semitism.[5] Moreover, the "kakanian" multi-ethnic state, whose unity had been secured not least through an efficient, thoroughly juridical administrative structure, was beginning to break apart. During the increasing ideological usurpation of the societal discourse, Kelsen called for a scientifically correct, non-political approach to the law. The project of the Pure Theory of Law, which was initially directed against the scientific premises of the preceding German voluntaristic positivism [*Staatswillenspositivismus*], can thus be understood simultaneously as a legal-scientific reaction to the centrifugal forces of the ideologized zeitgeist.

The foundation of Kelsen's theory of international law was the 1920 monograph *Das Problem der Souveränität und die Theorie des Völkerrechts* [The Problem of Sovereignty and the Theory of International Law]. This book, which, according to Kelsen himself, was largely already completed during the war, was the second important

[3] As Adorno and Horkheimer said of Kant in *Dialektik der Aufklärung: Philosophische Fragmente* (reprint of the 1947 original edition, Frankfurt am Main: Suhrkamp, 1998), 100.

[4] The most compact and lucid recent account of the methodological orientation of the Vienna School from the perspective of the history of public law, along with extensive references, can be found in M. Stolleis, *A History of Public Law in Germany 1914–1945* (Oxford University Press, 2004, trans. Thomas Dunlap), 151–160. For a comprehensive analysis and interpretation of Kelsen's doctrine of international law see H. Dreier, *Rechtslehre. Staatssoziologie und Demokratietheorie bei Hans Kelsen* (Baden-Baden: Nomos, 1986).

[5] On this see C. E. Schorske, *Fin-de-Siècle Vienna: Politics and Culture* (New York: Knopf, 1980), 116–180.

monographic publication after Kelsen's *Habilitation* thesis of 1911, "Hauptprobleme der Staatsrechtslehre" [Main Problems in the Theory of Public Law]. Its critical thrust was directed against the main traditional approaches to international law theory by German-speaking theorists, from Adolf Lasson to Georg Jellinek, from Heinrich Triepel to Erich Kaufmann. In its constructive aspect, this monograph, with its emphasis on the primacy of international law, connected with the theory of international law developed by C. Kaltenborn in the mid nineteenth century. As an important contribution to the development of the Pure Theory of Law, Kelsen's monograph had a lasting impact on the conception of international law by the two Viennese students and companions, Alfred Verdross and Joseph L. Kunz.

Verdross, who had endeavored already during the war to transfer to international law the foundations of the Kelsenian notion of law and the state as laid out in "Hauptprobleme," published *Einheit des rechtlichen Weltbildes* [The Unity of the Legal Conception of the World] in 1923 and *Verfassung der Völkergemeinschaft* [Constitution of the Community of Nations] in 1926, two monographs on international law that were shaped by the understanding of international law shared by the school. Also three years after the appearance of Kelsen's *Das Problem der Souveränität und die Theorie des Völkerrechts*, Joseph L. Kunz published *Völkerrechtswissenschaft und Reine Rechtslehre* [The Science of International Law and Pure Theory of Law], a work with an epistemological focus. His subsequent books, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* [The Recognition of States and Governments in International Law] and *Die Staatenverbindungen* [Confederacies of States], provide explicit evidence of the school's shared foundation of legal theory. The trained concert pianist Joseph L. Kunz, who – like Kelsen – had been shaped by the basic liberal convictions of the Austrian bourgeoisie,[6] became Kelsen's closest student with respect to international law.

[6] Schorske, *Fin-de-Siècle Vienna*, 116–120 on Austrian liberalism and its decline at the *fin de siècle*; on liberalism, the Enlightenment, and the Austrian Jews see S. Beller, *Vienna and the Jews, 1867–1938* (Cambridge, MA: Harvard University Press, 1989), 122–137; on Jewish emancipation and the German theory of state law since the *Vormärz* by way of individual biographies see M. Stolleis, *"Junges Deutschland," jüdische Emanzipation und liberale Staatsrechtslehre in Deutschland*. Sitzungsberichte der Wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität (Stuttgart: F. Steiner, 1994); on the political and cultural environment in Vienna see also K. Günther, "Hans Kelsen (1881–1973). Das nüchterne Pathos der Demokratie," in Th Blanke et al. (eds.), *Streitbare Juristen*: *Eine andere Tradition* (Baden-Baden: Nomos, 1988), 368–371.

The monographs on international law published by these two authors in the 1920s, along with a large number of essays on the topic by other scholars belonging to Kelsen's academic circle,[7] grappled intensively with Kelsen's theoretical grounding of international law. In the process, Verdross and Kunz, especially, but also Métall and Pitamic, sought to advance the critical development of the international-law foundations of the Pure Theory of Law and to apply them to special problems in international law.[8] At the end of the 1920s, the critical distance of the Catholic-conservative Verdross toward the methodological basis of the Pure Theory of Law had grown so large that one could no longer speak of a shared school in relation to Verdross, in spite of the efforts by Kunz to bridge the deepening theoretical divide.

