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Front cover: *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

Back cover: *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

Hans Kelsen and the Move to Compulsory Criminal Jurisdiction in International Law

Jochen von Bernstorff*

Kelsen was a Viennese law professor in between the two World Wars, who is seen by many, particularly those on the continent, as one of the most – if not *the* most – outstanding jurist of the twentieth century. He was not only an international lawyer, but also a legal theorist and eminent scholar of constitutional law. His extremely successful academic career, in the period before, between, and after the two World Wars, took him from Vienna, Cologne, and Geneva, to Harvard and Berkeley. However, nearly all moves and emigration were involuntary and came in response to life-threatening perils, persecution, or political defamation, all of which had an anti-Semitic basis. Kelsen was a radical modernist thinker, social democrat and liberal cosmopolitan. His writings on constitutional law, democracy theory and international law were hotly debated in Germany during the Weimar Republic. Among Kelsen's students were outstanding international lawyers, namely Alfred Verdross, Josef L. Kunz, Hans Morgenthau and also Hersch Lauterpacht. His writings on international law include numerous articles, a monograph on the problem of sovereignty, a general text-book, Hague Lectures and a United Nations ('UN') Charter Commentary. His vigorous defence of democracy and a cosmopolitan international legal order made him subject to harsh criticism of mainstream German scholars, most of whom were contemptuous of Weimar democracy and the League of Nations.

What is perhaps less well known is that Hans Kelsen also was one of the first scholarly promoters of introducing compulsory criminal jurisdiction in international law. This quest formed part of his general support

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for introducing a strong world court after World War II. Somewhat unexpectedly, however, Kelsen at the same time belonged to the small group of cosmopolitan scholars who were very critical of the Nuremberg Trials, which are commonly hailed as a historical breakthrough for international criminal law. Yet, as I will attempt to explain in this chapter, Kelsen's stance on Nuremberg was a direct and logical consequence of his general approach to international adjudication.

This chapter will first explore, in greater detail, Kelsen's belief in the international judiciary in the context of the liberal pacifist quest for compulsory arbitration and adjudication in international relations in the first three decades of the twentieth century. Next, it will consider Kelsen's 1940s blueprint of a court establishing compulsory criminal jurisdiction. Lastly, the chapter will deal with Kelsen's critical stance regarding the move to criminalising aggressive war in Nuremberg, in which he had an unexpected ally in Hans Morgenthau.

16.1. Kelsen and the International Judiciary

From the middle of the 1930s to the end of World War II, Kelsen devoted most of his scholarly attention to the question of a political reform of the international legal community's institutional structure. Before the outbreak of World War II, his publications dealt with discussions about the reform of the League of Nations that had been ongoing since the mid-1930s.¹ Later, Kelsen's work on this topic made a contribution to the debate over a new, peace-securing world organisation that got under way during the war.² At the centre of these publications stood the *de lege ferenda* call for the establishment of an international court charged with compulsory adjudication. Kelsen's blueprint of a constitutive document

¹ Hans Kelsen, *The Legal Process and International Order*, The New Commonwealth Research Bureau Publications, London, 1934; Hans Kelsen, "Les résolutions de la S.D.N. concernant la séparation du Pacte et des Traités de Paix", in *Revue de Droit International et de Législation Comparée (RDILC)*, 1939, vol. 1, pp. 101 ff. For a critical revision of the various provisions of the Charter, see Hans Kelsen, "Revision des Völkerbundstatus", in *Legal Technique in International Law: A Textual Critique of the League Covenant*, Geneva Research Center, 1939; Hans Kelsen, "Sanktionen sind Sache des Gerichts", in *Geneva Press Service*, 10 July 1936, pp. 1–3.

² Hans Kelsen, "The Old and the New League: The Covenant and the Dumbarton Oaks Proposals", in *American Journal of International Law*, 1945, vol. 39; Hans Kelsen, "The Strategy for Peace", in *The American Journal of Sociology*, 1944, XLIX, pp. 381 ff.; Hans Kelsen, "International Peace by Court or by Government?", in *The American Journal of Sociology*, 1941, XLVI, pp. 571 ff.

for the new world organisation made the court the central organ, whose decisions would have to be enforced by a Council of the great powers. The creation of such a court rendering binding decisions was the institutional core of Kelsen's cosmopolitan project.

Having witnessed two World Wars, Kelsen saw in the rule of law in international relations, secured by courts rendering binding decisions, the only way to a more peaceful world order. For Kelsen, the state of peace pursued by compulsory jurisdiction³ did not mean the complete absence of violence, but merely a state of relative peace.⁴ In that sense Kelsen set himself apart from a 'utopian pacifism', which he regarded as a serious threat to international politics.⁵ In the future, the decision to use force would no longer remain within the competency of individual legal subjects, but would be transferred to central organs of the community for the purpose of sanctioning violations of the law. The final, binding decision about the existence of a violation of the law subject to sanction, referred to by Kelsen as a 'delict', would be made by a central court organ *ex officio* or at the request of the contending parties. The central place that Kelsen accorded compulsory jurisdiction within the legal system had already manifested itself clearly in the 1920s with respect to national law in his scholarly analysis of the dispute over the reach of constitutional jurisdiction in the Weimar Republic.⁶ Kelsen's approach to both issues seems to be marked by Kelsen's general faith in the peace-creating function of constitutional adjudication, which he helped to develop and introduce in Austria after World War I.