However, a reading of the international law doctrines of the Vienna School that is limited to Pure Theory of Law would fail to take into account the influence that authors outside the School exerted on the legal theorists within the School. If we shift our view to the broader environment of international law theory, it is apparent that the authors of the interwar period saw themselves as part of a modernization movement in international law. This international movement for a new law of nations had already begun during the First World War and reached its climax in the 1920s. The shared enthusiasm for a changed, more peaceful world order prompted legal scholars in various countries, coming from different methodological backgrounds, to try and prepare, in a scholarly fashion, the road to what they called "a new international law." As part of this movement one could mention, in addition to the authors of the Vienna School, Lammasch, Nippold, Krabbe, and Duguit from the prewar generation, and from the younger generation Scelle, Politis, Brierly, and Lauterpacht, for example.[9] During the First World War, Kelsen had

[7] On his students in general see R. A. Métall, *Hans Kelsen. Leben und Werk* (Vienna: Deutike, 1969), 28–47; M. Stolleis, "A critique from the '*Wiener Kreis*.' Margit Kraft-Fuchs (1902–1994) on Carl Schmidt," in D. Diner and M. Stolleis (eds.), *Hans Kelsen and Carl Schmitt: A Juxtaposition*. Schriftenreihe des Instituts für Deutsche Geschichte, Universität Tel-Aviv, 20 (Gerlingen: Bleicher, 1999), 123 *et seq*. On the 'School' specifically in international law see J. L. Kunz, "The 'Vienna School' and International Law" [1934], in J. L. Kunz, *The Changing Law of Nations: Essays on International Law* (Ohio State University Press, 1968), 59–124, with a compilation of the most important publications on international law from the circle around Kelsen.

[8] On Kunz's self-understanding see J. L. Kunz, "The 'Vienna School' and International Law" [1934], 59–124, and J. L. Kunz, *Völkerrechtswissenschaft und Reine Rechtslehre* (Leipzig: F. Deuticke, 1923), 83 *et seq*.

[9] J. W. Garner, in the Hague lectures in 1931, sought to provide an overview of the reform movement in the 1920s: "Le développement et les tendances récentes du droit international," in: *RCADI* 35/I (1931), 605 *et seq*.

been an active office-holder of the declining Habsburg monarchy, and unlike the Austrian pacifist, politician, and legal scholar Lammasch, he had refrained from publishing pacifist works or works promoting international understanding.[10] But the publication of his monograph *Das Problem der Souveränität und die Theorie des Völkerrechts* in 1920 made him into a pacesetter in international law theory within the renewal movement during the interwar period.

Driven by a spirit of enlightenment, these thinkers set out to destroy what they felt were the detrimental tenets of classic international law theory. At the center of the critical analyses stood the concept of state sovereignty and its place within the international legal order.[11] Although methods and results diverged strongly, what characterized the representatives of this movement was a shared claim to modernization.[12] The dynamic of this movement sprang from the reaction against classic international law, which was regarded as the product of European prewar nationalism. For example, Brierly, in his inaugural lecture in 1924, emphasized that "the world regards international law today as in need of rehabilitation."[13] In the light of this criticism, the theoretical landscape of

[10] This probably had something to do with his involvement at the ministerial level of the Austrian war department during the First World War, a position that was beneficial to his career; on this see G. Oberkofler and E. Rabofsky, *Hans Kelsen im Kriegseinsatz der k.u.k. Wehrmacht. Eine kritische Würdigung seiner militärtheoretischen Angebote* (Frankfurt am Main and New York: P. Lang, 1988), 13.

[11] With a good survey of the literature on the concept of sovereignty, see Garner, "Le développement et les tendances récentes du droit international," 698.

[12] The term "modernization" describes the self-understanding of this movement and in that sense departs from other uses of the notion of "modern" international law theory. For Quincy Wright, the "modern" jurisprudence of international law was characterized by the renaissance of natural law in the interwar period in conjunction with the emerging conception of the international organization: *The Study of International Relations* (New York: Appleton-Century-Crofts, 1955), 228–334. By contrast, Richard Falk sees the defining characteristic of "modern" international jurisprudence in the incorporation of the political context into the analysis of norms: *The Status of Law in International Society* (Princeton University Press, 1970), 41–47. Nathaniel Berman understands "international legal modernism" in terms of cultural history as a "primitivist/experimentalist alliance" in the international law literature of the interwar period: "But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law," *Harvard Law Review*, 106 (1993), 1800–1808.