The real originality in Kelsen's works on international law from this period lies in the direct combination of concrete *de lege ferenda* proposals and his own socio-historical studies that buttressed his policy proposals. As a constructive justifying strategy, Kelsen developed his own theory of the evolution of legal systems, which, applied to international law, made

³ See the programmatic title of his book *Peace through Law*, The University of North Carolina Press, Chapel Hill, 1944.

⁴ Hans Kelsen, "The Law as a Specific Social Technique", in *University of Chicago Law Review*, 1941, vol. 9, no. 81.

⁵ Hans Kelsen, 1944, chap. VIII, see *supra* note 3.

⁶ Hans Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit: Überprüfung von Verwaltungsakten durch die öffentlichen Gerichte", in Heinrich Triepel, Hans Kelsen and Max Lauer (eds.), in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 5, Tagung vom 23. und 24. April 1928 in Wien*, W. de Gruyter, Berlin, 1929, pp. 30–88.

the establishment of compulsory international jurisdiction seem like the next step in a progressive development of the international legal order. According to this theory, decentralised primitive” legal orders historically started to centralise their legal functions by introducing compulsory jurisdiction on a centralised level. A centralised legislature and executive branch could then follow as a second step.⁷ To further underpin his legal-political convictions, Kelsen trained his critical eye on the traditional international legal doctrine concerning the function of international courts in international relations, such as the doctrine of the non-justiciability of political disputes. For him, every political dispute could conceptually be turned into a legal one. Kelsen thus solicited support for the establishment of compulsory jurisdiction as the central element of his cosmopolitan project on three different levels: first, through the constructive articulation of a draft charter for the new world organisation; second, through the equally constructive development of his own general theory of the evolution of legal systems; and third, by deconstructing those doctrinal elements in international legal scholarship that could be marshalled against his *de lege ferenda* proposal.

In 1944, Kelsen published a draft charter for a ‘Permanent League for the Maintenance of Peace’ as the successor organisation to the League of Nations.⁸ Kelsen’s new world organisation had four main organs: Assembly, Court, Council, and Secretariat.⁹ The charter consisted of clear procedural rules governing the working relationships between the four organs. The only substantive regulation was a comprehensive prohibition of the use of force on the part of members of the new organisation.¹⁰ If a State wanted to enforce international legal rules through war or forcible reprisals against another member State, it was up to the Court, at the request of the affected State or the Council, to decide whether the charter had been violated. Only after the Court had determined that the law had been broken could the Council impose the necessary military and economic sanctions on the responsible member States. In Kelsen’s draft charter, the Council could take action on the matter of a sanction only on the basis of, and in conformity with, the Court’s finding that the State conduct

⁷ Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, Cambridge University Press, Cambridge, 2010, chap. 6A.

⁸ Hans Kelsen, 1944, Annex I, pp. 127–40, see *supra* note 3.

⁹ *Ibid.*, art. 2, p. 127.

¹⁰ *Ibid.*, art. 34, p. 134.

in question had been illegal. The Court became the central organ whose actions bound the Council. The eruption of violence in international relations was hereby to be rationalised in a judicially dominated and fully institutionalised procedure.

With this, Kelsen was reviving the Hague Movement's strategy of 'juridifying' international relations through obligatory arbitration.¹¹ The international pacifist movement had already made the development of the international judiciary one of its central demands in the first two decades of the century. The decisions rendered by international tribunals over legal disputes, in the view of these authors, should be implemented by an international organisation by way of collective enforcement measures.¹² These demands, put forth in German scholarship even before and during World War I by Nippold, Schücking and other authors,¹³ could not prevail during the political negotiations over the Covenant of the League of Nations.¹⁴ The call for compulsory jurisdiction¹⁵ fell on deaf ears in Paris and Gene-

¹¹ Much to the chagrin of the pacifist movement, the Second Hague Conference in 1907, because of the alleged obstructionist attitude of the Reich government, was able to agree only on a voluntary form of arbitration by the Court of Arbitration in The Hague. If the pacifists had their way, the Third Hague Conference would finally remedy this shortcoming. On this, see, from the perspective of someone involved in the pacifist movement, Otfried Nippold, *Die Gestaltung des Völkerrechts nach dem Kriege*, O. Füssli, Zurich, 1917, pp. 12–27.

¹² On the blueprints of the "League to Enforce Peace", see *ibid.*; Otfried Nippold, *Der Völkerbundsvertrag und die Frage des Beitritts der Schweiz*, K.J. Wyss Erben, Bern, 1919, pp. 5–6.

¹³ Walther A. Schücking, *Der Staatenverband der Haager Konferenzen*, Duncker & Humblot, Munich, 1912. Alongside the Court of Arbitration in The Hague, an international agency was to be created that would be staffed with independent international lawyers and able to function as an obligatory and non-partisan arbitration authority, see *Der Weltfriedensbund und die Wiedergeburt des Völkerrechts*, Verlag Naturwissenschaften, Leipzig, 1917.

¹⁴ David Kennedy, "The Move to Institutions", in *Cardozo Law Review*, 1987, vol. 8, no. 5, p. 888.

¹⁵ At the time of the Paris negotiations, the pacifist conception became the basis of the official German proposals for the League of Nations. The so-called '*Gelehrtenentwurf*' [Experts' Blueprint] (on this see Philipp Zorn, *Der Völkerbund*, Engelmann, Berlin, 1919) was introduced into the Paris negotiations by the Reich government in slightly modified form, though it failed to have any influence on the Covenant of the League of Nations that was finally agreed upon. See "Entwurf der Reichsregierung als Note an die Pariser Friedenskonferenz vom 9. Mai 1919", Berlin in Alma Luckau, *The German Delegation at the Peace Conference*, Columbia University Press, New York, 1941, pp. 225–33.

va after World War I.¹⁶ The influential British draft by General Smuts, on which Wilson had based the revision of his own first draft that he brought to Paris, opted instead for a strong Council of the great powers, which was to come up with and implement political solutions to disputed issues. A neutral mediation authority was seen as an unnatural superstructure that was not in accord with the reality of the co-existence of sovereign States:

The new institution must not be something additional, something external, superimposed on the existing structure. It must be an organic change; it must be woven into the very texture of our political system. The new motive of peace must in future operate internally, constantly, inevitably, from the very heart of our political organization, and must, so to speak, flow from the nature of things political.¹⁷

The Covenant of the League of Nations subsequently institutionally enshrined the primacy of politics over international law with the powerful organ of the Council.¹⁸ Agreement could be reached only on the formula in Article 14 of the Covenant, which charged the Council with drafting a plan for the establishment of a permanent court of international justice.¹⁹ In effect, then, the new institutional arrangement failed to institutionalise the encompassing and compulsory judicial controls of political decisions taken in and outside of the new institution, as demanded by internationalists.²⁰ To be sure, the Covenant itself, in Article 12, provided for a process

¹⁶ In the response (written by Robert Cecil) of 22 May 1919, the conference rejected the German proposals for obligatory arbitration and a permanent international court as being impractical at that time. See the response in David H. Miller, *The Drafting of the Covenant*, Vols. I–II, G. P. Putnam's Sons, New York, 1928, pp. 539–41.

¹⁷ Smuts's Plan, printed in *ibid.*, p. 46.

¹⁸ The institutional structure of the Paris blueprint of the League of Nations envisioned three main organs: the Assembly of all members states, the Council of the five great powers, and the Secretariat. In other words, there were two political organs and one administrative organ.

¹⁹ On the history of the creation of the Permanent Court of International Justice ('PCIJ'), see Walther A. Schücking and Hans Wehberg, *Die Satzung des Völkerbundes*, 2nd rev. ed., Vahlen, Berlin, 1924, pp. 556–68.

²⁰ The statute for the PCIJ was adopted only by a decision of the General Assembly on 13 December 1920. However, through Article 13 of the Covenant, the jurisdiction of the court was linked to the voluntary declaration by the state in question to abide by the decision. The attempt, especially by South American states, to enshrine obligatory arbitration in the statute proposed by the Council did not find enough support in the first session of the General Assembly. The majority of the states joined the opinion of the Council that the time for such a provision was not yet ripe: on this, see *ibid.*, p. 563. On the compatibility of an ob-

of dispute settlement, which obligated the members of the League, in case of a dispute, to submit the matter to “either arbitration or judicial settlement or to enquiry by the Council”. Further, the contending parties could not resort to war until three months after the announcement of the decision.²¹ Still, in this case again, given the fact that States could choose between political settlement by the Council and judicial proceedings or arbitration, the contending parties were not obligated to subject themselves to a binding legal decision.²² A later attempt to introduce compulsory jurisdiction by amending the Covenant, in the form of the so-called ‘Geneva Protocol’, failed in 1924 when Britain ultimately did not ratify the document.²³ Moreover, while the arbitration treaty of 1928 that supplemented the Covenant of the League of Nations, the so-called ‘General Act’, introduced compulsory jurisdiction in a differentiated procedure,²⁴ it limited such jurisdiction through the possibility of making reservations as allowed under Article 39 of the Charter.²⁵

ligatory jurisdiction with the Covenant of the League of Nations, see P.J. Baker, “The obligatory jurisdiction of the Permanent Court of International Justice”, in *Baltic Yearbook of International Law*, 1925, vol. IV, pp. 68–102.

²¹ On Article 12, see Schücking and Wehberg, 1924, pp. 501–14, *supra* note 19.

²² Hans Wehberg, “Der Weltschiedsvertrag der Generalakte”, in *Völkerbund: Monatsschrift der Dt. Liga für Völkerbund*, 1929, vol. 2, p. 39.