[13] J. L. Brierly, *The Basis of Obligation and Other Papers* (Oxford: Clarendon, 1958), 68; on Brierly see C. Landauer, "J. L. Brierly and the Modernization of Transnational Law," *Vanderbilt Journal of Transnational Law*, 25 (1993), 881–917; on the cultural-historical rupture of 1914 see M. Stolleis, *Der lange Abschied vom 19. Jahrhundert. Vortrag gehalten vor der Juristischen Gesellschaft zu Berlin am 22. Januar 1997* (Berlin and New York: W. de Gruyter, 1997).

international law in the nineteenth century seemed dominated by mystically transfigured notions of sovereignty. From this perspective, the traditional doctrines of international law, with their "subjective" orientation focused on the "will" of the individual state, had contributed to the rupture of civilization represented by the First World War.[14] For the reformers, it was not only international politics, but also international legal scholarship infected by the dogma of sovereignty, that bore responsibility for the inadequate elaboration of the Hague order.[15]

This somewhat distorted picture of the nineteenth century as a "dark" era of international law theory (which is still handed on today) was to boost the readiness for a fundamental reform of the doctrines of international law.[16] From the perspective of the modernization movement, there was a need for an updated theory of international law in order to invest the international legal order, shattered by the war, with new authority. The reformist spirit of this movement was a reaction to the corpse-strewn battlefields of the war to a peaceful world legal order. The developments in the international conduct of states offered contemporaries plenty of reasons to believe that a new era in international law had begun. And here the newly founded League of Nations served initially as a screen onto which the hopes for a more peaceful world order were projected. A description of the situation at the beginning of the 1920s by Kunz illustrates the hopeful, cosmopolitan mood of this movement:

> At the end of World War I, fought under the leadership of Woodrow Wilson "to end the war," boundless optimism prevailed. There was everywhere, in victors, neutrals, and vanquished, not only the will to achieve a better world through international law, but also the firm conviction that it could be done. Hence, the ambitious experiment of the League of Nations. Away with power politics! No more secret diplomacy, no more entangling alliances, no longer the forever discredited balance of

[14] The criticism focused above all on Jellinek's doctrine of self-obligation: J. L. Brierly, "Le fondement du caractère obligatoire du droit international public," *RCADI* 23/III (1928), 482–484; H. Lauterpacht, *The Function of Law in the International Community* (reprint of the 1933 edn., New York: Garland, 1973), 409–412, with extensive references on the critique of the doctrine of self-obligation; A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna: J. Springer, 1926), 12–20; J. Spiropolous, *Théorie generale du droit international* (Paris: Librairie générale de droit & de jurisprudence, 1930), 46–50.

[15] N. Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux," *RCADI*, 6 (1925), 5–27.

[16] On this distorted image see D. Kennedy, "International Law and the Nineteenth Century: History of an Illusion," *Nordic Journal of International Law*, 65 (1996), 403–420.

> power, no more war! Democracy and the rule of international law will change the world. . . . In all the dealings of the League, international law was at the heart of the discussion. Idealistic approach, optimism, emphasis on international law created the Geneva atmosphere.[17]

Against the lamentations of the doubters and naysayers,[18] international law was to emerge from the war not only unscathed, but stronger. In this process, an objective theoretical construction of international law was to back and push the creation of a peaceful international order based on the rule of law.

Among German international lawyers, the cosmopolitan spirit of the times was carried above all by the Vienna School and the pacifist movement around Schücking and Wehberg as well as Strupp. As for the rest, the "modern" approaches in international legal theory were received with greater reserve than in France and England, for example, by the rather conservative mainstream around Triepel, Kaufmann, Hold-Ferneck, and the rising Walz. The weaker resonance of this "modern" current in German writings compared to other countries can be attributed largely to the political situation following the defeat in the war. In Germany, the new world order created by the Treaty of Versailles and guaranteed by the League of Nations was regarded as unjust and rejected.[19] This often went hand in hand with a politically motivated reserve on the part of German international lawyers toward the "new" international law. In spite of a growing acceptance of the Geneva institutions among the

[17] J. L. Kunz, "The Swing of the Pendulum: From Overestimation to Underestimation of International Law," *AJIL*, 44 (1950), 136.

[18] Under the hegemony of the Jellinek–Triepelian construct, the legal character of international law had no longer been fundamentally questioned at the beginning of the century. That changed profoundly only in the course of the First World War. The international legal debate was characterized by a more existential tone. For example, the question by John Austin, whether law between sovereigns was law properly so called, which had been the topic of frequent philosophical speculations in the nineteenth century, though without shaking the belief of international lawyers in the legal nature of their field of study, had caused cracks in the foundation of international legal theory after 1914. A number of publications cast doubt on the legal character of international law: F. Somló, *Juristische Grundlehre* (Leipzig: F. Meiner, 1917; 2nd edn. 1927), 167 *et seq.*; and in the interwar period, A. von Hold-Ferneck, "Anerkennung und Selbstbindung. Ein Beitrag zur Lehre vom Wesen des Völkerrechts," *Zeitschrift für Rechtsphilosophie*, 4 (1929), 179; W. Burckhardt, *Über die Unvollkommenheit des Völkerrechts* (Bern: P. Haupt, 1923); A. V. Lundstedt, *Superstition or Rationality in Action for Peace? Arguments against Founding a World Peace on the Common Sense of Justice. A Criticism of Jurisprudence* (London: Longmans, Green, 1925).