²³ Even with this ambitious project, the preparatory commission, in the unanimously adopted report to the General Assembly of the League of Nations, maintained that conflicts involving territorial issues and the revision of treaties should remain excluded from the system of arbitration. See the report by N. Politis to the Assembly on 1 October 1924, printed in *Niemeyers Zeitschrift für Internationales Recht*, 1924–5, vol. 33, pp. 172–201 [185–6].

²⁴ Following the failure of non-judicial dispute settlement, a party to the treaty could no longer avoid judicial proceedings: see Articles 17 and 21 of the General Act, printed in Wilhelm G. Grewe (ed.), *Fontes Historiae Iuris Gentium. Quellen zur Geschichte des Völkerrechts*, vol. 3/2, W. de Gruyter, Berlin, 1992 [1815–1945], pp. 1067–78.

²⁵ “The General Act is the first instrument which aims at institutionalizing obligatory arbitration in the case of failure of previous conciliation as a means of settling non-legal disputes”, quoted from Karin Oellers-Frahm and Norbert Wühler, *Dispute Settlement in Public International Law*, Springer, New York, 1984, p. 61, with additional references. On this see James L. Brierly, “The General Act of Geneva 1928”, in *Baltic Yearbook of International Law*, 1930, vol. XI, pp. 119 ff.; Hans Wehberg, “Der Weltschiedsvertrag der Generalakte”, in: *Völkerbund. Monatsschrift der Deutschen Liga für Völkerbund*, 1929, vol. 2, p. 40; E.H. Carr, *The Twenty Years' Crisis 1919–1939*, Perennial, New York, 2001 [1939], p. 185.

16.2. Compulsory Criminal Jurisdiction

Kelsen's own draft charter in 1944 was based on the conviction that the absence of a global court rendering compulsory decisions on any dispute brought before it by States or organs of the League had permanently weakened the international legal order in the inter-war period. In his blueprint, the jurisdiction of the court extended to all disputes that arose between members. As laid out above, that also included the matter of the legality of the use of force in international relations. In Kelsen's conception, war and reprisal were possible only as legally authorised sanctions against a State that was violating the charter. Imposing the sanction presupposed a court's decision that the member had in fact broken the rules. To that extent, not only did the monopoly of force lie with the world organisation, but the use of force was possible only to enforce international law on the basis of a court decision. Within his vision of universal law, war and reprisals became acts of law enforcement of the international legal community. As such, this legal community was in need of a central organ that determined the illegality of the behaviour being remedied and reviewed the legality of the applied sanction. In Kelsen's eyes, only a judicial organ was able to exercise that function.

The substantively unlimited competence of the court also reflected Kelsen's conception of universal law. The political sphere to be regulated by international law was not restricted by a pre-legal concept of sovereignty. A rigid conception of the '*domaine réservé*' or 'domestic jurisdiction', in the sense of an untouchable core area of State sovereignty, was incompatible with the objective construction of international law by the Vienna School.²⁶ According to the doctrine of the primacy of international law, it could claim jurisdiction over, and regulate, any matter previously regulated by national law. If the judicial organ was to decide all disputes between members brought before it, its jurisdiction could not be subject to any *a priori* substantive limitations. In another annex to his draft statute, Kelsen added procedural rules on how to punish those individuals who, as organs of their States, were responsible for the violation of the charter.²⁷ The jurisdiction of the court over criminal matters included the possibility,

²⁶ On this see Jochen von Bernstorff, 2010, chap. 3 C IV, *supra* note 7.

²⁷ Hans Kelsen, 1944, annex II, art. 35a, p. 144, see *supra* note 3; excluded from this, according to Article 35c of the draft, were representatives of states belonging to the Council of the organization (see p. 145).

upon the request by a member State or the Council, to prosecute and try war crimes committed or ordered by governments.²⁸ Members of governments were to be punished by the international court as they would have been according to their own State law if they had acted as organs of the State.²⁹ Member States were obligated to hand over individuals prosecuted by the court.

Kelsen, in light of the widespread violations of international humanitarian law and the indescribable horrors of the Holocaust committed during World War II, did not believe that the doctrine of the functional immunity of State organs was in any way legally sacrosanct. He argued that the immunity of heads of States could be completely revoked by the new charter as a treaty under international law. Direct jurisdiction over individuals, as well as individualised prosecution, indictment and conviction through international courts, was perfectly in line with the concept of international law as articulated by the Vienna School through the concept of a monist global legal order according international law primacy over national law.³⁰ The court envisioned by Kelsen was composed of five criminal lawyers and twelve international lawyers, thus it not only had the power to decide any dispute brought before it by the organs or individual member States, but it also functioned as a two-tiered criminal court for individual representatives of governments who could be charged with violations of international law.

The proposed powers of the new international court were a political reaction by Kelsen to the ‘failure’ of the League of Nations and the impending legal processing of war crimes and the Holocaust.

For Kelsen, the problem of international jurisdiction before and during World War II revolved above all around the future institutional development of international relations; that development could be achieved only by way of an international treaty and thus via international law. With the theoretical insight of the legal scholar into the specific inherent rationality of highly evolved legal systems, the Vienna School in international law favoured, to this end, the creation of a court that rendered binding decisions. The transfer of their system-oriented approach to the law to

²⁸ *Ibid.*, annex I, art. 35b, section 1, p. 144.

²⁹ *Ibid.*

³⁰ On the individual within Kelsen’s doctrine of international law, see Jochen von Bernstorff, 2010, chap. 4 B, *supra* note 7.

international law was beyond question for them. If international law had the quality of law, it had to be conceptualised as a complete system of norms. In this respect, the relatively small number of general international legal norms was no obstacle to the creation of a compulsory jurisdiction. Had not the League of Nations given excessive consideration to the power-logic of politics in the structure of its organs? As they saw it, the existing international legal framework was in dire need of better judicial support. Irrational power politics had brought war, now a unified international legal system was to bring peace. International legal validity, which came with the criticised notion of formal equality, had an irreplaceable function and value for taming and civilising the irrational forces of nationalism and unrestrained pursuit of alleged national interests. The last sentence of the lectures on “Law and Peace in International Relations”, delivered by Kelsen at Harvard in 1942, remained programmatic for this thinking during World War II: “The idea of law, in spite of everything, seems still to be stronger than any other ideology of power”.³¹

16.3. Kelsen on the Nuremberg Trials

In 1945, Kelsen must have been strongly disappointed by the position and competencies the founders of the UN accorded to the International Court of Justice (‘ICJ’). As in 1918, strong judicial controls were not the central concern of the Allies when erecting the edifice of the new world organization in the last three years of World War II. Regarding the jurisdiction of the new Court, the drafters of the UN Charter and the ICJ Statute relied heavily on the jurisdictional rules of its predecessor from the inter-war period, the Permanent Court of International Justice. Hence, jurisdiction of the Court was only foreseen on the basis of voluntary acceptance of the respective States Parties, and only confined to ‘legal’ disputes as opposed to ‘political’ ones. In addition, individuals had no standing before the court, neither as applicants nor as defendants. Thus, unlike in Kelsen’s wartime blueprint, the new Court could not render judgment on cases of individual criminal responsibility for war crimes. Instead, the Allies opted for a special *ad hoc* tribunal outside the UN framework based on a separate agreement concluded amongst them (the London Agreement). This agreement foresaw jurisdiction of the temporarily erected International Military Tribunal for individual crimes against peace, war crimes and

³¹ Hans Kelsen, *Law and Peace in International Relations*, William S. Hein & Co., Buffalo, 1997, p. 170.

crimes against humanity. It was the establishment and application of the first notion, the crimes against peace, which gave rise to Kelsen's and Morgenthau's harsh critique of the Nuremberg Trials.

16.3.1. Waging Aggressive War as an Individualised Crime

'Crimes against peace' are defined in the Charter of the Tribunal, which was annexed to the London Agreement, as "planning, preparation, initiation, or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". In the first trial against 24 of the highest-ranking German war criminals, which begun on 20 November 1945 and continued until October 1946, twelve defendants were found guilty of, *inter alia*, waging 'aggressive war' or conspiracy thereof. The majority of this group was sentenced to hang, all of them in combination with additional charges (Frick, Göring, Jodl, Keitel, Ribbentrop, Rosenberg, and Seyss-Inquart) or given life sentences (Hess, Räder and Funk).³² In the judgment, the Tribunal attempted to argue that individual responsibility for crimes against peace existed before the London Agreement gave the Tribunal jurisdiction over these crimes. Otherwise, it would have had to apply Article 6 of the Nuremberg Charter retroactively. In order to avoid the *nullum crimen* problem, the Tribunal thus needed to find a norm which had stipulated international criminal responsibility of State officials for waging war before the Nazis began their international acts of aggression in 1938.

Until World War I, the right to wage war had not been seriously questioned by international lawyers as a sovereign prerogative of States in international relations.³³ The first international treaty which substantively attempted to outlaw war as a matter of national policy was the Briand-Kellogg Pact of 1928. Article 1 of the Pact states that the "High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it, as an instrument of national policy in their relations with one another". No explicit references to collective or individual criminal responsibility were to be found in the Briand-Kellogg Pact, but it was

³² Two defendants found guilty of 'crimes against peace' successfully pleaded mitigating circumstances: Neurath was sentenced to 15 years and Dönitz to 10 years' imprisonment.

³³ Bernhard Roscher, *Der Briand Kellogg-Pakt von 1928*, Nomos Verlagsgesellschaft, Baden-Baden, 2004, chap. II.

the only international treaty that could serve as an applicable pre-war rule restricting *ius ad bellum* that the Tribunal sought.