[19] M. Stolleis, *A History of Public Law in Germany 1914–1945*, 60–64. (See also Chapter 5 D 1 in the present book.)

German population at the time of Germany's entry into the League of Nations in 1926, the "Versailles trauma" had a palpable and lasting after-effect in the field of international law.[20]

Kelsen and Kunz emigrated in the 1930s. Both men eventually ended up in the United States, where they continued to publish on international law during and after the Second World War. Verdross, having been suspended for a semester in 1938 as the new Nazi rulers vetted him carefully, remained a full professor at Vienna University during the 1930s and 1940s.

Kelsen's work on international law, which he expanded upon during his exile in Geneva at the Institut de hautes études internationales and later at Berkeley, culminated in his commentary on the UN Charter and his *Principles of International Law*. Joseph L. Kunz worked in the United States as an editor of the *American Journal of International Law* and taught at the University of Toledo. With the predominance of Anglo-American pragmatism in the field of international law, the audience for Kelsen's writings shrank increasingly after the Second World War. The renewed renaissance of natural law[21] and the "realistic" current that began in international legal jurisprudence in the 1950s also did little to boost the acceptance of Kelsen's theory of international law. At the beginning of the 1960s, the optimism of the 1920s had given way to a deep skepticism about the potential and value of law in international relations.

In addition, Kelsen's own draft for a new world organization institutionalizing the international rule of law in the post-war era, published in 1944, was not considered during the negotiations in San Francisco. Kelsen's two central projects thus proved impossible to implement. Both the attempt to introduce a "scientific" method of international law on the basis of the Pure Theory of Law, and the political project of a thoroughly legalized global order had to be regarded by Kelsen and Kunz as failures for the time being during the crisis of the United Nations in the Cold War era. The goal of the historical reconstruction undertaken here is to make it easier to assess the real contribution that Kelsen's work made to the development of the field of international law.

[20] Ibid.

[21] The term "natural law" is used with a variety of meanings: first, as ontological natural law of the scholastic tradition; second, in the sense of the "rational" natural law of the Enlightenment; and third, by way of negative demarcation against legal positivism to describe an extra-judicial justification of norms. Unless specified, the term is used here with the first meaning.

The structure of the book is guided by the two central goals of Kelsen's theory of international law. Part I, "The Quest for Objectivity: The Method and Construction of Universal Law," reconstructs the attempt by Kelsen and his students to introduce a "pure" – i.e. non-political – method in international law. Part II, "The Outlines of the Cosmopolitan Project – the Actors, sources, and courts of universal law," takes a closer look at Kelsen's own, highly political project of a world order that was thoroughly pervaded by law and largely institutionalized. The concluding reflections examine the prevailing destructive thrust of the Kelsenian doctrine of international law as the result of the inherent tension between the claim to a non-political method of international legal scholarship and his own cosmopolitan project. Moreover, with respect to the analyzed texts, the reconstruction undertaken here follows largely the actual historical chronology. Chapters 1–4 are devoted largely to texts from the nineteenth century, the 1920s, and early 1930s, while Chapters 5 and 6 tend to focus on texts from the 1930s to early 1950s.

In Part I, the discussion emphasizes Kelsen's application of his own fundamental methodological beliefs to the traditional theoretical construct of international law of the nineteenth and early twentieth centuries. Kelsen claimed to have developed a new, more objective method of legal scholarship. Following the lead of the natural sciences, jurisprudence was to be reshaped into a post-metaphysical "science" of the law that was logically verifiable and purified of political value judgments. In the critical methodological analyses reconstructed in Part I, Kelsen subjected the traditional notion of sovereignty, the voluntaristic foundation of international law, and Heinrich Triepel's dualistic doctrine to a fundamental critique. With the help of his critical tools, Kelsen ruthlessly unmasked the inherent limitations and contradictions of the traditional constructs of international law.

In their stead, Kelsen and his students, building on the primacy thesis borrowed from Kaltenborn, constructed international law as a law above the state. As the highest and thus sovereign strata of norms within the hierarchically structured legal cosmos, international law was to delegate the respective state legal orders and delimit them from one another in their sovereign spheres. The traditional, voluntaristic theories of international law were to be replaced by an "objective" construction of international law that was independent of the subjective "will" of individual states.

Part II of the book seeks to outline more sharply the contours of the political project of a universal order that was largely institutionalized