But how could the Nuremberg Tribunal deduce criminal responsibility of individuals from the Pact, which had merely declared war waged by States under specific circumstances to be illegal under international law? The Tribunal at the outset conceded that the Briand-Kellogg Pact had not explicitly foreseen individual criminal responsibility but nonetheless attempted to develop individual responsibility by interpretation. The main argument for individual criminal responsibility under the Pact was a constructed analogy with existing national practices of criminal prosecution of individuals violating rules of the Hague Conventions on international humanitarian law. Legal developments in the criminalisation of *ius in bello* (as in the Hague Conventions) in the early twentieth century were thus argumentatively transferred by the Tribunal to the *ius ad bellum* area (as in the Briand-Kellogg Pact):

[...] it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor in any sentence prescribed, nor is any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention.³⁴

Upon likening national developments in the criminalisation and prosecution of violations of *ius in bello* with the current legal situation under *ius ad bellum* following the Briand-Kellogg Pact, the analogy in the judgment is then based upon a moral *a fortiori* reasoning:

³⁴ International Military Tribunal, Trial of the Major War Criminals before the International Criminal Tribunal, Nuremberg, Vol. 1, Judgment of 30 September – 1 October 1946, p. 220 (www.legal-tools.org/doc/388b07/).

In the opinion of the tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.³⁵

Because waging war in the first place (*ius ad bellum*) has more dramatic political and moral effects than violating specific rules of conduct in war (*ius in bello*), it should also be criminalised. In a later part of the judgment, this essentially moral *a fortiori* reasoning is argued in universalist terms:

The charges in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.³⁶

With this justification, which was used to overcome the *nullum crimen* problem faced by the Tribunal, the ‘crime of aggression’ was for the first time in history tried by international judges.

16.3.2. Kelsen’s Reading of the Nuremberg Trials: A Missed Opportunity for the Advancement of International Law

It needs to be mentioned at the outset that both Kelsen and Morgenthau did not oppose the conviction of Nazi Officials in general. Both defended the need to try high ranking Nazi-officials for the crimes committed within and outside of Germany since 1933. Both also did not see the at least partly retroactive character of the judgment as a legally insurmountable problem of the trial. Kelsen expressed two main grievances with regard to the judgment: first, its flawed attempt, in his view, to deduce international criminal responsibility from the Briand-Kellogg Pact; and second, the insufficient legal foundation of the trial with the absence of the consent of the vanquished States and the related lost opportunity for the international community to generally establish individual criminal responsibility in international law via a universal multilateral instrument.

³⁵ *Ibid.*, p. 220.

³⁶ *Ibid.*, p. 186.

As to the ‘crimes against peace’, Kelsen clearly rejected the argument developed by the Tribunal to justify the assumption that criminal responsibility could be inferred from the Briand-Kellogg Pact by way of analogy with the Hague Conventions:

The differences between the Hague Convention on the rules of warfare and the Briand-Kellogg Pact is that the former can be violated by acts of state as well as by acts of private persons, whereas the latter can be violated only by acts of states. The Briand-Kellogg Pact does not – as does the Hague Convention – forbid acts of private persons.³⁷

Given that the Briand-Kellogg Pact, unlike the Hague Conventions, did not oblige or authorise States Parties to punish under their own laws the individuals who acted in their capacity as organs of a State-waged war in contravention of the Pact, Kelsen was of the view that Article 6 of the Nuremberg Charter had created genuinely new law and not merely applied the Briand-Kellogg Pact.

According to his interpretation of the events in Nuremberg, the application of the newly established ‘crimes against peace’ to acts of aggression which were committed during the ‘Third Reich’ through the Nuremberg judgment was clearly a form of retroactive legislation and punishment. However, the prohibition of retroactive legislation was no recognised rule of international law and in most domestic legal systems was only valid with important exceptions. Since it was not an established rule of international law, the Allies in 1945 did not violate international legal rules by authorising the application of these newly-established crimes to acts committed during the war.³⁸ There were simply no applicable rules which prohibited the new rules established by the London Agreement. Kelsen, at this juncture, did not explicitly refer to the *Lotus* Principle or the Kantian negative rule according to which – in the absence of a specific prohibition – restrictions upon the freedom of the Allies to establish retroactive legislation through the London Agreement could not have been presumed.³⁹ However, in the absence of a legal prohibition, the matter for Kelsen could indeed be assessed on moral grounds or ‘general principles

³⁷ Hans Kelsen, “Will the Judgement in the Nuremberg Trial constitute a Precedent in International Law?”, in *International Law Quarterly*, 1947, pp. 153–71, at p. 161.

³⁸ *Ibid.*, p. 164.

³⁹ Permanent Court of International Justice, *The Case of the S.S. “Lotus” (France v. Turkey)*, Judgment, 7 September 1927, *Series A*, no. 10.

of justice'. For him, there were good "moral" reasons to allow retroactive punishment of those persons "who are morally responsible for the international crime of the second World War".⁴⁰ The fact that there was no clear rule against retroactive legislation in international law and that there was a demand of moral justice to punish the perpetrators led Kelsen to endorse retroactive punishment in Nuremberg.

Much more worrying for Kelsen seems to have been his second main point of critique, namely the limited relevance of the trial for the advancement of international law. Very much in the late nineteenth century German international law tradition, Kelsen had always judged international law against the background of a highly developed and formalised Western national legal system. Hence his labelling of international law as a "primitive" law, which still had to rely on custom and decentralised legislation, enforcement and adjudication.⁴¹ The move from collective to individual responsibility was a decisive evolutionary step in turning a primitive legal order into a developed one; analogous to the development of the modern State, international law was supposed to move from the phase of privately declared vendettas or blood-feuds to the stage of judicially controlled individual criminal responsibility.

The problem with Nuremberg was that the Allies had failed to advance general international law to that desired stage of development. They had failed to do so due to various shortcomings in the legal architecture of the Nuremberg Trials. There was first the missing consent to the London Agreement of those States that had lost the war and whose nationals were being tried. The Allies, exercising the sovereign rights for Germany as a whole in a condominium through the Allied Control Council, had not made the effort to formally declare Germany's consent to the trial. For Kelsen, the absence of the consent of the European Axis powers was problematic:

⁴⁰ Kelsen, 1947, p. 165, see *supra* note 37.

⁴¹ Kelsen agrees with the argument put forth by the Tribunal itself: "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished", see International Military Tribunal, Judgment of 30 September – 1 October 1946, p. 219, see *supra* note 34.

If, however, a tribunal is instituted to make individuals criminally responsible for their State's violation of a treaty, it is not exactly an improvement of general international law to establish that tribunal without the consent of the State accused of the treaty violation.⁴²

While admitting that this was more a formal rather than a substantive charge against the judgment, Kelsen moves on to the main point of his critique. What really impaired the authority of the judgment was that the rules established by the London Agreement had not been established as general principles of international law, but as rules applicable only to vanquished States by the victors.⁴³ Through its asymmetrical establishment and application, the London Agreement had the character of a '*privilegium odiosum*'. This impression was aggravated by the fact that the Tribunal was exclusively composed of representatives of victorious States directly affected by the crimes over which the Tribunal had jurisdiction. Representatives of neutral States were excluded from the bench. The Allies became judges in their own cause.⁴⁴

The Nuremberg Trials in their basic architecture had not lived up to the principle of formal equality before the law, which for Kelsen was the very essence and unique property of law as a specific social technique that was distinguishable from every other form to exercise power over human beings.⁴⁵ All in all, Kelsen in 1947 saw Nuremberg as a lost opportunity to move from collective responsibility to individual responsibility in general international law. Not only had the Allies failed to enshrine this principle in a legal document of general application, such as the UN Charter, they also had missed the opportunity to provide a historical example for the neutral application of this principle in line with the ideal of formal equality.

⁴² Kelsen, 1947, p. 168, see *supra* note 40.

⁴³ *Ibid.*, p. 170.

⁴⁴ It needs to be mentioned here that the Tribunal in several cases reacted to this problem by dropping prosecutions once the defendant could prove that military forces or officials from the United States or United Kingdom acted in a similar manner during the war. See "International Military Tribunal (Nuremberg) Judgement and Sentences", in *American Journal of International Law*, 1946, vol. 41, no. 1, p. 172; *International Law Reports*, 1946, vol. 13, p. 203.

⁴⁵ Hans Kelsen, "The Essential Conditions of International Justice", in *Proceedings of the Thirty-fifth Annual Meeting of the American Society of International Law*, 24–26 April 1941, vol. 35, pp. 70 ff.

16.3.3. ‘Crimes Against Peace’ as Allied Moral Hypocrisy

As early as December 1948, Hans Morgenthau published a brief comment on the Nuremberg Trials in a non-scientific journal.⁴⁶ He interestingly concurred with Kelsen as to the fundamental problem of the trials. In his view, the eighteen men convicted at Nuremberg “were guilty of many crimes, and they were justly condemned and punished”. Like Kelsen, Morgenthau also took issue with the establishment and application of ‘crimes against peace’ in Nuremberg:

If the leaders of Nazi Germany are guilty of conspiring to wage, and of planning and waging, a war of aggression and a war in violation of international law, so are the leaders of France, Great Britain, and Russia. [...] German aggression and lawlessness were not morally obnoxious to France and Great Britain as long as they were directed against Russia. If one can believe Ribbentrop’s last plea, Stalin wired congratulations to Hitler upon the starting point of the Second World War, which became morally reprehensible in Russian eyes only on June 22, 1941.

For Kelsen and Morgenthau, the Allies in Nuremberg were judging in their own cause. By comparing the Nuremberg trial to a ‘punitive trial’ in the scholastic tradition, Morgenthau reminded the Allies that the scholastic just war tradition had limited and qualified the right of the princes to pass judgment on the justice of the enemy’s cause in war.⁴⁷ Morgenthau polemically observes a “flood of moralizing legend” and criticises the Allies for mistaking “the voice of the victor for the voice of Divine Justice”. A crime of aggression adjudicated by the victors in a punitive trial was inherently problematic in its inclination to hypocritical condemnation of the enemy by those who win the war. A modern and thus secular revitalisation of a just war concept in international relations was a dangerous undertaking. The reason was that the foundational circumstances of the scholastic concept had long vanished; namely the moral unity of Christendom and the originally rather strict doctrinal limitations of punitive wars.⁴⁸ Without these preconditions, a modern punitive war was problematic in its inherent tendency to demonise the opponent and to absolve one-

⁴⁶ Hans J. Morgenthau, “America”, 7 December 1948, reprinted in Hans J. Morgenthau, *The Decline of Democratic Politics*, University of Chicago Press, 1962, pp. 377–79.

⁴⁷ *Ibid.*, p. 378.

⁴⁸ *Ibid.*

self from any wrongdoings by moralising one's own cause for, and conduct in, war. This Nietzschean critical sensibility with regard to the moralisation of politics and law was shared by both of Morgenthau's main intellectual reference points, namely Carl Schmitt's concept of the political and Kelsen's pure theory of law.

In his seminal *Politics among Nations* of 1948, Morgenthau only devotes a few lines to the Nuremberg Trials. According to his reading of the legal debate on Nuremberg, there was "no way of stating with any degree of authority whether any country which went to war after 1929 in pursuance of its national policies has violated a rule of international law and is liable before international law for its violation; or whether only those individuals responsible for preparing and declaring the Second World War are liable in this way; or whether all countries and individuals which will prepare for, and wage aggressive war in the future will thus be liable".⁴⁹

The Nuremberg uncertainties about a question so fundamental as the legality of collective acts of violence in Morgenthau's view demonstrated the weakness of international law as a legal order. For him, both the uncertainty reigning in the *ius ad bellum* area as well as the consistent violation of previously less uncertain rules of the *ius in bello* raised serious doubts as to the validity of international legal rules in these areas. Uncertainty and lack of adherence thus could have repercussions for legal validity itself. In contrast to Kelsen's strict methodological dualism, the effectiveness of the norm (its '*Sein*') does affect its '*Sollen*'. In line with Morgenthau's realist approach, international law in his eyes is valid and generally adhered to in all areas where it regulates the delineation of jurisdictions and technical co-operation between States in times of peace,⁵⁰ its validity will however be at stake when vital political interests are involved and once war looms under the surface of inter-State diplomacy.

After Nuremberg, it took more than sixty years before a shaky consensus could be forged in a multilateral setting on how international law could define and prescribe individual criminal responsibility for waging aggressive war. What is being called the 2010 'Kampala compromise' includes a definition of the crime of aggression, which was intended to amend the Rome Statute of the International Criminal Court and was acti-

⁴⁹ *Ibid.*, p. 218.

⁵⁰ *Ibid.*, pp. 210–11.

vated by the Assembly of States Parties as of 17 July 2018.⁵¹ Even though international criminal law has advanced enormously over the last twenty years, the problem of the ‘*privilegium odiosum*’ through the asymmetrical application of existing rules remains a fundamental one. The definition of the crime of aggression has deliberately been made malleable in order not to impose an obligation to prosecute all acts violating the prohibition of the use of force. Only “manifest” violations of the prohibition of the use of force can be tried under the new definition.⁵² This highly flexible substantive standard comes with the institutional privilege of the UN Security Council, dominated by Great Powers, to block investigations into alleged violations of the crime of aggression. The permanent members of the UN Security Council have thus been granted a convenient legal justification for preventing potential prosecution in cases of violations of the *ius ad bellum* in the future.⁵³ As long as it appears politically unimaginable, or even often technically impossible, for the International Criminal Court to indict leaders of the most powerful nations for waging illegal aggression, the promise of peace and global justice through international criminal law will remain a distant dream at best and another moralising legend at worst.⁵⁴

⁵¹ ICC Assembly of States Parties, Resolution proposed by the Vice-Presidents of the Assembly Activation of the Jurisdiction of the Court over the crime of aggression, UN Doc. ICC-ASP/16/L.10, 14 December 2017 (www.legal-tools.org/doc/d7cb22/).

⁵² Also critical of the qualification of the breach of the *ius ad bellum* is Andreas Paulus, “Second Thoughts on the Crime of Aggression”, in *European Journal of International Law*, 2010, pp. 117–1128, at p. 1121; less critical is Claus Kreß and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, vol. 8 (5), 2010, pp. 1179–217.

⁵³ In general, the “determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute”, see ICC Assembly of States Parties, Review Conference Resolution, The Crime of Aggression, UN Doc. RC/Res.6, 11 June 2010, Annex I, Article 15bis(9) (www.legal-tools.org/doc/de6c31/). Hence, the Court is not bound by the assessment of the UN Security Council. However, the UN Security Council can always block the investigation, per Article 15bis(8).

⁵⁴ The jurisdiction of the Court over the crime of aggression is further limited by the two following provisions of the ‘Kampala compromise’ (*ibid.*), namely Article 15bis(4): “The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years”; and 15bis(5): “In respect of a State

that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory".

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